REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

November 20, 1914, to March 15, 1915.

H. A. LIBBY
REPORTER

VOLUME 29

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1915.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. CHARLES J. FISK, Chief Justice.
[1] HON. A. M. CHRISTIANSON, Judge.
HON. EDWARD T. BURKE, Judge.
HON. EVAN B. GOSS, Judge.
HON. ANDREW A. BRUCE, Judge.

H. A. LIBBY, Reporter.
R. D. HOSKINS, Clerk.

[1] Elected a member of the Supreme Court at the 1914 general election, to succeed Hon. BURLEIGH F. SPALDING, former Chief Justice.

PRESENT JUDGES OF THE DISTRICT COURTS.

District No. One,
HON. CHARLES M. COOLEY.
District No. Two,
HON. CHARLES W. BUTTZ.
District No. Three,
HON. CHARLES A. POLLOCK.
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.[1]

OFFICERS OF THE BAR ASSOCIATION.

HON. BENJAMIN W. SHAW, President, Mandan.
HON. ROBERT M. POLLOCK, Vice President, Fargo.
HON. OSCAR SILER, Secretary and Treasurer, Jamestown.

[1] Appointed to succeed Hon. S. L. NUCHOLS, resigned.

CONSTITUTION OF NORTH DAKOTA.

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

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

COUNTY COURTS.

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

Constitutional Provisions.

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

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

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

Statutory Provisions.

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

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

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

CASES REPORTED IN THIS VOLUME.

TABLE OF DAKOTA CASES CITED IN OPINIONS.

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

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TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

RULES OF PRACTICE

OF THE

Supreme Court of North Dakota

Adopted Feb. 16, 1914.

To Take Effect April 1, 1914.

RULE 1.

Clerk.] The clerk of the supreme court shall keep his office at the capitol of the state. His duties shall be those usually pertaining to that office, and those intrusted to or enjoined upon him by direction of this court or by statute.

RULE 2.

Fees.] At or before the filing of a record on appeal, or upon the filing of papers in proceedings originating in this court, the appellant or petitioner filing papers shall deposit with the clerk $8 to apply on fees; provided, that no fees shall be exacted in habeas corpus proceedings.

RULE 3.

Terms.] There shall be four general terms of the supreme court held each year at the seat of government at Bismarck, to be known as the March, June, September, and December terms, each of said terms convening on the 1st Tuesday of each of said respective months; pro-

vided, that special terms may be held at such times and places as the court may deem necessary and after ten days' notice thereof given by publication, as provided by law.

RULE 4.

Cases to be placed on calendar.] At each general term of the supreme court all cases in which the record on appeal has been filed in said court not less than twenty days prior to the first day of the term shall be placed upon the calendar of said court for final disposition. Attorneys will not be allowed to stipulate cases upon the calendar where the record on appeal has not been filed with the clerk of this court twenty days before the term.

RULE 5.

Calendar.] During the twenty-day period preceding each general term the clerk shall compile and cause to be printed a calendar of causes at such term. Criminal causes shall be given precedence and be placed at the head of the calendar, to be followed by civil causes, all to be numbered consecutively as to docket and calendar numbers. Civil appeals shall be placed upon the calendar in the order of the filing of the records on appeal with the clerk. Each cause on the calendar shall be stated by title, calendar number, and docket number, and shall show the names of the respective counsel and the court from which the appeal is taken.

RULE 6.

Clerk to mail printed calendar.] The clerk shall mail a printed calendar to counsel of record in all cases as soon as the same is printed. Counsel on receiving it are requested to notify the clerk at once of any requests concerning assignment of causes for argument, or motions to be made, which the clerk will note and bring to the attention of the court on or before the first day of the term.

RULE 7.

Advancement of cases.] Cases may be advanced for cause shown,

but only upon written application supported by affidavit presenting reasons therefor. A party shall be entitled, upon motion duly noticed, to advancement, where otherwise he would lose all or a considerable portion of the benefits of a favorable decision on the appeal; or where questions *publici juris* are involved, or appeals from orders concerning injunctional orders or writs of injunction, orders dissolving or refusing to dissolve attachments, appointing or refusing to appoint receivers, or orders or judgments holding appellant in custody, and, generally, in all proceedings invoking the original jurisdiction of this court.

RULE 8.

Proceedings upon opening of term.] At 10 o'clock A. M., on the first day of each regular term, court will convene. Consideration will then be given to all motions, including applications for advancement of causes, motions to dismiss for any cause, and all applications made and orders to show cause then pending for argument. At such time a call of the calendar will not be had except as to motions, applications, and matters then for argument. The court will place upon a short cause calendar, for final determination, those cases upon the printed calendar in which both sides have filed written submission or written waivers of oral argument.

RULE 9.

Short cause calendar.] All causes submitted without oral argument under the preceding rule shall be noted by the clerk, and constitute a short cause calendar, upon which the court may work when not otherwise occupied with causes assigned and argued. All other causes shall be assigned for argument and disposition in the order in which they are placed on the calendar. If not reached earlier, those cases on the short cause calendar will be decided in order as they appear upon the printed calendar.

RULE 10.

Arguments had. When.] Commencing on the 1st and 3d Tuesdays in each month, excepting July and August, unless otherwise provided

by order or direction of the Chief Justice, the court will hear such causes as shall have been assigned for argument for that week. The assignment will consist usually of from ten to fifteen cases, according to the work remaining unfinished before the court. In assigning cases for argument the convenience of counsel will be considered, and when possible two or more cases in which one or more of the same counsel appear will be set together, or for the same week, where the same can be done without unduly advancing causes. The clerk will, about two weeks in advance of assignment for argument, mail counsel a notice stating approximately when the cases will be reached for assignment for argument; upon receipt of which counsel should notify the clerk of any change or extension of time desired. When a case is set for argument for a date certain, and the attorneys notified thereof, no change in date of argument will be made without consent of counsel on both sides of the case, and if so postponed the case shall go to the foot of the calendar.

RULE 11.

Oral argument limited.] On argument appellant will be limited to one hour and respondent to forty-five minutes. In cases of great importance, where more time for argument is necessary, counsel may, on or before the commencement of argument, be granted such additional time as may be deemed necessary. On arguments of motions, counsel will be limited to fifteen minutes on each side, unless otherwise directed by the court. Oral arguments will not be permitted in cases involving less than $100, exclusive of costs, but such cases will be placed upon the short cause calendar.

RULE 12.

Dismissal for not filing briefs.] Any appeal in which the appellant shall not have served and filed his brief by the time the cause is reached for assignment for argument may be summarily dismissed or the decision appealed from affirmed, according as justice may require; and for failure of an appellant to serve and file his brief in time, or when the appellant shall not have served and filed his brief more than twenty

days preceding the opening of the term, and such delay shall have inconvenienced opposing counsel or needlessly delayed them in the preparation of the respondent's brief, this court will, on a showing and application therefor, after notice, by respondent, place the cause at the foot of the calendar, or impose such terms as may be just, or both. Delay by appellant in serving and filing briefs, until after the first day of the term, places the control of the cause on the calendar with the respondent. The respondent must serve and file his brief within thirty days after the service upon him of appellant's brief, and in any event at least ten days prior to the argument of the case; provided, that on notice and cause shown respondent's time for serving and filing his brief may be extended.

RULE 13.

Notice that no brief of appellant is filed.] On compiling the calendar the clerk shall at once mail notice to counsel for both appellant and respondent of the failure of an appellant to have his brief on file in any cause appearing upon said calendar; and the same shall constitute notice to appellant to forthwith transmit his brief on appeal, or suffer respondent to control the place of the cause upon the calendar, or suffer dismissal of the appeal or affirmance of the judgment under the conditions provided elsewhere in these rules.

RULE 14.

Motions for continuance and dismissal.] Motions for continuance or to dismiss appeals for want of prosecution shall be brought on for hearing on the first day of each term, or within fifteen days thereafter. Notice of such motion must be served upon opposing counsel not less than five days before the day fixed for hearing, or, if given by mail to the opposing counsel, not less than ten days prior thereto.

RULE 15.

When appeals will be dismissed for nonprosecution.] In all civil and criminal actions, neglect or unreasonable delay on the part of an appellant in ordering or procuring a transcript of the testimony for ap-

peal purposes, or inexcusable delay in thereafter causing a statement of the case to be settled, where the obtaining of a transcript or a statement of the case is necessary, or unnecessary delay in taking any step preliminary to or concerning an appeal, including unnecessary delay or negligence in causing the clerk of the lower court to transmit the judgment roll or record on appeal to the clerk of this court, shall constitute sufficient ground for dismissal of the appeal so taken; and in the absence of a showing of sufficient cause excusing such delay, a motion to dismiss upon such grounds will be granted; provided, however, that on showing made, where the benefit of not more than one term of this court has been lost to respondent by such delay, dismissal will not be ordered unless the delay be aggravated and inexcusable. Where needless delay has lost to respondent more than one term of this court the appeal will be dismissed upon his motion. It is the intent of this rule to exact of all appellants a reasonable degree of diligence in prosecuting appeals.

RULE 16.

Joinder of issue and time for argument on orders to show cause.] A party cited by order to show cause, issued out of this court, shall make return or respond by answer, motion, or demurrer. If he desires to both demur and answer he shall, on or before the return day, so present such issues, and shall not be held to have waived the issue of law by any return made on facts. He shall serve and file his return and all affidavits and papers he intends to use. Whereupon the moving party, if controverting the same, may serve and file counter-affidavits, when permissible, within five days thereafter, unless a shorter time is fixed by the court. When circumstances will permit, the court may, in the order, set the hearing for a date subsequent to the return day designated in the order, on which date no affidavits will be permitted to be served or filed. And this rule applies, where practicable, to all applications invoking the original jurisdiction of this court, but such applications shall also be accompanied by citation of authority supporting the applicant's petition. Where any court, officer, board, or tribunal is the respondent in original proceedings, the moving papers shall disclose the name of the principal party in interest, or whose interest will be

directly affected by the proceedings, in which case such party shall be served with a copy of the petition or application, all affidavits and alternative writ or order to show cause, if issued, in the same manner and upon the same notice as the respondent is served and noticed, and may, like the respondent, appear, respond, or make return and be heard; provided, that where such party has appeared by attorney, service thereof on such attorney shall be sufficient. Seven copies of all papers used under this rule shall be filed with the clerk, and be of the same style as provided for typewritten briefs.

RULE 17.

Stipulations.] Any stipulation upon which counsel intended to rely in this court must be in writing, where challenged or denied by the opposing party.

RULE 18.

Rehearings granted. When. How obtained.] A petition for rehearing will be entertained if six copies of the same be filed with the clerk within twenty days after the decision is filed, and the remittitur will be stayed during the twenty days and no longer, unless, for good cause shown, the court or a judge thereof shall, by an order delivered to the clerk, extend such time for a period not exceeding ten days; provided, nevertheless, that the court in any case at its discretion may direct that the remittitur be sent forthwith to the court below. The petition must be typewritten. It need not be served upon opposite counsel. It shall be signed by counsel, and must particularly set forth the grounds thereof, showing either that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not called, either in the brief or oral argument, or which has been overlooked by the court; and the question, statute, or decision so overlooked must be distinctly and particularly set forth in the petition. *The petition shall contain no argument or brief. This rule must be strictly complied with* by counsel. Where a rehearing is granted, it will stand for argument at the next term, unless otherwise ordered by the court, and will take

precedence on the calendar of all cases except motions and criminal business. When a decision is made after reargument, no new petition for rehearing will be received.

RULE 19.

Opinions.] Written opinions will be filed in all cases decided, but not upon motions, collateral questions, or mere points of practice, except when deemed exceptionally important.

RULE 20.

Taxation of costs.] In all cases originating in this court the costs and disbursements will be taxed by the clerk of this court. In other cases the costs and disbursements of both courts (except the fees of the clerk of this court, which shall be taxed by him without notice) shall be taxed in the district court after the remittitur is there filed, and the amount as taxed shall be inserted in the judgment of the court below. In civil cases the remittitur will not be transmitted until the fees of the clerk of this court shall first have been paid. In all cases where parties are dissatisfied with any bill of costs as taxed by the clerk of this court, costs will be informally retaxed at any time on application.

RULE 21.

Execution for costs.] Executions signed by the clerk, sealed with the seal of this court, attested as of the day when the same was issued, may issue out of this court to enforce judgment for any costs made and entered in cases which originate in this court. Such executions may issue and be directed to the marshal, and may be enforced in any county in the state in which a transcript for such judgment for costs is filed and docketed.

RULE 22.

Process. When returnable.] All writs and process issued from and out of this court shall be signed by the clerk, sealed with the seal of the court, and attested of the day when the same issues. When no

necessity appears for an earlier return to be made, except when otherwise ordered, all process shall be made returnable on the first day of the term next succeeding its issue. In the absence of an order otherwise fixing the time it shall be deemed returnable on the first day of the term next succeeding its issue.

RULE 23.

Correction of records on appeal.] In a proper case on application after notice to counsel, a record may be returned to the district court, when that court, or either party, desires it corrected. Such application must be made on or before the first day of the term, and, in any event, without delay after discovering the defect or omission.

RULE 24.

Papers to be transmitted. Clerk's certificate appended.] When an appeal is taken (except in cases where by order of the district court copies are transmitted in lieu of original papers) the clerk shall transmit the original judgment roll, or, in case of an order, the original order and original papers used by each party on the application for the order, as required by § 7206, Rev. Codes 1905 [Comp. Laws 1913, § 7822], with his certificate attached thereto as herein provided. In framing appealable orders the attention of trial courts and of counsel is directed to § 7325, Rev. Codes 1905 [Comp. Laws 1913, § 7944].

RULE 25.

Record to be transmitted on appeals.] (A) *From orders:*

On appeal from an order the record transmitted must contain the order appealed from and all original papers used by each party on the application for such order (or copies thereof as provided in § 7206, Rev. Codes 1905 [Comp. Laws 1913, § 7822]). When any portion of the record is embraced in the stenographer's minutes, the original transcript or a copy thereof, certified as correct by the trial judge, shall be filed and transmitted. All papers and evidence upon which the order is based must be designated in the order as provided by § 7325, Rev. Codes 1905 [Comp. Laws 1913, § 7944].

(B) *From judgments:*

On appeal from a judgment the record must contain the judgment roll as defined in § 7081, Rev. Codes 1905 [Comp. Laws 1913, § 7688], and such other orders or papers as have been by the order of court incorporated into and made a part of it, including such order. And in making up such judgment roll the papers constituting the same shall, when practicable, be securely attached together in chronological order.

In all cases the record transmitted must contain the certificate of the clerk, authenticating it, as required in these rules.

Whenever copies of any papers included in the judgment roll are transmitted to this court on appeal in lieu of the original, such copies must be plainly typewritten, double spaced, on good paper, and the pages thereof must be consecutively numbered.

RULE 26.

Respondent may require return to be transmitted or have appeal dismissed.] An appeal is deemed perfected, in civil cases, upon both the service and filing of a notice of appeal with undertaking on appeal, and in criminal cases upon the service and filing of a notice of appeal. The appellant shall cause the proper return to be made and filed with the clerk of the supreme court within sixty days after the appeal is so perfected, unless he shall, upon showing for cause made, upon five days' notice to respondent, procure from the trial court an order that the record shall remain in the district court for such time as shall be necessary to enable the appellant to properly prepare and have the same certified, which order shall definitely specify such extension of time. If after the expiration of said sixty day period for transmission of the record, or upon the expiration of the time as extended by the trial judge, the return on appeal has not been filed with the clerk of this court, the respondent may, by notice in writing, require such return to be filed within twenty days after the service of such notice; and if the return is not filed in pursuance of such notice the appellant shall be deemed to have abandoned the appeal, and, on an affidavit proving when the appeal was perfected, accompanied with a copy of the original notice of appeal, and that no extension of time has been granted by the

trial judge, and that the case is not within the exceptions mentioned in rules 30 and 31, and proof of the service of such notice to transmit the record, and a certificate of the clerk of this court that no return has been filed, the respondent may on eight days' notice in writing to the appellant, apply to any judge of this court for an order dismissing the appeal for want of prosecution with costs, which if so dismissed will authorize the court below to thereupon proceed as though there had been no appeal; provided, however, that this rule shall have no application to cases where the respondent has elected to himself cause the record to be transmitted to the supreme court as regulated by the proviso contained in § 7206, Rev. Codes 1905 [Comp. Laws 1913, § 7822].

When respondent has served the eight days' notice in writing of his application for an order of dismissal for want of prosecution, no order of the district court, or judge, thereafter made granting an extension of time to appellant to file said return in this court, will be recognized by this court without the consent of the respondents.

RULE 27.

Statement. Size and requirements.] The statement of the case and copies thereof to be filed shall be carefully typewritten, clearly legible, and on plain white or yellow paper (yellow preferred) of not less than 10 pounds per ream of folio in weight, having a finish that will permit legible alterations and annotations with pen and ink. The paper page shall be 8½ by 11 inches in size, and consecutively numbered, and with all lines numbered on the left-hand margin of the page. The typewritten page shall contain not more than 30 nor less than 25 lines, made with black ribbon or carbon, and there shall be a margin on the inner edge of not less than 1½ inches. It shall be bound on the side and have flexible covers, and shall have a complete index showing where any exhibit may be found and where the beginning of the direct, cross, redirect, and recross examination of each witness may be found. Illegible statements or those not complying with this rule may be stricken from the files of this court.

RULE 28.

Settlement of statement of the case.] (A) *General provisions.*

The statement of the case in all civil actions and proceedings must be prepared and settled in conformity with chapter 131, Laws of 1913 [Comp. Laws 1913, §§ 7653, 7655, 7654, 7656, 7662, 7664, 7666, 7945, 7843, 7689, 7621, 7677, 7690, 7820, 7847, 7848]. In case of the death or removal of the district judge his successor, if not disqualified, shall, in all cases, civil and criminal, settle and sign the statement of the case, but during a vacancy in such office the statement may be settled by a judge of an adjoining district. In the absence of the trial judge from the state the judge of any adjoining district may, upon written request of such judge, settle the statement and enlarge the time for so doing. If the judge authorized to settle a statement of the case shall refuse to allow an exception in accordance with the facts, in any case, civil or criminal, the party desiring the statement settled, or the exception included, may apply by petition to the supreme court to prove the same, in accordance with the provisions of § 7060, or § 10075, Rev. Codes of 1905 [Comp. Laws 1913, § 7657 or § 10912], according as the case be civil or criminal.

(B) *Statement in civil cases. Contents.*

It shall not be necessary in civil cases to reduce testimony to narrative form, but instead the transcript of the evidence, after the same has been duly certified by the official court reporter taking and transcribing the same, as a true and correct transcript of the original shorthand notes of testimony taken by him on the trial, shall be served by the party desiring its settlement upon the opposing party, who shall, within the statutory time, serve any amendments desired, and thereafter the trial judge shall, after making the transcript conform to the facts, settle and certify the same as correct.

(C) *Statement in criminal cases.*

In criminal cases the statement of the case must still be settled as required by §§ 10074 to 10078, inclusive, Rev. Codes of 1905 [Comp. Laws, §§ 10911 to 10915].

RULE 29.

Preparation of judgment roll. Jury cases.—Civil actions.] To

prepare the record in a case for presentation to the trial court on motion for a new trial, or to the supreme court on appeal, where a statement of the case is necessary, in any civil action, the moving party shall proceed as follows: Within thirty days after the notice of the entry of judgment or the order to be reviewed, or within such further time as the court shall allow, he must procure a transcript of the evidence and proceedings had on trial, including objections taken, and furnish a copy thereof to the adverse party with a notice that at a place named and time not less than fifteen nor more than thirty days from the date of service of such notice (and copy of transcript served therewith), he will present the same to the judge for certification, as a correct transcript of the evidence and of all proceedings had and made matter of record by the official stenographer, and that he will then and there ask the judge for a certificate identifying the exhibits and depositions in the case.

If the adverse party questions the correctness of the transcript he shall, five days before the date set for the certification of the record, or within such further time as the court may allow, serve upon the party serving the transcript a notice of the particulars in which he claims it is inaccurate, with any proposed amendments thereto, and such notice shall be presented to the judge with the original notice and transcript. The judge shall make such corrections as shall make the same conform to the facts, and shall then attach thereto his certificate that it is a correct transcript of the proceedings, which certificate shall also clearly identify all exhibits and depositions in the case. Where the stenographer's transcript does not include written documents, motions, orders, or proceedings had during the trial, and deemed by either party to be material to the questions to be reviewed on appeal, such party shall, if he be the moving party, serve with the transcript a copy of the same, or such portions thereof as he shall deem material. An event, writing, or document not shown in the transcript may be brought into the statement by either party by affidavit, served as a proposed amendment to the transcript, or by written stipulation, whereupon the trial judge shall consider the same in settling the statement, and shall either include such matter therein, or reject and refuse to settle the same as a part of the statement, according to the facts.

The judgment roll on appeal shall consist of the application and notice of motion for new trial when made, the notice of appeal and undertaking thereon (and any stay bond or copy thereof), together with a concise statement of the errors of law complained of, and a specification of the insufficiency of the evidence if claimed (§ 4, of chap. 131, Laws of 1913 [Comp. Laws 1913, § 7656]); the pleadings, including summons and proof of service thereof; the findings of fact, conclusions of law, and order for judgment; the verdict, general or special, or findings of the jury; instructions of the court, where the instructions are challenged, including all instructions requested and refused and exceptions thereto; any motion made for judgment notwithstanding the verdict, or for new trial; the order of the court granting or denying a new trial, together with its memorandum opinion (§ 8 of chap. 131, Laws 1913 [Comp. Laws 1913, § 7945]); and the judgment if entered. In case a review is asked of any intermediate order involving the merits and necessarily affecting the judgment, it shall be included in the judgment roll. Where an application for a new trial is made upon a statement of the case, or when a statement is necessary on appeal, the judgment roll shall also contain the statement, and any affidavits used upon such motion, together with the court's order thereon. Where a review is sought of an order enlarging or denying time in which to do any act preparatory to appeal, the judgment roll shall contain the application therefor and all affidavits used and the order made thereon, which order shall recite the papers and proceedings upon which it is based.

The provisions of this rule shall also apply to mandamus and other special proceedings so far as applicable.

RULE 30.

Preparation of judgment roll in criminal cases.] The judgment roll on appeal in criminal cases shall consist of the original notice of appeal with proof of service, and a copy of the information or indictment, and of any demurrer or motion filed, and of the clerk's minutes of the trial, including his minutes of the plea entered, and the court's rulings on any demurrer or motions; a copy of the verdict and clerk's minutes thereof (see § 10106, Rev. Codes 1905 [Comp. Laws 1913,

§ 10942]); and all instructions to the jury, given, requested, and refused, and exceptions taken or filed; and if oral instructions were given, a certified transcript thereof, with all exceptions thereto taken and filed and a copy of all papers filed in the action; and any papers used on motion for a new trial or in arrest of judgment, and order made thereon. Where a statement of the case is settled, it, together with the order settling it, shall also be incorporated into the judgment roll. The judgment roll must be authenticated by the clerk of the district court, as required by § 10147, Rev. Codes 1905 [Comp. Laws 1913 § 11002]. While the statute does not require the clerk of the district court to submit the judgment roll as certified by the clerk to the trial judge for inspection before its transmission to this court, nevertheless it should be done, where possible, to avoid the possibility of errors or omissions therein.

RULE 31.

Preparation of judgment roll in cases triable de novo.] In all actions tried under the provisions of § 7229, Rev. Codes 1905 [Comp. Laws 1913, § 7846] the proceedings to procure a settlement of the statement of the case shall be taken as in other civil actions as provided in these rules, and as required by chap. 131, Laws of 1913 [Comp. Laws 1913, § 7655.] *In all cases where a trial de novo of all issues is desired, the appellant must specify in his statement of the case that he desires a review of the entire case in the supreme court,* and the judge's certificate settling the statement must state that such statement contains all the evidence and proceedings had on the trial. But if the appellant desires a review of only particular facts, *the specification must state the particular facts of which a review is desired,* in which event the specifications may be in the following form: "Appellant specifies the following questions of fact which he desires the supreme court to review, to wit: (One . . . Two . . . Three . . . etc.,—stating each fact to be reviewed separately and concisely). When such particular view is specified, the statement shall contain only such evidence as relates to the questions of fact to be reviewed. *The specification demanding a review of the entire case or of certain specified facts must be incorporated in and settled as a part of the statement of the case. This is*

imperative under § 7229 Rev. Codes 1905 [Comp. Laws 1913, § 7846], not amended by chap. 131, Laws of 1913.

RULE 32.

Abstracts not required. Typewritten statements filed in lieu thereof.] Abstracts are no longer required either in civil or criminal cases, but instead the original judgment roll (in criminal cases a certified copy thereof), including the original statement of the case as settled by the trial judge, together with two duplicate first impression or carbon copies of said statement, shall be filed with the clerk of this court in lieu of abstracts formerly required. See chap. 131, Laws of 1913 [Comp. Laws 1913, §§ 7653, 7655, 7654, 7656, 7662, 7664, 7666, 7945, 7843, 7689, 7621, 7677, 7690, 7820, 7847, 7848].

RULE 33.

Briefs on appeal. When printed.] In all civil cases in which the amount in controversy, exclusive of costs, does not exceed $300, and in all criminal cases wherein the defendant shall have been adjudged to be in indigent circumstances and unable to employ counsel on trial, typewritten briefs may be filed in this court on appeal. In all other cases, civil and criminal, briefs shall be printed and must conform to the requirements prescribed in rule 34.

RULE 34.

Printed briefs. Arrangement and contents, in jury trial.] The brief of the appellant shall contain in the front thereof that portion of the pleadings of both parties necessary to an understanding of the nature of the case and the issues. The appellant shall then print his specifications of errors of law and fact, and state whether the appeal is from an order denying or granting a new trial, and, if so, whether the specifications were served with the notice of appeal. Then shall follow a concise statement of the facts of the case, presenting succinctly the questions involved and the manner in which they are raised, to be followed with the findings and conclusions and order for judgment, verdict, and, if entered and material, the judgment. Where the suffici-

ency of the evidence to sustain the findings or verdict is challenged, the brief shall contain such portion of the record as will enable the court to clearly understand the state of the record on that question. Where a consideration of the findings, conclusions, and order for judgment is unnecessary to a decision of the error assigned, the brief shall so state, and the same need not be printed. Where rulings on testimony constitute the errors complained of, sufficient explanatory facts or evidence shall be recited. Errors may be assigned by groups where the same argument applies to them as classified; otherwise the error should be assigned in connection with the argument thereof made in the brief. The brief shall contain at the front thereof so much of the pleadings as shall be necessary to a general understanding of all issues presented for determination. Appellant must recite in his brief so much of the evidence or the record as contained in the original judgment roll as will fully illustrate the points made in his brief, and upon which he urges a modification or reversal of the judgment appealed from; and the brief of the respondent shall contain a summary of the evidence constituting his defense, or explanatory of any points raised by appellant's brief. In citing cases the name of the case and the report shall be given, the same to constitute a separate line, properly indented. *All cases cited from this court when published, should be cited by reference to the official state reports.* Reference in the briefs to testimony may refer by page to the statement of the case. Each assignment of error in the brief must refer to the specification of errors served, and upon which it is predicated. The brief of the respondent shall correspond to that of the appellant, except that no assignment of errors is required, and no statement of facts need be made except as the facts presented in the brief of the appellant are controverted, when the facts as controverted shall be stated. In answering the appellant's points, respondent shall discuss them in the same order adopted by the appellant. Assignments of error not within the scope of the specification of errors served will not be considered, nor will questions of law or of fact not raised by the specifications and discussed in the briefs.

RULE 35.

Printed briefs. Arrangement and contents, in trials de novo.] In

appeals in actions triable *de novo* the appellant shall specify, at the front of the brief, as he is required to specify in his statement of the case, a demand for a review of the entire case, or the part particularly specified to be reviewed. Such portion of the testimony as shall be necessary to illustrate the point shall be printed, and appellant shall designate those findings claimed to be unsupported by the evidence, and concisely state the facts claimed to be established by the evidence, and quote such parts of the evidence as tend to sustain his contention. Where the evidence is conflicting he may argue the facts in connection with his contention as to what facts are or should be found. Where particular questions of fact are specified for review, the same will be tried in connection with the evidence bearing thereon, and other matters not at issue or not within the specifications will be deemed properly decided by the trial court, as provided in § 7229, Rev. Codes 1905 [Comp. Laws 1913 § 7846]. The testimony may be printed in the brief in narrative form when desired, and when so printed by appellant such narrative will be taken as true except when challenged.

RULE 36.

Printed briefs. Arrangement and contents, in briefs on appeal from orders and in special proceedings.] Where the appeal is from an order sustaining or overruling a demurrer, the brief of appellant shall contain the pleading demurred to, or the record searched by the demurrer, together with the demurrer and the order appealed from. Memorandum opinion, when filed, shall then be printed, to be followed by the argument and citation of authorities.

The respondent's brief may briefly summarize the point to be decided.

This arrangement of the brief shall also be followed, as far as practicable, in appeals upon all matters of law only, including orders granting motions for judgment upon the pleadings, and appeals in mandamus and other special proceedings.

RULE 37.

Size of printed briefs and type to be used.] When printed briefs are required, nine shall be filed. All briefs shall be printed upon white,

unglazed book paper, of reasonable thickness, in size 10¼ inches long by 6¾ inches wide, and paged and folioed from the commencement to the end. The printed page shall be 7 inches long by 3½ inches wide, with an outer margin of 1½ inches upon which shall appear the folio numbers. The finished book shall be trimmed to 10¼ inches in length and 6¾ inches in width. Small pica solid is the smallest letter and most compact form of composition allowed. On the cover shall appear the title of the cause, the court and county in which and the name of the judge before whom it was tried, and the names of counsel and their addresses. The covers shall be of light color to plainly show filing marks. No charge for printing briefs shall be allowed as a disbursement unless the requirements of this rule have been substantially complied with. Where parties are awarded costs and disbursements they may tax for briefs printed in compliance with the rules of this court the sum actually paid, not to exceed, however 75 cents per page of printed matter.

RULE 38.

Indexing briefs and statements.] At the front of the brief there shall be an index of contents, with reference to assignments of error and argument; and where pleadings and exhibits are copied in the brief, the page where the same appear.

There shall be prefixed to the original statement of the case as settled, and to the two copies thereof to be transmitted on appeal, a detailed and carefully prepared index, with reference to the page or folio where each exhibit and the direct, cross, redirect and re-cross examination of each witness may be found; each exhibit shall therein be designated by number and also by name; as for instance, if the same be a warranty deed, it shall be so described.

Where the statement or brief is of less than ten pages no index is required.

RULE 39.

Typewritten briefs.] In cases where typewritten briefs are allowed, they shall conform to the requirements of the rule of this court governing the preparation of statements of the case, under rule 27. Seven copies shall be filed.

RULE 40.

Application for writ of habeas corpus.] When upon application for a writ of habeas corpus it is apparent that no necessity exists for its immediate issuance, and a district court or judge thereof has entertained an application for the writ, and, upon hearing, quashed it, this court will require all the papers, including the application and supporting affidavits and any return and supporting affidavits, and the order of such lower court, to accompany the application made to this court. But in emergency cases the above requirement may be dispensed with.

RULE 41.

When state is a party. Attorney general served.] In all appeal cases in which the state is respondent, and in which the attorney general is required by law to represent the state, the notice of appeal and briefs shall be served upon the attorney general, and in criminal cases or where a county is a party, the notice of appeal and briefs shall also be served upon the state's attorney of the proper county.

RULE 42.

Attorney's certificate of clerkship.] It shall be the duty of attorneys in this state with whom law students shall commence a course of study, to file a certificate in the office of the clerk of the supreme court, which certificate shall in each case state the date of beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing and shall be computed by the calendar year.

RULE 43.

Attorneys. Admission to practice.] Applications for admission to the bar of this state, when made upon a certificate issued by a court of any other state, may be made at any regular or special term of this court. Such application shall be upon written motion made by a member of the bar of this court and filed with the clerk; and with such motion shall be filed the applicant's certificate of admission to practice in the foreign state and his affidavit, which shall disclose the place or

places where he has practised law in such foreign state or states, the length of time he has practised and shall show that he has been actively and continuously engaged in the practice of law at the places designated in the foreign state or states for a period of more than three years in the aggregate. He shall also give the name and postoffice address of one or more of the district or circuit judges who have presided during said time in the court before which he has practised, and, where possible, present the certificate of such judge showing the above facts in support of his application. The affidavit of the applicant shall also disclose whether any proceedings in disbarment or suspension of his license to practice are pending against him, or were pending at the time of his removal from the foreign jurisdiction, and that he is still an attorney at law in good standing in such foreign state.

The applicant must also furnish the affidavits of at least two practising attorneys of said state who were fellow practitioners with the applicant in the foreign court, stating that the applicant is of good moral character and a proper person to be licensed to practice law.

Upon the hearing of the motion for admission the court may orally examine the applicant as to his qualifications and his right to admission to the bar of this state.

Provided, however, that any member of the bar of another state, actually engaged in a cause or matter pending in this court, may appear in or conduct said cause or matter while retaining his residence in another state.

Persons intending to apply for admission by examination to practice may be examined by the board of examiners, in the instances and as provided by law. Information upon this subject will be furnished by the clerk of this court upon request.

RULE 44.

Disbarment.] All petitions for disbarment, presenting facts sworn to upon positive knowledge, or upon information and belief and corrobated by facts proven, and upon charges made in apparent good faith, or where the court in its discretion deems it necessary that such action be taken, may be referred to the proper committee of the state bar association with instructions to fully investigate, as provided by chap.

11, Laws of 1913 [Comp. Laws 1913, §§ 808–813] and to make a report of the facts or evidence taken and the conclusions of the committee. If therefrom it shall appear that reasonable grounds exist for further investigation or for the prosecution of charges of disbarment, the same will be ordered, and said committee or other person appointed by this court will be directed to prepare and file formal written accusations and prosecute the matter to final determination, the expenses thereof to be paid by the state, as provided by law.

Disbarment proceedings may also be instituted and prosecuted as otherwise provided by law.

RULE 45.

Cases may be dismissed for failure to comply with rules.] A failure to comply with any of the requirements contained in these rules within the times or in the manner therein provided will, in the discretion of the court, be cause for dismissal of the appeal, or affirmance of the judgment, as the case may demand.

ORDER ADOPTING RULES.

Ordered, That the above and foregoing Rules of Practice (being forty-five in number) be and the same are hereby adopted as the "Rules of Practice of the Supreme Court of North Dakota." Until abrogated or modified, said rules shall govern the practice of this court and shall be supplemental to other provisions of law regulating the practice. The clerk of this court is directed to spread these rules upon the minutes of this court, and also to cause the same to be published in pamphlet form, for at least thirty days prior to April 1, 1914.

Ordered, Further, that these rules shall take effect and be in force from and after April 1, 1914.

CLERK'S CERTIFICATE.

SUPREME COURT, }
State of North Dakota. } ss.

I, R. D. Hoskins, Clerk of the Supreme Court of North Dakota, do hereby certify that the above and foregoing Rules of Practice of the Supreme Court of North Dakota are true and correct copies of such rules as adopted by the court at a regular session thereof, held at the Capitol, Feb. 16, 1914.

Witness my hand and the seal of said Court this 16th day of Feb. 1914.

R. D. HOSKINS,
Clerk.

(Seal)

INDEX TO RULES.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

COUNTY OF FOSTER v. P. E. MORRIS et al.

(149 N. W. 561.)

Courthouse site — bond of suretyship — county — purchasing site without notice to bondsmen — opportunity to perform conditions must be given — sureties discharged from liability.

These nine defendants, with eighteen other persons, in 1909 executed to plaintiff county a bond in the sum of $3,000 in the matter of a courthouse site, should bonds for the erection of a new courthouse be voted, which was done. A new site was required. Construction of the bond is the sole question. County urges that the bond was in effect a subscription of money to be applied to reimburse it for the expense of such new site. Defendants assert that by the bond they merely became sureties that upon selection of a site by the county board they would furnish and deliver to the county, free of expense, on demand, the site so chosen; that they have never been called upon to furnish title to such site, but that the county purchased it, making it impossible for them to do so, and thereby discharged them from liability. *Held*, that the bond is one of suretyship, and not a subscription. That as the county purchased the site from many different owners holding portions thereof, and this without notice to or demand upon the sureties to perform by furnishing plaintiff with title, and not affording the sureties an oppor-

tunity to perform their contract of suretyship, these sureties are discharged. Judgment entered against them ordered vacated and the action dismissed.

Opinion filed November 6, 1914.

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

Reversed, with direction to dismiss.

T. F. McCue, for appellants.

The defendants are simply sureties on the bond in question, and their liability is controlled by the bond, and cannot be extended by implication. They are entitled to stand upon the strict terms of this agreement. Rev. Codes 1905, § 6101; Novak v. Pitlick, 120 Iowa, 286, 98 Am. St. Rep. 360, 94 N. W. 916; Walsh v. Bailie, 10 Johns. 180; Gahn v. Niemcewicz, 11 Wend. 312; Bean v. Parker, 17 Mass. 594; Zinns Mfg. Co. v. Mendelson, 89 Wis. 133, 61 N. W. 302.

To bind the sureties, it is of the very essence of the contract that there be a valid obligation of the principal. Evans v. Keeland, 9 Ala. 46; Sacramento v. Dunlap, 14 Cal. 421; Ferry v. Burchard, 21 Conn. 597; Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665.

The county commissioners were bound to keep themselves within the strict provisions of the bond. Failing to do so relieves the sureties. Patrick v. Barker, 35 Iowa, 451.

When the citizens of Carrington furnished and delivered the courthouse site free of encumbrance, and conveyed it by a good title, they had performed every obligation resting upon them. Their undertaking is really a subscription for real estate. Union Stopper Co. v. McGara, 66 W. Va. 403, 66 S. E. 698.

Plaintiff was required to prove a breach of the undertaking, even though it was not pleaded. Morgan v. Menzies, 60 Cal. 341; Salisbury v. Shirley, 53 Cal. 461; Fisher v. Pearson, 48 Cal. 472; Horner v. Harrison, 37 Iowa, 378; 4 Enc. Pl. & Pr. 937, and cases cited.

All conditions precedent should have been complied with. Wrought Iron Bridge Co. v. Greene, 53 Iowa, 562, 5 N. W. 770; First M. E. Church v. Sweny, 85 Iowa, 627, 52 N. W. 546; Keys Bros. v. Weaver, 95 Iowa, 13, 63 N. W. 357; Patrick v. Barker, 35 Iowa, 451; Lafayette County Monument Corp. v. Ryland, 80 Wis. 29, 49 N. W. 157; Sickles v. Anderson, 63 Mich. 421, 30 N. W. 78; Sult v. Warren School Twp. 8 Ind. App. 655, 36 N. E. 291.

The burden was upon the plaintiff to prove this. Paddock v. Bartlett, 68 Iowa, 16, 25 N. W. 906; Waters v. Union Trust Co. 129 Mich. 640, 89 N. W. 687; Bohn Mfg. Co. v. Lewis, 45 Minn. 164, 47 N. W. 652.

The sureties should have notice and opportunity to have their principals perform their obligation. Stanford v. McGill, 6 N. D. 563, 38 L.R.A. 760, 72 N. W. 938; Davidson v. Overhulser, 3 G. Greene, 196; Markley v. Rhodes, 59 Iowa, 57, 12 N. W. 775.

The bond was without consideration because of failure of the county to meet and carry out its conditions. Sutton v. Rann, 149 Mich. 35, 112 N. W. 722; Dumont v. United States, 98 U. S. 142, 25 L. ed. 65; United States v. Allsbury (United States v. Burbank) 4 Wall. 186, 18 L. ed. 321.

The bond was against public policy. Edwards v. Goldsboro, 141 N. C. 60, 4 L.R.A.(N.S.) 589, 53 S. E. 652, 8 Ann. Cas. 479.

The plaintiff, by using the site, prevented the citizens of Carrington from performing their contract, and thereby destroyed the right of subrogation. This released the sureties. Crim v. Fleming, 101 Ind. 154; Hereford v. Chase, 1 Rob. (La.) 212; Bangs v. Strong, 7 Hill, 250, 42 Am. Dec. 64.

C. B. Craven, for respondent.

The bond here in question is not a contract of suretyship. There was no obligation on the part of the citizens of Carrington, and therefore there was no principal. A suretyship contract presumes a principal whose payment or performance of some act the contract of the sureties guarantees. 23 Cyc. 14, notes 1–3; American Bonding Co. v. Pueblo Invest. Co. 9 L.R.A.(N.S.) 557, 80 C. C. A. 97, 150 Fed. 17, 10 Ann. Cas. 357.

There must be a primary obligation. Thornburg v. Allman, 8 Ind. App. 531, 35 N. E. 1110; 32 Cyc. 23.

A court should so construe a contract as to render it effective and legal, rather than to destroy it, in the absence of fraud. 9 Cyc. 586, and cases cited in notes, 34 and 36; 7 Am. & Eng. Enc. Law, 1041; Neal v. Shinn, 49 Ark. 227, 4 S. W. 771; Dishon v. Smith, 10 Iowa, 212; Hawes v. Miller, 56 Iowa, 395, 9 N. W. 307; Atty. Gen. v. Lake County, 33 Mich. 289; Thompson v. Mercer County, 40 Ill. 379; Callam v. Saginaw, 50 Mich. 7, 14 N. W. 677.

A contract must be construed according to the intention of the par-

ties; and this intention is determined not only from the writing itself, but from a full consideration of all of the facts and circumstances surrounding the parties and the transaction. 9 Cyc. 590, cases cited in notes 51 and 52; 9 Cyc. 577, cases cited in note 93; 9 Cyc. 588, cases cited in note 45.

Goss, J. This is a suit on a bond which is set forth in full.

Undertaking.

Know all men by these presents, that we (here follow the names of twenty-seven persons, among them the eight defendants) are held and firmly bound unto the county of Foster in the penal sum of $3,000 lawful money of the United States, to be paid to the said county of Foster; for which payment, well and truly to be made, we hereby jointly and severally bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

The condition of the above obligation is such that whereas the board of county commissioners in and for the county of Foster and state of North Dakota has called an election for the purpose of voting upon the question of said county issuing its bonds for the purpose of erecting a public building to be used for a courthouse and jail; and whereas said election will be held on the 29th day of June, A. D. 1909; and whereas, if the bond issue upon said election prevails and carries, the said county of Foster will erect such public building aforesaid; and whereas the citizens of Carrington propose in the event that public building is erected to furnish and deliver to said county of Foster a suitable site for such public building, the same to be selected by the said board of county commissioners, provided, however, that said site shall not exceed in value the sum of $3,000 and provided, further, that the said board of county commissioners may, in their judgment, decide that a new location for such public building other than the one now used for the old courthouse building be used;

Now therefore, if the said bond issue carries at this coming election aforesaid, and the said county of Foster proceeds to erect the public building aforesaid, and for that purpose decides to choose a new site as aforesaid, then this obligation shall be in full force and effect and binding upon the signers hereto; otherwise this obligation is to be void.

Provided always that the liability under this obligation shall not exceed in any event the sum of $3,000.

In witness whereof, we have hereunto set our hands and seals this —— day of June, A. D. 1909.

This bond was signed and acknowledged by the twenty-seven named in the body of the instrument. The plaintiff seeks to recover on the bond as for money due and unpaid. The court found "that the plaintiff has fulfilled each and every of the conditions by it to be performed under and by virtue of the terms of said undertaking, and by reason thereof the said defendants have become indebted to the county of Foster. . . . That there is now due and owing from the defendants to the county, under the terms of said undertaking and obligation, the sum of $884 and interest." The specifications of error taken to these findings are "that there is no evidence that any breach ever occurred in the contract or bond sued upon. That there is no evidence that demand of performance on the part of the defendants or their principal was ever made, or that an opportunity was given to them to perform their contract. That the evidence shows that the plaintiff through its county commissioners, before the definite selection of the site for the buildings was made, obtained optional contracts for the site, and thereby made it impossible for these defendants or their principal to comply with the conditions of the bond sued upon." The evidence consists wholly of a written stipulation of fact, carefully prepared and signed by the attorneys for both parties. Therefrom it appears beyond question that the specification of error states the fact in its recitation that the defendants or obligors on the undertaking were never called upon or requested to procure title in the county to any site, and thus furnish to the county a site chosen as suitable by its board of commissioners. Instead, the board chose a site consisting of various contiguous tracts owned by six different owners exclusive of the city of Carrington, which city held title to or an easement in the streets segregating the site as entirety as selected. The county by its commissioners thus secured title to the site by conveyances from six different owners, and then vacated intervening streets and alleys, procuring a satisfactory site. In so doing it paid $3,475 for the different

tracts, some of which contained improvements which the county sold, reducing the net cost of the tracts $530, or to $2,945. It seems that eighteen of the signers of this undertaking contributed $110 each to the county. These nine defendants refused to pay, and this suit was brought. The above outlines the case.

The county in its brief summarizes its contention to be: "The interpretation of this contract is the vital point in this action; . . . and that such contract or bond is not to be construed as a contract guarantying the performance of certain acts of citizens of Carrington, but *is a contract for the payment of the value of a new site,* to be selected by the county commissioners of the county of Foster, in the event of the carrying of the bonding election; . . . and that no other construction of this contract could give it validity at its inception." Appellants construe the undertaking as one wherein the signers became sureties that the citizens of Carrington (the bond issue carrying, and selection having been made by the board of a suitable site) *would furnish and deliver, free of charge, such site to the county,* providing it did not exceed in cost more than $3,000. Both sides concede the question to be but one of the interpretation of this instrument. The county claims it to be a subscription of moneys in the sum of $3,000 to be applied on the expense of purchase of a site. Defendants insist that it should be construed as a contract of suretyship, wherein a site is to be furnished after its selection and upon demand, in default of which defendants would be responsible in the penal sum of the cost thereof, not to exceed $3,000.

The county contends that the portion of the instrument wherein a recitation is had of the election having been called to vote on the bonding question, and the necessity for building of a courthouse in case it would carry, and "whereas the citizens of Carrington propose in the event that if such public building is erected to furnish and deliver to said county of Foster a suitable site for such public building, the same to be selected by the said board of county commissioners, providing, however, that said site should not exceed in value of $3,000"—are merely preliminary recitations, and are not a part of the conditions of the bond. Or in other words, the county contends that these signers have bound themselves to make payment in the event of the bonds' carrying. Under its contention, the moment the canvass of the votes

cast disclosed that the bonding proposition had carried, a liability arose, not that the citizens of Carrington would furnish a suitable and approved site, but that the signers would contribute to the extent of $3,000 toward the cost of such a site as the commissioners should select and purchase.

The construction given this undertaking by the appellants is correct beyond question. Suppose that the citizens of Carrington other than the signers of the undertaking had furnished and delivered this site to the county, and it had been accepted and built upon, could these defendants be held liable on the bond as for a money subscription? Unquestionably not, unless it is also held that this is a subscription of moneys not limited in use to reimburse for the expense of the county in procuring a new site. And to so construe it as a $3,000 contribution ignores the purpose as well as the penal nature of the obligation. It cannot be contended that the instrument does not purport to reimburse for the expense of or else provide for a site free of expense to the county. Such being the case, the other recitations specified in the bond itself as conditions must be considered, and, being considered, must be regarded as conditions, instead of mere surplusage. If the recitations as to purpose and application of the fund be thus conditions of the bond, why not the portion providing that defendants may on demand exonerate themselves by furnishing not money, but, instead, the chosen site, and thus relieve themselves from any necessity of providing the county with a purchasing fund for it to apply in buying a site. The contract is one of suretyship in form, in which the signers obligated themselves that a suitable site would be furnished the county by them after the board had selected said site, leaving the location of it to be determined by the body having the power of choice. It is undisputed that the board did not so interpret it. Instead, it proceeded upon the theory advanced, that the instrument amounted to a subscription of moneys. Accordingly no demand was made upon the obligors to furnish title to the tract selected after it had been chosen. In purchasing direct from the owners, the county rendered performance of the contract by the sureties impossible, and thereby discharged them.

It is unnecessary to discuss other questions raised in the briefs. The judgment appealed from is ordered vacated, and a judgment of dismissal directed to be entered instead. Appellants will recover costs on trial and on appeal.

JAMES W. HOGG v. E. CHRISTENSON and L. S. B. Ritchie, as Trustee, Intervener.

(149 N. W. 562.)

The last day of the thirty-day period for answer expired with Sunday, and the answer was served the following day, but before its service, plaintiff's attorney applied for default judgment, which was ordered the day later, and immediately entered. The answer served on Monday was returned to defendant's attorney as served too late. Levy on execution was made. Before sale thereon defendant moved to vacate the judgment as one wrongfully taken by default over answer served in time. Before said motion was heard, defendant's property was sold on execution sale to third parties, and said judgment of $1,398.50 and costs was satisfied in full. Plaintiff claims (1) that the answer was not served in time, and (2) if served in time the court lost jurisdiction to grant relief by motion, by the satisfaction of said judgment, and that to secure relief, defendant must resort to an action in equity for that purpose. *Held:*

Service of answer — thirty days expiring on Sunday — may be served on Monday.

1. Following Styles v. Dickey, 22 N. D. 515, 134 N. W. 702, that the answer was served in time. Section 7324, Comp. Laws 1913, excludes Sunday, the last day of the thirty-day period, from being counted as a part of the thirty-day period for answer, and that the answer served on Monday, the thirty-first day after service of summons, was served within time, and defendant was not in default of answer when judgment was erroneously entered as by default.

Judgment as by default — execution sale thereunder — motion to vacate — order denying motion — judgment — set aside — trial ordered.

2. That defendant, not having been in default, was not prejudiced by the execution sale, and on his motion was entitled to a vacation of the judgment, notwithstanding its wrongful satisfaction by execution sale. Both the

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Note.—The general rule seems to be that under the provisions of statutes excluding Sunday in the computation of time, when it is the last day of a given period, where the last day of a period falls on Sunday it is sufficient if the act is done on Monday. This rule is sustained by the authorities, which are reviewed in notes in 49 L.R.A. 204; 15 L.R.A.(N.S.) 687; and 38 L.R.A.(N.S.) 1162.

As to computation of time generally, see notes in 7 Am. Dec. 250; 46 Am. Rep. 410; and 78 Am. St. Rep. 872.

order denying motion to vacate, and judgment thus attacked, will be set aside and a trial granted.

Opinion filed November 7, 1914.

From an order of the District Court of Barnes County, *Coffey*, J., denying an application to vacate a judgment taken by default, both defendant and intervener appeal.

Reversed.

Todd & Kerr, Herman Winterer, and *David S. Ritchie,* for appellants.

Where the thirty-day period allowing a defendant to answer expires on a holiday, he may serve his answer on the first following business day. A defendant so answering is not in default, and a judgment entered against him under such a state of facts should be vacated on motion. 21 Enc. Pl. & Pr. 705; 19 Enc. Pl. & Pr. 603; 31 Cyc. 597, 598; Blackwood v. Cutting Packing Co. 71 Cal. 461, 12 Pac. 493; Fries v. Coar, 19 Abb. N. C. 267; Borst v. Griffin, 5 Wend. 84; Marks v. Russell, 40 Pa. 372; Feuchtwanger v. McCool, 29 N. J. Eq. 151; Womack v. McAhren, 9 Ind. 6; Turner v. Thompson, 23 Ga. 49; Baxley v. Bennett, 33 Ga. 146; Ferris v. Plummer, 46 Hun, 515; Carothers v. Wheeler, 1 Or. 194; M'Kibbin v. M'Clelland [1894] 2 I. R. 654; Bacon v. State, 22 Fla. 46; State v. Beasley, 21 W. Va. 777; Styles v. Dickey, 22 N. D. 515, 134 N. W. 702 and cases cited; Romayne v. Hawkeye Commercial Asso. — Iowa, —, 135 N. W. 735; Kelly v. Independent Pub. Co. 45 Mont. 127, 38 L.R.A.(N.S.) 1160, 122 Pac. 735, Ann. Cas. 1913D, 1063; Ehrhart v. Esbenshade, 233 Pa. 18, 81 Atl. 814; Wilcox v. Engebretsen, 160 Cal. 288, 116 Pac. 750; Elmore v. Fanning, 85 Kan. 501, 38 L.R.A.(N.S.) 685, 117 Pac. 1019; Hendrickson v. Callan, 70 Misc. 342, 128 N. Y. Supp. 980; Delaski v. Northwestern Improv. Co. 61 Wash. 255, 112 Pac. 341; Troy Laundry Machinery Co. v. Drivers' Independent Laundry Co. 13 Cal. App. 115, 109 Pac. 36; Close v. Twibell, 47 Ind. App. 290, 92 N. E. 377; Webb v. Strobach, 143 Mo. App. 459, 127 S. W. 680.

It was an abuse of discretion for the court to refuse to permit the answer to be so made and entered, even though defendant was not in time, because it appears that defendant had a meritorious defense, and

he was not guilty of gross negligence. Styles v. Dickey, 22 N. D. 515, 134 N. W. 702.

Page & Englert, for respondent.

The answer was not served within the statutory time. It was returned to defendant's counsel for that reason, such reason being pointed out to said counsel. His failure to act promptly in the matter ought to be deemed a waiver of the defect in securing judgment. He ought to be estopped from pressing the alleged defect. Fluegelman v. Armstrong, 59 Misc. 506, 110 N. Y. Supp. 967.

An application to reopen a judgment should be accompanied not only by an affidavit of merits, but by a verified answer showing a good defense. Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151.

The judgment having been fully satisfied, there was nothing upon which the court could act. The judgment was no longer in existence, and there was no action in which an answer could be filed. Fluegelman v. Armstrong, 59 Misc. 506, 110 N. Y. Supp. 967; Foster v. Hauswirth, 5 Mont. 566, 6 Pac. 19; Skillings v. Massachusetts Ben. Asso. 151 Mass. 321, 23 N. E. 1136; Bank of Upper Canada v. Corbett, 21 U. C. Q. B. 65; Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364; Copper v. Galbraith, 24 N. J. L. 219; Davis v. Blair, 88 Mo. App. 372; Alverson v. Alverson, 2 R. I. 27; Enders v. Burch, 15 Gratt. 64; 23 Cyc. 893.

Vested rights now exist in third parties who bought at the execution sale, and they are the ones who would suffer if the judgment were reopened and the execution sale set aside. Under such circumstances the judgment will not be vacated. Foster v. Hauswirth, 5 Mont. 566, 6 Pac. 19; Shepherd v. Marvel, 16 Ind. App. 417, 45 N. E. 526.

Goss, J. Complaint was served, March 8, 1912. Answer was served on plaintiff's attorney on Monday, April 8, 1912, the last day of the thirty-day period for answer being Sunday. The answer was returned as served too late. On April 8 plaintiff's attorney made the usual affidavit of default and proof of claim, and forwarded the same with pleadings to the district judge, with an application for judgment by default. Judgment was ordered April 9, and entered the next day. Plaintiff's attorney acted in good faith, supposing the time for answer to have expired with Sunday, April 7, and had forwarded proof of the assumed default before the answer was served upon him. The

judgment was for recovery of $1398.50 and costs. The answer denied liability. On April 15 execution levy was made. Notice was given April 23 that execution sale thereunder would be had May 6, upon which date sale was had, and enough of defendant's property was sold to satisfy the judgment to third parties. Two days before the sale, or on May 4, notice of motion to vacate the judgment as one improperly taken in disregard of answer previously interposed was served, noticing hearing for May 13, 1912, in district court chambers at Jamestown. Hearing was not had at the time noticed, but was continued by agreement, and finally had during the July term. Motion to vacate was denied by order of July 20, 1912. From this order defendants appeal, specifying as error that "the court erred in denying the motion to vacate said judgment and set the same aside for the reasons: (a) That the thirty days granted by statute and the summons served in this action had not expired at the time of service of this answer, (b) that an answer was served within time and an issue of fact joined, and a judgment by default would not lie, but that defendant was entitled to a trial of the issues." Error is assigned in accordance with the specifications taken.

The answer was served within time. The last day of the thirty-day period for answer fell on Sunday. Under § 6736, Rev. Codes 1905, § 7324, Comp. Laws 1913, as construed and fully discussed in Styles v. Dickey, 22 N. D. 515, 134 N. W. 702, the last day of the thirty-day period for answer being Sunday, that day is excluded from computation of the period of time within which answer was required. The rule prescribed by statute is applicable in practice matters as well as the calculation of the periods of time within which to make redemption or to do other acts. The authorities are exhaustively reviewed in Styles v. Dickey, written after rehearing had. The rule there adopted is "a universal rule for the computation of time, alike applicable to matters of mere practice and to the construction of statutes" providing time limits for performance. That decision had been but recently filed when this judgment was ordered. Counsel for respondent admits that he was then unfamiliar with that precedent. The judgment purporting to have been taken by default, vacation of judgment should have been granted unless other grounds appear for denial of the motion. And as defendant was not in default, whatever was done by plaintiff in procuring judgment and execution sale thereon afterwards was in law

wrongfully done and in disregard of, and in violation of, the rights of the defendant, as to whom no wrongful act of the plaintiff can constitute a foundation for a charge of laches as against defendant. The defendant has at all times been within his legal rights, while the plaintiff has, at all times after the answer imposed, been wholly without any legal right to do what he did. No duty rested upon the defendant to do more than he has done. A duty at all times after answer rested upon plaintiff to desist or proceed at his peril of the consequences.

With this situation confronting him, respondent urges that, because he wrongfully enforced collection by execution, a clear abuse of legal process, he has nevertheless satisfied, even though wrongfully, the judgment he has thus caused to be wrongfully entered, and has therefore devested the court of jurisdiction to vacate said judgment in this action. He contends that defendant must go for relief into a court of equity, and there be relieved from this erroneous judgment wrongfully satisfied. We cannot agree with respondent. The contrary is already the adjudicated rule in this state. Appellant is not seeking to pursue the property sold, nor is he seeking relief against the purchasers at the execution sale, nor the sheriff making the sale. The court in this action is authorized, as between the parties to the original suit, to administer relief, be it legal or equitable. In Kitzman v. Minnesota Thresher Mfg. Co. 10 N. D. 26, 84 N. W. 585, on virtually the same contention, the opinion reads: "This familiar remedy by motion [to vacate judgment] is both speedy and economical, and it is also well settled that in granting this relief by motion the courts *will exercise the powers of a court of equity* applicable in administering relief sought in actions of this nature. . . . It is further true that, under the Code procedure, certain statutory provisions such as that embraced in § 5289 [Rev. Codes 1899, later § 6884, Rev. Codes 1905, now § 7483, Comp. Laws 1913] have afforded a remedy by motion as a means of relief against judgments, which, prior to the adoption of the Code, was obtainable only in courts of equity." The necessity of resorting to an action in equity to procure vacation of a judgment is dispensed with, and the court on a motion to vacate may grant relief, even though it be equitable in nature. If an action in equity did not lie to enjoin collection of this judgment (and it would not under the express holding in Kitzman v. Minnesota Thresher Mfg. Co.) because the remedy was by

motion to vacate, instead of by an action in equity, to deny this motion to vacate on the grounds urged would be the equivalent of overruling in effect the Kitzman Case.

The order appealed from is reversed, with direction to the lower court to grant the motion to vacate the district court judgment erroneously entered April 10, 1912, in this action as a default judgment, that trial on the merits on the issues joined by the complaint and answer may be had. Appellant will recover his taxable disbursements and costs on both his motion to vacate and on appeal. It is so ordered.

T. H. RONEY, as Trustee of the Peterson Machine Company, a Corporation, v. H. S. HALVORSEN COMPANY, a Corporation, Hammer-Condy Company, a Corporation, Hammer-Halvorsen-Beier Elevator Company, a Corporation.

(149 N. W. 688.)

Executory contract for sale of land — vendor — possession — title to crops — cancelation of contract — notice of.

1. A vendor under an executory contract for the sale of land, and who is not in possession thereof, has no title to the crop raised and severed by the vendee in possession, even though the severance takes place after notice of the cancelation of the contract by reason of failure to make the necessary payments.

Election of remedy — cannot change or repudiate after once made — knowledge of the facts.

2. A party may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.

Cancelation of contract — vendor — choice of mode of redress — unpaid balance of purchase price — no right to same.

3. A vendor in an executory contract for the sale of land, who has clearly

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Note.—On the general question of the right to crops growing on real estate sold under contract, see notes in 35 L.R.A.(N.S.) 1066; and 38 L.R.A.(N.S.) 420.

elected to cancel the same and not abide by it, has no right of action for the unpaid balance of the purchase price.

Crops raised by vendee — right to, in vendee — conversion by vendor — action by vendee — vendor cannot counterclaim balance due under contract.

4. Where the vendee in a land contract has sowed and harvested grain upon the land involved, and the vendor wrongfully seizes said grain, such vendor will not be allowed to counterclaim, in an action for the conversion thereof, payments claimed to be due and owing on such land contract. Such claim does not arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, nor is it connected with the subject of the action.

Opinion filed November 10, 1914.

Appeal from the District Court of Cass County, *Pollock*, J. Action of trover for the conversion of grain. Counterclaim for balance due on land contract. Judgment for plaintiff. Defendants appeal.

Affirmed.

Statement by BRUCE, J.

This is an action brought by T. H. Roney as trustee of the Peterson Machine Company to recover of appellants for the conversion of certain flax of the stipulated value of $1,500. The defendant, the Halvorsen Company, secured a contract to purchase the land on which the flax was grown, from the state of North Dakota. Thereafter it contracted with one Patterson to assign its contract with the state to him for $7,200, $600 of the purchase price being paid by Patterson in cash, $1,000 due under the contract on March 1, 1911, $1,000 on November 1, 1911, and the balance due November 1, 1912. Thereafter the said Halvorsen Company assigned its interest in the said contract to the defendant, the Hammer-Condy Company. In April, 1912, and after the payment of $1,000 to be made on March 1, 1911, became due, Patterson assigned his interest in the land to the plaintiff Roney as trustee, etc., with the knowledge and consent of the Halvorsen Company. The said Halvorsen Company agreed to accept the balance of the purchase price on said real estate from the said Roney. After this assignment, Roney immediately entered into possession of the land, and, with the Halvorsen Company's knowledge, sowed the land to flax. On July 20, 1911,

none of the payments, except the original payment of $600, having been made, the Halvorsen Company served on the said Roney a notice of cancelation of the contract, claiming that the $1,000 instalment of March 1, 1911, was past due and unpaid. Although the said Roney testified to a waiver of this default or an agreement with the Halvorsen Company to extend such payment to November 1, 1911. After the thirty days specified in the notice had lapsed, the Halvorsen Company claims to have made an arrangement with Roney's tenant to cut the flax for them, but admits that Roney knew nothing of this agreement. Roney, on the other hand, testified that his tenant advised him that he had cut the flax for him, and that threshing would commence late in October, 1911. Later Roney sent a man to look after the threshing, and found that the Halvorsen Company had seized the crop and was threshing it. After such seizure the Halvorsen Company turned over one half of the flax to Roney's tenant, though under the lease between Roney and the tenant the whole of such flax belonged to Roney until the division and the plowing back of the land in the fall, which Roney testified was not done. The other half of the flax, being of the stipulated value of $1,500, the Halvorsen Company kept, and it is for the conversion of this portion that the action was brought and the recovery was permitted in the lower court. The Halvorsen Company in its answer claimed that the cancelation proceedings devested Roney of any interest in the land and in the crops, and also set up a counterclaim asking to have the value of the flax applied as an offset on the amount due from Roney on the purchase price of the land under the contract alleged to have been canceled. At the close of the trial Roney moved for a directed verdict on the ground that the evidence showed that he, Roney, was in undisturbed possession of the land and the grain growing thereon, until after the latter was cut and to be threshed, and that the Halvorsen Company's remedy, if any, was limited to the recovery of the value of the use and occupation of the land during the time Roney was in possession after default, if he was in default. Plaintiff, Roney, also urged that the Halvorsen Company did not seek to recover the value of the use of the land in the action, and that, since the grain was wilfully and wrongfully converted, the damages arising from the breach of the contract were not pleadable as a counterclaim in an action for the conversion of such property; also that if the Halvorsen Company's

cancelation of the contract was properly made, and operated to cancel the contract, it discharged, the indebtedness.

Lee Combs and *L. S. B. Ritchie,* for appellants.

The service of the notice of cancelation of the contract for the sale of the land, in form as required by statute, forecloses, cancels, and terminates all interest of the vendee in the contract. Hage v. Benner, 111 Minn. 365, 127 N. W. 3; Lafrance v. Griffin, 160 Mich. 236, 125 N. W. 34; Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 97, 128 N. W. 691; Williams v. Corey, 21 N. D. 509, 131 N. W. 457, Ann. Cas. 1913B, 731; Rev. Codes 1905, §§ 7494–7497; Schmidt v. Williams, 72 Iowa, 317, 33 N. W. 693.

Defendant had the right to counterclaim the balance due on the contract. The word "transaction," and the phrase "connected with the subject of the action," do not mean merely, or refer alone to, the wrong of which complaint is made, but are construed to include all the facts and circumstances out of which arose the injury. 34 Cyc. 687; Story & I. Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671; Ritchie v. Hayward, 71 Mo. 560; Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881; 34 Cyc. 660, cases cited in note 21; Hanson v. Skogman, 14 N. D. 445, 105 N. W. 90; Christofferson v. Wee, 24 N. D. 506, 139 N. W. 689.

It is well settled that one in possession under color of title to real estate may state, if he knows, who owns it. Olson v. O'Connor, 9 N. D. 504, 81 Am. St. Rep. 595, 84 N. W. 359; Ochsenreiter v. George C. Bagley Elev. Co. 11 S. D. 91, 75 N. W. 822.

Lawrence & Murphy, for respondent.

Plaintiff was at all times the owner and entitled to the possession of the flax in question. He was in possession of the land under the contract of sale to him, and entitled to all beneficial use of same. Nearing v. Coop, 6 N. D. 345, 70 N. W. 1044; Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631; Brown v. Newman, 15 N. D. 1, 105 N. W. 941; Rev. Codes 1905, § 4752; Churchill v. Ackerman, 22 Wash. 227, 60 Pac. 406; Stockwell v. Phelps, 34 N. Y. 363, 90 Am. Dec. 710; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Martin v. Thompson, 62 Cal. 618, 45 Am. Rep. 663; Lindsay v. Winona & St. P. R. Co. 29 Minn. 411, 43 Am. Rep. 228, 13 N. W. 191; Woodcock v. Carlson, 41 Minn. 542, 43 N. W. 479;

Aultman & T. Co. v. O'Dowd, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756; Phillips v. Keysaw, 7 Okla. 674, 56 Pac. 695; Kirtley v. Dykes, 10 Okla. 16, 62 Pac. 808; Killebrew v. Hines, 104 N. C. 182, 17 Am. St. Rep. 672, 10 S. E. 159, 251; Hinton v. Walston, 115 N. C. 7, 20 S. E. 164; Jenkins v. McCoy, 50 Mo. 348; Dollar v. Roddenbery, 97 Ga. 148, 25 S. E. 410; 8 Ballard, Real Prop. § 99; Cobbey, Replevin, § 378; Shinn, Replevin, § 227; 12 Cyc. 977; 8 Am. & Eng. Enc. Law, 329.

One who sows, cultivates, and harvests a crop upon the land of another is entitled to the crop as against the owner of the land, whether he came into possession of the land lawfully or not, so long as he remains in possession until crop is harvested. Gunderson v. Holland, 22 N. D. 258, 133 N. W. 546; Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479; Sornberger v. Berggren, 20 Neb. 399, 30 N. W. 413; Johnston v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979; Groome v. Almstead, 101 Cal. 425, 35 Pac. 1021; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; Martin v. Thompson, 62 Cal. 618, 45 Am. Rep. 663; Dollar v. Roddenbery, 97 Ga. 148, 25 S. E. 410; Lindsay v. Winona & St. P. R. Co. 29 Minn. 411, 43 Am. Rep. 228, 13 N. W. 191; Adams v. Leip, 71 Mo. 597; Jenkins v. McCoy, 50 Mo. 348; Harris v. Turner, 46 Mo. 438; Morgner v. Biggs, 46 Mo. 65; Boyer v. Williams, 5 Mo. 335, 32 Am. Dec. 324; Edwards v. Eveler, 84 Mo. App. 405; McAllister v. Lawler, 32 Mo. App. 91; Stockwell v. Phelps, 34 N. Y. 363, 90 Am. Dec. 710; Hinton v. Walston, 115 N. C. 7, 20 S. E. 164; Faulcon v. Johnston, 102 N. C. 264, 11 Am. St. Rep. 737, 9 S. E. 394; Ray v. Gardner, 82 N. C. 454; Brothers v. Hurdle, 32 N. C. (10 Ired. L.) 490, 51 Am. Dec. 400; Phillips v. Keysaw, 7 Okla. 674, 56 Pac. 695; Churchill v. Ackerman, 22 Wash. 227, 60 Pac. 406.

Defendants are not entitled to recover on their counterclaim. This is an action against the landowner for converting the crop after he had served notice of cancelation of the sale contract. He seeks to counterclaim the balance of the purchase price, under such contract. His counterclaim did not arise out of the "transaction," nor is it connected with the "subject-matter of this action." Warren v. Ward, 91 Minn. 254, 97 N. W. 886; Gillilan v. Oakes, 1 Neb. (Unof.) 55, 95 N. W. 511;

Shenners v. Pritchard, 104 Wis. 287, 80 N. W. 458; Thompson v. Howard, 31 Mich. 309; McNutt v. Hilkins, 80 Hun, 235, 29 N. Y. Supp. 1047; Welsh v. Carder, 95 Mo. App. 41, 68 S. W. 580.

The defendant elected as to his remedy, and he cannot rescind or repudiate his action in so doing. He canceled the contract; therefore he is not entitled to recover in any action the balance of the purchase price. The rescission terminates the rights of the parties to the contract. Rev. Codes 1905, § 5380; 39 Cyc. 1399; Warren v. Richmond, 53 Ill. 52; Rowe v. Rowe, 5 Ill. App. 331; Chrisman v. Miller, 21 Ill. 227; Little v. Thurston, 58 Me. 86; Frost v. Frost, 11 Me. 235; Winter v. Livingston, 13 Johns. 54; Icely v. Grew, 6 Nev. & M. 467; Harvey v. Wiens, 16 Manitoba L. Rep. 230; Fraser v. Ryan, 24 Ont. App. Rep. 441; Sterman v. Thornton, 3 Ky. L. Rep. 540; Johnson v. Jackson, 27 Miss. 498, 61 Am. Dec. 522.

In fact the plaintiff might well claim the return of that portion of the purchase price already paid. Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; Harris v. Catlin, 37 Tex. 581; Houston v. Killough, — Tex. —, 13 S. W. 959; Staley v. Murphy, 47 Ill. 241; Castle v. Floyd, 38 La. Ann. 583; Milligan v. Ewing, 64 Tex. 258; Conrad v. Grand Grove, U. A. O. D. 64 Wis. 258, 25 N. W. 24; Hamill v. Thompson, 3 Colo. 518, 14 Mor. Min. Rep. 690; Davis v. Smith, 5 Ga. 274, 48 Am. Dec. 279; Frink v. Thomas, 20 Or. 265, 12 L.R.A. 239, 25 Pac. 717.

Defendant who has tortiously obtained possession of personal property cannot, in trover for its conversion, show in mitigation of damages that he sold it and applied the proceeds to a just debt of plaintiff. East v. Pace, 57 Ala. 521; Marin v. Satterfield, 41 La. Ann. 742, 6 So. 551; Northrup v. McGill, 27 Mich. 234; Sprague v. McKinzie, 63 Barb. 60; Lyon v. Yates, 52 Barb. 237; Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511, affirming 44 Barb. 505; Mississippi Mills v. Meyer, 83 Tex. 433, 18 S. W. 748; 38 Cyc. 2103, and cases contained in note 13; Pierce v. Schenck, 3 Hill, 28; 3 Sutherland, Damages, 483.

The law does not permit the wilful and arbitrary conversion of property as a method of satisfying or offsetting mutual claims. Carpenter v. Manhattan L. Ins. Co. 93 N. Y. 552; Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511.

BRUCE, J. (after stating the facts as above). It is quite clear from the evidence that, though the notice of the cancelation of the contract was served on July 20th, 1911, neither the Halvorsen Company nor the Hammer-Condy Company made any demand for the possession of the land, nor attempted to enter thereon, until October, 1911, when they seized the flax. The service of the notice of cancelation was not in itself sufficient to confer upon the defendants any title in the grain in controversy. It is also clear that in April and prior to this time the said Roney sowed the crop in question. Such being the case the holding of the Minnesota court in the case of Aultman & T. Co. v. O'Dowd, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756, which is followed by this court in the case of Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631, seems to be controlling. In that case the court said: "The fact that the owner of the premises may recover the rents and profits of the land for which it is being withheld precludes the idea of his right to recover the crops. It is the value and use of the land which the owner recovers, and not the fruits of the land. A contrary rule would give the owner the value of the use of the land and the value of the labor of the farmer in producing the crop, for the crop contains the value of both. In this case not only did Nelson sow and care for the crop before plaintiff became the owner of the land, but he continued in possession of the same thereafter, and was permitted to harvest and thresh it, and remove the same to his own granary. It would be an oppressive rule to permit the plaintiff to remain inactive while this was going on and Nelson adding to the gross value of the crop which he had raised in the course of months of husbandry, and then deprive him of the entire property. We sanction no such rule."

It is true that in this case there is some testimony to the effect that the tenant was instructed by the Halvorsen Company to harvest the crop for it, but it is admitted that Roney had no knowledge of these instructions, and there is no controversy over the question that the land was seeded by Roney before any notice had been given to him of the cancelation of the contract. The rule as laid down in the Minnesota court, indeed, has not merely been affirmed by this court in the case of Golden Valley Land & Cattle Co. v. Johnstone, supra, but in the case of

Gunderson v. Holland, 22 N. D. 258, 133 N. W. 546. It, as far as we can learn, has universal recognition. See 12 Cyc. 977; Brown's Bl. Com. 235.

Nor do we believe that the counterclaim was availing in this case. The defendants had clearly elected to cancel the contract, and not to abide by it. Such being the case, it is clear that the defendants could not sue for the unpaid balance of the purchase price. Warren v. Ward, 91 Minn. 254, 97 N. W. 886; Gillilan v. Oakes, 1 Neb. (Unof.) 55, 95 N. W. 511; Shenners v. Pritchard, 104 Wis. 287, 80 N. W. 458. It is well settled, indeed, that a party may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. Thompson v. Howard, 31 Mich. 309; McNutt v. Hilkins, 80 Hun, 235, 29 N. Y. Supp. 1047, 1049; Welsh v. Carder, 95 Mo. App. 41, 68 S. W. 580.

So, too, the counterclaim was unavailing because it was not pleadable in the case at bar. The action of conversion is a tort action, and the counterclaim set forth an action on the contract. The cause of action, being the contract for the payments alleged to be due, was not a cause of action "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action." See § 6860, Rev. Codes 1905. In order to be pleadable, it must have been such. Force v. Peterson Mach. Co. 17 N. D. 220, 116 N. W. 84; Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133.

The judgment of the District Court is affirmed.

JOHN MALMSTAD v. McHENRY TELEPHONE COMPANY, a Corporation.

(149 N. W. 690.)

New trial — insufficiency of evidence — discretion of court — unless only conclusion favors verdict.

The granting of a new trial for insufficiency of the evidence to support the verdict is within the trial court's discretion, unless no conclusion can be drawn from the evidence except one favorable to the party for whom the verdict was found.

Opinion filed November 11, 1914.

Appeal from the District Court of Foster County. *Coffey*, J. Action to recover damages for removal of lateral support. Plaintiff appeals from order setting aside the verdict and granting a new trial.

Affirmed.

Lee Combs and *L. S. B. Ritchie*, for appellant.

In a motion for a new trial upon the ground of newly discovered evidence, there must be facts sufficient to enable the supreme court to see that the trial judge had legal evidence before him showing the existence of such ground. Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419.

Where the affidavits upon such a motion show and pertain solely to matters of a negative or merely cumulative nature, they are not ground for a new trial. Boos v. Ætna Ins. Co. 22 N. D. 11, 132 N. W. 222.

W. O. Lowden and *S. E. Ellsworth*, for respondent.

The motion for a new trial was made and based upon several grounds —insufficiency of the evidence, newly discovered evidence, and error in law occurring at the trial. The order of the court granting a new trial was general, without specifying any ground. Therefore such order will not be disturbed if there is any tenable ground for its support. Citizens' Bank v. Schultz, 21 N. D. 551, 132 N. W. 134; Gooler v. Eidsness, 18 N. D. 338, 121 N. W. 83; Davis v. Jacobson, 13 N. D. 430, 101 N. W. 314.

If any of the grounds urged for a new trial are tenable and supported, the order will not be disturbed. Olson v. Riddle, 22 N. D. 144, 132 N. W. 655; White v. Barling, 36 Mont. 413, 93 Pac. 348.

The application for a new trial upon the ground of insufficiency of the evidence is addressed to the sound discretion of the trial court, and the order on same will not be disturbed unless it appears that such discretion has been abused. Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Libby v. Barry, 15 N. D. 286, 107 N. W. 972; White v. Barling, 36 Mont. 413, 93 Pac. 348; Ball v. American Transfer Co. 21 Cal. App. 437, 132 Pac. 82; Cutten v. Pearsall, 146 Cal. 690, 81 Pac. 25; Re Martin, 113 Cal. 479, 45 Pac. 813; Cunningham v. Atterbury, 163 Mo. App. 594, 147 S. W. 495; Dobbins v. Graer, 50 Colo. 10, 114 Pac. 303; Gross Coal Co. v. Milwaukee, 148 Wis. 72, 134 N. W. 139; Bailey v. McCormick, 132 Wis. 498, 112 N. W. 457.

The supreme court will not weigh conflicting evidence, or disturb the order of the trial court in granting a new trial. Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; McGraw v. Manhattan Co. 66 Wash. 388, 119 Pac. 822; McCarthy v. Morris, 17 Cal. App. 723, 121 Pac. 696; 14 Enc. Pl. & Pr. 930, 955, 960, 978, 982 note 3, 985 and cases in note 1, 987 and cases in note 1; Taylor v. Scherpe & K. Architectural Co. 47 Mo. App. 257; Watson v. St. Paul City R. Co. 42 Minn. 46, 43 N. W. 904; Sunberg v. Babcock, 66 Iowa, 515, 24 N. W. 19; Hayne, New Trials, p. 250; Distad v. Shanklin, 11 S. D. 1, 75 N. W. 205; Patch v. Northern P. R. Co. 5 N. D. 55, 63 N. W. 207; Hicks v. Stone, 13 Minn. 434, Gil. 398; Cowley v. Davidson, 13 Minn. 92, Gil. 86; Morrison v. Mendenhall, 18 Minn. 238, Gil. 212; Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; McCann v. McCann, 20 Cal. App. 567, 129 Pac. 965; Maynard v. Des Moines, 159 Iowa, 126, 140 N. W. 208; Christie Lithograph & Printing Co. v. American Bonding Co. 119 Minn. 11, 137 N. W. 188; Peterson v. Chicago G. W. R. Co. 106 Minn. 245, 118 N. W. 1016; Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

A new trial will sometimes be granted on a showing of newly discovered evidence which is cumulative, especially where it appears that such new evidence is of a character so convincing and controlling that it will or ought to change the result on another trial. Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; Germinder v. Machinery Mut. Ins. Asso. 120 Iowa, 614, 94 N. W. 1108.

Where interest is not recoverable, and the court instructs the jury to award interest if it finds a verdict for plaintiff, such instruction is reversible error. Rev. Codes 1905, § 6560; Johnson v. Northern P. R. Co. 1 N. D. 354, 48 N. W. 227; Burger v. Sinclair, 24 N. D. 624, 140 N. W. 246; Lindblom v. Sonstelie, 10 N. D. 140, 86 N. W. 357.

BRUCE, J. This is an appeal from an order setting aside a verdict and granting a new trial in an action to recover damages for the negligent removal of the lateral support of a building. It would serve no useful purpose to review the evidence. The theory of the plaintiff is that the defendant negligently made the excavation in question, and, by not giving the plaintiff notice of the proposed work, made it impossible for him to protect his building. The theory of the defendant, on the other hand, is that, though no notice was given, a wall was constructed against the adjoining bank as the work progressed, which gave it all the support that was necessary, and that the real fact was that the building of plaintiff was itself improperly constructed and without any foundation, and that the injuries complained of were occasioned by the defects in the building itself, and were not in any way caused by the negligence of the defendant, or necessarily by the excavation at all. The excavation seems to have been dug in November, and plaintiff himself testifies that there was no sliding of the building until the frost went out in the spring, and, though he testifies to cracks before that time, the photographs which he introduces in evidence were not taken until the spring, and his testimony as to the time when the injuries became apparent is quite confusing.

There is, on the other hand, quite convincing evidence of the poor construction of the building, and of an inferior grade of materials which were used therein. This evidence is also sought to be corroborated by after discovered evidence which is quite convincing, and, though no diligence is shown in the attempt to obtain it, we are not prepared to say that the court in passing upon the motion for a new trial was not justified in considering it, and that the evidence is, as claimed by the plaintiff, merely cumulative. It is, in fact, corroborative rather than cumulative. It is, at any rate, quite probable that this evidence would have a material influence in determining the result upon the new trial, and in such cases the discretion of the trial

court in granting a new trial on cumulative evidence is rarely, if ever, interfered with upon appeal. Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; Germinder v. Machinery Mut. Ins. Asso. 120 Iowa, 614, 94 N. W. 1108. It is to be remembered that we are here dealing with the discretion of the trial court, and that it is one thing to say that a court has not erred in refusing to consider such evidence, and quite another thing to say that it has abused its discretion in doing so.

The proof of negligence in the case, indeed, is far from satisfactory. We cannot ourselves but be in doubt whether the course pursued by the defendants in making the excavation and in building the supporting wall was not all that could be required or expected, and that the wall was not as serviceable as any protection that the plaintiff himself could have adopted. The only witness of plaintiff upon this specific question is the witness Anderson. Although he testified that the usual procedure in such cases was "to build a false structure and remove it after the wall as you go along," he also testified that "there might be more than one way," and that he "did not say that the only proper way to construct a wall in the vicinity of a cement block was to put up false work. Whether a false work is required or not depends upon the soil or the time of the year. The purpose of that retaining or false wall is to keep it from caving. If the earth does not cave, then you do not need the false work. If, for instance, south of the wall I was about to construct, there existed a cellar 10 by 15 feet in length, running parallel with the wall, 7 feet deep, dug out of the earth, and plastered on the earth and remaining in good condition for years, with no signs of cracks or scaling of the walls, I would say the chances are a wall of that character, in the month of November, *would not need a false work to support it.* The chances are it was a reasonably compact wall. In order to determine if it was necessary to construct a false wall after starting the excavation, a man must use his judgment as he went along. I was not asked the question whether the making of this wall without false work was negligence. I did not see it built. *I don't say that it was negligence.* I do not want the jury to understand I did. *I do not want the jury to understand that the failure to use false work caused this injury.* I did not see the building built, and if I had told them that, it would only have been my opinion. I did not examine the foundation inside under the floor. I do not know

how the floor joists of the building are supported. I saw that the wall was cracked. *I cannot tell whether the wall slipped or slid.* I saw that it was out of plumb. It had settled, I suppose. I do not know what else could cause it."

It may be conceded that failure to give the notice which is required by the statute is evidence of negligence. Schultz v. Byers, 53 N. J. L. 442, 13 L.R.A. 569, 26 Am. St. Rep. 435, 22 Atl. 514. The purpose of the statute, however, (Rev. Codes 1905, § 4811), could only have been to enable the adjacent landowner to take steps for his protection if his neighbor failed to do so, and the question, after all, is merely whether or not the wall that was built did not afford all of the protection that the "false work," or any other reasonable method of protection, could have given, and whether the injury to the building was caused by the excavation at all, but rather by its own poor construction. It is, too, very doubtful whether any part of the damage complained of was occasioned in the fall of 1909 and prior to the spring of 1910. It is admitted that plaintiff had a personal knowledge of the excavation within a few days after the work was commenced, and, if no damage had then occurred, in ample time to take steps for his protection. If such is the fact, the failure to give the statutory notice is by no means decisive of the case. 1 Cyc. 780; Novotny v. Danforth, 9 S. D. 301, 68 N. W. 749.

Upon the state of facts disclosed, indeed, this court cannot say that the learned trial judge abused his sound discretion in granting a new trial. The case is not one where a new trial has been refused, and where the applicant has been denied any other hearing but upon appeal, nor is it a case where this court upon appeal is asked to set aside a verdict of a jury. The rule, indeed, seems to be well established that the granting of a new trial for insufficiency of the evidence to support the verdict is within the trial court's discretion, unless no conclusion can be drawn from the evidence except one favorable to the party for whom the verdict was found. Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397.

We cannot say that but one conclusion can be drawn from the evidence in this case, and that favorable to the plaintiff and appellant. After a thorough examination of the record, we in fact find ourselves entirely confused as to the merits of the controversy. The trial judge,

indeed, "is something more than a mere moderator presiding over a contest in which it has no concern. On the contrary, it has a distinct function to perform, and whenever it is convinced that justice has not been done under the law and the facts, it is its duty to set aside the verdict and grant a new trial. As an appellate court we have a somewhat different function to perform, for we have not only the verdict of a jury, but the deliberate judgment of the trial judge after hearing all the testimony, and we should not interfere with the final order of the trial judge except in cases where it appears that such judge has abused his discretion and acted in such an arbitrary and capricious manner that, instead of effectuating justice, he has in fact thwarted it." Maynard v. Des Moines, 159 Iowa, 126, 140 N. W. 208. "At the conclusion of all the testimony," the trial judge "weighs the evidence and determines the facts; and if he afterwards concludes that he has made an erroneous decision, it is his duty, where proper proceedings are had, calling the matter to his attention, to grant a motion for a new trial; and where there has been heard conflicting testimony, an appellate court cannot, in reviewing the ruling made upon such motion, disturb the order. It is only where the evidence heard establishes an uncontradicted state of facts in favor of one or the other of the parties to an action that a question of law is presented which an appellate court may consider. The record of the testimony heard at the trial of this action does not disclose that the material facts were uncontradicted or undisputed, and that being true the appellants must rest content with the order made granting a new trial, unless they can present some question of law upon which we would be impelled for other reasons to conclude that the order was irregularly or improperly made." McCann v. McCann, 20 Cal. App. 567, 129 Pac. 965.

"An examination of the grounds of the application for the order appealed from," says Mr. Justice Wallin, in the case of Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619, "will at once develop the fact that the trial court, in disposing of the problem presented upon the application, was not governed by fixed rules of law. . . . When motions of this nature are presented to a court, they are classified as motions addressed to the discretion of the court. In considering the evidence adduced or that newly discovered, no fixed rules of law exist which could be de-

cisive of the result of the investigation. Under such circumstances a margin of discretion is vested in trial courts, which permits them, with a view to promoting the ends of justice, to weigh the evidence, and, within certain limitations, act upon their own judgment with reference to its weight and credibility. Nor in such cases will the court necessarily be governed by the fact that the verdict returned has the support of an apparent preponderance of the evidence. Unrighteous verdicts sometimes are supported by apparently substantial evidence, and to meet such exceptional cases the presiding judge, who sees and hears the witnesses, is vested with a discretion to vacate such verdicts and order a new trial in furtherance of justice. *The rule that governs a court of review in this class of motions—i. e.,* those which appeal to judicial discretion—*does not apply to trial courts,* and hence the trial court is not debarred from granting or refusing a new trial by the mere fact that the verdict rests upon substantial or conflicting evidence. Hayne, New Trials, § 97. This discretion, however, is neither capricious, arbitrary, nor unrestricted. It is, on the contrary, a reasonable discretion, to be exercised with great caution; and in cases of abuse the trial court will be reversed by the reviewing court in this class of cases. The duties devolving upon a court of review in this class of cases are to be distinguished from those which govern in trial courts. In the reviewing tribunal the weight and credibility of testimony will only be considered with a view to determine whether the order made in an inferior court, when acting within the domain of discretion, was or was not an abuse of discretion. See 14 Enc. Pl. & Pr. 930, 985, and cases in note 1; Taylor v. Scherpe & K. Architectural Co. 47 Mo. App. 257. The rule applicable here is analogous to that applied where a new trial is sought on the grounds of improper remarks made by counsel to a jury, *i. e.,* the granting or refusing the application is within the discretion of the trial court. See Watson v. St. Paul City R. Co. 42 Minn. 46, 43 N. W. 904, and Sunberg v. Babcock, 66 Iowa, 515, 24 N. W. 19. In the Federal courts, as at common law, all motions for a new trial are addressed to the discretion of the trial court, and its ruling cannot be reversed. See 14 Enc. Pl. & Pr. 955. As to the application of this rule to newly discovered evidence, see Id. 982, note 3, and Hayne, New Trials, p. 250. See also the South Dakota cases cited in Distad v. Shanklin, 11 S. D. 1,

75 N. W. 205. In the case at bar the order appealed from granted a new trial. Such orders, when based upon the insufficiency of the evidence, are rarely reversed by a reviewing court, and never except upon grounds which are strong and cogent. The reason for discriminating in favor of such orders is that they are not decisive of the case, but, on the contrary, only open the way for a reinvestigation of the entire case upon its facts and merits. See Patch v. Northern P. R. Co. 5 N. D. 55, 63 N. W. 207; Hicks v. Stone, 13 Minn. 434, Gil. 398; Cowley v. Davidson, 13 Minn. 92, Gil. 86; Morrison v. Mendenhall, 18 Minn. 236, 238, Gil. 212; also 14 Enc. Pl. & Pr. 978, 987, and cases in note 1; also, Id. 960."

The order of the District Court is affirmed.

EDWARD WILSON v. HENRY H. KRYGER.

(149 N. W. 721.)

The Daniels-Jones Company executed at Minneapolis, Minnesota, a contract for deed to one Peterson, for 2,560 acres of land in Kidder county, this state, upon which an initial payment down had been made. The contract was assigned to defendant Kryger. Two instalments became due, and, remaining unpaid, the company served notice of cancelation of the contract. It then sold and deeded the land to plaintiff, who brought this action to quiet title. Kryger defends, claiming "that the place to cancel the contract was in Minnesota, where it was made, where it was to be performed, and where the parties reside;" that if cancelation under the laws of this state is allowed, he is denied the equal protection of the laws and deprived of his property without due process of law. *Held:*

Action to pursue land — suit to quiet title — contract for deed involved — county where land situated.

1. That in this action to pursue the land, the validity of the contract is directly involved in the suit to quiet title, and the situs of the action is fixed by the statute as in the county where the land is situated.

Sale contract — cancelation — foreclosure — default — notice of — procedure and remedy — situs of land and suit governs procedure.

2. That the statutory provision for cancelation or foreclosure of contracts by notice of default to be given relates to procedure and remedy concerning

the enforcement of the contract against the land; and the situs of the suit and of the land govern the procedure and remedy to recover title to the land; and the cancelation made under the laws of this state furnishes sufficient evidence of defendant's default under said contract to sustain the conclusion of law drawn from the findings, to the effect that all rights of the defendant to the land under said contract were terminated because of his defaults. The findings sustain the judgment entered.

Foreign law — immaterial — contract executed in other state.

3. Under the findings and on the judgment roll there is no proof of the Minnesota law governing cancelation of this contract although the foreign law in such respect is immaterial. The law of the forum and of the situs of the real property control the method and procedure of cancelation of contracts in this suit involving title, and where the contract was executed in a foreign state and without stipulating for performance to be had within this state.

Appeal — judgment roll — specification of error — no statement of case — notice of appeal — brief — assignment of error in — such error reviewed.

4. Defendant has appealed upon alleged error appearing upon the judgment roll only, and without settling a statement of the case. Where a statement of the case is not settled, and the questions to be raised on the appeal are not errors of law occurring on the trial, but, instead, only errors appearing on the face of the judgment roll, no specification of error need be taken at all, and no specification of error therefore need be served with the notice of appeal, or at all. All that is necessary to have such error appearing on the face of the judgment roll only reviewed is to assign and argue in the brief the error complained of. The insufficient specification of error here taken and served, not being necessary, is disregarded, and the alleged error assigned in the brief on the judgment roll is passed upon.

Opinion filed November 12, 1914.

From a judgment of the District Court of Kidder County, *Hon. W. H. Winchester,* Judge, defendant appeals.

Affirmed.

W. W. Fry, for appellant.

The contract in this case must be canceled in Minnesota, where it was made, and under the procedure of that state provided. Finnes v. Selover, B. & Co. 102 Minn. 334, 113 N. W. 883; Walsh v. Selover, B. & Co. 109 Minn. 136, 123 N. W. 291.

The *lex loci contractus* governs in the cancelation of a land sale con-

tract. Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. Rep. 69.

The contract itself involves certain rights of the parties, irrespective of where the subject-matter thereof is located. It makes no difference where the land is located: We are dealing with the contract. If we were trying to get the land, to recover possession thereof, to compel specific performance, we would bring any such action at the situs of the property. This is an action *in personam,* and not one *in rem.* Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; Whart. Confl. L. 616; Storey, Confl. L. 8th ed. 591; Polson v. Stewart, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737.

Forfeitures of land contracts are not favored, and will not be enforced unless clearly provided for by the contracts. Hudson v. Shepard, 90 Ill. App. 626.

If a definite place of performance is given in the contract, it must be performed there. Prairie Development Co. v. Leiberg, 15 Idaho, 379, 98 Pac. 616.

If no place is designated, then the vendor must seek the purchaser at his residence. Samuel v. Allen, 98 Cal. 406, 33 Pac. 273; First Nat. Bank v. Edgar, 65 Neb. 340, 91 N. W. 404; Drum v. Stevens, 94 Ind. 181; Randall v. Constans, 33 Minn. 329, 23 N. W. 530.

The covenants and agreements of such a contract are personal in their nature. 39 Cyc. 1787.

Reese L. Phelps and *Jesse Van Valkenburg,* for respondent.

The Minnesota statute cannot be considered, as under our law it is not a matter of which our courts will take judicial notice. Cosgrove v. McAvay, 24 N. D. 343, 139 N. W. 693.

Aside from this, the Minnesota law relied upon was not in force at the time of the cancelation of this contract. Minn. Laws, 1909, chap. 355, p. 406.

If a purchaser under such a contract undertakes to enforce the contract, he must do so where the land is located; upon a breach of such contract or for damages thereunder, he must bring the action in the state where the contract was made and performance required. Finnes v. Selover, B. & Co. 102 Minn. 334, 113 N. W. 883.

An action by the vendor for specific performance under such a con-

tract may be brought where the vendee resides, even though the land is in another jurisdiction. O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112, Ann. Cas. 1912C, 538.

Goss, J. This is an action to determine adverse claims. Defendant answers that he is interested as the holder of a contract of sale of the land involved. By reply it is alleged said contract was canceled for defaults thereunder. Trial was had at a regular term, defendant failing to appear. On plaintiff's proof the court made findings, conclusions, and order for judgment, upon which judgment was entered quieting title in plaintiff. Defendant's appeal is governed by chap. 131, Laws of 1913, as was held in this action. Wilson v. Kryger, 26 N. D. 77, 51 L.R.A.(N.S.) 760, 143 N. W. 764. Subsequently and pending this appeal portions of appellant's brief on motion were stricken, together with certain matter not properly a part of the judgment roll. The case is now for decision upon error assigned upon the judgment roll, and upon that alone, as there is no settled statement of the case, and hence nothing reviewable except error as assigned in appellant's brief upon the judgment roll proper.

In the opinion written in this action upon motion to dismiss this appeal, in 26 N. D. 77, 51 L.R.A.(N.S.) 760, 143 N. W. 764, appear statements concerning the specification of errors of law, there permitted to be served after time. It was assumed that the taking and service of said specification was necessary as a prerequisite to an assignment of error and review in this court. What was there said was under the apprehension that a statement of the case would be used on appeal, and that the same would therefore be necessary accordingly to raise alleged errors occurring on the trial. The justice who prepared said opinion has also since written the opinion in Leu v. Montgomery, — N. D. —, 148 N. W. 662, wherein it is held that in an appeal taken to review alleged error on the judgment roll alone, no specification of errors of law need be taken at all. Nor in such an appeal on the judgment roll alone need there be any specification of errors of law either taken or served. "It was not the purpose in the enactment of § 4 [chap. 131, Sess. Laws 1913, now § 7656, Comp. Laws 1913] to require any statement or specification to be thus served, except in cases where under the former statute (§ 7058, Rev. Codes 1905) the same were required to be incorpor-

ated in statements of the case, and it is of course true that no such specifications were required under § 7058, in order to enable the court to review rulings appearing upon the judgment roll proper. In such case it is only necessary for the appellant to assign such ruling as error in his brief. To make our position plain, the words 'errors of law' as used in § 4 of the new practice act should be construed to refer only to errors of law occurring at the trial, and which, in order to be brought to the attention of the court under the former practice, had to be specified in the settled statement of case, and that they have no reference to errors appearing upon the face of the record proper." Mention is made of this for the reason that appellant, in attempting to comply with permission granted in the former hearing in this court of this appeal, served a so-called specification of error, but which specification as such is wholly insufficient to raise any error on the judgment roll. As it was unnecessary, however, to take or serve any specification of error, this one served may be disregarded. Consideration will now be given to appellant's brief.

The three briefs filed by appellant, while somewhat indefinite as to error assigned, are sufficient to raise the principal question of whether the conclusion of law that the contract of sale under which appellant claims an interest in the premises was canceled is the correct legal deduction from the facts found in the findings as supplemented by those admitted in the pleadings. And this is the question mainly discussed in the respondent's brief. The contracts in question are a part of the pleadings, and their execution and delivery is admitted. The contract in question is one by the Daniels-Jones company to Carl Peterson, dated January 19, 1909, wherein said Company agreed to sell to Peterson 2,560 acres of land in Kidder county, North Dakota, for $21,760, with $1 paid on said purchase, and the balance in instalments, the first of which, for $1,280, matured the following March 1st, and $2,560, the first of each month thereafter until November 1st, the date of the last instalment. This contract was assigned immediately to Kryger, the appellant, who subsequently has contracted to sell a portion of said land to a codefendant, Piper, the date of said agreement being December 30, 1910; that the Daniels-Jones Company, at the time of executing said contract of sale to Peterson, owned the land. They

subsequently have conveyed it to this plaintiff, Wilson, who owned it at the time of the commencement of this action. The contract given to Peterson is dated at Minneapolis, Minnesota, and does not stipulate for a place of performance. The findings establish that Peterson and Kryger defaulted in the payments due under the contract March 1st and April 1st, and that on April 15 notice of cancelation because of default was placed in the hands of the sheriff of Kidder county, North Dakota, for service, who made return of inability to find either Peterson or Kryger, whereupon notice of cancelation was served by publication thereof in Kidder county for three weeks beginning May 1, 1909. Said notice thus served was to the effect that unless said defaults were cured by payment of all amounts due before thirty days after the service of said notice, the contract would be canceled and terminated. Subsequently, affidavit of publication, together with affidavit of nonredemption from said contract, were filed for record. Deeds to this plaintiff were filed for record June 6, 1910, and May 15, 1911. On March 1, 1909, Kryger filed his affidavit for record, therein reciting that he held a contract for deed. Service of notice of cancelation was completed prior to June 1, 1909, and said purchasers had not paid to said company any sum of money whatever, nor had any payments been made on said contract except the initial payment of $1; after cancelation was effected the company notified Peterson that it was willing to surrender all his notes evidencing said defaulted payments, and that they would be surrendered on his demand, but they were not called for. Neither of said defendants have ever had possession of nor have exercised any ownership over the lands in question. The answer pleads § 4442 of the Revised Laws of Minnesota of 1905, and plaintiff in his reply admits that said section reads "as set forth in the answer."

Under these facts appellant contends in his brief that the contract was not canceled, and that the findings do not support the conclusion of cancelation; "that the place to cancel this contract is in the state of Minnesota, where it was made, where it was to be performed, and where the parties reside; and (2) that the judgment appealed from is of no force or effect for the reason that its enforcement by the state of North Dakota abridges the privileges and immunities of a citizen of Minnesota, and denies him the equal protection of the laws, and de-

prives him of his property without due process of law as guaranteed to him by art. 14 of the Federal Constitution, and that the judgment has an extraterritorial effect in depriving a citizen of Minnesota of his property rights under and by virtue of a contract made and enforceable in Minnesota."

The foreign statute is a fact to be established. Cosgrave v. McAvay, 24 N. D. 343, 139 N. W. 693. Though the answer recites § 4442 of the Revised Laws of Minnesota 1905, and the admission is made in the reply that the same reads as stated, it is no proof that the same was in effect, or was unchanged or unamended, or was the law of that state at the time this contract was entered into; nor is it claimed to have been such in the answer; and defendant has failed to prove the fact of what the foreign law was at the time the parties entered into this contract. The presumption would then apply that the common law prevailed and governed the parties at the time and subsequently. Comp. Laws 1913, § 7936, Subdiv. 41. Indeed, in respondent's brief attention is called to an alleged amendment to the section of the Minnesota statute quoted, claimed to have been effective at or before the time of the cancelation of this contract. As the proof of the foreign law applicable to this contract at the particular time in question, and which must have been a part of the evidence in the case, is not before us, and the record is otherwise uncertain as to what said law was in fact, no presumption will be indulged in, and it will be regarded as a failure of proof of the fact of the foreign law governing cancelation of this contract, conceding that its cancelation depended upon a compliance with the Minnesota instead of the North Dakota statutes as to cancelation of the land contract after default.

This action is one in pursuit of the land, drawing in question the validity of this contract for sale of land. That the action is for realty, and is in no sense a personal one, must not be lost sight of, Defendant has overlooked this distinction. As such the action is local, and not transitory. Not incidentally, but primarily, this action is "for the recovery of real property or an estate or an interest therein," under defendant's own pleading. Section 7415, Comp. Laws 1913, fixes the situs of such a suit as within the county wherein the land lies. And if defendant's contention be true, and his contract of sale enforceable against the land, he is an equitable owner thereof, the vendor holding

the legal title in trust for him and as security for the purchase money. 57 L.R.A. 643, note. Accepting his claims at face, he is in the courts of this state seeking specific performance with a view of obtaining a decree awarding him title to land here situated. The question of the validity of his contract so asserted for such purposes is directly involved, and is challenged by plaintiff's claim that cancelation thereof was had in conformity to the laws of this state. Defendant answers that the cancelation thus affecting title to land here situated and in litigation must be determined according to *lex loci contractus,* instead of *lex rei sitæ.* His claim is unsound for the reason the question is one of remedy, that is, procedure involved in the enforcement of the contract and the procuring of title, analogous to the foreclosure of a mortgage or an action to specifically perform. That it is a course of statutory procedure used and invoked against defendant to defeat his equitable title in no wise changes the fact that it is a statute relating to a remedy; namely, the manner of foreclosure of land contracts. Defendant can no more urge necessity for cancelation of this contract under the Minnesota law than he could that he should cast his pleadings and form of action to obtain title to this land under and according to the foreign law. Both relate to matters of remedy in the enforcement of this contract to land here situated. Comp. Laws 1913, §§ 8119–8121. The statute on cancelation is but provision for a certain kind of evidence of default. It is not a substantive law provision, but rather evidentiary. Such provisions pertain to the law of the forum. Wharton on Conflict of Laws, 3d ed. § 690. "That matters respecting remedy depend upon the law of the place where suit is brought is universally conceded." Wharton, Confl. L. § 675a. "When the law involved is a statute, it is a question of construction whether the law is addressed to the necessary constituent elements or legality of the contract, on the one hand, or to the evidence by which it shall be proved, on the other. In the former case the law affects contracts made within the jurisdiction, wherever sued; . . . in the latter it applies to all suits within the jurisdiction, wherever the contracts sued upon were made." Wharton, Conflict of Laws, Page 1436, quoted from Emery v. Burbank, 163 Mass. 326, 47 Am. St. Rep. 456, 28 L.R.A. 57, 39 N. E. 1026. This is not a contract primarily of security, and therefore the case is not analogous to security transactions; nor is it an action for damages,

brought under the law of the place of the contract, for breach of said contract to convey land in another state, as is illustrated by Finnes v. Selover, B. & Co. 102 Minn. 334, 113 N. W. 883, or Walsh v. Selover, B. & Co. 109 Minn. 136, 123 N. W. 291, appealed to the Federal Supreme Court and decided in 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. Rep. 69, and here relied upon by appellant. The action is not personal and transitory, but real and local. Neither is title involved as incidental to equitable relief awarded in a jurisdiction foreign to the land; nor is there here any question of enforcement of a contract affecting realty, valid where made, but invalid where the land is situated. The contract when executed was valid both there and here. It has been canceled according to the law of the forum and the situs of the realty. The law of the forum will recognize no foreign law touching cancelation; in other words, pertaining to the enforcement or nonenforcement of this contract in this suit, involving particular real property, by our statute necessarily local to the county where the real property is situated. Comp. Laws 1913, §§ 8119–8122. The distinction between this suit and the so-called Selover Cases is clearly drawn in Selover, B. & Co. v. Walsh, 226 U. S. 112, at page 123, in the following language: "The contention is that the statute as applied affected the transfer of land situated in another state, and outside of, therefore, the jurisdiction of the state of Minnesota. In other words, it is contended that the law of Colorado, the situs of the property, is the law of the contract. . . . The principle cannot be contested, but plaintiff in error pushes it too far. Courts in many ways, through action upon or constraint of the person, affect property in other states, . . . and in the case at bar the action is strictly personal. It in no way affects the land or seeks any remedy against it. The land had been conveyed to another by plaintiff in error, and it was secure in the possession of the purchaser. Redress was sought in a Minnesota court for the violation of a Minnesota contract, and, being such, the law of Minnesota gave the right and measure of recovery." But the recovery sought was for damages, and, as stated in the opinion, the land was not affected, nor was a remedy sought against it. The decisions cited are not applicable; on the contrary, see note to Clement v. Willett, 17 L.R.A.(N.S.) 1094, citing authority that "it is obvious, of course, that the *lex fori* prevails over *lex rei sitæ*, the *lex loci con-*

tractus, the *lex loci solutionis,* and all other laws so far as concerns matters that relate to the remedy as distinguished from the substantive contract. . . . And the necessity of alleging facts avoiding the grantor's attempted release of the grantee from the assumption covenant is also determined by the *lex fori;*" and other illustrations are given. See notes to Smith v. Southern R. Co. 26 L.R.A.(N.S.) 927–941; Bank v. Doherty, 4 L.R.A.(N.S.) 1191; Fall v. Easton, 23 L.R.A.(N.S.)924; and 17 L.R.A.(N.S.) 1094; and extensive note to Procter v. Procter, 69 L.R.A. 673, particularly summary at page 696; and Bullitt v. Eastern Kentucky Land Co. 99 Ky. 324, 36 S. W. 16; 39 Cyc. 1435; Polson v. Stewart, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737; Cosgrave v. McAvay, 24 N. D. 343, 139 N. W. 693, decisive of many of these questions.

Defendant desires a decision on his second assignment of error particularly set out in detail earlier in this opinion, in which he claims our holding (1) denies him equal protection of the law, and (2) deprives him of his property without due process of law. Considering the last first, he is in no position to urge that the cancelation effected operated to divest him of his property without due process of law. On the face of the findings, back of which this court cannot go because the evidence upon which the findings are based has not been brought into the record, defendant was in default, and the contract was adjudged canceled, and he decreed to have no interest in said real property. The decree was entered after his appearance in an action in which he has had his day in court. His rights were not necessarily canceled by the notice of cancelation served. Defendant has erroneously assumed the contrary. Service of notice of cancelation does not alone necessarily divest him of any rights. It is but a step required by statute to be taken to lay the basis for rights afterwards to be adjudged, if necessary, by court action. The steps taken but furnish evidence of default, whether insufficient or conclusive, to depend upon the other considerations. It is hard to see, then, where the defendant has been deprived of his property without due process of law, he having had his day in court, and title being quieted against him by court decree. In no way has his right been short circuited.

As to whether the privileges and immunities of the defendant as a citizen of Minnesota have been invaded and he been denied equal pro-

tection of the laws has already been decided adversely to his contention in the very case he cites, that of Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. Rep. 69, holding that "the test of equal protection of law is whether the parties are all treated alike in the same situation." Defendant as a nonresident is treated no differently from any resident holder of a contract on lands within this state. The same rules apply to foreclosure of interest therein against all parties, residents and nonresidents, and without discrimination. "All parties are treated alike in the same situation," and the test is satisfied. The judgment of the District Court is affirmed, with costs. It is so ordered.

SPALDING, C. J. I concur in the result.

IN THE MATTER OF THE PETITION OF MARTHA A. HART FOR A WRIT OF HABEAS CORPUS.

(L.R.A. —, 149 N. W. 568.)

Commutations and pardons — board of pardons — exclusive power vested in.

1. The exclusive power to grant commutations and pardons is vested by article 3 of the Amendments to the Constitution of North Dakota in the board of pardons.

Trial court may suspend execution of sentence — appeal to executive clemency.

2. A trial court may, without encroaching upon the prerogatives of the pardoning power, suspend the execution of sentence so as to allow an opportunity for an appeal to executive clemency.

Suspension of sentence — may be revoked — sentence later pronounced.

3. Where the court suspends a jail sentence for an indefinite period, under the provisions of chapter 136 of the Laws of 1913, such suspension may be

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Note.—This case is in harmony with the other authorities on the subject, as shown by a review of the cases in notes in 33 L.R.A.(N.S.) 112, and 39 L.R.A. (N.S.) 242, in sustaining the power of the court to enforce a sentence after a stay of execution.

revoked and the defendant imprisoned even after the period of the sentence has expired.

Opinion filed November 21, 1914.

Original petition for a writ of habeas corpus. Writ issued. Writ quashed.

Statements of facts by BRUCE, J.

This is a proceeding upon a writ of habeas corpus, the writ having been issued by this court. On the 20th day of October, 1913, the petitioner was arrested at the city of Fargo, and brought before the Honorable A. G. Hanson, judge of the county court of Cass county, on the charge of keeping and maintaining a bawdy house. She entered a plea of guilty, and the court imposed a fine of $300 and a jail sentence of six months, and also required the defendant to pay the costs of the action. On the same day the following order suspending the jail sentence was entered: "Said defendant and her attorney, Seth W. Richardson, Esq., appeared in court, and the state's attorney, A. W. Fowler, was also present. The defendant then in person and in open court withdrew her plea of not guilty to the charge of keeping and maintaining a bawdy house, and entered a plea of guilty to said charge. By consent of counsel, judgment was then entered, and said defendant was sentenced to be confined in the county jail of Cass county, North Dakota, for a period of six months, and pay a fine of $300 and costs of this action taxed at $3.70, and in default of the payment of the fine and costs, that she stand committed to the said county jail for the further period of ninety days. Thereupon said defendant by her counsel paid into court said fine of $300 and $3.70 costs, and, it appearing to the satisfaction of the judge of this court that said defendant has not heretofore been imprisoned for crime, and it further appearing to the satisfaction of the judge of this court that said defendant is about to leave this state, and it further appearing to the satisfaction of the judge of this court that the public welfare does not demand or require that the defendant shall suffer the full penalty of the judgment imposed by said sentence; now therefore, on motion of said state's attorney, it is hereby ordered and directed that said jail sentence of six months imposed upon said defendant as aforesaid be, and the same

hereby is, suspended, and said defendant having paid into the court the fine and costs as required by said judgment and sentence, said defendant is hereby ordered discharged and released from custody forthwith. Dated at Fargo, N. D. this 28th day of October, 1913. By the Court, A. G. Hanson, Judge."

After the entering of this order the petitioner seems to have resided outside of the state for the period of six months. About a year after and on the 2d day of October, 1914, however, she was again charged with keeping a bawdy house in the city of Fargo, and although a plea of not guilty seems to have been entered in the action, and no trial seems to have been yet had thereon, the following order was entered by the court: "Order vacating order suspending jail part of sentence. The above-entitled action came on this day to be heard upon the application of Arthur W. Fowler, state's attorney, for an order vacating that certain order made in this court on October 28th, 1913, in the above-entitled case, suspending the jail part of the sentence which had been on that day imposed upon the above-named defendant, and the state's attorney having submitted evidence proving that the above-named defendant had on the 2d day of October, 1914, violated the laws of this state by conducting a bawdy house at No. 217, 2d Avenue North, in the city of Fargo, North Dakota, and the court having duly considered the matter, and being fully advised in the premises, and believing that the said order suspending said sentence should be revoked and set aside, now therefore, it is hereby ordered that the said order dated October 28th, 1913, suspending the jail part of the sentence, be, and the same is hereby, revoked and set aside. Dated at Fargo, N. D. this 2d day of October A. D. 1914. By the Court, A. G. Hanson, Judge."

A bench warrant was duly issued on this order of suspension, and the petitioner was arrested. A petition was then made to the district court of Cass county for a writ of habeas corpus, which was issued, but quashed on the hearing. Petitioner and defendant then applied to this court for a writ, which was issued and a return made, the sheriff justifying under the order of revocation and the bench warrant of the county court.

Harry Lashkowitz, for petitioner.

Wm. C. Fowler, State's Attorney, and *Wm. C. Green,* Assistant State's Attorney, for the State.

The court had jurisdiction to suspend the execution of the sentence, and, later on, to revoke such suspension and enforce the sentence. Mere matters of form are immaterial. State ex rel. Styles v. Beaverstad, 12 N. D. 531, 97 N. W. 548; State v. Buckley, 75 N. H. 402, 74 Atl. 875; Re Collins, 8 Cal. App. 367, 97 Pac. 188; Weber v. State, 58 Ohio St. 616, 41 L.R.A. 472, 51 N. E. 116; State v. Vaughan, 71 Conn. 457, 42 Atl. 640; Re Hinson, 156 N. C. 250, 36 L.R.A. (N.S.) 352 and cases cited, 72 S. E. 310; Fults v. State, 2 Sneed, 232.

Every court has inherent power to enforce obedience to its mandates, and to do all things within its jurisdiction necessary for the administration of justice. 8 Am. & Eng. Enc. Law, 28, and cases cited; Re Markuson, 5 N. D. 180, 64 N. W. 939; Re Schantz, 26 N. D. 380, 144 N. W. 445; Rev. Codes 1905, § 9513.

The suspension of sentence is not a reprieve. The one postpones the execution of sentence for an indefinite time; the other to a fixed day. Carnal v. People, 1 Park. Crim. Rep. 263; State v. Finch, 54 Or. 482, 103 Pac. 511; Miller's Case, 9 Cow. 730; State v. Abbott, 33 L.R.A.(N.S.) 120, note.

A court in suspending the execution of sentence does not encroach upon the powers of the pardon board. Snodgrass v. State, — Tex Crim. Rep. —, 41 L.R.A.(N.S.) 1144, 150 S. W. 162.

BRUCE, J. (after stating the facts as above). The question to be resolved in this case is whether, after an order suspending a jail sentence on which no commitment has been issued, and six months after the period of that sentence has expired, the court which imposed the sentence and suspended the same may revoke the order, and order the commitment of the defendant, and require her to serve out the original jail sentence.

The statute under which the sentence was suspended is chapter 136 of the Laws of 1913, and reads as follows: "Section 1. Court may suspend or modify sentence, when. In all prosecutions for misdemeanors, where the defendant has been found guilty, and where the court or magistrate has power to sentence such defendant to the county

jail, and it appears that the defendant has never before been imprisoned for crime, either in this state or elsewhere (but detention in an institution for juvenile delinquents shall not be considered imprisonment), and where it shall appear to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that such defendant is not likely again to engage in an offensive course of conduct, and where it appears that the public welfare does not demand or require that the defendant shall suffer the penalty imposed by the law, said court or magistrate may suspend the execution of the sentence or may modify or alter the sentence imposed in such manner as to the court or magistrate, in view of all the circumstances, seems just and right."

We are of the opinion that the court had jurisdiction to revoke this order. There can be no doubt that the power "to remit fines and forfeitures, to grant *commutations* and *pardons* after convictions, for all offenses except treason and cases of impeachment," was by § 76 (art. 3) of the Constitution vested solely and exclusively in the governor; that § 76, that is to say—article 3 of the Amendments—took this exclusive power from the governor and vested it in the board of pardons, of which the governor is a member, and that the sole and exclusive power in such matters now rests in that board. Re Webb, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; Snodgrass v. State, — Tex. Crim. Rep. —, 41 L.R.A.(N.S.) 1144, 150 S. W. 162. We realize, of course, that there are some authorities which seem to hold that, prior to the American Revolution, the English courts exercised a co-ordinate power in such matters, and which seem to argue for a like power in the American courts. If the premise were true, it can, on the ground of analogy, have no application in America, as, prior to the English Revolution and the establishment of the so-called parliamentary idea, the theory, though occasionally combatted, was consistently adhered to, that the power which was possessed by the courts flowed from the King, that all agencies of government derived their power from him, and that these powers were exercised in accordance with his wish and will, and that when the exercise of power or authority was sanctioned by him it was deemed to have the approval of the sovereign power. Even after the English Revolution, and the establishment of the parliamentary idea, it has been "the King in Par-

liament" who has governed trials. There are not in England, in fact, and never have been, three distinct agencies of government, wholly independent of each other, with their powers and duties defined by the written law of the land, as is the case in America. See Snodgrass v. State, supra; Jenks, Short History of English Law, p. 187. The act of the judge, therefore, was to a large extent that of the sovereign.

Even if this were not the case, however, the premise is itself entirely false from a historical standpoint. Prior to the American Revolution the English courts never, as a matter of fact, exercised, or presumed to exercise, the powers which are sought to be conferred by the statute in question, and at the time of the English Revolution, in 1688, and, long prior to the American Revolution and to the adoption of the American Constitutions, both state and national, had ceased to exercise the powers on the analogy of which the premise and the argument is based. To quote from the opinion in the case of Snodgrass v. State, supra: "In the early days of England a person upon trial as to his guilt or innocence was not permitted to introduce any witnesses to prove himself innocent of an offense charged against him, nor in mitigation of the punishment. The Crown introduced its evidence to prove his guilt, and, if that testimony showed his guilt to the satisfaction of the jury, they so found. If the court had a doubt of his guilt from the testimony, it could not grant a new trial on that ground, and no appeal was then permitted on this ground. Under this condition the plea of benefit of clergy arose. It was first claimed by officials of the church alone, who claimed the right to be tried in the ecclesiastical court. This plea was then permitted to all persons eligible to clerk or other position in the church,—that is, all men who could write,—and finally broadened to apply to all persons charged with crime. Not being permitted to offer testimony showing his innocence on the trial, nor offer testimony in mitigation of the punishment, after being found guilty by verdict, when granted the benefit of clergy, persons adjudged guilty of crime were first permitted in the ecclesiastical court to expurgate themselves, or prove their innocence and offer evidence in mitigation. Later the courts that tried the cases after verdict but *before assessment of the punishment by sentence,* would permit a defendant to introduce testimony in mitigation of the punishment to be assessed by the sentence or judgment of the court; and under this system there grew up

the custom of suspending the sentence until the evidence was heard under this plea, so that the court might have the benefit of it in arriving at the punishment he would assess. Upon hearing this testimony the court frequently refused to inflict the death penalty, which was virtually the penalty for all felonies, and would only assess a penalty of burning in the hand to mark the man; later, burning in the face; and, still later, sentencing the person adjudged guilty, to transportation to America or some other point beyond the seas, and other penalties. From this power of the courts of England, claimed and exercised in an early day, must we look to any inherent power in a court to ameliorate or relieve any person of punishment adjudged guilty of an offense. In Chitty's Crim. Law, Vol. 1, p. 624, the rule at that time is said to have been: 'By the common law . . . the prisoner was not even permitted to call witnesses. . . . But the jury were to decide on his guilt or innocence according to their judgment upon the evidence offered in support of the prosecution. And, though . . . this latter practice of rejecting evidence for the prisoner was abolished about the time of Queen Mary, yet the witnesses could not be sworn on behalf of the prisoner, but were merely examined without any particular obligation, and therefore obtained but little credit with the jury.' In his work he recites that Queen Mary in appointing Sir Richard Morgan Chief Justice of the common pleas enjoined him 'that notwithstanding the old error [of the old law], which did not admit any witnesses to speak, or any other matter to be heard, in favor of the adversary, her Majesty being a party, her Highness's pleasure was that whosoever could be brought in favor of the subject should be heard.' Mr Blackstone in his commentaries says that, shortly after the Revolution of 1688, among the chief alterations of the law was the 'regulation of trials by jury, and the admitting of witnesses for prisoners under oath.' Other learned commentators and writers of that period could be cited as showing that the 'plea of benefit of clergy,' or *suspending sentence,* was the outgrowth of that condition, when during the trial not only was his mouth closed, but the mouths of all persons who would testify in his favor were also closed, and this plea or suspension of sentence, or reprieve, as it was called in that day and time, was but a way of permitting those who would testify in his favor to be heard in mitigation of the punishment to be assessed, although in the common pleas court on this hearing they were

not allowed to dispute the verdict of guilt which had been found by the jury, but the testimony was received alone to aid the judge in passing sentence after the verdict of guilt, and in mitigation of the punishment. But in the beginning and for a long time this plea was not allowed in cases except where the penalty was death, and was never applied to petit theft or misdemeanors. This can have no application to our jurisprudence, for the jury in their verdict fix the punishment, as well as pass upon the guilt or innocence of an accused person. After it became the law in England that witnesses were permitted to testify on oath in behalf of a defendant on trial of his guilt or innocence, this plea and custom rapidly waned, and by statute it was provided it could not be pleaded in many cases, and finally in 1827 it was wholly abolished, and has not been the rule in that country since that date. Bishop, Crim. Law, § 937. Yet we find some trying to work out a theory whereby our courts would inherit that power from the jurisprudence of England, although it was taken away from the courts of England nearly a century ago, and arose under conditions wholly at variance with our system of jurisprudence." See also State v. Voss, 80 Iowa, 467, 8 L.R.A. 767, 45 N. W. 898.

That the order of the trial court suspending sentence in the case at bar would, if construed as petitioner desires it, constitute an invasion of the province of the board of pardons, there can, indeed, be but little question. Ex parte Clendenning, 1 Okla. Crim. Rep. 227, 19 L.R.A. (N.S.) 1041, 97 Pac. 650; Snodgrass v. State, — Tex. Crim. Rep. —, 41 L.R.A.(N.S.) 1144, 150 S. W. 162; Re Webb, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; State v. Abbott, 87 S. C. 466, 33 L.R.A.(N.S.) 112, 70 S. E. 6, Ann. Cas. 1912B, 1189. It is to be remembered that the Constitution vests in the board the power both to *commute* and to *pardon*. We have no doubt that, following the analogy of the English courts, and as a power which is inherent in the court itself, and certainly under the sanction of the statute, the trial judge can suspend the enforcement of a sentence for a reasonable time in order to allow an appeal to the executive clemency. Beyond this, however, the courts cannot go. The case at bar, in fact, is none other than one in which the court has, under the sanction of the statute, allowed the defendant that opportunity; and although the time that has elapsed between the rendition of the judg-

ment and the rearrest has been longer than the original sentence, the defendant cannot complain, as the original order was legal, and the failure to sooner seek for the clemency of the board of pardons is due to the delay not of the court, but of the defendant herself. Miller v. Evans, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; Re Schantz, 26 N. D. 380, 144 N. W. 445; Fuller v. State, — Miss. —, 39 L.R.A.(N.S.) 242, 57 So. 6.

We are not unmindful of the case of Re Markuson, 5 N. D. 180, 64 N. W. 939, and that in it we said: "We know of no authority which will permit a trial court to postpone from time to time the date at which imprisonment shall go into effect after a valid judgment has been entered, declaring that the imprisonment shall begin at a definite date which is stated in the judgment. The time at which a sentence of imprisonment begins and ends is a matter of the greatest importance, and is so considered by all the authorities. . . . Under § 21, supra, the judgment may be withheld for thirty days upon the terms stated in the statute, and to facilitate a review in the supreme court, but we find no authority anywhere under which the time of taking effect of a judgment of imprisonment as originally pronounced may by orders of the trial court be postponed from time to time for any purpose or under any circumstance." That case, however, was handed down in 1895, and long prior to the enactment of the statute which is now before us, which authorizes the suspension of sentences, and which must, if possible, be upheld and be given a construction which will be in accordance with the provisions of the Constitution.

To construe the statute as granting the power to the trial court to commute a sentence or to pardon the offense would render the statute unconstitutional. To hold that the suspension is indefinite, and only for a reasonable time, and for the purpose of affording the prisoner, if he desires, an opportunity to apply for executive clemency, would render it valid. We so construe it. We hold, indeed, that the statute justifies just such a procedure as was suggested in the Texas court of criminal appeals in Snodgrass v. State, supra. In that case, the court, though holding a statute to be unconstitutional which sought to confer upon the courts the power "to suspend judgment on conviction during the good behavior, and ultimately to annul the judgment," expressly said: "A law can be drawn so that if on the trial it appears that it is

the first offense, and the evidence convinces the judge that the best interests of society, of the individual, and of the state would be served if the hand of the law was stayed and the person adjudged guilty be given a chance to reform, he may recommend to the governor a conditional pardon, *and we are sure that in every deserving case the recommendation would be complied with by the governor.* The people had the confidence in the governor to place this power in his hands, and we, too, have the same confidence. The law could require that he have the court stenographer make a copy of the testimony heard, and require the judge to forward it to the governor, with his recommendation, and provide that the prisoner be not conveyed to the penitentiary until the governor had acted on the recommendation. Thus the end sought may be reached in a way not violative of our Constitution, and all the good features in the law be retained."

The suspension in the case at bar is, in effect, nothing more or less than a recommendation to the board of pardons, and the giving to the defendant an opportunity to obtain clemency from that board. The order was made under the authority of the statute, and therefore does not come within the condemnation of the case of Re Markuson, 5 N. D. 180, 64 N. W. 939. If the defendant has neglected to take advantage of the opportunity offered, she has herself only to blame, and cannot complain if the order is afterwards revoked.

The writ will be quashed.

SPALDING, Ch. J., dissenting. I cannot concur in the conclusion reached by my associates in this case. The result seems to come by reason of a belief that no different conclusion can be reached, and avoid a decision that the statute in question is invalid. To save so holding, it seems to me the court has put an exceedingly strained construction on the meaning and the reasons for the law. I shall not at length review the authorities cited, but on this question simply refer to the case of Snodgrass v. State, — Tex. Crim. Rep. —, 41 L.R.A.(N.S.) 1144, 150 S. W. 162, on which so much reliance seems to be placed. I am unable to discover that it has any application to either the law or the facts before us.

In effect the Texas law wiped out the effect of the conviction, as well as the fact of conviction, and restored the party to practically the same

position in society that he had occupied before the conviction, or would have occupied had he never been convicted. This is why the Texas statute was construed as working a pardon, if valid. Our statute does not contain any such provisions, but, on the contrary, when strictly construed, if the defendant's conduct is exemplary, it leaves a sentence hanging over him during the remainder of his life. The better his conduct the more certain it is that his future must be blighted by a judgment of conviction in a criminal case still suspended over him. It thus becomes a punishment for good conduct rather than for infractions of law, and this only in case of the commission of a minor offense. The court may at any time, either with or without cause, revoke its order of suspension and inflict the punishment prescribed.

The defendant may not have sought a suspension of the execution of the judgment. He may not have desired it. The court may, nevertheless, inflict upon him a punishment far in excess of anything usual or theretofore known in the annals of jurisprudence for the offense committed. To say the least, for a misdemeanor it becomes an unusual punishment. In the case at bar the record discloses that the application for a suspension of execution was made by the state, and not by the defendant. But the Texas case is not authority on the further point to which it is cited.

The Texas court in its opinion suggested that a law might be drawn to cover first offenses, providing for a recommendation by the judge to the governor; that is, a recommendation for a conditional pardon, supported by a copy of the testimony taken on the trial, and a provision that in such case the prisoner should not be conveyed to the penitentiary until action had been had on the recommendation of the judge. This suggestion of the Texas court that a law might be enacted, which by its terms specified that it was for the purpose of enabling the judge to recommend clemency, and staying execution long enough to enable the governor to act, is made a basis of the holding that our statute, which contains none of these provisions, was enacted for the purpose only of giving an opportunity to seek executive clemency.

Its very terms refute any such assumption. It specifies the reasons for the stay or suspension of execution of the judgment. They are: If it appears that it is the first offense, that the character of the defendant and the circumstances are such that the offense is not likely to be re-

peated, and, finally, that the public welfare does not require the imposition of the penalty. It does not authorize the suspension of the execution of the sentence for any reason except those enumerated. Furthermore, if any such intention existed, why should the suspension be permitted for a longer period than necessary to enable the party to apply for clemency, the court to make the recommendation, and the pardon board to act? In no case would a suspension of more than six months be necessary to permit these things to be done. In the case at bar the conviction was had in October; the next meeting of the board of pardons was fixed by law for the 2d day of December following. No application was made for clemency, and none has been made at any of the subsequent meetings of the board. Still further, the record discloses that the execution of the sentence was in fact suspended for an entirely different reason. It was suspended because the defendant was willing to take her departure from the state. It remained suspended for more than a year and until she returned to the state.

For these reasons I cannot concur in the reasoning of the conclusions of my learned brethren on this subject. Neither can I concur in their intimation that, except for imagining that the law were enacted solely with a view to permitting the defendant to apply for executive clemency, it would be unconstitutional. There is a wide difference between the suspension of the execution of sentence, as provided in this statute, and the granting of a pardon or conditional pardon. A pardon is a remission of guilt, and a conditional pardon is one which does not become operative until the grantee has performed some specific act, or which becomes void when some specified event transpires. 1 Bishop, Crim. L. § 914. A remission of guilt reinstates the offender as nearly as possible in the same condition as he would have occupied had he never been charged with committing the offense. A pardon releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as though he had never committed the offense. It makes him, as it were, a new man, and gives him a new credit and capacity; People ex rel. Forsyth v. Court of Sessions, 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675. This is not true of the suspension of execution of a judgment. In such case the court in effect says: "This is your first conviction. Your record heretofore has been good. The offense is only a misdemeanor. The circumstances

surrounding it and your relations to society have been such as to indicate that you are not naturally criminal, and that you are not likely to become a confirmed criminal. From these facts it appears that the welfare of society does not demand that at this time the sentence be executed. The policy of the law is to give every person the greatest opportunity for development that due protection to society will permit him to have. Hence you are put on probation. The court will see whether you are disposed to become a criminal, and whether in fact you are entitled to its consideration and society still be protected. We will, therefore, not execute the sentence until we have an opportunity to note your conduct and learn more of your disposition. Should you be guilty of further infraction of law, and not deport yourself as a good citizen at all times within the period for which the sentence was pronounced, the suspension will be revoked, and you will be required to pay the penalty of the offense which you committed and of which you were convicted." This does not constitute a pardon, either full or conditional. It does not absolve him from guilt. It is not a remission. It does not restore to him his rights as a citizen, or wipe out the record of his conviction; the defendant enjoys his liberty outside the walls of the jail, yet he remains under the sentence to which he has been condemned, and may be imprisoned at any time. George v. Lillard, 106 Ky. 820, 51 S. W. 793, 1011.

In my judgment, so long as the statute is construed to not extend the power of suspension beyond the maximum limit of the time for which the defendant was sentenced, by express terms, and does not permit a revocation thereof except within such period, it is valid, and not subject to attack as an invasion of the pardoning power. All that is necessary is to read and construe the statute as applying only to the time during which the sentence would have been running, had there been no suspension. It is then made to harmonize with the modern policy of dealing with criminals for the first time guilty of minor offenses. It gives them an opportunity to prove their worth and that society will not suffer if the full penalty is not executed, and it minimizes the punishment, rather than increases it, as is done by the construction given the statute by my brethren.

Courts do not try criminals and pronounce sentence with reference to what the board of pardons may do in the future. They are guided by

the law. The board of pardons is governed by no law. It exercises its functions whenever in its judgment the ends of justice have been met in a given case. When an offender has served long enough to punish him adequately for the offense committed, and to serve as a warning to others, and thereby protect society, and when at the same time he gives adequate evidence of reformation, the board of pardons may feel justified in acting favorably. But none of these considerations apply to a court. Its action within certain limits is controlled by the law. I am aware that numerous authorities hold that some statutes somewhat similar to the one in question provide for an invasion of the pardoning power, but I think that in each instance the statute was a palpable invasion of that power, or the court failed to distinguish between a pardon and the suspension of execution of judgment, and did not recognize that there is a marked difference.

The pardoning power in this country is not parallel to that in monarchical countries, where the king rules by divine right, and a history of this power in such countries properly sheds but little light upon the subject. For a clear, comprehensive consideration of the subject of the pardoning power in America, see State v. Nichols, 26 Ark. 74, 7 Am. Rep. 600. Because the order suspending the execution of the judgment in this case was not entered until long after the expiration of the six months for which the defendant was sentenced, I am of the opinion that the writ should be granted. Re Markuson, 5 N. D. 180, 64 N. W. 939, is a direct authority on this subject.

Furthermore, it is not necessary to strain the construction to protect the offender. Everything that is attempted to be accomplished by this statute can be done by suspending sentence, which the court has the inherent power to do, as held by nearly all authorities. See People ex rel. Forsyth v. Court of Sessions, supra.

STATE OF NORTH DAKOTA v. ARTHUR E. DAHMS.

(149 N. W. 965.)

Common nuisance — conviction — not principal in crime — aided and abetted — instruction to that effect — prejudicial error.

1. Appellant was convicted of the crime of maintaining a common nuisance.

Concededly, there was no evidence introduced proving, or tending to prove, that he was a principal in the unlawful transaction, it being the state's contention merely that he aided and abetted another in the commission of the crime charged.

Held, that there is no evidence to support such contention, and that it was therefore prejudicial error to instruct the jury that they might convict the defendant upon the theory that he aided and abetted another in keeping and maintaining such nuisance.

Offense — unlawful keeping and maintaining a place — one must be owner or keeper.

2. Following prior decisions of this court, which are cited in the opinion, construing § 10,117, Comp. Laws 1913 (Rev. Codes 1905, § 9373), *Held*, that the offense therein defined is the unlawful keeping and maintaining of a *place* where certain prohibited acts are committed, and no one except the *owner* or *keeper* of such place can be adjudged guilty of such offense.

Opinion filed November 25, 1914.

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

From a judgment of conviction of the crime of keeping and maintaining a common nuisance, defendant appeals.

Reversed.

Geo. R. Robbins and *Geo. R. Bangs*, for appellant.

Where the statutes distinctly limit the punishment to persons who participate in the act only in a certain way, they furnish the rule for the court. 1 Bishop, New Crim. Law, § 657, subdiv. 2.

A person who by acts induces a crime is not punishable unless the statute upon such crime makes him so. Anderson v. South Chicago Brewing Co. 173 Ill. 213, 50 N. E. 655; Bishop, Crim. Law, § 657; State v. Cullins, 53 Kan. 100, 24 L.R.A. 212, 36 Pac. 56; Jones, Chat. Mortg. § 458; Cobbey, Chat. Mortg. § 637; Gage v. Whittier, 17 N. H. 312; Pratt v. Maynard, 116 Mass. 388.

So with statutes penalizing certain sales, where they have not been held to apply to vendees. State v. Cullins, 53 Kan. 100, 24 L.R.A. 212, 36 Pac. 56; State v. Turner, 83 Kan. 183, 109 Pac. 983; Wakeman v. Chambers, 69 Iowa, 169, 58 Am. Rep. 218, 28 N. W. 498; Sterling v. Jugenheimer, 69 Iowa, 210, 28 N. W. 559.

The keeping and maintaining of a place, etc., constitutes the crime of keeping a common nuisance. The owner or keeper only can be punished.

State ex rel. Kelly v. McMaster, 13 N. D. 58, 99 N. W. 58; State v. Dellaire, 4 N. D. 312, 60 N. W. 988; State v. Rozum, 8 N. D. 548, 80 N. W. 477; Com. v. Wood, 97 Mass. 225; Com. v. Carroll, 124 Mass. 30; Hunter v. State, 14 Ind. App. 683, 43 N. E. 452; Rev. Codes, 1905, § 2764; State v. Thoemke, 11 N. D. 386, 92 N. W. 480; State v. Kruse, 19 N. D. 203, 124 N. W. 385; State v. McGillic, 25 N. D. 27, 141 N. W. 82; Laws of 1907, chap. 193.

There must be a proprietorship or control, or keeping. Com. v. Galligan, 144 Mass. 171, 10 N. E. 788; Com. v. Murphy, 145 Mass. 250, 13 N. E. 892; Plunkett v. State, 69 Ind. 68; State v. Gravelin, 16 R. I. 407, 16 Atl. 914; Com. v. Churchill, 136 Mass. 148.

It is not for the jury to say what evidence it will believe and what it will not believe. McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685, 38 Cyc. 1735; 2 Thomp. Trials, 2d ed. § 2423, p. 1687; 24 Cyc. 193; Hartford Life & Annuity Ins. Co. v. Gray, 80 Ill. 31; 3 Brickwood's Sackett, Instructions to Juries, §§ 3380 et seq.; Evans v. George, 80 Ill. 51; McMahon v. People, 120 Ill. 584, 11 N. E. 883; Chicago, B. & Q. R. Co. v. Roberts, 35 Colo. 498, 84 Pac. 68; Underhill v. Chicago & G. T. R. Co. 81 Mich. 43, 45 N. W. 508; Fruit Dispatch Co. v. Russo, 125 Mich. 306, 84 N. W. 308; Drew v. Watertown Ins. Co. 6 S. D. 335, 61 N. W. 34; Georgia, S. & F. R. Co. v. Thompson, 111 Ga. 731, 36 N. E. 945; Lomer v. Meeker, 25 N. Y. 361, with citations in 3 N. Y. Anno. Dig. 341; 11 N. Y. Anno. Dig. 845 et seq.

J. P. Cain, State's Attorney, *Andrew Miller,* Attorney General, *Alfred Zuger,* and *John Carmody,* Assistant Attorneys General for the State.

A person, though not the owner or keeper of a common nuisance, but who resides at such place, and knowingly allows another to conduct such a nuisance therein, is guilty of the offense. State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Ekanger, 8 N. D. 559, 80 N. W. 482; State v. Herselus, 86 Iowa, 214, 53 N. W. 105.

Aiding and assisting another in the sale of intoxicating liquors in any manner, however slight, renders such aider guilty. State v. Snyder, 108 Iowa, 205, 78 N. W. 807; Webster v. State, 110 Tenn. 491, 82 S. W. 179; Phillips v. State, 95 Ga. 478, 20 S. E. 270; State v. Lord, 8 Kan. App. 257, 55 Pac. 503; Buchanan v. State, 4 Okla. Crim. Rep. 645, 36 L.R.A.(N.S.) 83, 112 Pac. 32.

Any person who aids or abets in the commission of such offense is guilty as a principal. 23 Cyc. 209, ¶ G.; 1 R. C. L. 139; McLain v. State, 43 Tex. Crim. Rep. 213, 64 S. W. 865; 12 Cyc. 187.

It is the duty of the jury to find the facts from the testimony of the witnesses, and the instruction of the court was proper. 1 Brickwood's Sackett, Instructions to Juries, §§ 327 et seq.; State v. McPhail, 39 Wash. 199, 81 Pac. 683; State v. Thoemke, 11 N. D. 386, 92 N. W. 480; State v. Moran, 112 Iowa, 535, 84 N. W. 524; Cupps v. State, 120 Wis. 504, 102 Am. St. Rep. 996, 97 N. W. 210, 98 N. W. 546; Zube v. Weber, 67 Mich. 52, 34 N. W. 264; Knox v. Knox, 123 Iowa, 24, 98 N. W. 468.

Fisk, J. Appellant was convicted in the lower court of the crime of keeping and maintaining a liquor nuisance, and was sentenced to imprisonment in the county jail for ninety days, and to pay a fine, including costs, of $600. He has appealed from the judgment. Prior to the pronouncement of judgment, defendant moved, both in arrest of judgment and for a new trial, upon numerous grounds, among which are alleged insufficiency of the evidence to warrant the verdict, and alleged erroneous instructions to the jury prejudicial to the defendant. These are the only grounds which we need notice.

It is conceded on the part of the state's counsel, as we understand them, that there is no competent testimony in the case to warrant a finding that defendant was a principal in keeping and maintaining the nuisance, their contention being that he merely aided and abetted another in so doing, and this appears to have been the view of the learned trial judge, who instructed the jury as follows:

"Under the statutes of North Dakota there is no distinction between the principal and accessories to a crime, and I will read to you that particular section: 'All persons concerned in the commission of a crime, whether it is a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed.' So you will see, gentlemen of the jury, that all persons stand on the same footing, who actually commit the crime, if any, or who aid and abet in the commission of the same.

"Now, the questions for you, gentlemen of the jury, to determine in

this case, are whether or not there was a place kept where intoxicating liquors were sold as a beverage, or where persons were permitted to congregate for the purpose of drinking intoxicating liquors, or where intoxicating liquors were kept for sale. First, to determine whether or not there has been a place kept and maintained, second, who kept and maintained such place; and, third, whether or not this defendant kept and maintained the place, or aided and abetted in the keeping and maintaining of such a place.

"If you find from the facts in this case that at the stockyards near Taylor, in this county and state, there was a nuisance kept and maintained on the 4th of July, 1912, and that this defendant, while not actually keeping the place, yet aided and abetted in the keeping of the same, then you should find the defendant guilty as charged in the information; but unless the state has proven each of these facts to your satisfaction, beyond a reasonable doubt, then the defendant is entitled to be acquitted.

"Now, gentlemen, I think this covers about all the law for you to determine in this case as to whether or not, under the statutes of this state, this defendant has committed the offense with which he stands charged. Whether or not he committed the crime, or aided and abetted in its commission, makes no difference, he is equally guilty. The person who actually commits the crime, and the person who aids and abets in the commission of the crime, are jointly guilty of the offense."

Without quoting from the testimony it will suffice to merely state that it is wholly insufficient to sustain the conviction except upon the theory that defendant aided and abetted in the commission of such crime. There is concededly a total lack of proof that defendant had any proprietary interest in the keeping or the maintaining of the nuisance, or that he was, even for an instant, in charge or control thereof; nor was he instrumental in the least in directly aiding or assisting in the actual sales of liquor on the premises constituting such nuisance. If, however, the giving of the instruction above quoted was proper as a matter of law, then, for the purposes of this appeal, it may be conceded that the evidence was such as to warrant a conviction thereunder.

The state relies, in support of the correctness of the instruction, upon the following authorities: State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Ekanger, 8 N. D. 559, 80 N. W. 482; State v. Herselus, 86

Iowa, 214, 53 N. W. 105; State v. Snyder, 108 Iowa, 205, 78 N. W. 807; Webster v. State, 110 Tenn. 491, 82 S. W. 179; Phillips v. State, 95 Ga. 478, 20 S. E. 270; State v. Lord, 8 Kan. App. 257, 55 Pac. 503; Buchanan v. State, 4 Okla. Crim. Rep. 645, 36 L.R.A.(N.S.) 83, 112 Pac. 32; McLain v. State, 43 Tex. Crim. Rep. 213, 64 S. W. 865.

A brief analysis of these cases will, we think, disclose that they are not in point, and do not support the state's contention.

In the Rosum Case the court inferentially held against the contention of the state in the case at bar by placing its decision upon the ground that the husband, who was prosecuted for keeping and maintaining a common nuisance, was guilty of *keeping* and *maintaining* such nuisance, because of the fact that he was the head of the family, and knowingly suffered intoxicating liquors to be kept for sale or sold as a beverage in his home, and knowingly suffered persons to resort thereto for the purpose of drinking intoxicating liquors contrary to law. By placing the decision upon the ground that by his conduct he kept and maintained the nuisance, instead of upon the ground that he aided and abetted his wife in keeping and maintaining the same, it is apparent that the court did not consider the fact that he aided and abetted his wife in the unlawful enterprise, of any controlling importance. In the Ekanger Case the court on this point merely adheres to its prior decision in the Rosum Case.

The Iowa cases are readily distinguishable from the case at bar, on the ground that the Iowa statute differs from that in this state. Our statute (§ 10,117, Comp. Laws 1913, Rev. Codes 1905, § 9373) 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 . . . and the *owner* or *keeper* thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance." This section has been construed in numerous cases in this court, and it is firmly settled that the offense therein defined consists of the *keeping* and *maintaining* of the place. State v. Dellaire, 4 N. D. 312, 60 N. W. 988; State v. Thoemke, 11 N. D. 386, 92 N. W. 480; State

v. McGillic, 25 N. D. 27, 141 N. W. 82; State v. Kruse, 19 N. D. 203, 124 N. W. 385.

In the opinion by Mr. Justice Carmody in the latter case it was said: "The selling of intoxicating liquors contrary to the provisions of this act does not constitute the offense, nor does the keeping of intoxicating liquors for sale contrary to the provisions of this act constitute the offense. Neither is the offense committed by permitting persons to resort to the place for the purpose of drinking intoxicating liquors as a beverage. They are evidences of the offense. It is keeping the place where these things, or some of them, are done, that constitutes the offense. Proof of keeping by the defendant, and that any one of the prohibited acts was done by the defendant in such place during such keeping, would make the offense complete."

In the more recent case of State v. McGillic, this court, in speaking of the object and purpose of the above section, says: "That law is aimed primarily at a place wherein is permitted the commission of acts violative of the prohibition law, the statute condemning the place of the violations by declaring it to be a common nuisance. The person in control or charge, whether temporarily or continuously, is the keeper of such nuisance and the person punishable for its maintenance. . . . Under the law prior to chapter 193 [Laws 1907] the owner might lease to a tenant, or permit an occupant to use, control, and occupy a place wherein a nuisance might be maintained by such lessee, occupant, or person in control, without the owner being criminally liable, unless the state could prove such facts as would render the owner liable as a joint principal in the unlawful business." This would seem to clearly negative the idea that a person who merely aids or abets another in the maintenance of a liquor nuisance can be adjudged guilty of violating said statute. It is, we think, entirely clear, under our statute, that a person cannot be guilty of maintaining a common nuisance unless it be shown that he kept or maintained the place. Even the fact that he may have aided and assisted the proprietor of the place in dispensing liquors contrary to law is not enough to fasten guilt upon him. Such a person, no doubt, would be guilty of the offense of selling intoxicating liquors contrary to law. Although he may as clerk or servant of the proprietor have aided and assisted him in conducting the place by making illegal sales of liquors, or in keeping such liquors for sale, and inducing persons to resort

to the place for the purpose of drinking the same as a beverage, he cannot be convicted of keeping and maintaining the nuisance unless it appears that during the time the same was kept and maintained he was in sole charge and control for some period of time. In the latter case he would be deemed the keeper, and would be guilty. Such we believe to be practically the universal holdings of the courts under similar statutes. Com. v. Galligan, 144 Mass. 171, 10 N. E. 778; Com. v. Murphy, 145 Mass. 250, 13 N. E. 892; Plunkett v. State, 69 Ind. 68; State v. Gravelin, 16 R. I. 407, 16 Atl. 914; Com. v. Churchill, 136 Mass. 148; Com. v. Burns, 167 Mass. 374, 45 N. E. 755.

The supreme judicial court of Massachusetts in the Churchill Case said: "The distinction between acts which amount to maintaining the nuisance, and those which do not, is one of degree. We do not think that the misdemeanor of unlawfully selling, committed by a servant, can be said as a matter of law to amount to maintaining a nuisance, unless he has assumed a temporary control of the premises, or in some other way emerged from his subordinate position to aid directly in maintaining it."

In the Galligan Case that court said: "It may not be necessary, in order to convict a defendant who is an agent of the proprietor, that he should have had the sole charge and control of the tenement, but the instruction given was that, if one of the defendants was the sole proprietor, and the other was present, aiding and abetting him 'in acts of proprietorship and control, both might be found guilty.' We think that this instruction was too indefinite, and may have misled the jury; and for this reason the exceptions are sustained. The defendants could be jointly found guilty only by proof that they jointly kept or maintained the nuisance charged. If one was sole proprietor, and the other only kept or maintained the nuisance as his servant, under his direct personal supervision, the latter could not be convicted. If, however, the servant, in carrying on the business of his employer, and in the absence of his employer, was authorized by him to make illegal sales of intoxicating liquors, and made such sales, both could be found guilty of maintaining the nuisance."

The Indiana court in the Plunkett Case held to the same rule as did the court in the other cases cited.

The gist of these holdings, as well as those of this court above cited,

is to the effect that there is no such thing as aiding and abetting another in the control of his property, for otherwise the opinions in these cases would have been written differently, and convictions of mere clerks and servants of the proprietors would have been sustained upon the theory that they aided and abetted such proprietor in the maintenance of the nuisance.

The cases cited by respondent from the state of Iowa are based upon a statute radically different from that in this state. The Iowa statute does not declare that the *keeping* or *maintaining* of a *place* for the illegal traffic shall alone constitute a nuisance, but it goes beyond this, and declares that "whoever shall erect, establish, continue, or *use* any building, erection, or place for any purposes herein prohibited, is guilty of a nuisance; . . . and the building, erection, or place, or the ground itself in or upon which such unlawful manufacture or sale or keeping with intent to sell, use, or give away said liquors, is carried on or continued or exists, and the furniture, fixtures, vessels, and contents, are also declared a nuisance." Iowa Code 1897, § 2384. And § 2382 of same Code provides: "No one, by himself, clerk, servant, employee, or agent, shall, *for himself, or any person else,* directly or indirectly, or upon any pretense or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any service or in evasion of the statute, or keep for sale, any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or own, *keep or be in any way concerned, engaged, or employed in owning or keeping* any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; *and any clerk, servant, employee, or agent engaged or aiding in any violation of this chapter, shall be charged and convicted as principal.*"

It will thus be seen that such statute not only penalizes the person who *keeps and maintains* the place, but also him who *uses* such place for the illegal purposes forbidden. This is made plain by a perusal of the opinions in the Herselus and Snyder Cases, as well as the earlier case of State v. Stucker, 33 Iowa, 395, in each of which cases the defendant was held upon the ground that he *used* the place for the illegal enterprise.

Both Maine and Texas have statutes similar to Iowa, which accounts

for the decisions in State v. Sullivan, 83 Me. 417, 22 Atl. 381, and Tardiff v. State, 23 Tex. 169. The cases cited from Tennessee and Georgia are clearly distinguishable from the case at bar, for the reason that they were controlled by facts differing from those in this case. The convictions in those cases were sustained upon the ground that the defendants were principals in the crime, and not that they aided and abetted others in their commission.

The case cited from Oklahoma is not in point. It involved merely the crime of making an unlawful sale of liquors, and not that of maintaining a liquor nuisance.

The case of State v. Lord, cited by respondent, was decided by the intermediate appellate court of Kansas under a statute like that in North Dakota, and in a portion of the opinion the contention of respondent seems to be supported. An examination of such opinion discloses, however, that what was said on the point here under consideration was unnecessary to the decision; for in an earlier portion of the opinion it was held that the evidence disclosed that Lord was a *keeper* of the place as a principal, having a proprietary interest therein. The portion wherein it is said, "A defendant may be charged, tried, and convicted as the keeper of a place, a common nuisance, even though he only assisted in keeping the same," was mere *obiter,* and entitled to but little weight. It is also significant that shortly thereafter the legislature amended the Kansas statute so as to read "every person who maintains or *assists* in maintaining such common nuisance shall be guilty," etc., thereby conforming the statute to the rule thus through a mere *dictum* announced by the appellate court in State v. Lord. See § 4387, Kansas Statutes 1909.

Even if it be conceded, contrary to the concession of respondent's counsel, that there was evidence sufficient to warrant the jury in finding that defendant was a joint principal with others in keeping such nuisance, still a new trial must be directed for the very obvious reason that the court erroneously instructed the jury to the effect that they might convict even though they found that defendant did not keep such nuisance as one of the principals. According to the positive testimony of one Wallace, a witness for the state, and who concededly conducted the nuisance, and which testimony the jury had a right to believe, this defendant had nothing whatsoever to do with the keeping and maintenance

of the nuisance, and had no interest therein. Yet in the face of such testimony the court explicitly charged the jury to the effect that it was their duty to convict, although they should find that defendant did not commit the crime as a principal offender, but merely aided and abetted, or, not being present, advised and encouraged, its commission. The jury evidently based its verdict upon the ground that defendant did not directly commit the offense, but merely aided and abetted Wallace in the commission thereof, for the record discloses that after deliberating for sometime they returned into court for further instructions upon the question of aiding and abetting, whereupon the following colloquy took place:

Juror: There is some question on the terms "aiding and abetting."

The Court: Aiding and abetting practically means the same thing, assisting, counseling, or advising. Under the law, aiding, abetting, or *assisting,* those three words are synonymous and mean the same thing. Anyone who *in any way* aids or assists in the commission of a crime, why then he is an aider and abetter under the law.

The Juror: Would this necessarily need to be previous to the 4th of July when the crime was committed?

The Court: It wouldn't have to be. Either before or at the time of the commission of the offense.

Thereafter the verdict was returned, finding defendant guilty and recommending *leniency.* It is fair to conclude, therefore, that the jury, at least, *may have* found that defendant's only connection with the crime consisted in his acts of purchasing the lumber for Wallace and bringing him a lunch, etc. Surely no lawyer would contend that such aiding and abetting would justify a conviction under the law, and yet the jury may, and probably did, understand the instructions that way, as not only justifying but requiring them to convict if they found beyond a reasonable doubt that defendant thus aided and assisted, or advised and counseled, Wallace with reference to his unlawful acts. It is no answer to this to say that the jury, nevertheless, was warranted under the circumstantial evidence in finding that defendant was the prime mover in such unlawful enterprise, and in fact was a principal in such crime, and partici-

pated in the fruits thereof; for the jury had a *right* to and *may* have viewed the evidence otherwise. Such circumstantial evidence might not, in the judgment of the twelve jurors, have outweighed the positive testimony of the state's witness, Wallace. We may also add that such recommendation in the verdict is hardly consistent with a finding by the jury that defendant was guilty as a principal, or otherwise than in a mere technical way, as the jury viewed it, by reason of having, to some degree, aided and assisted, or advised and counseled, Wallace in and about such unlawful venture.

It follows that the giving of the instructions complained of constituted prejudicial error, for which the judgment appealed from must be reversed and a new trial ordered.

BRUCE, J., dissenting. I am unable to concur in the majority opinion in this case. It seems to be assumed that because the defendant was charged as a principal he could not be convicted of aiding and abetting, and that one cannot, any way, aid and abet in the keeping and maintaining of a common nuisance. I can concur in neither of these propositions. There is, in the case at bar, quite conclusive evidence, not only that the whole scheme was the defendant's scheme, but that he was a party to the construction of the temporary shed, and was directly interested in the operation thereof. There is evidence that, about two weeks before the occurrence in controversy, he visited a banker in Taylor, and asked him "if the people in Taylor would want something to drink on the 4th, and would stand for something being sold," and that he stated that "if they wanted some he would arrange to have somebody there to sell it." A drayman testifies: "I worked for Bert Moore on the dray line and I was working for him on the 3d and 4th of July, this year. I knew the defendant, Dahms. I delivered some barrels, ice, and lumber and some cases. I guess I made three trips. I delivered four cases, and I think nine casks. Also a little dab of lumber, probably 50 or 60 feet. Dahms was at the stock yards when I was up there on one trip. Dahms paid me for hauling the lumber, ice casks, and cases. He is the defendant here. Wallace did not pay me anything. Dahms paid me $5 for the entire bill. The bill was $4.75, and Dahms paid me that *and a quarter tip.* I asked Wallace first for the money, and he said he didn't have any money, but I could go over to Dahms and get it, and I told

Dahms what Wallace had said to me, and Dahms gave me the money. Dahms was 50 or 60 feet from Wallace, right at the gate, at the time. I did not have any dispute with Dahms about the pay. This was about 11 or 12 o'clock that day. I got the lumber from the Mandan Mercantile yards. When I asked Wallace for the money, he said he didn't have the money yet, to wait a while, or I could go over to Dahms and get it. Wallace said he didn't have the money, but I could either wait for it or get it from Dahms. When I went over to Dahms I asked him about the money. I think he said that Wallace was supposed to pay it, and I told him he didn't have any money, and Dahms paid me. I don't think he talked to Wallace in the meantime. I don't think he did while I was there. Wallace did not come over with me, I went over and told him what Wallace said, and he paid me the bill and a quarter besides." S. E. Bergland, a witness for the state, testified as follows: "I have lived in Taylor about a year, and I am manager of the Mandan Mercantile Company, and was such manager on the 4th of July last. The Mandan Mercantile Company sells lumber. I know the defendant Dahms when I see him. I sold Dahms 110 feet of lumber on July 4th. He paid me either $3.25 or $3.30, or $3. He paid me at the time he bought it. He said the dray would be around there to get it in a short while. That was the only lumber that I delivered to the dray that morning. When Dahms came to order the lumber he said he wanted some lumber, and I asked him what kind he wanted. He said he wanted some white boards. The lumber was a cash deal, and Dahms requested that I make out a bill of it to P. D. Wallace. I did that, and Dahms took the bill away with him. . . . We heard that they were selling beer out there, and we thought we would go and stop them. This was between 3 and 4 in the afternoon. We went out there, and I saw the defendant there. I saw this little shed or place back of which the beer was kept. The defendant was standing, I think he was standing up alongside of the fence at the end of the opening where those boards were; standing at one end of this little shed. Mr. Wallace was inside of the shed. There were people about the place, but they were standing further back. I was at the ball game that day, and I don't think I saw Dahms there at the ball game. I was down at the grand stand where the exercises were taking place, but I did not see Mr. Dahms down there at that time."

It is true that the witness Wallace testifies that the defendant was

merely acting as his agent in purchasing the lumber, and merely loaned the money to him to pay for the drayage, and that he was not interested in the maintenance of the establishment. Wallace, however, had already pleaded guilty to the crime of maintaining a nuisance, and it can hardly be claimed that the jury was not justified in looking upon his testimony with some suspicion. If, for instance, the defendant merely loaned the money for paying the drayage, why did he, without consulting Wallace, tip the drayman? And if he had no interest in the concern, why was he so solicitous about running errands, purchasing lumber, and obtaining and providing for Wallace's lunch? The evidence shows that a number of hundred dollars worth of beer must have been sold. When Wallace was arrested he had but $60 or $66 on his person. There is no evidence that he left the place during the day, before he was arrested. Such cases may be proved by circumstantial evidence, and I do not believe that anyone can read the evidence without being convinced that the prime movers were the defendant and the corporation which he represented. If the defendant Dahms was a party to the building of the structure and furnishing the place with beer and ice, and stood by and allowed the liquor to be sold therein which was furnished by his concern, and which he admits had not been paid for prior to the transaction in question, I am quite satisfied that he could be convicted as a joint principal in the undertaking. The jury would have been justified in finding that he and his concern looked to the profits of the enterprise for their compensation. It, it is true, is "no criminal offense to stand by, a mere passive spectator of a crime, even of murder. Noninterference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present, witnessing the commission of a crime, and offered no opposition to it though he might reasonably be expected to prevent it, and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not." Hawkins, J., in Rex v. Coney, 51 L. J. Mag. Cas. N. S. 78.

In the case of State v. Snyder, 108 Iowa, 205, 78 N. W. 807, it was held that "a banker selling bills of lading at his bank to whoever might apply, thereby enabling the purchasers to obtain intoxicating liquors at

a freight depot, is guilty of selling the liquors, such dealings precluding him from asserting that he was a mere collecting agent for the consignors of the liquors. He is also guilty of maintaining a nuisance, defined as using a building in which intoxicating liquors are sold unlawfully, though he owned neither the building nor the liquors." The court on page 206 says: "It is contended in the argument that while it may be true that defendant was guilty of selling intoxicating liquor, he was not guilty of maintaining a nuisance, and that the jury should have been so instructed. The crime of nuisance consists in the keep or use of a building or place in which intoxicating liquors are kept with unlawful intent, or are sold for forbidden purposes. It is the use of a place in which the inhibited acts are done, rather than the doing of these acts, that constitutes the offense. Now, with the practical concession that there was sufficient evidence to justify the defendant's conviction of the crime of selling intoxicating liquors contrary to law, or of keeping such liquors with intent to sell the same unlawfully, the only question for solution is, Did the defendant keep or use a building or place for that purpose? The authorities furnish no uncertain answer to this proposition. In the case of State v. Arnold, 98 Iowa, 253, 67 N. W. 252, it is said: 'It, of course, is to be understood that it is not necessary to prove that the defendant was the owner, or even that he was a lessor under a formal lease. It is sufficient if he is shown to have been maintaining a nuisance; and the ownership or even the rightful possession of the property is not a material question.'" See also State v. Herselus, 86 Iowa, 214, 53 N. W. 105.

In the case of Webster v. State, 110 Tenn. 491, 82 S. W. 179, it was held that a wholesale liquor dealer who sets up a retailer in business, indorses his application for a license, encourages him to engage in the business under it, and is present in the saloon when unlawful sales are made, and is, in fact, the chief beneficiary of the business, although it is not done in his name, is equally guilty with the retailer of making illegal sales. Again, in the case of Phillips v. State, 95 Ga. 478, 20 S. E. 270, it was held that "one who, by the use of his capital or credit aids in procuring or furnishing whisky to another for the purpose of being unlawfully sold by the latter, and it is so sold, and the former, by the agreement for conducting the business is to receive, and does actually receive, a given per cent on the cost of all the whisky so furnished and

sold," is guilty with the seller of selling the liquor unlawfully, whether under the terms of the agreement between them a technical partnership between them existed or not.

I have no fault to find with the form of the information or with the instructions which were given thereunder. It is true that the information charged the defendant was a principal, and that this was the proper method of procedure. It is also true that the instruction spoke of the connection of the defendant as that of an aider and abetter. Wherein, however, the defendant was prejudiced by this instruction it is difficult for me to understand. Section 8555, Rev. Codes 1905, § 9218 Compiled Laws of 1913, provides that "all persons concerned in the commission of a crime, whether it is a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed." It is perfectly clear, therefore, that the defendant was a principal and could be charged as a principal, even though the evidence showed that he did not actually and physically keep the place, but merely aided and abetted in the transaction. An aider and abetter is one who assists, counsels, or advises; and I can see no error in instructing the jury to that effect.

The court charged the jury that "if you find in the facts in this case that at the stock yards near Taylor, in this county and state, there was a nuisance kept and maintained on the 4th of July, 1912, and that the defendant, while not actually keeping the place, yet aided and abetted in the keeping of the same, then you should find the defendant guilty as charged in the information." And later, when asked by a juryman for further instructions, added: "Aiding and abetting practically means the same thing,—assisting, counseling, and advising. Under the law, aiding, abetting, or assisting—those three words are synonymous and mean the same thing. Anyone who in any way aids or assists in the commission of a crime, why then he is an aider and an abetter under the law." And in answer to the question put by the jury, "Would this necessarily need to be previous to the 4th of July when the crime was committed?" he answered, "It wouldn't have to be,—either before or at the time of the commission of the offense." The learned trial judge took pains to point out that it was for the offense only of keeping and maintaining a common nuisance, as opposed to the offense of unlawfully selling intox-

icating liquors, that the defendant could be convicted, and there can be no possible ground for any belief that the "assisting, counseling, and advising" mentioned could have related to any other offense. He merely in effect told the jury that, even if the defendant himself did not manage the place, he nevertheless could be found guilty if he assisted, advised, or encouraged the act.

To quote the language of the supreme court of Kansas, in the case of State v. Corn, 76 Kan. 416, 91 Pac. 1067, "Evidently he (the defendant) was either the proprietor or a person who was actually aiding and assisting another in maintaining a nuisance. In either case he was guilty of the offense charged." See also State v. Nield, 4 Kan. App. 626, 45 Pac. 623; State v. Lord, 8 Kan. App. 257, 55 Pac. 503; State v. Hoxsie, 15 R. I. 1, 2 Am. St. Rep. 838, 22 Atl. 1059.

One, in short, can be convicted of aiding and abetting in the commission of a nuisance, and it is sufficient and proper that he shall be informed against as a principal. The mere fact, however, that the information may charge him as a principal does not alter the fact that proof that he aided and abetted will be sufficient to justify a conviction. It seems to me to be the summit of absurdity to say that one may furnish the money and reap the profit of running a nuisance, and yet not be liable unless he actually manages or superintends, or that, when the former facts are testified to, the jury may not be told that the testimony, if believed, will justify a conviction of the crime of keeping and maintaining, even though the defendant has merely aided, assisted, counseled, and advised.

BURKE, J.: I approve of the views of Judge BRUCE.

COMMERCIAL SECURITY COMPANY v. W. R. JACK.

(150 N. W. 460.)

Negotiable promissory note — suit by indorsee — title of payee not shown defective — burden of proof on maker — indorsee not in due course — prima facie case.

1. In a suit by the indorsee of a negotiable promissory note, the title of the

payee of which is not shown to have been defective within the meaning of § 6940, Comp. Laws 1913 (Rev. Codes 1905, § 6357), the burden is upon the maker, who seeks to defeat payment, to first prove that plaintiff is not an indorsee thereof in due course. In other words, the burden is upon him of overthrowing the prima facie presumption, as prescribed in § 6944, Comp. Laws, that plaintiff is a holder in due course. *Held*, that defendant failed to meet such burden.

Title of payee — when defective — note obtained by fraud, duress, force, or fear, other unlawful means — illegal consideration — negotiated in bad faith.

2. The title of a payee of a promissory note is defective within the meaning of the above statute, only "when he obtained the instrument or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Tested by this statutory rule it is held that the title of the payee of the note in suit was not defective.

Presumption of law — introduction of testimony to prove sale and indorsement — not a waiver.

3. Defendant's contention that plaintiff waived the benefit of the presumption created by § 6944, Comp. Laws, by the introduction of certain testimony for the purpose of proving the sale and indorsement of the note by the payee to the plaintiff, is held untenable.

Testimony as to sale and indorsement — impeachment — question for jury.

4. The contention that the testimony of the plaintiff's witness who was called to prove the sale and indorsement of the note, and who testified that such sale and indorsement took place on September 29, 1911, was sufficiently impeached by proof of certain letters written by the witness after such date, but long prior to the maturity of the note, to authorize a submission to the jury of the question whether such sale and indorsement were made before the maturity of the note,—held without merit.

Testimony of witness — impeachment — contradictory statements — out of court — relevant and material.

5. While the testimony of a witness may be impeached by proof of contradictory statements of the witness made out of court, such impeachment must be confined to such testimony as is relevant and material to the issues.

Opinion filed November 25, 1914. Rehearing denied January 2, 1915.

Appeal from District Court, Grand Forks County; *C. M. Cooley*, J.

From a judgment ordered *non obstante veredicto* in plaintiff's favor, defendant appeals.

Affirmed.

Scott Rex, for appellant.

In a suit on a promissory note, a verdict should not be directed for the holder, unless the evidence is such that fairminded men can draw only one inference therefrom, and may not be directed where the evidence is uncontroverted, if the inferences to be drawn from the circumstances are open to different conclusions by reasonable men. Arnd v. Aylesworth, 145 Iowa, 185, 29 L.R.A.(N.S.) 638, 123 N. W. 1000.

Where there is an issue as to the title or ownership of the note, or as to whether plaintiff is a bona fide holder, the case is for the jury. 8 Cyc. 289; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Owens v. Snell, 29 Or. 483, 44 Pac. 827; Iowa Nat. Bank v. Sherman, 19 S. D. 238, 117 Am. St. Rep. 941, 103 N. W. 19; Union Nat. Bank v. Mailloux, 27 S. D. 543, 132 N. W. 168; Burroughs v. Ploof, 73 Mich. 607, 41 N. W. 704; Davy v. Kelly, 66 Wis. 452, 29 N. W. 232; Joy v. Diefendorf, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602.

W. J. Mayer, for respondent.

If the witness is not a party to the action, his declarations out of court are mere hearsay, and cannot be received as evidence in chief. They only go to the question of credibility. 10 Enc. Pl. & Pr. 296; Law v. Fairfield, 46 Vt. 425; Hicks v. Stone, 13 Minn. 434, Gil. 398; Davis v. Hardy, 76 Ind. 272.

Where there is an issue as to title or ownership of the note, or as to whether plaintiff is a bona fide holder, the question is for the jury. 8 Cyc. 289; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Owens v. Snell, 29 Or. 483, 44 Pac. 827; Rev. Codes 1905, §§ 6357, 6361.

Proof of failure of consideration does not shift the burden of proof to the indorsee. 4 Am. & Eng. Enc. Law, 2d ed. 325; 8 Cyc. 338; 2 Greenl. Ev. § 172; 1 Randolph, Com. Paper, p. 923; 1 Dan. Neg. Inst. 814; 2 Parsons, Bills & Notes, 438.

Defendant did not plead or prove a defense to the note in the hands of an indorsee. Only material allegations are put in issue by a general denial. 14 Enc. Pl. & Pr. 560, 641; Kinney v. Brotherhood of American Yeoman, 15 N. D. 21, 106 N. W. 44.

There was no rescission in this case. Rev. Codes 1905, §§ 5378, 5380; 6 Enc. Law, 788.

In action for breach of contract, in order that plaintiff may recover more than nominal damages, actual loss sustained must be proved by competent evidence. 8 Enc. Law, 553–556; Roberts v. Minneapolis Threshing Mach. Co. 8 S. D. 579, 59 Am. St. Rep. 777, 67 N. W. 607.

Fisk, J. Plaintiff and respondent, a foreign corporation, brought this action to recover upon a negotiable promissory note for $350, executed and delivered by defendant and appellant to the American Manufacturing Company, and indorsed by it to plaintiff. The complaint is in the usual form, alleging the corporate existence of plaintiff, the execution and delivery of the note as aforesaid, and the transfer thereof by indorsement to plaintiff for value and before maturity. By his answer defendant expressly admits the allegations as to the corporate existence of plaintiff, the execution and delivery of the note, and the nonpayment thereof, but denies generally the other allegations of the complaint. He then alleges certain new matter by way of defense as follows:

III. "Further answering and for a separate defense herein, defendant alleges that the consideration for the giving of said note was the agreement on the part of said American Manufacturing Company to furnish material for and superintend a voting contest to be carried on in connection with the skating rink business which was then operated by defendant at Grand Forks, North Dakota, and that company thereby stipulated and agreed to increase the gross proceeds of such business during the six months commencing October 1st, 1911, in the sum of $3,000; that said American Manufacturing Company failed to furnish the material for such contest, and failed to superintend the same, and wholly failed to increase the gross proceeds of this defendant's business, and that by reason of the premises the consideration for said note has failed."

IV. "Further answering and for a separate defense herein, defendant alleges that the consideration for the note in suit was the agreement on the part of said American Manufacturing Company to furnish material for and to superintend a voting contest to be carried on in connection with the skating rink business which was then operated

by defendant at Grand Forks, North Dakota, and that said company thereby stipulated and agreed to increase the gross proceeds of such business during the six months commencing October 1st, 1911, in the sum of $3,000, and whereby it agreed to refund to defendant 6 per cent of each dollar it so failed to increase the gross proceeds of such business; that the gross proceeds of defendant's business during the period aforesaid were not increased in any sum whatsoever by the said contest; that said American Manufacturing Company failed to furnish material therefor and to superintend the same, and that by reason of such failure of said company to carry out the terms of said contract, this defendant has been damaged in the sum of $1,000 and upwards."

It is observed that nowhere is it alleged in such answer that plaintiff ever had any notice or knowledge of the facts thus averred as a defense, or that there was a rescission of the contract, defendant evidently relying upon the fact that plaintiff, if it purchased the note at all, took it subject to all defenses, and not as an indorsee in due course. In other words, he relied upon the assumption that he had put in issue, by the denial in the answer, plaintiff's allegations respecting the sale and indorsement of the note by the payee to plaintiff before its maturity and for value, and that such issue would, at the trial, be resolved in his favor. The issues thus framed were tried to a jury, and, in brief, the following proceedings took place: Plaintiff proved by the deposition of one G. H. Partin, president of the payee, that the note in suit was, on September 29, 1911, which was prior to its maturity, sold and indorsed by such payee to the plaintiff for value. Thereupon the note, together with the indorsement on the back thereof, "Pay to the order of the Commercial Security Co., American Mfg. Co., G. H. Partin, President," was offered and received in evidence without objection. Defendant's counsel then read from such deposition certain testimony given by such witness on cross-examination, which we need not here set out, as we do not deem it very material. Thereupon plaintiff rested its case. The defendant was then permitted, over plaintiff's objections, to testify relative to the various defensive matters alleged in his answer and to the contract entered into between him and the payee of the note; also to two letters, one dated September 30, 1911, and the other October 16th of that year, both written on letter heads of the payee of the note, addressed to defendant, and signed "American

Manufacturing Company by G. H. Partin, President," and both pertaining to such note, the purpose of the latter proof being to discredit Pattin's testimony as to the transfer of the note to plaintiff on September 29th. Defendant's testimony discloses that the note in suit was given by him pursuant to and in consideration of an order or contract between him and the American Manufacturing Company, of date July 14, 1911, as follows:

American Manufacturing Co.
Lexington, Tenn.

Gentlemen:—

Please reserve and ship me at your earliest convenience f. o. b. Minot, N. D., or distributing point, your Piano, Dinner Sets and Advertising matter described on this and reverse side, in payment for which I hereby hand you my instalment note for $350, payable to your order, with the understanding that if this order is not approved this contract is to be canceled and returned to me.

My past twelve months' sales were $3,000, and you are to increase my next six months' sales to $6,000, with the understanding that if my gross sales for the next six months do not amount to $6,000 you are to refund me 6 per cent of each dollar you fall short of said increase, and send your bond for $350 to cover this agreement with me.

To make this last clause binding upon you, I agree to take shipments of Piano, Dinner Sets and literature promptly, prominently display Piano, issue Piano Votes with each cent purchase, and report every thirty days to you my gross sales for six months, furnish all information requested to assist you in pushing the contest. In consideration of special methods to conduct contest and the special terms, agreements, and reservation herein, this order cannot be countermanded. The title to remain in vendor until fully paid.

(We agree to start contest Oct. 1st., 1911, and furnish 100 contestants, and to have representative close contest. Exclusive rights for our methods in amusement line. Copy of agreement. S. H. G.) Town ....Grand Forks.....County....Grand Forks....State....N. Dak.....Freight Station....Grand Forks....Express Office.... Grand Forks.....

Salesman: S. H. Grant.

Proof was introduced over plaintiff's objection, showing a breach by said company of this contract in certain particulars, but no proof was offered showing notice on plaintiff's part of such contract, or its breach, and, furthermore, it affirmatively appears that no rescission thereof was ever made or attempted by defendant. On the contrary, he retained the piano and other material, and carried on the contest himself.

At the close of the testimony plaintiff moved for a directed verdict, which was denied. The case was submitted to the jury, and a verdict returned in plaintiff's favor for only the sum of $138.64, being the supposed value, with interest, of the property retained by defendant.

On a motion by plaintiff for judgment for the full amount sued for notwithstanding such verdict, or for a new trial, the district court gave judgment for the amount of the note, with interest and costs, from which defendant appeals, assigning as error the order granting such motion.

We find no difficulty in sustaining such judgment. It is, we think, quite clear that the ruling of the learned trial judge was proper, for numerous reasons which we might mention, but the following will suffice:

It does not appear that the title of the payee of this note was defective. Hence, before it was permissible for defendant to prove any defense to the note in the hands of plaintiff the burden was upon him of first showing that the plaintiff is not a holder in due course. This he failed to show. In other words, the prima facie presumption that plaintiff is an indorsee in due course of the note in suit has not been met by defendant. On the contrary, it is, we think, perfectly clear under § 6940, Comp. Laws 1913 (Rev. Codes 1905, § 6357), that the title of the American Manufacturing Company to the note was not defective. That section provides: "The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." The defendant's own testimony conclusively negatives the fact that such payee's title was defective within the statutory definition of that term. It follows, therefore, that plaintiff "is deemed prima facie to be a holder in due course"

as prescribed in § 6944, Comp. Laws, and the burden of overthrowing such presumption rested upon defendant. It was incumbent upon defendant, therefore, in order to lay a foundation for the admission of his alleged defenses, to allege and prove that plaintiff did not acquire title to this paper as a holder in due course as that term is defined in § 6937, Comp. Laws 1913. No such allegation or proof appears in this record. The contention of appellant's counsel and the testimony of the witness Partin was sufficiently impeached and discredited by the two letters to warrant the jury in ignoring or disbelieving the same is not sound, nor is his argument sound to the effect that plaintiff, by eliciting testimony from such witness as to the date of his indorsement of the note, thereby waived the benefit of the legal presumption that it was indorsed prior to the maturity of the note. While the sending of the letters to defendant after September 29th, the date the witness Partin testified that the note was sold and indorsed to plaintiff, had some tendency to impeach and discredit the testimony of such witness as to the date thus stated by him, it is not sufficient to justify the jury in finding that the note was not thus sold and indorsed at all prior to its maturity. The fact that the note was duly indorsed to plaintiff by the payee was the material fact, and the only material fact, necessary for plaintiff to establish under the issues. The letters, at the most, merely tended to show the improbability that such indorsement was made prior to the date of such letters, not that no indorsement was in fact made prior to the maturity of the note. While it is well settled that a witness's testimony may be impeached by proof of contradictory statements out of court, it is equally well settled that such impeachment must be confined to testimony which is *relevant* and *material* to the case. Becker v. Cain, 8 N. D. 615, 80 N. W. 805.

For the foregoing reasons the judgment appealed from is affirmed.

On Petition for Rehearing Filed Jan. 2, 1915.

PER CURIAM. Appellant's counsel has petitioned for a rehearing upon two points. First, he asserts that the statement in the opinion that there is no allegation or proof that plaintiff did not acquire title to this paper as a holder in due course is erroneous; and, second, that inasmuch as the plaintiff had the burden of proving the transfer and

its ownership of the note, "it was incumbent on it to meet that issue and sustain that burden of proof by some evidence."

As to counsel's first contention, it is apparent that he misconstrues our holding. All we intended to hold, and we think it clear that all we in fact held, was that it was incumbent on defendant to allege and prove that plaintiff is not a holder in due course, and that he failed so to do. The Code, § 6944, Comp. Laws 1913, places such burden on him. By such holding, however, we should not be understood as saying that the denial in the answer does not raise an issue as to plaintiff's ownership of the note through a sale and indorsement thereof by the payee to him. Plaintiff no doubt has the burden of proving such facts, and this is all that was held in Nunnemacker v. Johnson, 38 Minn. 390, 38 N. W. 351, and Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449, cited by counsel. In the first case it was held that "the transfer of the note and plaintiff's ownership are put in issue." In the latter case it was said: "The complaint alleged the assignment and delivery of the note by the payee to the plaintiffs, and that the plaintiffs were the owners and holders thereof. The answer denied this. The action being by the assignees, it was necessary for them to allege their ownership in some way, and prove it if denied."

It does not follow, however, that plaintiff had to go further than this, and prove that he was a holder *in due course,* or that such issue was raised by the denials in the answer. See Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614.

The other Minnesota case cited by counsel, Hodgson v. Mather, 92 Minn. 299, 100 N. W. 87, it is true, holds that a denial of the allegation in the complaint that the owner of the note "duly assigned, transferred, indorsed, and delivered it to the plaintiff, who now owns the same," put in issue such allegations, and also the fact that the note was transferred before maturity, which latter fact it was held was an inference implied by law therefrom, and that defendant was therefore entitled to prove that such note came into plaintiff's possession after its maturity. But even conceding such decision to be sound,—regarding which we entertain grave doubts,—it assumes that defendant has the burden of proving the transfer of the note after its maturity.

If we should eliminate from the opinion the statement that there

is no allegation that plaintiff did not acquire title to the note as a holder in due course, the result must be the same, for there is no evidence that plaintiff acquired such note after its maturity. Counsel's contention under the second ground for rehearing is, we think, based on the erroneous assumption that because the witness Partin's testimony was somewhat impeached and discredited as to the exact date of the transfer of the paper to plaintiff (which fact is immaterial, the only material fact being whether such transfer was prior or subsequent to the maturity of the note), his entire testimony is likewise impeached, including that portion wherein he testified to the fact of the indorsement of such paper. We think the testimony as to the fact of such indorsement, which is undisputed, must be given effect. Had such witness testified, as suggested by counsel, that the indorsement and transfer took place after the maturity of the note, this would have been material; but the exact date on which it was transferred after maturity, if such was the fact, would not have been material to any issue in the case.

Petition denied.

MEYERS LUMBER COMPANY, a Corporation, v. JARVIS H. TOMPKINS.

(149 N. W. 955.)

Two adjoining lot owners made separate contracts for the erection of buildings upon their adjoining lots. When erected, the two buildings were so connected as to appear as one. The defendant was the owner of the smaller building, which comprised one third of the entire structure. The contractor failed to pay for the material bought by him of the plaintiff, who filed one lien against both lots and the buildings thereon. This court in the case of Meyer Lumber Co. v. Trygstad, 22 N. D. 558, 134 N. W. 714, held such lien void. Plaintiff thereafter filed separate liens against the buildings. *Held*:—

Filing of void lien — not such election of remedies as to preclude filing proper lien.

1. That the filing of the void lien was not such an election of remedies as precludes the filing of the proper liens thereafter.

Notices to landowner — sufficiency of.

2. That the notices to the landowners set forth in the opinion are sufficient as between the parties to this action.

Materials furnished — pleading — allegations — sufficiency.

3. The allegation that one third of the material was furnished for the defendant's building, coupled with an itemized statement of the material furnished for both buildings, is sufficient to support the lien.

4. Point four is covered by the third paragraph of the opinion.

Opinion filed November 28, 1914.

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

Thompson & Wooledge, Engerud, Holt, & Frame, for appellant.

In some states there is a distinction between the terms "subcontractor" and "materialman." This is not true in this state. Rev. Codes 1905, § 6250.

A direct lien is given to the subcontractor. Robertson Lumber Co. v. State Bank, 14 N. D. 515, 105 N. W. 719; Langworthy Lumber Co. v. Hunt, 19 N. D. 436, 122 N. W. 865.

It is the furnishing of the materials for the purpose of the construction, and the good faith delivery that controls and gives the lien right. Schlosser v. Moores, 16 N. D. 185, 112 N. W. 79; Central Lumber Co. v. Braddock Land & Granite Co. 84 Ark. 560, 105 S. W. 583, 13 Ann. Cas. 11; 27 Cyc. 47, note 67, and note p. 758; Pittsburg Plate Glass Co. v. Leary, 25 S. D. 256, 31 L.R.A.(N.S.) 746, 126 N. W. 271, Ann. Cas. 1912B, 928.

One who furnishes materials to a contractor who has separate contracts with the different owners has no right to a joint lien against all the property of the different owners into whose building his material went, but must claim and file a separate lien against the property of each of such owners. Meyer Lumber Co. v. Trygstad, 22 N. D. 558, 134 N. W. 714.

In such cases an apportionment may be made. Kinney v. Mathias, 81 Minn. 64, 83 N. W. 497; Davis v. Farr, 13 Pa. 167; Harper v. Keely, 17 Pa. 234; Gordon v. Norton, 186 Pa. 168, 40 Atl. 312; Edwards v. Edwards, 24 Ohio St. 403; Sexton v. Weaver, 141 Mass. 273, 6 N. E. 367; Halsted & H. Co. v. Arick, 76 Conn. 382, 56 Atl.

628; Ballou v. Black, 17 Neb. 389, 23 N. W. 3, 21 Neb. 131, 31 N. W. 673; Shaw v. Thompson, 105 Mass. 345; Hannon v. Logan, 14 Mo. App. 33; Byrd v. Cochran, 39 Neb. 109, 58 N. W. 127; Hines v. Cockran, 44 Neb. 12, 62 N. W. 299; Garner v. Van Patten, 20 Utah, 342, 58 Pac. 684; Hayden v. Logan, 9 Mo. App. 492; Springer Land Asso. v. Ford, 168 U. S. 513, 42 L. ed. 562, 18 Sup. Ct. Rep. 170; Lehmer v. Horton, 67 Neb. 574, 93 N. W. 964, 2 Ann. Cas. 685; Bowman Lumber Co. v. Newton, 72 Iowa, 90, 33 N. W. 377; Stoltze v. Hurd, 20 N. D. 412, 30 L.R.A.(N.S.) 1219, 128 N. W. 115, Ann. Cas. 1912C, 871; 34 Century Dig. Mechanics' Liens, 178–182, 259, 315, 320, 322; 13 Decen. Dig. Mechanics' Liens, 130, 149, 183 and corresponding sections in Am. Dig. Key number series. 27 Cyc. 131, 224, 226.

The notices served were amply sufficient to satisfy the law. Rev. Codes 1905, § 6237.

The purpose of the notice required is to enable the owner to take all necessary steps for his own protection against the possibility of having to pay twice for the same improvement. Gilman v. Gard, 29 Ind. 291; Henry v. Plitt, 84 Mo. 237; Bambrick v. King, 59 Mo. App. 284; 27 Cyc. 110, 118; Fidelity Storage Corp. v. Trussed Concrete Steel Co. 35 App. D. C. 1, 20 Ann. Cas. 1157; Faulkner v. Bridget, 110 Mo. App. 377, 86 S. W. 483.

E. R. Sinkler, for respondent.

The plaintiff once elected as to its remedy; it had knowledge of the facts as to coexistent remedial rights, inconsistent and irrevocable; and such election is a bar to any action based upon a remedial right inconsistent with that asserted by such election. 15 Cyc. 262.

The Pennsylvania rule, which gives a direct lien to the subcontractor, does not obtain in this state. It is not the contract between the materialman and the contractor, but the contract between the owner of the property and the contractor, that controls. Meyer Lumber Co. v. Trygstad, 22 N. D. 558, 134 N. W. 714; Beach v. Stamper, 44 Or. 4, 102 Am. St. Rep. 597, 74 Pac. 209; Larkins v. Blakeman, 42 Conn. 292.

The right to a mechanics' lien exists by virtue of the statute; and to successfully claim and maintain such right, substantial compliance at every step, with the statute, must be shown. Stoltz v. Hurd, 20

N. D. 412, 30 L.R.A.(N.S.) 1219, 128 N. W. 115, Ann. Cas. 1912C, 871.

Where lienable and nonlienable articles are indiscriminately intermingled in one lien claim, the lien cannot stand. McClain v. Hutton Continental Bldg. & Loan Asso. 131 Cal. 140, 61 Pac. 274, 63 Pac. 182, 622; J. E. Greilick Co. v. Taylor, 143 Mich. 704, 107 N. W. 712; Bradely v. Gaghan, 208 Pa. 511, 57 Atl. 985; Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 Pac. 393; Dalles Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co. 3 Or. 527; Kezartee v. Marks, 15 Or. 529, 16 Pac. 407; Williams v. Toledo Coal Co. 25 Or. 426, 42 Am. St. Rep. 799, 36 Pac. 159; 2 Jones, Liens, 1409, 1419.

It is the duty of materialmen dealing with contractors and furnishing them with materials, to ascertain and know the nature of the contract between the property owner and the contractor, and to take notice of the authority of, and the limitations placed upon, such contractor. Andrews v. Kneeland, 6 Cow. 354; Hill v. Bowers, 45 Kan. 592, 26 Pac. 13; Kneeland, Mechanics' Liens, 87; Bottomly v. Grace Church, 2 Cal. 90; Houghton v. Blake, 5 Cal. 240; Rogers v. Currier, 13 Gray, 129; Chapin v. Persse & B. Paper Works, 30 Conn. 461, 79 Am. Dec. 263.

In such cases as this one, no apportionment can possibly be made. No lien can attach unless the articles are lienable, can be identified, and actually went into the improvement. Stimson Mill Co. v. Los Angeles Traction Co. 141 Cal. 30, 74 Pac. 357; Houghton v. Blake, 5 Cal. 240; Patent Brick Co. v. Moore, 75 Cal. 211, 16 Pac. 890; Silvester v. Coe, Quartz Mine Co. 80 Cal. 513, 22 Pac. 217; Bewick v. Muir, 83 Cal. 373, 23 Pac. 390; John A. Roebling Sons Co. v. Bear Valley Irrig. Co. 99 Cal. 490, 34 Pac. 80; Hamilton v. Delhi Min. Co. 118 Cal. 153, 50 Pac. 378; Gordon Hardware Co. v. San Francisco & S. R. Co. 3 Cal. Unrep. 140, 22 Pac. 406, 86 Cal. 620, 25 Pac. 125; Allen v. Elwert, 29 Or. 428, 44 Pac. 823, 48 Pac. 54; Edgar v. Salisbury, 17 Mo. 271.

BURKE, J. This is a continuation of the controversy treated in Meyer Lumber Co. v. Trygstad, 22 N. D. 558, 134 N. W. 714, where a statement of the facts may be found. After the said decision, holding void the lien filed against both lots and buildings thereon, the

lumber company, on the 4th day of April, 1912, filed separate liens upon each lot and building, and later brought action to enforce the lien against Tompkins, in the district court of Ward county, North Dakota. The complaint is in the ordinary form, and alleges that, at the request of the contractor, they furnished for both buildings, material of the value of $7,118.75, according to a schedule thereto attached, giving itemized statement of such material; that the contractor agreed to pay therefor, but that no part of the same had been paid except the sum of $391.40, leaving a balance due and unpaid of $6,727.35. That said materials were purchased by the said contractor and were furnished by the plaintiff to be used, and were in fact used, in and about the construction of two certain store and office buildings, one building owned by defendant Tompkins and the other by one Frank, situated upon adjoining lots. That the contracts between the owners of the buildings and the contractor were separate and distinct, and the buildings were constructed at about the same time by the said contractor, and the materials entering into the construction of said buildings were used indiscriminately in each of said buildings; and it is now and has been at all times impossible for this plaintiff to designate the particular items of said materials entering into the construction of each of the said buildings, respectively. That one third of said materials were used in and about the construction of said building owned by said defendant (Tompkins), and situated upon the aforesaid lot 15; and two thirds of said materials were used in and about the construction of said building owned by one Guy O. Frank, situated upon lots 13 and 14, aforesaid. That pursuant to said contracts the buildings were erected upon the respective premises; that on the 16th day of March, 1908, the plaintiff served upon the said defendants and each of them, by registered mail, certain notices whereby it notified the said defendants and each of them that it had furnished the material mentioned, and that it would claim a lien upon the respective premises above described, which said notices were marked exhibits B and C and made a part of the complaint. That the said Tompkins is the owner of the buildings erected by him, and that on the 4th day of April, 1912, the plaintiff had filed in the offices of the clerk of the district court within and for Ward county its duly verified claim, con-

taining a just and true account of the demand due it after allowing all credits, and a correct description of the property owned by the said defendant Tompkins to be charged with said lien; which claim was duly filed and docketed with said clerk, and is now, and ever since has been, unsatisfied of record. This was followed by a demand for judgment of foreclosure. To this a demurrer was interposed, which, after argument, was sustained by the trial court. This appeal is from the resulting judgment.

The defendant and respondent in his brief states that there are four propositions raised by the demurrer and the complaint: first, that the plaintiff has by a former action elected its remedy, and is barred from maintaining this action; second, that the notice of lien is not sufficient; and, third, where building materials entering into the construction of two buildings owned by different parties are used indiscriminately in each of said buildings by a subcontractor under separate contracts with the owners, and it is impossible for the materialman to designate the particular items entering into the construction of the said buildings, and the materialman furnishes such material under a general contract with the subcontractor, no lien can be had, and an apportionment cannot be had so as to give the materialman a lien on one building for an appropriate share of the materials going into both buildings; and, fourth, where lienable and unlienable articles are indiscriminately intermingled in lien account, and the lienable items cannot be segregated, no lien can be had.

(1) We do not believe the filing of a void lien amounts to such an election of remedies as precludes the filing of a valid lien thereafter. At 15 Cyc. 262, it is said: "A person who prosecutes an action or suit based upon a remedial right which he erroneously supposes he has, and is defeated because of the error, has not made a conclusive election, and is not precluded from prosecuting an action or suit based upon an inconsistent remedial right." Many cases are cited in support of the text, both in the original Cyc. and in the annotations. A case particularly in point is Sullivan v. Ross, 113 Mich. 311, 71 N. W. 634, 76 N. W. 309, Judge Moore giving a very lucid exposition of the equities involved.

(2) Taking up the second point raised by the demurrer, we believe

render it harder for the materialman to perfect his separate liens. The distinction between the two cases is obvious.

The complaint therefore stated a cause of action, and the demurrer was improperly sustained. Judgment reversed.

Goss, J., disqualified

L. D. TUBBS v. CHRIST SATHER.

(149 N. W. 567.)

Appeal — dismissal for — order on — compliance with, impossible — substantial rights — moot question.

Where it appears that a conditional order from which an appeal has been taken, made after judgment in plaintiff's favor in an action in claim and delivery, directing the clerk to satisfy of record such judgment, which was for the return and delivery by defendant to plaintiff of a horse, upon proof that such horse had been returned or tendered to the plaintiff by the defendant, the appeal will be dismissed when it is made to appear that the conditions of such order could not be complied with by reason of the death of such horse prior to the making of the order. Proof of such fact discloses that the order could not affect, in the least, the substantial rights of the plaintiff under his judgment, and the appeal therefore presents nothing but a moot question.

Opinion filed November 30, 1914.

Appeal from District Court, Pierce County. *E. B. Goss,* Special J.

Motion to dismiss appeal from an order directing the clerk to satisfy a judgment of record.

Motion granted.

Albert E. Coger, for appellant.

A mere return of the property after judgment in the alternative in a claim and delivery action does not operate to satisfy the judgment. To have such effect, the property returned must be in substantially the same condition as when taken, and without material deterioration in value. Vallancy v. Hunt, 26 N. D. 611, 145 N. W. 134; Cobbey, Replevin, § 1184; Note to Three States Lumber Co. v. Blanks,

69 L.R.A. 286; Gibbs v. Bartlett, 2 Watts & S. 34; Nichols & S. Co. v. Paulson, 10 N. D. 440, 87 N. W. 977; Jackson v. Morgan, 167 Ind. 528, 78 N. E. 633; Fair v. Citizens' State Bank, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847, 2 Ann. Cas. 960; Schott v. Youree, 142 Ill. 233, 31 N. E. 591; McPherson v. Acme Lumber Co. 70 Miss. 649, 12 So. 857; Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947.

Cowan & Adamson and *H. A. Blood,* for respondent.

The record on appeal must be authenticated by the certificate of the judge who presided in the lower court. Cummings v. Conlan, 66 Cal. 403, 5 Pac. 796, 903.

The order appealed from is not framed to comply with the law, in that it fails to specify the affidavits and papers upon which the motion was made and which resulted in the order. Rev. Codes 1905, § 7325.

Fisk, J. Motion by respondent to strike appellant's record from the files, and for a dismissal of the appeal. Such motion is based upon the affidavit of one of respondent's attorneys, the certificate of the clerk of the district court, and the records and files in the action. In opposition to the motion, appellant has produced an affidavit of his counsel.

The only ground of the motion which we need specially notice is in substance that appellant is in no manner aggrieved by the order appealed from.

Such order was made on November 22, 1910, and is as follows, omitting the title:

In the above-entitled action, the property mentioned in the judgment having been returned to plaintiff by defendant, and defendant having paid the costs in the action and demanded a release of said judgment, and the plaintiff having insisted on the collection of the money judgment, and refused to receive the property therein mentioned tendered him by the defendant,

Now, therefore, it is hereby ordered that upon the delivery of the horse in question by defendant to plaintiff, or a tender thereof made, and proof of such tender or delivery being filed with the clerk, satisfying him that the same has been done, the clerk of this court is directed to, on defendant's demand, thereafter to satisfy said judgment of record

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.

(149 N. W. 564.)

Substitution of party defendant — order for — appealable — motion to dismiss appeal.

In an action for the recovery of money only, brought against the Western Grain Company, an order was made, on defendant's motion, substituting Albert Lane, as receiver, as the defendant in lieu of such Grain Company, from which order of substitution plaintiffs appeal. After such substitution Lane procured a judgment dismissing the action as to him upon the ground that the complaint fails to state facts sufficient to constitute a cause of action, and that permission to sue him, as such receiver, had not been granted. He now moves to dismiss plaintiffs' appeal from such order of substitution, upon the ground that the entry of the judgment of dismissal renders the question involved on the appeal wholly moot.

Held, that the grounds of such motion are untenable.

Opinion filed November 30, 1914.

Motion to dismiss an appeal from an order made by the District Court of Hettinger County.

Motion denied.

F. C. Heffron and *Emil Scow* for the motion.

J. K. Murray and *Alfred Zugeo*, contra.

FISK, J. This is a motion to dismiss an appeal taken by the plaintiffs from a certain order substituting Albert Lane as defendant in the place and stead of the Western Grain Company, the original party defendant. Such motion is made by and on behalf of the said Albert Lane and the defendant and respondent, and the ground of the motion is that the question involved on such appeal has become moot by reason of the fact that after the order appealed from was made and entered the action was, on motion of the said Albert Lane, dismissed as to him.

The action in which the order appealed from was made is the ordi-

nary civil action to recover damages for the alleged conversion, by the defendant Western Grain Company, of certain grain, which action was commenced in December, 1913, and shortly thereafter defendant's attorney moved that Albert J. Lane, as receiver of the property of one Charles Procise, be substituted as defendant in lieu of the Western Grain Company, which motion was granted by an order entered on February 12, 1914, from which order plaintiffs appealed on March 17, 1914. The record before us discloses that on February 12, 1914, a judgment was entered on motion and in behalf of Albert Lane, as such receiver, dismissing the action as to him and awarding him costs for the sum of $35.50.

The question for decision, therefore, is whether, under these facts, plaintiffs' appeal from the order of substitution of Lane, as receiver, in lieu of the Western Grain Company, the original defendant, should be dismissed because of the entry of the judgment aforesaid. In other words, is the question which plaintiffs seek to have determined by its appeal from the order, merely a moot question? We are clear that it is not, and that the motion to dismiss such appeal should be denied. If the order of substitution is held erroneous, it would follow logically and necessarily that the action is still pending as against the Western Grain Company. It has never been dismissed as to it. Whether such order is or is not erroneous, of course, goes to the merits of the appeal, and will not be considered on this motion. All we decide at this time is that a reversal of the order appealed from will leave the original parties just where they stood prior to the making of such order. It would be rather a novel doctrine, to say the least, that if a stranger to the litigation may intrude himself therein as a party defendant in lieu of the party whom plaintiffs elected to sue in an action for the recovery of money only, and this, over plaintiffs' objection, and because he is successful in persuading the court that the complaint as to him fails to state a cause of action, and that permission to bring such action as against him as receiver has not been granted, and on such grounds recovers a judgment of dismissal, he is thereby in a position to champion the cause of the original defendant by challenging plaintiffs' right to prosecute their appeal as against the latter. The contention that a reversal of such order would avail appellant nothing without a reversal also of the judgment in Lane's

quired. The sheriff may demand his fees in advance of services. Rev. Codes 1905, § 2628.

Full weight and credit must be given to all matters admitted in evidence without objection. Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; F. Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110.

All reasonable presumptions will be indulged to sustain the trial court in overruling motion for new trial. Westphal v. Nelson, 25 S. D. 100, 125 N. W. 640; State v. Brandell, 26 S. D. 642, 129 N. W. 242.

BURKE, J. Plaintiff holds assignment, from the sheriff of Hettinger county, of the latter's claim for fees incident to an attachment levied by the defendant against the property of one Billyard. The particular items in dispute relate to extraordinary expenses incurred by the sheriff in storing and guarding the property attached,—the four items being rent incurred by storage, four months at Regent at $15 a month, $60; expenses incurred for supervising said property while in storage at Regent for a period of four months, $90; storage of said goods at Mott, $200; and guard for said property at Mott, $228.50. It is admitted that the said expenses of taking and keeping possession of and preserving such property under attachment have not been allowed by the court. Subdivision 32 of § 3514, Compiled Laws of North Dakota 1913, reads as follows: "The sheriff shall be entitled to charge and receive the following fees—(34): for the expense of taking and keeping possession of and preserving property under attachment, . . . such sum as the court may order, not to exceed the actual expense incurred, and no keeper must receive to exceed $3 per day, nor must he be so employed unless the property is of such character as to require the personal attention and supervision of a keeper. No property must be placed in charge of a keeper if it can be safely and securely stored, or when there is no reasonable danger of loss." In appellant's brief he says: "The only points in this case, as we view it, are: (a) the right of the sheriff to sue for his expenses and disbursements in the attachment proceeding without first obtaining an order of the court allowing the same. . . ."

(1) We think appellant is correct in his view of the law. At 35 Cyc. 1579, it is stated: "In the absence of proof, compensation is not allowable to the sheriff for trouble and expense in taking and preserving

property; and it has been held necessary that such allowance shall be made or ordered by the court."

In Bower v. Rankin, 61 Cal. 108, it is said: "By the statute the sheriff of Kern is entitled to be paid 'for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution, or other process, *such sum as the court shall order,* provided that no more than $3 *per diem* shall be allowed to a keeper.' . . . The complaint does not allege, nor do the findings show, that any allowance had been made by the court to the sheriff 'for his trouble and expense in taking and keeping possession of and preserving the property' under the attachment. Judgment reversed, and cause remanded, with directions to court below to enter a judgment in favor of plaintiff in the sum of $26.10, without costs."

In Shumway v. Leakey, 73 Cal. 260, 14 Pac. 841, it is said, after quoting the above statute: "It is a settled rule that unless the court makes such order the sheriff has no right to the fees." See also Lane v. McElhany, 49 Cal. 424; Geil v. Stevens, 48 Cal. 590; Barman v. Miller, 23 Minn. 458. It is apparent that no action can be maintained by the sheriff or his assignee upon the items hereinbefore mentioned, until the same have been approved by the court. Plaintiff, however, insists that this question has been waived by failure of the defendant to demur to the complaint upon this ground, and by the offer in the answer to pay the reasonable rental value of the building in which the property was stored, and which is alleged to be the sum of $50, and by the testimony of the counsel for defendant, and by the admission in evidence without objection of the sheriff's return. After careful examination we have decided that such acts do not constitute a waiver of the objection. In the list of fees claimed by the sheriff were some that were not in dispute, and a general demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action would have been properly overruled. The objection of the defendant to the balance of the items is sufficiently expressed in his motion for a new trial. Besides, the allowance by the court should have been proven by the plaintiff as a part of his case. The result is that the verdict should be reduced to the sum of $154.94 to conform to the proof. In this computation we have allowed to the plaintiff $50 rent, which is

10 N. D. 180, 86 N. W. 697; Grandin v. Emmons, 10 N. D. 223, 54 L.R.A. 610, 88 Am. St. Rep. 684, 86 N. W. 723; Lynch v. Burt, 67 C. C. A. 305, 132 Fed. 429; Reilly v. Phillips, 4 S. D. 604, 57 N. W. 780; Dray v. Dray, 21 Or. 59, 27 Pac. 223; Tharp v. Kerr, 141 Iowa, 26, 119 N. W. 267; Gilchrist v. Comfort, 34 N. Y. 235; Tinkcom v. Lewis, 21 Minn. 132; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834; Hoover v. Johnson, 47 Minn. 434, 50 N. W. 475; Littler v. People, 43 Ill. 188; Durley v. Davis, 69 Ill. 133; Hyman v. Bogue, 135 Ill. 9, 26 N. E. 40; Wooters v. Joseph, 137 Ill. 113, 31 Am. St. Rep. 355, 27 N. E. 80; Parker v. Dacres, 130 U. S. 43, 32 L. ed. 848, 9 Sup. Ct. Rep. 433; Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

Courts have no right to extend the period in which to make redemption, except in case of fraud which prevents a redemption within one year. Ignorance of the law, or misfortune, gives a court of equity no right to interfere. 17 Cyc. 1329; 27 Cyc. 1822, 1830, 1831; 2 Jones, Mortg. § 1053; 3 Freeman, Executions, § 316; State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692; Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694; Grandin v. Emmons, 10 N. D. 222, 54 L.R.A. 610, 88 Am. St. Rep. 684, 86 N. W. 723; Little v. Worner, 11 N. D. 382, 92 N. W. 456; Lynch v. Burt, 67 C. C. A. 305, 132 Fed. 429; Tilley v. Bonney, 123 Cal. 118, 55 Pac. 798; Hurn v. Hill, 70 Iowa, 40, 29 N. W. 796; McConkey v. Lamb, 71 Iowa, 636, 33 N. W. 146; Stocker v. Puckett, 17 S. D. 267, 96 N. W. 91; Hoover v. Johnson, 47 Minn. 434, 50 N. W. 475; Gates v. Ege, 57 Minn. 465, 59 N. W. 495; Bethel v. Smith, 83 Ky. 84; Gosmunt v. Gloe, 55 Neb. 709, 76 N. W. 424; Stewart v. Park College, 68 Kan. 465, 75 Pac. 491; Keely v. Sanders, 99 U. S. 441, 446, 25 L. ed. 327.

One making redemption proceeds at his peril, and if he does not tender the proper amount his rights are lost. 17 Cyc. 1332, note 45; 27 Cyc. 1823; 2 Jones, Mortg. § 1070; Hunt, Tender, §§ 51, 196; Davis v. Dale, 150 Ill. 239, 37 N. E. 215; Boyden v. Moore, 5 Mass. 370; Wright v. Behrens, 39 N. J. L. 413; Williams v. Dickerson, 66 Iowa, 106, 23 N. W. 286; Case v. Fry, 91 Iowa, 132, 59 N. W. 333; Horton v. Maffitt, 14 Minn. 289, Gil. 216, 100 Am. Dec. 222; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834; Hoover v. Johnson,

47 Minn. 434, 50 N. W. 475; Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038; Bartleson v. Munson, 105 Minn. 348, 117 N. W. 512; McMillan v. Vischer, 14 Cal. 232; Durley v. Davis, 69 Ill. 133; Dickenson v. Gilliland, 1 Cow. 481; Harmon v. Steed, 49 Fed. 779; Beebe v. Buxton, 99 Ala. 117, 12 So. 567; Beatty v. Brown, 101 Ala. 695, 14 So. 368; Murphree v. Summerlin, 114 Ala. 54, 21 So. 470.

While the sheriff is a public agent for the purpose of receiving redemption money, he cannot bind the purchaser by an illegal or improper redemption. Hunt, Tender, § 285; North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453; McDonald v. Beatty, 10 N. D. 519, 88 N. W. 281; Hannah v. Chase, 4 N. D. 355, 50 Am. St. Rep. 656, 61 N. W. 18; Bennett v. Wilson, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390; McMillan v. Vischer, 14 Cal. 232; Horton v. Maffitt, 14 Minn. 289, Gil. 216, 100 Am. Dec. 222; Davis v. Seymour, 16 Minn. 210, Gil. 184; Tinkcom v. Lewis, 21 Minn. 142; McCarthy v. Grace, 23 Minn. 182; Schroeder v. Lahrman, 28 Minn. 75, 9 N. W. 173; Hall v. Swensen, 65 Minn. 391, 67 N. W. 1024; Hull v. Chapel, 71 Minn. 408, 74 N. W. 156; Hughes v. Olson, 74 Minn. 237, 73 Am. St. Rep. 343, 77 N. W. 42; Byer v. Healy, 84 Iowa, 1, 50 N. W. 70; Byers v. McEniry, 117 Iowa, 499, 91 N. W. 797; Gilchrist v. Comfort, 34 N. Y. 235.

Misfortune, culpable negligence, ignorance of the law, or mistake as to the law, will not justify the interference of a court of equity. 17 Cyc. 1332; 3 Freeman, Executions, § 316, p. 1857; Case v. Fry, 91 Iowa, 132, 59 N. W. 333; McConkey v. Lamb, 71 Iowa, 636, 33 N. W. 146; Tharp v. Kerr, 141 Iowa, 26, 119 N. W. 267; Campau v. Godfrey, 18 Mich. 27, 100 Am. Dec. 133; Cameron v. Adams, 31 Mich. 426; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834; State v. Kerr, 51 Minn. 417, 53 N. W. 719; Hyman v. Bogue, 135 Ill. 9, 26 N. E. 40; Lynch v. Burt, 67 C. C. A. 305, 132 Fed. 430.

The issue as to whether or not Anna G. Heitsch redeemed is *res judicata*. Where the real party in interest defends the action, the judgment is none the less *res judicata* because the proceedings are in the name of the sheriff. Baxter v. Myers, 85 Iowa, 328, 39 Am. St. Rep. 298, 52 N. W. 234; Elder v. Frevert, 18 Nev. 446, 5 Pac. 69.

A judgment in mandamus is as conclusive as a judgment in any other action, as to the issues determined therein. 19 Am. & Eng. Enc. Law, 723; 26 Cyc. 485; 13 Enc. Pl. & Pr. 504; Santa Cruz Gap Turnp. Joint Stock Co. v. Santa Clara County, 62 Cal. 40; Visher v. Smith, 92 Cal. 60, 28 Pac. 94; Hoffman v. Silverthorn, 137 Mich. 60, 100 N. W. 183; Lewis v. Brown Twp. 109 U. S. 162-166, 27 L. ed. 892, 893, 3 Sup. Ct. Rep. 92; Smeaton v. Austin, 82 Wis. 76, 51 N. W. 1090; Ashton v. Rochester, 133 N. Y. 187, 28 Am. St. Rep. 619, 30 N. E. 965, 31 N. E. 334.

A valid judgment for plaintiff definitely and finally negatives every defense, objection, or exception which might have been urged in the action. 24 Cyc. 1196, 1295; 24 Am. & Eng. Enc. Law, 781; 23 Cyc. 1242; Ward v. Clendenning, 245 Ill. 206, 91 N. E. 1028; Landes v. Matthews, 136 Mo. App. 637, 118 S. W. 1185; Kennedy v. Security Bldg. & Sav. Asso. — Ky. —, 57 S. W. 388; Shoemake v. Finlayson, 22 Wash. 12, 60 Pac. 50; Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186; Daskam v. Ullman, 74 Wis. 474, 43 N. W. 321; American Bonding Co. v. Loeb, 47 Wash. 447, 92 Pac. 282; Ramsey v. Wilson, 52 Wash. 111, 100 Pac. 177; Rullman v. Rullman, 81 Kan. 521, 106 Pac. 52; Drinkhouse v. Spring Valley Waterworks, 87 Cal. 253, 25 Pac. 420; Harvie v. Turner, 46 Mo. 444; Landis v. Hamilton, 77 Mo. 554; Walden v. Walden, 128 Ga. 126, 57 S. E. 323; Canal Constr. Co. v. Woodbury County, 146 Iowa, 526, 121 N. W. 556; Montgomery v. Vickery, 110 Ind. 211, 11 N. E. 38; Parr v. State, 71 Md. 220, 17 Atl. 1020; Bachelder v. Brown, 47 Mich. 366, 11 N. W. 200.

Where the real party in interest conducts the defense,—employs and pays counsel,—he is bound by the judgment. 24 Am. & Eng. Enc. Law, 737; 1 Freeman, Judgm. §§ 174, 184; 1 Herman, Estoppel, §§ 148, 150, 156, 157; 2 Van Fleet, Former Adjudication, §§ 522, 523; Bigelow v. Draper, 6 N. D. 158, 69 N. W. 570; Boyd v. Wallace, 10 N. D. 78, 84 N. W. 760; Bachelder v. Brown, 47 Mich. 366, 11 N. W. 200; Carpenter v. Carpenter, 126 Mich. 217, 85 N. W. 576; 136 Mich. 362, 99 N. W. 395; Kolpack v. Kolpack, 128 Wis. 169, 116 Am. St. Rep. 29, 107 N. W. 457; Hendricks v. Dean, 105 Minn. 162, 117 N. W. 426; Parsons v. Uric, 104 Md. 238, 8 L.R.A.(N.S.) 559, 64 Atl. 927, 10 Ann. Cas. 278; Hurd v. McClellan, 1 Colo. App. 327, 29 Pac. 181; Thomsen v. McCormick, 136 Ill. 135, 26 N. E.

373; Stoddard v. Thompson, 31 Iowa, 80; McNamee v. Moreland, 26 Iowa, 96; Wright v. Andrews, 130 Mass. 149; Albert v. Hamilton, 76 Md. 304, 25 Atl. 341; Parr v. State, 71 Md. 220, 17 Atl. 1020; Peterson v. Lothrop, 34 Pa. 228.

The notes and mortgage were unconditionally delivered. But the law presumes delivery where notes are no longer in the hands of the maker. Rev. Codes 1905, § 6318.

An express warranty in an order for goods excludes any implied warranties. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903.

A party to whom an order for goods, signed by him, is delivered, is held to know the contents of such order. Reeves v. Corrigan, 3 N. D. 415, 57 N. W. 80; Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; Furneaux v. Esterly, 36 Kan. 539, 13 Pac. 824; Reeves & Co. v. Lewis, 25 S. D. 44, 29 L.R.A.(N.S.) 82, 125 N. W. 289; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 470, 92 N. W. 826.

A general agent or branch house manager has no authority or power to modify a contract of his company, or change its provisions. J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 470, 92 N. W. 826; Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 425, 61 N. W. 145; J. I. Case Threshing Mach. Co. v. Patterson, 137 Ky. 180, 125 S. W. 287.

The rendering of assistance in starting a machine, or repairing defects therein, does not affect or waive any provisions of the contract, or extend time of trial. Reeves v. Corrigan, 3 N. D. 415, 57 N. W. 80; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 425, 61 N. W. 145; Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Heagney v. J. I. Case Threshing Mach. Co. 4 Neb. (Unof.) 745, 96 N. W. 175; J. I. Case Threshing Mach. Co. v. Hall, 32 Tex. Civ. App. 214, 73 S. W. 835; Rev. Codes 1905, § 5333; Reeves v. Bruening, 13 N. D. 157, 100 N. W. 241; McCormick Harvesting Mach. Co. v. Markert, 107 Iowa, 340, 78 N. W. 33.

A breach of warranty must be proved as alleged. 35 Cyc. 437.

A failure to strictly comply with the contract waives the warranties.

35 Cyc. 437, 438; 30 Am. & Eng. Enc. Law, 189, and note 4; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; Burke v. Keystone Mfg. Co. 19 Ind. App. 556, 48 N. E. 382; Seiberling v. Rodman, 14 Ind. App. 460, 43 N. E. 38; J. I. Case Threshing Mach. Co. v. Mattingly, 142 Ky. 581, 134 S. W. 1131; J. I. Case Threshing Mach. Co. v. Cook, 7 Ga. App. 631, 67 S. E. 890; Gaar, S. & Co. v. Hicks, — Tenn. —, 42 S. W. 455; Nichols & S. Co. v. Chase, 103 Wis. 570, 79 N. W. 772; Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227; Avery Planter Co. v. Peck, 86 Minn. 40, 89 N. W. 1123.

The provision in the order, that persons therein named shall have no authority to alter or change such order, or waive any of its provisions, is valid and binding on the purchaser of the goods, and he is held to know that any such person so acting is exceeding his authority. Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Reeves & Co. v. Corrigan, 3 N. D. 415, 57 N. W. 80; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 470, 92 N. W. 826; Larson v. Minneapolis Threshing Mach. Co. 92 Minn. 62, 99 N. W. 623; Furneaux c. Esterly, 36 Kan. 539, 13 Pac. 824.

Where the contract calls for written notice to the company at its home office, notice to the local dealer, agent, or branch-house manager, is not sufficient. Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 470, 92 N. W. 826; Aultman & T. Machinery Co. v. Wier, 67 Kan. 674, 74 Pac. 227; Gaar, S. & Co. v. Hicks, —Tenn. —, 42 S. W. 455; J. I. Case Threshing Mach. Co. v. Lyons, 24 Ky. L. Rep. 1862, 72 S. W. 356; Nichols & S. Co. v. Caldwell, 26 Ky. L. Rep. 136, 80 S. W. 1099; 35 Cyc. 426, note 3; 38 Cyc. 432, note 38; Gaar, S. & Co. v. Green, 6 N. D. 48, 68 N. W. 318; Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 798; Seiberling v. Rodman, 14 Ind. App. 460, 43 N. E. 38; Burke v. Keystone Mfg. Co. 19 Ind. App. 556, 48 N. E. 382; J. I. Case Threshing Mach. Co. v. Hall, 32 Tex. Civ. App. 214, 73 S. W. 835; Shearer v. Gaar, S. & Co. 41 Tex. Civ. App. 39, 90 S. W. 684; Murphy v. Russell, 8 Idaho, 133, 67 Pac. 421; Aultman & T. Machinery Co. v. Wier, 67 Kan. 674, 74 Pac. 227; Larson v. Minneapolis Threshing Mfg. Co. 92 Minn. 62, 99 N. W. 623; Zimmer-

man Mfg. Co. v. Dolph, 104 Mich. 281, 62 N. W. 339; Hercules Iron Works v. Dodsworth, 57 Fed. 556; Gaar, S. & Co. v. Hicks, — Tenn. —, 42 S. W. 455; Trapp v. New Birdsall Co. 109 Wis. 543, 85 N. W. 478; Nichols & S. Co. v. Chase, 103 Wis. 570, 79 N. W. 772; Reeves & Co. v. Lewis, 25 S. D. 44, 29 L.R.A.(N.S.) 82, 125 N. W. 289; J. I. Case Threshing Mach. Co. v. Gidley, 28 S. D. 101, 132 N. W. 711; J. I. Case Threshing Mach. Co. v. Mattingly, 142 Ky. 581, 134 S. W. 1131; J. I. Case Threshing Mach. Co. v. Lyons, 24 Ky. L. Rep. 1862, 72 S. W. 356.

Such an order or contract for the purchase of machinery is a valid, reasonable, and enforceable contract. Fahey v. Esterly Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Reeves & Co. v. Corrigan, 3 N. D. 415, 57 N. W. 80; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; Gaar, S. & Co. v. Green, 6 N. D. 48, 68 N. W. 318; James v. Bekkedahl, 10 N. D. 120, 86 N. W. 226; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 470, 92 N. W. 826; Reeves v. Bruening, 13 N. D. 157, 100 N. W. 241; Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 798; Colean Mfg. Co. v. Feckler, 20 N. D. 188, 126 N. W. 1019; J. I. Case Threshing Mach. Co. v. Hall, 32 Tex. Civ. App. 214, 73 S. W. 835; Nichols & S. Co. v. Chase, 103 Wis. 570, 79 N. W. 772; J. I. Case Threshing Mach. Co. v. Gridley, 28 S. D. 101, 132 N. W. 711, 30 Am. & Eng. Enc. Law, 188.

Where the contract is divisible, and the warranties apply to each article covered by the contract, and it provides that a defective article may be returned if not remedied by the seller, a return of the entire outfit is not a rescission. Nichols & S. Co. v. Wiedemann, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41; Aultman & T. Co. v. Lawson, 100 Iowa, 569, 69 N. W. 865; Westbrook v. Reeves, 133 Iowa, 655, 111 N. W. 11; Northwest Thresher Co. v. Mehlhoff, 23 S. D. 476, 122 N. W. 428; Nichols & S. Co. v. Chase, 103 Wis. 570, 79 N. W. 772; Young & Conant Mfg. Co. v. Wakefield, 121 Mass. 91.

Paul Campbell, for respondents.

One who holds mere interest notes, and a mortgage securing same, the principal being represented by a separate note and mortgage, has no right to declare unearned interest due, and foreclose, by reason of any acceleration clause in such interest mortgage. Rev. Codes 1905, § 5511; Smith v. Whitley, 28 L.R.A.(N.S.) 114; Close v. Riddle, 91 Am.

St. Rep. 586; France v. Munroe, 19 L.R.A.(N.S.) 391; Davis v. Garr, 55 Am. Dec. 392; Sylvester v. Swan, 81 Am. Dec. 736; Bank of Newport v. Cook, 46 Am. St. Rep. 178.

A court cannot quiet title in a mandamus proceeding by cancelation of our certificate of redemption. 26 Cyc. 484–490; Randall v. Johnstone, 25 N. D. 284, 141 N. W. 352; Ueland v. More Bros. 22 N. D. 283, 133 N. W. 543; Luick v. Arends, 21 N. D. 614, 132 N. W. 353; Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491; Clarke v. Doyle, 17 N. D. 340, 116 N. W. 348; West v. Northern P. R. Co. 13 N. D. 221, 100 N. W. 254.

The plaintiff properly secured the certificate of redemption; the full amount required to redeem was paid to the sheriff, the proper person. A redemptioner gets no certificate of redemption. The officer has no duty to perform other than to take the money and turn it over to the person entitled to receive it. Rev. Codes 1905, § 7145.

Our rights are governed by the law existing at the time we gave the mortgage. 11 Am. & Eng. Enc. Law, 2d ed. 213, 214; 28 Am. & Eng. Enc. Law, 2d ed. 845, note 2; Cargill v. Power, 1 Mich. 369; Smith v. Green, 41 Fed. 455; 8 Cyc. 894–994.

The tender and deposit law is mandatory, and is for the protection of persons who redeem, or attempt to redeem, in case the sheriff or others refuse their money. 13 Am. & Eng. Enc. Law, 13; 27 Am. & Eng. Enc. Law, 861; Styles v. Dickey, 22 N. D. 515, 134 N. W. 702; 19 Cyc. 529, 530.

The duties of the sheriff as to the "mortgagor" who redeems from sale, and his duties as to a "redemptioner" who redeems, are distinct. To the former he issues a certificate of redemption; to the latter, his deed. The certificate is filed and recorded; the notice of redemption is only filed. Rev. Codes 1905, §§ 7142–7156.

The purpose of the law is to furnish means of redress in case the sheriff refuses the money, and declines to issue certificate. 25 Am. & Eng. Enc. Law, 2d ed. 846; Spackman v. Gross, 25 S. D. 244, 126 N. W. 389; Rev. Codes 1905, §§ 6141, 6142, 1596; Graham v. Mutual Realty Co. 22 N. D. 423, 134 N. W. 43; Throop, Pub. Off. 560; Hannah v. Chase, 4 N. D. 351, 50 Am. St. Rep. 656, 61 N. W. 18; Berthold v. Hoeman, 12 Minn. 335, Gil. 221, 93 Am. Dec. 233; North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.

(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453; Hintrager v. Mahoney, 78 Iowa, 537, 6 L.R.A. 50, 43 N. W. 552; 27 Am. & Eng. Enc. Law, 2d ed. 858; 25 Am. & Eng. Enc. Law, 2d ed. 850.

We procured and paid for the certificate in good faith; it was delivered to us, and this is sufficient to enable us to invoke equitable interposition. 25 Am. & Eng. Enc. Law, 2d ed. 779; Hintrager v. Mahoney, 78 Iowa, 537, 6 L.R.A. 50, 43 N. W. 522.

Where one in good faith attempts to redeem, and through mistake or fraud fails to comply strictly with the statute, equity will grant relief. 17 Am. & Eng. Enc. Law, 1036; Moore v. Bishop, 20 Ky. L. Rep. 1622, 49 S. W. 957; Bunting v. Haskell, 152 Cal. 426, 93 Pac. 110; 25 Am. & Eng. Enc. Law, 845; Henderson v. Harness, 184 Ill. 520, 56 N. E. 786; 27 Am. & Eng. Enc. Law, 849–858; 17 Cyc. 330; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686; Branch v. Foust, 130 Ind. 538, 30 N. E. 631; Smith v. Huntoon, 134 Ill. 24, 23 Am. St. Rep. 646, 24 N. E. 971; Paddack v. Staley, 13 Colo. App. 363, 58 Pac. 363; Benson v. Bunting, 127 Cal. 532, 59 Pac. 991; Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512; Stephenson v. Kilpatrick, 166 Mo. 262, 65 S. W. 773; Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Hintrager v. Mahoney, 78 Iowa, 537, 6 L.R.A. 50, 43 N. W. 522; McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281; Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 697; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789; Kuhnert v. Conrad, 6 N. D. 215, 69 N. W. 185; Kenmare Hard Coal, Brick & Tile Co. v. Riley, 20 N. D. 182, 126 N. W. 241.

Delivery of the notes is a conclusion of law. It does not involve mere manual possession, but requires an intent to deliver. Possession obtained by fraud, or in any wrongful manner, cannot be converted into a delivery. Rev. Codes 1905, §§ 5292–5294, 5753–6381; Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299; Ditton v. Purcell, 21 N. D. 648, 36 L.R.A.(N.S.) 149, 132 N. W. 347; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Citizens' State Bank v. Garceau, 22 N. D. 576, 134 N. W. 882; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576; Viets v. Silver, 15 N. D. 51, 106 N. W. 35; Ueland v. More Bros. 22 N. D. 283, 133

N. W. 543; McCormick Harvesting Mach. Co. v. Taylor, 5 N. D. 53, 57 Am. St. Rep. 538, 63 N. W. 890; 7 Cyc. 683–688; 20 Cyc. 22–85, note 64; 31 Cyc. 1582–1603; 8 Cyc. 38; 4 Am. & Eng. Enc. Law, 2d ed. 201–204.

There was not even a conditional delivery here. The notes were turned over with the actual intent that they would not be effective, and there was no consideration. Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717; 31 Cyc. 1217–1429; Mechem, Agency, 273, 278.

The restrictions contained in the order in question render it void as against public policy. Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575, 132 N. W. 137.

There was an oral contract under which the rig was delivered and accepted. Rev. Codes 1905, §§ 5286–5308; Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575, 132 N. W. 137; National Refining Co. v. Miller, 1 S. D. 548, 47 N. W. 962; National Cash Register Co. v. Pfister, 5 S. D. 143, 58 N. W. 270; J. L. Owens Co. v. Bemis, 22 N. D. 159, 37 L.R.A.(N.S.) 232, 133 N. W. 59; 24 Am. & Eng. Enc. Law, 1028, 1029; 35 Cyc. 50–302; A. W. Cooper Wagon & Buggy Co. v. Stedronsky Bros. Co. 24 S. D. 381, 123 N. W. 846; Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614; Reeves v. Bruening, 13 N. D. 157, 100 N. W. 241; Note to Bauman v. McManus, 10 L.R.A.(N.S.) 1139; P. J. Bowlin Liquor Co. v. Beaudoin, 15 N. D. 557, 108 N. W. 545; Minneapolis Threshing Mach. Co. v. Evans, 139 Fed. 860; Hooven & A. Co. v. Wirtz Bros. 15 N. D. 477, 107 N. W. 1078; Beiseker v. Amberson, 17 N. D. 215, 116 N. W. 94; McCormick Harvesting Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682; Rev. Codes 1905, §§ 5376–5382; Clark, Contr. 127–420; Barton v. Koon, 20 S. D. 7, 104 N. W. 521; Wisner v. Field, 15 N. D. 43, 106 N. W. 38; Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717; Haugen v. Skjervheim, 13 N. D. 616, 102 N. W. 311; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856; Benesh v. Travelers' Ins. Co. 14 N. D. 39, 103 N. W. 405; Talbot v. Boyd, 11 N. D. 81, 88 N. W. 1026; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136; Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; 35 Cyc. 126–332.

False warranties and representations, whether the contract is oral

or written, constitute fraud, and authorize rescission of contract and return of property. Rev. Codes 1905, §§ 5292–5388; Sockman v. Keim, 19 N. D. 317, 124 N. W. 64; Needham v. Halverson, 22 N. D. 594, 135 N. W. 203; J. I. Case Threshing Mach. Co. v. Erickson, 21 N. D. 478, 131 N. W. 269; 35 Cyc. 368; 30 Am. & Eng. Enc. Law, 132; Rev. Codes 1905, §§ 5287–6623; Rochford v. Barrett, 22 S. D. 83, 115 N. W. 522; Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45; Union Trust Co. v. Phillips, 7 S. D. 225, 63 N. W. 903; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; Ditton v. Purcell, 21 N. D. 648, 36 L.R.A.(N.S.) 149, 132 N. W. 347; American Case & Register Co. v. Walton & D. Co. 22 N. D. 187, 133 N. W. 309; National Cash Register Co. v. Pfister, 5 S. D. 143, 58 N. W. 270; 35 Cyc. 63–359; 9 Cyc. 474; 14 Am. & Eng. Enc. Law, 157, 158.

There was a waiver of all conditions of warranty and return, and an unperformed substituted agreement therefor. Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717; Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; Greder v. Stahl, 22 S. D. 139, 115 N. W. 1129; Houghton v. Vavrosky, 15 N. D. 308, 109 N. W. 1024; Peter v. Plano Mfg. Co. 21 S. D. 198, 110 N. W. 783; Simonson v. Jenson, 14 N. D. 417, 104 N. W. 513; Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837; Breeden v. Ætna L. Ins. Co. 23 S. D. 417, 122 N. W. 348; Fransen v. South Dakota Regents of Edu. 66 C. C. A. 174, 133 Fed. 24; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Benesh v. Travelers' Ins. Co. 14 N. D. 39, 103 N. W. 405; Lee v. Neumen, 15 S. D. 642, 91 N. W. 320; Canham v. Plano Mfg. Co. 3 N. D. 229, 55 N. W. 583; Briggs v. M. Rumely Co. 96 Iowa, 202, 64 N. W. 784; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 468, 92 N. W. 826; Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575, 132 N. W. 137; Pfeiffer v. Norman, 22 N. D. 168, 38 L.R.A.(N.S.) 891, 133 N. W. 97; Ueland v. More Bros. 22 N. D. 283, 133 N. W. 543; Fryer v. Cetnor, 6 N. D. 518, 72 N. W. 909; McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460; Rev. Codes 1905, §§ 5378–5399; 35 Cyc. 27–654; 20 Cyc. 87; 24 Am. & Eng. Enc. Law, 1100–1160; 30 Am. & Eng. Enc. Law, 132; Baskerville v. Johnson, 20 S. D. 88, 104 N. W. 913; Stine v. Foster, 23 S. D. 558, 122 N. W. 598; Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614;

Garland v. Keeler, 15 N. D. 548, 108 N. W. 484; Libby v. Barry, 15 N. D. 286, 107 N. W. 972.

Mrs. Heitsch and her land were mere sureties. Rev. Codes 1905, §§ 6099–6100; People's State Bank v. Francis, 8 N. D. 369, 79 N. W. 853; Colonial & U. S. Mortg. Co. v. Stevens, 3 N. D. 265, 55 N. W. 578; Roberts v. Roberts, 10 N. D. 533, 88 N. W. 289; State v. Mellette, 21 S. D. 404, 113 N. W. 83; Windhorst v. Bergendahl, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544; 27 Am. & Eng. Enc. Law, 2d ed. 433, 434; 32 Cyc. 22–37.

Acceleration clauses are only effective as remedies under the mortgage. They cannot be construed to make notes due, and are not effective against persons not parties. 7 Cyc. 860–861, note 59; 4 Am. & Eng. Enc. Law, 2d ed. 144; 7 Cyc. 599–628, note 92; Mallory v. West Shore Hudson River R. Co. 3 Jones & S. 174; McClelland v. Bishop, 42 Ohio St. 113; American Nat. Bank v. American Wood Paper Co. 19 R. I. 149, 29 L.R.A. 103, 61 Am. St. Rep. 746, 32 Atl. 305; White v. Miller, 52 Minn. 367, 19 L.R.A. 673, 54 N. W. 736; Trease v. Haggin, 107 Iowa, 458, 78 N. W. 58; Owings v. McKenzie, 133 Mo. 323, 40 L.R.A. 154, 33 S. W. 802.

Mrs. Heitsch is entitled to subrogation to the rights of the creditors. Rev. Codes 1905, §§ 6110–7144; Thurston v. Osborne-McMillan Elevator Co. 13 N. D. 508, 101 N. W. 892; Bingham v. Mears, 4 N. D. 437, 27 L.R.A. 257, 61 N. W. 808; Wm. Deering & Co. v. Russell, 5 N. D. 319, 65 N. W. 691; 27 Am. & Eng. Enc. Law, 202–209; 37 Cyc. 363–414.

The first instalments of the chattel mortgage constitute a first mortgage. Rev. Codes 1905, §§ 6157–7486; Borden v. McNamara, 20 N. D. 225, 127 N. W. 104, Ann. Cas. 1912C, 841; 6 Cyc. 1020; 7 Cyc. 82; 27 Cyc. 1303–1306.

The proceeds of the foreclosure of the chattel mortgage should be applied to the notes first due. These proceeds came from property to which the surety had the right to look. Note to McWhorter v. Bluthenthal, 96 Am. St. Rep. 57; Orleans County Nat. Bank v. Moore, 112 N. Y. 543, 3 L.R.A. 302, 8 Am. St. Rep. 775, 20 N. E. 357; Armstrong v. McLean, 153 N. Y. 490, 47 N. E. 912; Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129; Styles v. Dickey, 22 N. D. 515, 134 N. W.

702; Rev. Codes 1905, § 5243; 7 Cyc. 861, note, 62, 115; 27 Cyc. 1394; 30 Cyc. 1227–1252.

The conduct of appellant destroyed her said rights. Rev. Codes 1905, §§ 6092–7126; Peoples' State Bank v. Francis, 8 N. D. 369, 79 N. W. 853; 27 Am. & Eng. Enc. Law, 2d ed. 463, note 7, 464, note 1, 516–519, note 3, 520; 2 Am. & Eng. Enc. Law, 2d ed. 436–441, note 3, 442, note 5, 459–460, note 1, 461, note 2, 464; Lowe v. Reddan, 123 Wis. 90, 100 N. W. 1038, 3 Ann. Cas. 431; Thurston v. Osborne-McMillan Elevator Co. 13 N. D. 508, 101 N. W. 892; Bingham v. Mears, 4 N. D. 437, 27 L.R.A. 257, 61 N. W. 808; Crim v. Fleming, 101 Ind. 154; Pierce v. Atwood, 64 Neb. 92, 89 N. W. 669; 32 Cyc. 72–225; Anaheim Union Water Co. v. Parker, 101 Cal. 483, 35 Pac. 1048; Nelson v. Munch, 28 Minn. 314, 9 N. W. 863; Eppinger v. Kendrick, 114 Cal. 620, 46 Pac. 616; Keel v. Levy, 19 Or. 451, 24 Pac. 252; Morrison v. Citizens' Nat. Bank, 65 N. H. 253, 9 L.R.A. 282, 23 Am. St. Rep. 39, 20 Atl. 300.

The mortgage should be canceled. Rev. Codes 1905, §§ 6854–6857; Henry v. Maher, 6 N. D. 413, 71 N. W. 127; McLain v. Nurnberg, 16 N. D. 138, 112 N. W. 245.

Bruce, J. (after stating the facts as above). It is difficult for us to see how the usurious character of the mortgage can be urged by the plaintiffs in this action. The Minneapolis Threshing Machine Company had nothing to do with its making nor with its foreclosure. The usurious nature of the transaction was a matter which should have been litigated at the time of the foreclosure. If sought to be foreclosed by advertisement, the mortgagors (the plaintiffs herein) could have enjoined such foreclosure, and compelled an action in which they could have interposed the defense. If foreclosed by action in the first place, they could also have made use of the defense. This was not done. It was not until after the mortgage was foreclosed and the sheriff's certificate of sale issued to the Berwick State Bank on November 30, 1907, and the redemption had been made by the defendant Threshing Machine Company, the lienor and the holder of the third mortgage, and a certificate of redemption issued to it, that the question was ever raised. There is no proof, even, that at the time of its

redemption the defendant had any knowledge of the usurious nature of the transaction, if usurious it was. It is true that counsel for appellant denies this fact, and refers us to the record to corroborate his statement. All there is in the record, however, is the statement by Henry Heitsch that at the time of buying the threshing rig he had a talk with Mr. Wiff about the $400 mortgage and the $80 mortgage. Nothing is disclosed as to what that conversation was, and no reference whatever is made to the alleged usurious nature of the mortgage in question. The usurious nature of the transaction, then, is a matter which should have been litigated at the time of the foreclosure of the mortgage, and the matter cannot now be adjudicated. It seems, indeed, to be the established law that "where property is sold on a usurious mortgage, one who purchases at the foreclosure sale and pays his money without any notice of the usurious character of the mortgage is protected as a bona fide purchaser of the property; and the same is true where, after the foreclosure sale and before the expiration of the time of redemption, a person buys the interest or estate of the mortgagee who bid in the property at such sale." Holmes v. State Bank, 53 Minn. 350, 55 N. W. 555; McNeill v. Riddle, 66 N. C. 290.

There seems to be no question as to the regularity of these foreclosure proceedings, nor that the plaintiffs were properly served and had notice thereof. The presumption is that they had notice. Bailey v. Hendrickson, 25 N. D. 500, 143 N. W. 134.

Even if not a subsequent lienor and entitled to redeem as such, the defendant was at any rate an assignee for value of the sheriff's certificate. On no theory of agency can the sheriff be said to have been authorized to waive the payment of the taxes, or to postpone the payment of the same. We held in the case of North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453, that "the sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive the redemption money, but is not such an agent as can bind his principal to accept a check, instead of money from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner."

From this analogy it is perfectly clear that the sheriff in this case,

if an agent of the Minneapolis Threshing Machine Company at all, was an agent with limited authority merely, and was only authorized to receive the redemption money and to issue the certificate, provided that the redemption was made in compliance with the statute, and that the amount paid covered the taxes as well as the principal debt. It is well established that an agent to collect has no authority to accept less than the principal debt, nor to compromise the claim, or to allow any extensions thereon. See North Dakota Horse & Cattle Co. v. Serumgard, supra. These facts the Heitschs were bound to know, as the right and form of redemption is strictly limited and defined by the statute. They must have known that the sheriff was a statutory agent who exercised a limited authority. It is well established that a principal is not bound by the unauthorized acts of an agent which are not ratified by him, and where the lack of authority is known or should be known to the third party. The issuance of the certificate in this case was therefore in no way binding upon the defendant and appellant.

There is clearly no merit in respondents' contention that they were and should be excused from tendering the taxes and interest due because the notice of the payment and lien was not *filed* with the register of deeds as required by § 7142, Rev. Codes 1905, § 7756, Compiled Laws of 1913, which provides that, "written notice of redemption must be given to the sheriff, and a duplicate filed with the register of deeds of the county; and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the register of deeds; and if such notice is not *filed,* the property may be redeemed without paying such tax, assessment, or lien."

The evidence shows that the notices were duly and seasonably recorded. This we believe was sufficient. The notices were recorded in February, 1908. In 1907 the legislature specifically enacted that such notices should be *recorded* rather than filed. See chapter 127, Laws of 1907. The act of 1907 was in force at the time of the attempted redemption in this case, and was applicable thereto. It repealed all acts and parts of acts in conflict with its provisions, and in this way

amended § 7142, Rev. Codes 1905, and changed the remedy of the redemptioner, the appellant herein. The amended statute in no way impaired the obligation of the contract of the mortgagor, or deprived him of property without due process of law. No person has a vested interest in any particular remedy, the exercise of which does not deprive him of any substantial right. To require a notice by a redemptioner or purchaser of taxes and interest paid to be recorded, and not merely filed, can hardly be said to be the deprivation of a substantial right, or an impairment of the obligation of its contract. Craig v. Herzman, 9 N. D. 140, 144, 81 N. W. 288; Orvik v. Casselman, 15 N. D. 34, 105 N. W. 1105; Scott v. District Ct. 15 N. D. 259, 107 N. W. 61; Jack v. Cold, 114 Iowa, 349, 86 N. W. 374; Strand v. Griffith, 63 Wash. 334, 115 Pac. 512; State ex rel. National Bond & Secur. Co. v. Krahmer, 105 Minn. 422, 21 L.R.A.(N.S.) 157, 117 N. W. 780; Webb v. Lewis, 45 Minn. 285, 47 N. W. 803; Northwestern Mut. L. Ins. Co. v. Neeves, 46 Wis. 147, 49 N. W. 832; Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515.

Nor can it be claimed that the plaintiffs were misled in the case before us. On November 29th, 1908, Mrs. Heitsch signed and delivered to her husband to take to Towner, a redemption notice which, among other things, stated that she was redeeming from the redemption of the appellants, and in which she recopied the notice of appellant, which contained the following words: "Together with all *taxes and assessments* . . . as set forth in certain *affidavits and notices* served upon you by the redemptioner of said property, the Minneapolis Threshing Machine Company, and filed in the office of the register of deeds of McHenry county, North Dakota, on the 24th day of February, 1908, *which said notice was recorded* in Book 198 of Mortgages, at page 459 thereof."

It is perfectly clear also that her husband, Henry Heitsch, who acted as her agent in the proposed redemption, was fully aware of the taxes and of the lien thereof, and this, if not before the receipt of the certificate, at any rate on the day thereof and before he left Towner. Campbell, his lawyer, testified: "I personally wrote on the back of Ex. 45 (Anna Heitsch's notice of redemption) the words appearing there in pencil, 'pay no more than due on sale $111.02 and 12 per

cent interest and *taxes and assessments.* Pay no other liens or mortgages,'—and *called Heitsch's attention to this notation, and told him to show it to the sheriff."* Heitsch testifies that he not only showed the notation to the sheriff, but "told him about the taxes. . . . Sometimes he (the sheriff) said it would be all right to pay the taxes afterwards, and sometimes he said maybe it ought to be paid then, he and the lawyers up there didn't seem to know. The sheriff said he didn't have anything to do with them. . . . I had talked about taxes before I went to get that money in the morning. The sheriff said he didn't have nothing to do with the taxes that he knew of; he said all that he had anything to do with was the $125.35, and $1 was his, and I went to the bank and drew this money. . . . Mr. Campbell told me to pay the sheriff what he asked on the foreclosure, and also wrote it down so I wouldn't forget, and *taxes and interest* and no more. . . . I and the sheriff, from around shortly after 9:00 o'clock until 2:00 o'clock that day, were getting copies of the papers and going to see lawyers and *seeing about the taxes.* . . . *Mr. Javnager* told me that he thought it was necessary to pay the taxes at that time, and then at times he told me it was all right if I paid them afterwards. *I believe he told me that the Minneapolis Threshing Machine Company had paid some taxes.* He told me he had nothing to do with it, that the land was safe and I could pay this afterwards. I went *to see Mr. Christianson about the taxes.* Mr. Christianson did not tell me that it wouldn't be a redemption unless I paid the taxes, not in those words. He told me it would be all right if I paid them afterwards. . . . I remember phoning to Mr. Campbell, I think it was in the forenoon sometime. At the time I talked with Mr. Campbell *I did not have the certificate of redemption.* I wouldn't be certain that I said that I had the certificate at the time I phoned to Mr. Campbell. I think Campbell told me that if the sheriff wanted that money, that it was all right or something to that effect; that the taxes or anything could be sent to them later on."

We cannot, indeed, read the whole testimony without being thoroughly convinced that the version of the sheriff is the correct one, that the Heitschs knew of the taxes, and merely failed to pay the same because they were short of funds, and that after arguing with Heitsch for half

a day, and giving him a chance to consult lawyers, he grew tired of the controversy and issue the certificate. It is quite noticeable, indeed, that though Mr. Christianson and Mr. Donnelly were both admittedly consulted by Mr. Heitsch while at Towner, neither Mr. Christianson nor Mr. Donnelly were called as witnesses by the plaintiffs, and, though Mr. Donnelly was called by the defendant, the plaintiff objected, on the ground of professional connections, to all evidence of the advice given. Mr. Donnelly, however, did testify that the sheriff told him over the phone that "there was not enough money to pay the amount required *and the taxes.*"

The question, then, is simply this, Can a sheriff bind a prior redemptioner or purchaser on a foreclosure sale by a certificate of redemption which he issues without authority from the purchaser or prior redemptioner, and without having first received the full sum which is required to be paid, and where both he and the last would-be-redemptioner know of the shortage? and when such is done, may the last redemptioner compel the purchaser or prior redemptioner to accept the balance after the time for redemption has expired? We think not.

In view of our conclusion that the defendants failed to redeem from the foreclosure of the mortgage to the Berwick State Bank, and that the title to such land vested in the defendant Minneapolis Threshing Machine Company on the failure to so redeem, and the fact that the said defendant has only asked for a foreclosure of its other liens and for a deficiency judgment in case the first relief prayed for is not granted and the land quieted in it, it is unnecessary to pass upon the validity of the other liens which are herein asserted.

The judgment of the District Court will be reversed, and judgment entered confirming and quieting the title of the said Minneapolis Threshing Machine Company in and to the lands described in the plaintiffs' complaint herein, and awarding to said defendant the costs of the action. Plaintiffs and respondents will also pay the costs and disbursements of this appeal.

MOREAU LUMBER COMPANY, a Corporation, v. JAMES B. JOHNSON.

(— L.R.A. —, 150 N. W. 563.)

Plaintiff sold defendant building material used in construction of buildings upon an unproven government homestead. Within ninety days after furnishing said material, defendant filed his petition in voluntary bankruptcy in the Federal court, and was adjudged a bankrupt. The amount owing for such building materials was scheduled among his debts. Thereafter, and ninety-three days after furnishing the last item of materials, plaintiff filed its mechanics' lien on the buildings. Subsequently defendant was discharged in bankruptcy. He pleads it as his only defense. *Held:*

Bankruptcy — filing of petition — adjudication — mechanics' lien — inchoate right — statement for lien.

1. The filing of the petition and adjudication of bankruptcy did not defeat the right of plaintiff to, subsequently and after the expiration of the ninety-day period, perfect its inchoate mechanics' lien by the filing of a lien statement.

Trustee in bankruptcy — rights of — subordinate to right of mechanics' lien — right to file — property right — may file after period.

2. Any rights of the trustee in bankruptcy, or defendant under such trustee are subordinate to the prior rights of plaintiff under his mechanics' lien, the right to file which, at the time of the institution of bankruptcy proceedings, was a property right in plaintiff, and was not thus devested, and did not subsequently lapse or become defeated by the mere expiration of the ninety-day period, but, instead, is by the terms of the statute saved to plaintiff; and it may thereafter perfect and perpetuate its lien by filing its lien statement, and after the doing of which the lien remains a prior lien to any right acquired by the trustee, or that subsequently acquired by the bankrupt.

Foreclosure of lien — proceeds — application of — deficiency judgment — lien debt — sale of property — after — not allowed.

3. Judgment in foreclosure is awarded that the property may be sold and the proceeds applied in payment of the amount secured by the lien, with

Note.—The few cases which have passed upon the question of the effect of a discharge in bankruptcy on a mechanics' lien, which are collated in a note in 42 L.R.A.(N.S.) 296, are in harmony with the holding in MOREAU LUMBER CO. v. JOHNSON.

costs, but no deficiency judgment as on the lien debt will be entered against defendant after sale of the property.

Opinion filed December 12, 1914.

Appeal from the District Court of Hettinger County, *Crawford,* Judge.

Reversed. Judgment directed.

Charles Simon and *James M. Brown,* for appellant.

This is an action *in rem* and no personal judgment against defendant is sought. Plaintiff had the right to claim and file its statement for mechanics' lien, even after defendant had been adjudged a bankrupt. Its lien was superior to any claim of the trustee in bankruptcy. First International Bank v. Lee, 25 N. D. 197, 141 N. W. 716; Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243.

The failure to file the lien within the ninety-day period does not defeat the right to claim and file the lien, so long as the person who bought and used the materials continues to be the owner of the property where they were used by him. Rev. Codes 1905, § 6240; Robertson Lumber Co. v. State Bank, 14 N. D. 511, 105 N. W. 719.

The right to a mechanics' lien is a property right. It existed from the making of the contract and delivery of the materials. Mattley v. Wolfe, 175 Fed. 619; Collier, Bankr. 7th ed. 762; Remington, Bankr. § 1154.

The trustee takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of his petition, subject to all valid claims, liens, and equities. Zartman v. First Nat. Bank, 216 U. S. 134, 54 L. ed. 418, 30 Sup. Ct. Rep. 368; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Re MacDougall, 175 Fed. 400; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

He is never a purchaser or encumbrancer in good faith and for value, whose rights accrued after the ninety days and before the lien was filed. John P. Kane Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Security Warehousing Co. v. Hand, 206 U. S.

415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 Ann. Cas. 789; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; Re Hersey, 171 Fed. 1004; Collier, Bankr. 9th ed. 944, 945; Remington, Bankr. §§ 1154 and 1155, pp. 681, 682; Re Grissler, 69 C. C. A. 406, 136 Fed. 754; Re Robinson, 83 C. C. A. 121, 154 Fed. 343; Re Emslie, 42 C. C. A. 350, 102 Fed. 292.

A. C. Lacy and *Edgar E. Sharp,* for respondent.

Pleadings should be liberally construed with a view to substantial justice. Rev. Codes 1905, § 6869.

The trustee must be treated as an encumbrancer in good faith and for value from the date of the adjudication in bankruptcy. Teller v. Hill, 18 Colo. App. 509, 72 Pac. 811; Kelsey v. Remer, 43 Conn. 129, 21 Am. Rep. 638.

The act, by the amendment, is given the same force as the seizure of the property under execution or attachment by a creditor, and cannot be given any retroactive effect. Arctic Ice Mach. Co. v. Armstrong County Trust Co. 112 C. C. A. 458, 192 Fed. 114; Hart v. Emerson-Brantingham Co. 203 Fed. 60; Re Nuckols, 201 Fed. 437; Re Farmers' Supply Co. 196 Fed. 990; Re Dancy Hardware & Furniture Co. 198 Fed. 336.

By failing to file the statement within the ninety days they waived their right to claim the lien. Bastien v. Barras, 10 N. D. 29, 84 N. W. 559.

A petition in bankruptcy is a caveat to all the world, and is, in effect, an attachment or injunction. Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269.

Goss, J. This is an action to foreclose a mechanics' lien for $625.18, interest and costs. The material was sold to a homestead entryman, and used in the construction of a dwelling house and granary upon his unproven government homestead entry in Hettinger county. Final proof has not been made. The last item of material was furnished July 27, 1910. The statutory ninety-day period for filing lien as against subsequent purchasers and encumbrancers without notice expired October 25, 1910. Prior thereto, and on October 19, defendant filed in the district court of the United States for the district of North Dakota his petition in voluntary bankruptcy, and was forthwith ad-

judged a bankrupt. Nine days later, and on October 28, and ninety-three days after the last item of materials had been furnished, plaintiff filed its mechanics' lien statement. Subsequently defendant was granted a discharge in bankruptcy in the usual form. The answer admits the sale and the debt owing plaintiff when the petition in bankruptcy was filed, but pleads that the "debt was duly listed and scheduled in said petition, and that the same was discharged by the discharge in bankruptcy." Such alleged defense was upheld as sufficient, and plaintiff appeals.

Admittedly the adjudication in bankruptcy, and likewise the discharge, would not have affected this lien had it been perfected. A mechanics' lien comes within "the exception clause (D) of § 70, bankruptcy act, which provides that 'liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof is necessary in order to impart notice, shall not be affected by this act.'" Remington, Bankr. § 1155. To the same effect, see Collier on Bankruptcy, page 944. Against bankruptcy proceedings, as well as any purchaser or encumbrancer under the express and explicit terms of § 6820, Comp. Laws 1913, plaintiff had ninety days, or up to and including October 25, 1910, within which to file its lien statement. It had years if necessary, within which to file such statement of lien as against this defendant, the purchaser of the materials and owner of the buildings. "The filing of it within ninety days after the materials are furnished makes the lien effective as against everyone acquiring rights [during said period] in the land or building. If filed after said ninety days the lien is still preserved intact except as to those in good faith acquiring rights to the property after the ninety days and before the lien is filed." As stated in Robertson Lumber Co. v. State Bank, 14 N. D. 511, at page 515, 105 N. W. 719; Wisconsin Trust Co. v. Robinson & C. Co. (C. C. A. 8th C.) 15 C. C. A. 668, 32 U. S. App. 435, 68 Fed. 778, and recited in Robinson Lumber Co. v. State Bank, the language of the statute is plain, and "no argument or exposition can make the purpose or effect of the provision of the statute clearer than their own words." "The statute expressly declares that 'a failure to file the same within the time aforesaid shall not defeat the lien except against purchasers or encumbrancers in good faith without notice, whose

rights accrued after the ninety days and before any claim for the lien is filed.'" See also First Nat. Bank v. Warner, 17 N. D. 76, pages 82, 83, 114 N. W. 1085, 17 Ann. Cas. 213, on the final clause of this § 6820, Comp. Laws 1913, enforcing literally the concluding proviso of this statute, reading, "or against the owner except the amount paid to the contractor after the expiration of the ninety days and before the filing of the same." It is only after the expiration of the ninety-day period that rights can attach superior to the right of plaintiff to its inchoate lien upon delivery of material. Plaintiff had a right to a lien, which in itself was a property right, and which even the subsequent repeal of the statute could neither defeat nor impair. Craig v. Herzman, 9 N. D. 140, 81 N. W. 288. Hence, when defendant's petition in bankruptcy was filed, assuming that a trustee was appointed and took charge of the property,—an assumption beyond the pleadings or the stipulation of facts,—and assuming, again, that such trustee would not stand in the shoes of the plaintiff, but be in the position of a good faith creditor (a question of law assumed and not decided), nevertheless, such trustee's assumed rights would even then attach during the ninety-day period, and therefore be subordinate to the property right of plaintiff. Under the statute, the rights of the trustee thus accruing before the expiration of the ninety days are excluded from those to whom priority under the lien subsequently filed is saved by the statute. Conversely, by the express terms of the statute it is only those purchasers or encumbrancers in good faith "whose rights accrue after the ninety days and before any claim for a lien is filed," who can defeat the lien or have priority over it. Such is the construction of the circuit court of appeals of this district upon this identical statute under exactly these circumstances, in 68 Fed. 778. The statute is so plain as to be susceptible of but one interpretation; *viz.*, to defeat priority of a mechanics' lien filed after the ninety-day period the property rights of the third party must accrue more than ninety days after the furnishing of the last item of materials and before the lien is filed. During the ninety-day lien period the statute, together with the buildings or improvements, are alone sufficient to constitute notice that a mechanics' lien may be claimed during said period and subsequently be perfected according to law. As is said in Remington on Bankruptcy, § 1155, "a mechanics' lien arises by operation of law

and, according to the law of . . . [Missouri], if not all of the states, begins with the first stone laid, the first nail driven, or the first load of material dumped on the premises. It grows as the edifice grows, and expands with the development of the work. It is there in an inchoate form from the beginning." And "even if the bankruptcy of the owner occurs before the lien affidavit is filed, the lien is not affected so long as the affidavit is filed at some time within the statutory period for filing, although after the adjudication of bankruptcy; for the filing of the affidavit does not create the lien,—it simply prolongs it." Section 1155. See also Collier on Bankruptcy, page 945: "It seems even that such a (mechanics') lien may be perfected after bankruptcy."

But there is no proof that a trustee was appointed, or ever assumed authority over the property, or asserted any rights to it. The case stands no differently than if there had never been bankruptcy proceedings taken except as to the debt independent of the lien, which debt is discharged. The taking of a deficiency judgment over the proceeds of the sale under mechanics' lien foreclosure against defendant is thus prevented. The bankruptcy discharges the debt, not in a sense that the debt is paid or satisfied, but only that it is uncollectable by legal process. It still has life to furnish consideration for the lien, or for any valid contract that may thereafter be entered into concerning it. And the lien is preserved by force of the statute exempting it from being effected. Adam v. McClintock, 21 N. D. 493, 131 N. W. 394; John Leslie Paper Co. v. Wheeler, 23 N. D. 477, 42 L.R.A.(N.S.) 292, 137 N. W. 412; Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243; Lown v. Casselman, 25 N. D. 44, 141 N. W. 73.

The proceedings in bankruptcy therefore could not impair plaintiff's right to perfect his lien; that was property, and paramount as such to any rights obtainable by the trustee in bankruptcy, whose rights accrued during the ninety-day statutory period within which plaintiff might have perpetuated his lien by filing a lien statement. The burden is upon the defendant to establish facts to defeat the lien, and he has failed to show that anything affecting it has been done; the plaintiff is entitled under § 6824, Comp. Laws 1913, to a lien on these buildings, although upon unproven government land held under homestead entry.

It is therefore ordered that the judgment appealed from be reversed, and foreclosure awarded as prayed for in the complaint. No deficiency judgment, however, will be taken against defendant.

HERBERT C. KETCHUM v. ZEELAND MERCANTILE COMPANY, a Corporation.

(150 N. W. 453.)

Action for specific performance — trial de novo — corporation — treasurer — authority to contract.

Upon a trial de novo, in an action for specific performance of a contract to sell real estate, performed by the plaintiff, evidence is examined, and it is held sufficient to authorize a judgment for specific performance; also that the contract was binding upon the corporation defendant under both actual and ostensible authority in the treasurer to enter into and partially perform the same, as was done; that the statute of frauds is of no avail as a defense.

Opinion filed December 12, 1914.

From a judgment of the District Court of McIntosh County, *Allen*, J., defendant appeals.

Affirmed.

Hugo P. Remington, for appellant.

It must clearly appear that the officer of a corporation who executes a contract for the sale of land has authority to do so. Such does not appear in this case, and there was no valid contract. Ballou v. Bergvendsen, 9 N. D. 285, 83 N. W. 10.

There was no ratification, and consequently there can be no estoppel. Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047; Fargo v. Cravens, 9 S. D. 646, 70 N. W. 1053.

Franz Shubeck, for respondent.

There was a valid contract in this case. Letters, notes, and memoranda passed between the parties, referring to the identical land, may be sufficient to constitute a contract. Townsend v. Kennedy, 6 S. D. 47, 60 N. W. 164.

When one holds another out to the world as his agent, the question is not what authority was intended to be given the agent, but, rather, what authority third persons dealing with him were justified in believing him to have, from all the acts of the principal. Aldrich v. Wilmarth, 3 S. D. 523, 54 N. W. 811; 9 Cyc. 511.

A voluntary acceptance of the benefits resulting from the acts of the

agent is a consent to all the obligations arising from it, so far as the facts are known or ought to be known by the principal. Work v. Cowhick, 81 Ill. 317; Dedrick v. Ormsby Land & Mortg. Co. 12 S. D. 59, 80 N. W. 153.

A principal cannot avail himself of the benefit of the unauthorized acts of his agent, and repudiate obligations created. Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837; Chase v. Redfield Creamery Co. 12 S. D. 529, 81 N. W. 951; Mitchell v. Knudtson Land Co. 19 N. D. 736, 124 N. W. 950.

The contract deposited with the attorney for delivery operated as an escrow. 3 Words & Phrases, 2464; Shep. Touch. 7th ed. 59; Bowker v. Burdekin, 11 Mees. & W. 147, 12 L. J. Exch. N. S. 329, 8 Eng. Rul. Cas. 599; Millership v. Brookes, 5 Hurlst. & N. 797, 29 L. J. Exch. N. S. 369; Whelan v. Palmer, 58 L. T. N. S. 937, L. R. 39 Ch. Div. 648, 57 L. J. Ch. N. S. 784, 36 Week. Rep. 587; Naylor v. Stene, 96 Minn. 57, 104 N. W. 685; Stitt v. Rat Portage Lumber Co. 96 Minn. 27, 104 N. W. 561.

Part performance of an oral contract for the sale of land, which performance is of benefit and is accepted by the other party, is sufficient to take the case out of the statute of frauds. Stewart v. Tomlinson, 21 S. D. 337, 112 N. W. 849; Mitchell v. Knudtson Land Co. 19 N. D. 736, 124 N. W. 947; Reed v. Coughran, 21 S. D. 257, 111 N. W. 559; Naylor v. Stene, 96 Minn. 57, 104 N. W. 685; Fairbanks v. Meyers, 98 Ind. 92; Bean v. Clark, 30 Fed. 225; Russell v. Freer, 56 N. Y. 67; Whitaker v. Richards, 134 Pa. 191, 7 L.R.A. 749, 19 Am. St. Rep. 684, 91 Atl. 501; Street v. Chapman, 29 Ind. 142; Ballou v. Bergvendsen, 9 N. D. 285, 83 N. W. 10.

There is an equitable estoppel against the defendant. It is bound by its acceptance of benefits under the contract. It is guilty of laches in asserting its so-called claims, and in not having the sale set aside. New Orleans Nat. Bkg. Asso. v. Le Breton, 120 U. S. 765, 774, 30 L. ed. 821, 824, 7 Sup. Ct. Rep. 772; French v. Powers, 120 N. Y. 128, 24 N. E. 296; Martin v. Gray, 142 U. S. 236, 35 L. ed. 997, 12 Sup. Ct. Rep. 186; McBride v. Gwynn, 33 Fed. 402; Terbell v. Lee, 40 Fed. 40; Ex parte Branch Sons, 53 Ala. 140; 35 Century Dig. col. 2506; Walker v. Schum, 42 Ill. 462; Leonard v. Taylor, 12 Mich. 398; Lockwood v. McGuire, 57 How. Pr. 266; Babcock v. Perry, 8

Wis. 277; Meehan v. Blodgett, 86 Wis. 511, 57 N. W. 291; Kessler v. Ensley Land Co. 123 Fed. 546.

A person who knowingly stands by and sees, and by his silence permits, another to deal with his property as though he were its owner, to the injury and detriment of another who is innocent, is bound by it. 2 Pom. Eq. 3d ed. § 818; Michigan Paneling Mach. & Mfg. Co. v. Parsell, 38 Mich. 475; Hanner v. Moulton, 138 U. S. 486, 34 L. ed. 1032, 11 Sup. Ct. Rep. 408; Alabama G. S. R. Co. v. South & North Ala. R. Co. 84 Ala. 570, 5 Am. St. Rep. 401, 3 So. 286; Lindsay v. Cooper, 94 Ala. 170, 16 L.R.A. 813, 33 Am. St. Rep. 105, 11 So. 325; 2 Pom. Eq. 3d ed. cases cited in notes 2 and at p. 1451; Cases cited in note to Hagan v. Ellis, 63 Am. St. Rep. 173; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35.

Goss, J. Suit in equity to compel specific performance of an alleged oral contract to convey real estate, performed on the part of the purchaser, the plaintiff. Title is in defendant. The answer is a general denial. The property is a village lot, alleged to have been sold plaintiff by defendant corporation for a consideration of $75. Part of a livery barn subsequently has been built on the lot, and balance fenced. Defendant relies upon an alleged want of authority of its officials to sell this real estate, and also upon the statute of frauds.

It is established, by at least a preponderance of the evidence, that the treasurer of defendant, one Lew Feinstein, also shown to be ostensibly the active manager of defendant, sold this lot to plaintiff in behalf of the corporation. Several hundred dollars' worth of personal property was sold at the same time with the lot and as a part of the same transaction, and upon the sale of which a part payment of $25 was made. This payment was made by a check in evidence, the receipt of the proceeds of which by defendant is uncontroverted. The evidence is sufficient to sustain the trial court's finding that a written receipt was also then given plaintiff by said corporation, "which receipt stated upon its face that it was received in part payment upon said lot, and that said receipt had been lost."

The defendant was in the mercantile business at Zeeland. Its minutes and by-laws disclose Lew Feinstein to have been its treasurer, and his mother, Sarah Feinstein, its president and manager, at all times in

question; that the board of directors had the "general charge, control, and supervision of the business of said corporation;" that the treasurer and his father and mother were majority shareholders, holding two thirds of the corporate stock. The three Feinsteins constituted the majority of the board of directors. Both the president and general manager, the mother, and the son admittedly were present when the deal was made, and both had knowledge of the receipt of the initial payment thereon, although the mother seeks to disclaim knowledge, and charged that her son acted without authority. The circumstances strongly refute her contention. A statement of account rendered by the corporation to plaintiff is in evidence. One of the items therein charged against plaintiff, along with the personal property then sold, and other various items of merchandise later sold and delivered him, is "lot, $75." It shows total payments of $503, and debits in which the lot item is included, of $645. All credits, excepting $169, was paid at or after the charge made on the books for the lot. Defendant's books of account show the same charges and credits. It is admitted that plaintiff's promissory note for the $142, balance due, was taken by defendant, upon which plaintiff afterward paid $35. The lot sale was made October 14th, and the note closing balance of account was given in March following. Next August plaintiff notified defendant that he was ready to pay the balance of the note, $123, as soon as defendant could deliver him a deed to the lot. Both Feinstein and plaintiff then went to the village banker, the former taking defendant's deed along with him. The banker notified them of the fact that the defendant corporation did not own the lot, and could not give title by its deed, and that the title was outstanding in one Borofsky. Plaintiff had on deposit the amount of the note, and he then issued his check for said amount, running to the defendant, and delivered it to the banker, who, in the presence of both Feinstein and plaintiff, made the following memorandum of agreement as there entered into between plaintiff and defendant, the latter acting by its said treasurer. "This is to certify that Herbert C. Ketchum has this day deposited the sum of $123.75, to be paid to the Zeeland Mercantile Company as soon as clear title to lot No. 5 in block No. 5, in the town of Zeeland is furnished. Also a receipt in full for all indebtedness to the above stated incorporation to date. The attached check and note is to bind each party to fulfil the

above obligation." Defendant was given a copy of this agreement. Both parties fully agreed to said conditions. Feinstein, in defendant's behalf, delivered up plaintiff's note, and it and check were attached to this memorandum agreement, and left in the banker's hands August 15th. During the previous fall, plaintiff had built a portion of a livery barn on said premises, and made other valuable improvements thereon. The lot was only about 100 feet from the defendant's place of business. On cross-examination, treasurer fails to satisfactorily explain why, if defendant's contention be correct, he caused this memorandum agreement to be made; and why he went with plaintiff to the bank, admittedly taking with him a deed to this property and plaintiff's note to defendant; or why the corporation books, and also the account as rendered as above to plaintiff, each and all evidence a sale of the property. Admittedly, too, the defendant, soon after August 15th, procured the outstanding title, apparently to convey the lot to plaintiff in performance of the contract. These circumstances amply support plaintiff's straightforward testimony, while the testimony of the defense is probably false, and always evasive and unsatisfactory. About this time, too, and concededly *after the transaction at the bank,* plaintiff's brother contested the homestead entry of Lew Feinstein. Immediately trouble began, and this lawsuit was in embryo. Although the treasurer and the other members of the corporation have endeavored to find some defense, it is transparently clear that this contest is the cause of this litigation, and until then no thought of refusal to convey this lot to plaintiff had ever been entertained by defendant's managing officers. The actions of the parties, the books of account, the written note and memorandum referred to, the knowledge of all the officers of the corporation, of its books, and all these transactions, including the many payments made, final settlement by note, the fact that the sale of the lot was made by the treasurer, with his mother, the manager and president of the corporation, present, with the father and one other director, the secretary, assisting in running the corporation business; and with knowledge in all of them that within thirty days after the initial payment had been made on the lot, plaintiff had assumed control and started to build thereon, and occupied it for nearly a year, as well as the total failure of the defense on facts,—all lead to the only conclusion possible under the evidence, and that is, that the defense is utterly without

merit. These facts render needless any extended discussion of the statute of frauds. The initial payment, subsequent payments, attempted performance by defendant, and the memorandum agreement, and performance thereunder, take the case from under the operation of that statute. As to the authority of the corporation to sell real estate, the corporate by-laws in evidence disclose who are the officers, directors, and managing officials, and establish actual authority in the president and treasurer to do in its behalf all they have done. The facts as to ostensible authority, including the plaintiff's proof thereon, not recited, also would be ample to support findings as to ostensible authority and bind the corporation on that score. Then, again, defendant is estopped to deny said contract, or question the authority of its officials acting for it, as it is retaining a portion, if not all, of the proceeds of the sale of this lot, when the whole record is considered, besides having allowed plaintiff to spend many times the price of the lot on the improvements thereon, all with full knowledge of the source of plaintiff's claims of ownership therein. The decision of the trial court is in all things affirmed. Respondent will recover costs on this appeal.

S. J. SORG et al. v. JAKOB BROST.

(150 N. W. 455.)

Machinery — sale of — warranty — breach of — defense — contract avoided.

1. Action for recovery of machinery sold by the plaintiff manufacturer to defendant dealer. The defenses are breach of written warranties avoiding executory contract of sale. *Held:* From the proof the property delivered was so defective in manufacture that it would not do the work for which it was manufactured and intended as warranted.

Verdict — directing — judgment.

2. As a verdict could have been directed for defendant on such ground, all errors assigned on proof and instructions are nonprejudicial, and the verdict for defendant should not be disturbed.

Opinion filed December 19, 1914.

An appeal from a judgment of the District Court of McLean County; *Hon. W. H. Winchester,* J.

Affirmed.

A. C. Lacy, for appellants.

The allegations are wholly insufficient to constitute a breach of warranty. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903; Esterly Harvesting Mach. Co. v. Berg, 52 Neb. 147, 71 N. W. 952; Hooven & Allison Co. v. Wirtz Bros. 15 N. D. 477, 107 N. W. 1078.

Allegations to the effect that the machinery was not constructed of proper materials, and that it would not work to the satisfaction of defendant's customers, are insufficient to show breach of warranty. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903; Esterly Harvesting Mach. Co. v. Berg, 52 Neb. 147, 71 N. W. 952.

Sufficient foundation for the introduction in evidence of letters purporting to have been written from defendant's business place, on his stationery, is laid when proof of authority to write the letters is made. Armstrong v. Advance Thresher Co. 5 S. D. 12, 57 N. W. 1131.

Mere statements of opinion as to the materials and workmanship of machinery, as contained in the amended answer, do not constitute a breach of warranty. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903; Hooven & Allison Co. v. Wirtz Bros. 15 N. D. 477, 107 N. W. 1078.

There is no evidence of compliance with the conditions of the warranty. Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

There is no evidence of defects sufficient to show breach of warranty, nor is the defendant in any position, by the showing made, to claim any breach of warranty. No compliance with the terms of the contract. J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 590, 63 N. W. 1013; 22 Enc. Pl. & Pr. 44; Watson v. Roode, 30 Neb. 264, 46 N. W. 491; Evans v. Schriver Laundry Co. 57 Ill. App. 150.

There is an express warranty in writing. It shows the conditions of same. Therefore no implied warranty can be considered. McQuaid v. Ross, 77 Wis. 470, 46 N. W. 892; Smith v. Evans, 13 Neb. 314, 14 N. W. 406; J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 590, 63 N. W. 1013.

The evidence as to the six drills is entirely insufficient to show any breach of warranty. J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 590, 63 N. W. 1013.

James T. McCulloch, for respondent.

The authority vested in the courts to allow amendments to pleadings is conferred to promote the ends of justice, and the rule should be literally construed. Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003; Webb v. Wegley, 19 N. D. 606, 125 N. W. 562.

Goss, J. This action is brought for the purchase price of farm machinery, sold by the plaintiff manufacturer to the defendant dealer, under the usual written machinery order and warranty. The defense is breach of warranties, and because thereof a rescission of the executory contract of sale. The written contract contains the usual reservation of title in plaintiffs until full payment. The machinery in dispute consists of seven drills delivered defendant in the spring of 1907, only one of which was resold.

There are sixty-five different assignments of error in the brief. It is unnecessary to discuss many of them. Decision necessitates consideration of but three general questions: (1) Did the trial court err in permitting amendments of the answer? (2) If not, did the answer as amended set forth a defense grounded on breach of warranties? and (3) If so, does a breach of warranty relied on stand admitted, rendering all errors assigned nonprejudicial?

The first two may be treated together, for the better understanding of both. The written order and warranty are made a part of the complaint. The warranty reads: "All goods sold on this contract are purchased and sold subject to the following warranty and agreement, which is made a part of the contract. Any machine of our make is guaranteed 'to do good and efficient work for which it is intended when properly operated.'" No other warranty or qualification thereof is contained in the written contract. The original answer before amendment stated that the drills "were never accepted by defendant, for the reason that the same were not made and constructed of material to do the work for which they were intended, in this, that the castings were of inferior material, and the construction and material were such that said drills did not work to the satisfaction of defendant's customers; that the shoe was not properly thereon, and other defects which rendered said drills worthless and of no value whatever to this defendant in his trade; that defendant did all in his power to remedy the defects in said

machinery to enable him to sell and dispose of same, but was unable to make said drills do the work for which they were intended on account of said defects and defective materials of which they were constructed." This may not charge a breach of warranty in the specific terms in which the warranty was made, but plaintiff has raised this question only by objections to testimony. The pleading is not to be examined, as it would be under demurrer to the pleading, instead of to the evidence. With all reasonable intendments taken in favor of the pleading, the same must be held to shadow forth a defense for breach of the written warranty, which warranty is pleaded in plaintiff's complaint as the one under which the goods were sold. In the counterclaim, a sufficient breach of warranty is pleaded in these words: "That said grain drills . . . were constructed of inferior material and defectively constructed, so that they were entirely unfit for the purpose for which they were intended." This is a suit by the manufacturers. They have expressly warranted that which, when not expressly negatived by contract of sale, would be impliedly warranted by law. Comp. Laws 1913, § 5980. Defendant has pleaded a breach of this warranty, and also a breach of the manufacturer's warranty against the latent defects in manufacture, also implied by law under § 5979, Comp. Laws 1913, unless negatived by the express provisions of the contract of sale. The authorities cited under these sections of our 1913 Code, fully sustain our conclusions. Consult notes in 33 L.R.A.(N.S.) 508; 27 L.R.A.(N.S.) 914 and 925; 29 L.R.A.(N.S.) 139; 15 L.R.A.(N.S.) 868; 31 L.R.A.(N.S.) 783; 34 L.R.A.(N.S.) 737; and 15 L.R.A. (N.S.) 855. This is not a case, as was Dowagiac Mfg. Co. v. Mahon, 13 N. D. 517, 101 N. W. 903, where implied warranties were excluded by express terms of the written contract of sale, but, instead, is in line with Hooven & Allison v. Wirtz Bros. 15 N. D. 477, 107 N. W. 1078, that implied warranties are not excluded from operation except expressly contracted against. The issue on the implied and express warranties was thus presented by the pleadings before amendment, so that all objections on that score were not well taken. During the trial, defendant was permitted to amend the answer to allege that the drills "were of no value whatever," and this is assigned as error. Plaintiff strenuously contends that thereby his case was prejudiced by the allowance of an amendment presenting an issue, to meet which he was wholly

unprepared, and which he had no reason to anticipate. The portion of the answer heretofore recited refutes this, as it gave plaintiff notice that defendant would assert that the drills were worthless, wherein it recites the defects "which rendered said drills worthless." But even conceding plaintiff's objections in this respect to have been well taken, and that it was error to permit the amendment, it was nonprejudicial, as will hereafter appear, because the sale was executory, not executed, and the goods admittedly deficient in that they would not, as manufactured and delivered, do the work for which they were intended. This gave defendant the right to rescind the contract of sale, title never having passed to him, and leave the goods the property of the plaintiff, as they have always been, and relieving defendant of his obligation to accept and pay for them by releasing him from his contract of purchase. Hence it is immaterial what was the value of the goods, and any error in the pleadings, proof, or instructions relative to their value is as nonprejudicial as it is immaterial.

As the breach of warranty because of defect in manufacture was for trial, an examination will now be had to determine whether there is any substantial conflict in the testimony on that question. Soon after the receipt of the drills, defendant wrote the following letter to plaintiffs under date of April 10, 1907: "In respect to the drill, I do not understand why the drill is such that we cannot get it to work, maybe the people that I sold them to do not understand how to set them up. They, of course, come to me and complain that if the footboard is on the lever which lifts the discs will not go down far enough to lift the discs. Could you give me an explanation as to why same is that way, so that I may tell them, and kindly do not delay, as the time is near when the machinery is needed." By letter of April 13, three days later, defendant company answers: "We find that in making careful investigation in this instance that the rear strap of the two straps holding the footboard at each end of the frame and also in the center, that each of these rear straps belong to our other style of disc construction and have been made 1 inch too long for your drills, and accordingly it will be necessary to bore a hole 1 inch shorter for holding the footboard up higher so that in raising the discs from the ground the discs won't strike against the footboard. It is quite unusual for us to make any mistakes in setting up and shipping our machines, but it seems we were unfortu-

nate in this instance, and we very much regret the mistakes above explained, but we are very glad that the footboard is one that can be very easily overcome in this way." Defendant replies thereto by letter of April 16: "Yours of the 13th inst. at hand, and contents were carefully noted. Since writing you my last letter the drill has got something that I do not understand, and therefore ask you to kindly explain to me why it is that I must take the drill to the blacksmith shop and have it fixed over, doing it in the following manner:—I made eight new braces and eight braces I had to cut off 1½ inch, also setting the discs about 4 inches to the front, and at this wise I could make it work; that is, I think it will work because I turned out just one drill and the others I can not well unless I fix them like the one I put out. Now the ground is frozen yet, and therefore the farmers are unable to do any seeding yet, but I suppose I will find out soon whether or not the drill is going to work. Now, will you not tell me what I can do in respect to the braces which I have to change. Also tell me who is going to stand good for the repair bill which the blacksmith will have against me." To this letter plaintiff replied, three days later, as follows: "Answering your favor of the 16th, we assure you we will not hesitate to allow for the slight expense of having new holes drilled in the rear straps for the footboard. We don't just understand that part of your letter in which you say, 'I made eight new braces and eight braces I had to cut off one and one half; also setting the discs about 4 inches to the front and in this wise I could make it work,' etc. This really should not have been done, but if you will follow the directions explained on our card of directions sent with the drill, we surely believe that you will have no trouble in properly setting up these machines. We inclose herewith illustrations duly calling attention to zigzagging the discs in front, which we trust you have attended to. We are expecting our Mr. Goggins to arrange for calling upon you within the next week or two, as he is now visiting all of our customers in the Dakotas for the purpose of better explaining to them the various features of our different constructions." Goggins came and refused to go out and see the drill that had been sold, contenting himself with saying that "he had no time to go out, and he said to operate the drill right and she won't break. And I (defendant) said that the drill was broke, and the men couldn't operate it, and he said he had no time

to go out." He explained to witness on one of the unsold drills "what to do with the drills" to make them work, but to no avail. Later the company was notified that the drill that had been sold had been returned, and that none of the drills had been accepted or would be paid for. The contract does not stipulate for their return to plaintiffs. They were all of the same kind except the one sold was an eighteen-hose while the balance were twenty-hose drills. All were of the same construction and material, and had the same defects in manufacture and design. All were sold under the same warranty, and all were admittedly incomplete and unfit for the use for which they were manufactured. And from the evidence this defective condition on delivery was not remedied. Nor was it waived, nor is it claimed to have been waived. Had these drills arrived without driving shafts or wheels, no one would contend that defendant would be obliged to receive them as complete when they were not. The same is no less true where admittedly from faulty design the discs could not be raised out of the ground without radical change, to supervise or remedy which the company's agent was sent, but did nothing. The company's own letters admit all this, and shift upon them the burden of making that right which was wrong, and bringing forth proof that they have done so, and thus fulfilled the contract as to the goods delivered being suitable for the purpose for which they were manufactured and delivered. The proof is that they did nothing, and that nothing further was done in the matter. The inevitable conclusion is that from the uncontroverted testimony, the letters of the defendant company, and the admitted facts, a recovery is sought for defective machinery delivered. The court could and doubtless would have directed a verdict for defendant on this ground, had it been called to its attention. This conclusion renders unnecessary an examination into the court's instructions, as well as all objections taken to the admission of proof. No valid objection could be urged against the letters quoted from, and which are not explained, and in fact not susceptible of contradiction. The judgment for the defendant on these issues is affirmed, with costs of the appeal.

E. L. GREENE v. W. P. ROBBINS, as Sheriff.

(150 N. W. 561.)

General assignment — benefit of creditors — sale of property by assignee — general assignment void — innocent purchaser of property from assignee — title protected — bulk sales law — presumption — rebuttable — good-faith purchase.

J. made a general assignment for the benefit of creditors to G., which assignment is concededly void upon its face. Thereafter G., as such assignee, with the knowledge, consent, and acquiescence of J., sold to plaintiff a certain stock of drugs and fixtures supposedly acquired by G. under such assignment, plaintiff, under the undisputed evidence, being an innocent purchaser thereof for value and in good faith. Two months later defendant, as sheriff, at the suit of two of J.'s creditors levied warrants of attachments upon such property, whereupon plaintiff brought this action against the sheriff to recover the possession thereof.

Held, that plaintiff acquired a good title to such property, not only as against J., but also as against his subsequently attaching creditors.

Held, further, that the so-called bulk sales law, chapter 221, Laws 1907, even if applicable, creates merely a rebuttable presumption that such sale was fraudulent and void, which presumption was effectually rebutted by the undisputed evidence that plaintiff purchased such stock in good faith and for full value.

Opinion filed December 19, 1914.

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

From an order denying defendant's motion for a new trial, he appeals.

Affirmed.

J. A. Dwyer and *Wolfe & Schneller*, for appellant.

The assignment was void absolutely because in conflict with the bulk sales law of this state. Session Laws 1907, chap. 221.

It is void because it reserves to the debtor trusts and interests beneficial to him and detrimental to his creditors, not allowed by law. Denny v. White, 2 Coldw. 283, 88 Am. Dec. 596; Rev. Codes 1905, § 7122; Goodrich v. Downs, 6 Hill, 438; Clark v. Robbins, 8 Kan. 574; Kayser

v. Heavenrich, 5 Kan. 324; King v. Ruble, 54 Ark. 418, 16 S. W. 7; Johns v. Bolton, 12 Pa. 339.

Forbes & Thorpe, for respondent (*Todd & Kerr,* of counsel).

If the bulk sales law has any application here, it does not necessarily follow that this sale or assignment is wholly void. This statute provides what shall be a presumption of fraud,—a mere rule of evidence. It is rebuttable by proper proof. Thorpe v. Pennock Mercantile Co. 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229, and cases therein cited; General Laws 1899, chap. 291, p. 357; Fisher v. Herrmann, 118 Wis. 424, 95 N. W. 392; Hart v. Roney, 93 Md. 432, 49 Atl. 661; Gilbert v. Gonyea, 103 Minn. 459, 115 N. W. 640.

Respondent is entitled to the property even if the assignment is void, because, if void, a sale by the assignee would be in effect a valid sale. Greene was an innocent purchaser for value. 3 Am. & Eng. Enc. Law, 2d ed. 146, 147; Lamb v. Goodwin, 32 N. C. (10 Ired. L.) 320; The Governor v. Freeman, 15 N. C. (4 Dev. L.) 472; West v. Tilghman, 31 N. C. (9 Ired. L.) 165; Bird v. Benton, 13 N. C. (2 Dev. L.) 179; Pine v. Ricket, 21 Barb. 469; Wilson v. Grigsby, — S. D. —, 147 N. W. 992.

Fisk, J. Plaintiff, claiming to be the owner and entitled to the possession of that certain personal property described in the complaint, brought this action in the court below to recover the possession thereof from the defendant, as sheriff of Richland county, who claims the right to the possession of such personal property under certain levies made thereon pursuant to warrants of attachments issued out of the district court of such county, against the property of one A. B. Jacobson, in actions pending wherein he was defendant and William Crawe and the Wipperman Mercantile Company respectively were plaintiffs.

Plaintiff deraigns title to the property from the said Jacobson through a deed of assignment for the benefit of creditors, made by Jacobson to one J. P. Galbraith, and a bill of sale by the latter to plaintiff. It was stipulated as a fact that when such warrants of attachment were issued and levied a valid indebtedness existed in each action, owing by Jacobson to each of such plaintiffs, and that the procedure followed in the issuance of such warrants of attachment was in all respects legal. At the time of the trial of the case at bar the two attachment suits were

pending and undetermined, the defendant Jacobson having appeared in both actions.

At the trial of the case at bar a jury was expressly waived, and the cause tried to the court. Findings and conclusions were made, and judgment rendered in plaintiff's favor. Thereafter a motion was made to vacate the judgment and for a new trial, which motion was denied, and the appeal is from the order denying such motion. A statement of case was settled, containing all of the evidence and twelve specifications of error.

The alleged errors relied upon by appellant's counsel consist of certain rulings in the admission of evidence over defendant's objections, and in making the order denying the motion for a new trial.

Among other evidence introduced over defendant's objections are three exhibits. One is exhibit "E," the so-called trust deed from Jacobson to Galbraith; one a copy of the purported inventory of Jacobson's property, and the other a bill of sale from Galbraith to the plaintiff. Considerable space is devoted in appellant's brief to the question whether exhibit "E" was void or merely voidable, the contention of the appellant being that such instrument was void for two reasons: First, that such trust agreement was contrary to the "bulk sales law" found in chapter 221, Session Laws 1907, and, second, because the same was in fraud of creditors, and especially as to the plaintiffs in the attachment suits, and that therefore its introduction in evidence, as well as the introduction of the other two exhibits, constituted prejudicial error.

On the contrary, respondent contends that such trust agreement is not void upon its face on either of the grounds urged; but respondent's counsel further contend that even if the same is held to be void upon its face, still, the sale of the property by Galbraith, as assignee to the plaintiff, would be considered a sale by Jacobson himself, and that neither Crawe nor the Wipperman Mercantile Company are in a position to question plaintiff's title, they being estopped by their conduct from so doing.

It is unnecessary for us to determine the validity of such trust agreement, for at the oral argument in this court it was expressly conceded by respondent's counsel that such instrument was and is void upon its face. In this connection see the decision of this court in the

recent case of Maclaren v. Kramar, 26 N. D. 244, 50 L.R.A.(N.S.) 714, 144 N. W. 85.

In the light of such concession it remains for us to consider only the legal effect thereof upon the respective rights of these parties to the property in controversy.

The record discloses that plaintiff made such purchase for a valuable consideration, and parted with the purchase price in good faith, and therefore he is entitled to be protected, except as against persons possessing superior rights. The record discloses that Jacobson knew and consented to the negotiations between Galbraith and plaintiff respecting such sale and purchase. Therefore we think it clear that as to Jacobson the sale cannot be questioned, as it in law amounted to a sale by him. Moreover, there are numerous respectable authorities to the effect that, even though the assignment was void upon its face, it was valid as between the assignor and assignee, the parties to the instrument, and an innocent purchaser from such assignee will be protected in his purchase. Wilson v. Marion, 147 N. Y. 589, 42 N. E. 190, and cases cited; Sheldon v. Stryker, 42 Barb. 284; 4 Cyc. 211, and authorities therein cited; 3 Am. & Eng. Enc. Law, 2d ed. 147.

At page 146 of the latter work a correct rule is, we think, stated as follows: "Notwithstanding the invalidity of the assignment as it respects the assignor's creditors, a sale made by the assignee, before the creditors have acquired a specific lien upon the goods, to an innocent purchaser, for a valuable consideration, will be sustained, as in such a case the sale will be considered as effected under the authority of the original proprietor, who has still the right to sell the property."

Applying such rule to the facts of this case, we are unable to uphold the appellant's contention. The sale by the assignee to this plaintiff was consummated two months prior to the commencement of the attachment suits, and in order to successfully challenge the validity of such sale it was incumbent upon these attaching creditors to show facts impeaching the plaintiff's bona fides in purchasing such stock. It is not contended that they have done this, and plaintiff's testimony that he is an innocent purchaser is wholly undisputed. But it is asserted by appellant's counsel that such sale was void under the provisions of the so-called "bulk sales law," chapter 221, Laws 1907. This law

provides: "A sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or a sale of an entire stock of merchandise in gross, will be presumed to be fraudulent and void as against the creditors of the seller."

It is doubtful whether the sale by Galbraith, as assignee, to this plaintiff, falls within the condemnation of such statute which seems to be aimed at sales by merchants as such. Of course, Galbraith, as such assignee for the benefit of creditors, did not occupy the position of a merchant having a stock of merchandise which he had been engaged in selling in the usual mode, and it would appear from the statute that it was aimed only at such a person. We merely suggest the above, without deciding the point, for it is clear that even if such statute applies, it does not nullify the sale to this plaintiff. The presumption created by such statute is a rebuttable presumption, and we think the plaintiff has overcome such presumption by his undisputed proof to the effect that he purchased the property in good faith and for full value.

That the presumption mentioned in such statute is not a conclusive presumption is well settled. Fisher v. Herrmann, 118 Wis. 428, 95 N. W. 392; Thorpe v. Pennock Mercantile Co. 99 Minn. 26, 108 N. W. 940, 9 Ann. Cas. 229; Gilbert v. Gonyea, 103 Minn. 459, 115 N. W. 640; Williams v. Fourth Nat. Bank, 15 Okla. 477, 2 L.R.A. (N.S.) 334, 82 Pac. 496, 6 Ann. Cas. 970. Followed in Ellet-Kendall Shoe Co. v. Ross, 28 Okla. 697, 115 Pac. 892; Hart v. Roney, 93 Md. 432, 49 Atl. 661; Sprintz v. Saxton, 126 App. Div. 421, 110 N. Y Supp. 586; Baumeister v. Fink, 141 Ill. App. 372.

In Thorpe v. Pennock Mercantile Co. 99 Minn. 26, 108 N. W. 940, 9 Ann. Cas. 229, Judge Elliott, in speaking for the Minnesota court, said: "It is fair to assume that, if the legislature had intended that the failure to observe the requirements of the statute should render the transfer absolutely void, it would have done as the legislatures of other states have done,—said so, in clear and unmistakable language. The terms of the statute are in their nature strict and severe, when applied to ordinary business transactions, and they should not be held to imply conclusively that such transactions are in bad faith when the parties are in fact actuated by proper and honest motives."

We are not unmindful of the fact that a few courts have held to the contrary under a statute similar to our own, but we are convinced that the weight of authority, as well as reason, supports the view announced in the cases above cited.

The conclusion above reached renders a consideration of appellant's numerous specifications challenging the rulings of the trial court in the admission of certain testimony, unnecessary. Such rulings were, in any event, nonprejudicial.

The order appealed from is accordingly affirmed.

AMY A. BARNES v. WILLIAM H. HULET.

(150 N. W. 562.)

Trial court — equity case — judgment — amending or modifying judgment — provision of — merits — power to — making judgment effective.

1. The trial court which entered a judgment in an equity case has the undoubted power to later modify or amend such judgment respecting provisions thereof not affecting the merits of the adjudication, but merely relating to the mode of effectuating the court's decision.

Contract for sale of land — action to cancel — equity case — default in payment — judgment for payment or for cancelation — payment to plaintiff — to clerk of court.

2. Where, in an equity case brought to cancel a contract for the sale of land on account of defendant's defaults in making certain payments, a judgment is entered decreeing such cancelation unless defendant, within a time stated, relieves himself from such defaults by making such payments to plaintiff's attorneys, it is not prejudicial error for the court, with or without cause shown, to thereafter modify such judgment by directing or authorizing such payments to be made to the clerk of the court for plaintiff's benefit, instead of to plaintiff's attorneys.

Opinion filed December 22, 1914.

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

From an order modifying a judgment so as to authorize and direct the payment by defendant of certain moneys to the clerk of the district court, instead of to plaintiff's attorneys, plaintiff appeals.

Affirmed.

Rourke & Kvello, for appellant.

At common law a judgment cannot be amended after the term in which it was entered. Bramlet v. Pickett, 12 Am. Dec. 354, and note, 2 A. K. Marsh. 10; Black, Judgm. 2d ed. § 154.

In the absence of a statute authorizing it, the district court has no power to vacate, modify, or amend its judgments or decrees after they have been made and entered. Carlow v. Aultman, 28 Neb. 672, 44 N. W. 873; Barnes v. Hale, 44 Neb. 355, 62 N. W. 1063.

A final judgment is conclusive, both as to the relief granted and that which is denied. White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062.

The statute of this state provides for relief from judgments. N. D. Stat. § 6884; Exchange Bank v. Ford, 7 Colo. 314, 3 Pac. 449.

The remedy by motion is used only in case of irregularity, and resort cannot be had to it to enable a court to reform or correct errors of law. The judgment here was regularly entered. State ex rel. McClory v. Donovan, 10 N. D. 206, 86 N. W. 709; Olson v. Mattison, 16 N. D. 231, 112 N. W. 994; Black, Judgm. 2d ed. § 158.

A court of equity can only amend its decrees where the record itself furnishes the means of correction. It cannot amend by granting additional relief. Bramlet v. Pickett, 2 A. K. Marsh. 10, 12 Am. Dec. 350; O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225; Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775; First Nat. Bank v. Dusy, 110 Cal. 69, 42 Pac. 476; Thompson v. Thompson, 73 Wis. 84, 40 N. W. 671; Manning v. Nelson, 107 Iowa, 34, 77 N. W. 503; Parker v. Linden, 59 Hun, 359, 13 N. Y. Supp. 95; 23 Cyc. subdiv. 4, 868 and authorities cited; Day v. Mountin, 89 Minn. 297, 94 N. W. 887.

Nor can the court amend so as to change the rights of the parties as fixed by the original judgment. Heath v. New York Bldg. Loan Bkg. Co. 146 N. Y. 260, 40 N. E. 770; Pursley v. Wickle, 4 Ind. App. 382, 30 N. E. 1115; Griffith v. Maxwell, 19 Wash. 614, 54 Pac. 35.

Curtis & Curtis, for respondent.

District courts of this state have the power to amend their decrees where such amendment does not affect the merits of the case, but tends to make effective the original judgment. Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468.

FISK, J. This is an appeal from an order made by the district court of Ransom county on August 6, 1913, amending a judgment entered in that court on June 7th of that year. It is appellant's contention that such order was erroneous because the court had no authority in law to order such amendment, and, further, that the same was made without a proper showing of cause.

The judgment as originally entered recites the fact that a certain contract was entered into between the parties on June 21, 1905, whereby the plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff, certain real property therein described, upon certain conditions and pursuant to certain stipulations therein recited. Such judgment also recites the fact that defendant breached such contract in numerous particulars, and that he is in default in making the payments required of him thereunder. It determines and adjudges the amount of such default to be the sum of $5,141.75 on May 13, 1913, and directs that such amount, with interest from such date, be paid at the office of plaintiff's attorneys at Lisbon, within ninety days from and after said 13th day of May, 1913, and upon default on defendant's part in making such payments within the time aforesaid, the contract will be canceled and annulled.

On August 6, 1913, defendant's counsel moved the court on due notice for an order amending the judgment aforesaid so as to permit defendant to make such payments to the clerk of the district court of such county for plaintiff's benefit, and that upon the payment thereof judgment be entered, vesting in the defendant such title to said real property as plaintiff possessed at the date of such contract. In support of such motion an affidavit was produced by defendant's counsel, stating in substance and effect that defendant had informed plaintiff's attorneys that he was ready and willing to comply with the terms of said judgment by making the payments therein required, and had requested plaintiff's attorneys to procure from plaintiff a quitclaim deed to said premises, to be delivered, pursuant to the terms of such judgment, upon the payments being made as aforesaid, and that plaintiff's attorneys had failed to secure such quitclaim deed. On such showing the order complained of was made.

We are entirely clear that the district court had legal authority to make such order, and the same must be affirmed. Whether the show-

ing on such motion was technically sufficient to warrant the making of the order it is not material to consider, for it is, we think, clear that the court, on its own motion and without any showing whatever, had the right to thus amend the judgment. Such amendment in no manner affects the merits of the case. The amendment relates merely to a matter wholly within the discretion of the trial court. It does not in the least affect the merits as adjudicated by the judgment. The case falls squarely within the rule settled and announced by this court in Tyler v. Shea, 4 N. D. 377. The portion of the opinion relating to this point will be found on pages 387 to 389 inclusive. That decision is controlling of the case at bar.

Affirmed.

FRED SEIFERT v. OTTO LANZ, Anton R. Haug, Henry B. Haug, E. E. Van Schoiack, and All Other Persons Unknown Claiming any Estate or Interest in or Lien or Encumbrance upon the Real Property Described in the Complaint in This Action, and Their Unknown Heirs.

(150 N. W. 568.)

Plaintiff agreed in writing to trade his North Dakota farm for land in Wisconsin, and in conformity therewith deposited with the local bank a deed to his North Dakota land, signed by himself and wife. Before the defendant had complied with the terms of the contract, plaintiff attempted to withdraw said deed and cancel the contract.

Deed — deposit — control over — reserved — evidence.

1. Evidence examined, and *held*, that plaintiff did not reserve any control over the deed at the time it was deposited in the bank.

Escrow — how made — pre-existing contract of sale — offer of sale.

2. To constitute an escrow of a deed, there must be a pre-existing contract of sale, antedating the escrow agreement itself; otherwise, the deed so deposited could be withdrawn, as the negotiation would be merely an offer of sale.

Pre-existing contract of sale — homestead — executed by husband only — wife later joins in deed — adopts contract as her own.

3. Where the pre-existing contract of sale affects a homestead, and is signed

by the husband, but the wife at the same time joins in the deed to the premises, which is deposited in escrow, she adopts the pre-existing contract as her own. The husband is also estopped to object to her failing to sign the pre-existing contract.

Evidence of fraud — rescission — sufficiency to justify.

4. Evidence examined, and *held*, that there is not evidence of fraud sufficient to justify a rescission of the contract by plaintiff.

Agreement — conditions of — compliance with — time limit.

5. Record examined, and *held*, that the defendant complied with the conditions of agreement within the time therein limited.

Deed — minor blanks — filled in after execution by husband — not invalid.

6. The fact that the deed to the Wisconsin land contained minor blanks at the time it was signed by Mrs. Lanz, which were afterwards filled in by her husband, does not render the deed invalid.

Opinion filed December 26, 1914. Rehearing denied January 8, 1915,

Appeal from the District Court of Sargent County, *Allen,* J.

Affirmed.

John L. Koeppler and *W. S. Lauder,* for appellant.

Until delivery, the instrument under which defendants claim was not the plaintiff's deed. Devlin, Real Estate, 3d ed. 260.

Defendants claim the deed was delivered in escrow,—no actual delivery being claimed. To constitute a perfect delivery in escrow, there must be a pre-existing contract for the sale and purchase of the land. Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427; 11 Am. & Eng. Enc. Law, 2d ed. 333; 16 Cyc. 568.

An escrow presupposes an enforceable bilateral contract. Fitch v. Bunch, 30 Cal. 208, 2 Bl. Com. 307; 4 Kent, Com. 446; 2 Washb. Real Prop. 583; Jackson ex dem. Gratz v. Catlin, 2 Johns. 259, 3 Am. Dec. 415; Ruggles v. Lawson, 13 Johns. 285, 7 Am. Dec. 375; Green v. Putnam, 1 Barb. 500; Miller v. Sears, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 589; 1 Devlin, Real Estate, 3d ed. 313, 313a; 11 Am. & Eng. Enc. Law, 2d ed. 335, and 16 Cyc. 562; Stanton v. Miller, 58 N. Y. 192; Freeland v. Charnley, 80 Ind. 132; Nichols v. Oppermann, 6 Wash. 618, 34 Pac. 162; Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; McIntyre v. McIntyre, 147 Mich. 365, 110 N. W. 960; De Bow v. Wollenberg, 52 Or. 404, 96 Pac. 536,

97 Pac. 717; Clark v. Campbell, 23 Utah, 569, 54 L.R.A. 508, 90 Am. St. Rep. 716, 65 Pac. 496; Kenney v. Parks, 137 Cal. 527, 70 Pac. 556.

This transaction relates to the homestead. The wife did not sign the contract for sale, or any contract. There was no pre-existing contract on her part. This renders the contract a mere nullity. Schroeder v. Boyce, 127 Mich. 33, 86 N. W. 387; Rev. Codes 1905, § 5052; Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Rev. Codes 1905, § 7317 (41); Hanson v. Great Northern R. Co. 18 N. D. 329, 138 Am. St. Rep. 768, 121 N. W. 78; Myers v. Chicago, St. P. M. & O. R. Co. 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694.

Specific performance cannot be decreed because of too indefinite description of the land. Runck v. Dimmick, 51 Tex. Civ. App. 214, 111 S. W. 779.

There is a distinction between a mere option to buy, and a bilateral contract of sale. Runck v. Dimmick, 51 Tex. Civ. App. 214, 111 S. W. 779; Libby v. Parry, 98 Minn. 366, 108 N. W. 299; Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469; Moore v. Allen, 109 Minn. 139, 123 N. W. 292; Darr v. Mummert, 57 Neb. 378, 77 N. W. 767; Nichols v. Oppermann, 6 Wash. 618, 34 Pac. 162; Thomas v. Sowards, 25 Wis. 635; Freeland v. Charnley, 80 Ind. 132; Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427; Overman v. Kerr, 17 Iowa, 485; Parker v. Parker, 1 Gray, 409; Wier v. Batdorf, 24 Neb. 83, 38 N. W. 22; Popp v. Swanke, 68 Wis. 364, 31 N. W. 916; Kopp v. Reiter, 146 Ill. 437, 22 L.R.A. 273, 37 Am. St. Rep. 156, 34 N. E. 942; Comer v. Baldwin, 16 Minn. 172, Gil. 151; Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093; Stockwell v. Williams, 68 N. H. 75, 41 Atl. 973.

It was in the plaintiff's power to annex to the deposit of the deed any condition he wished, notwithstanding any prior contract. Wilkins v. Somerville, 80 Vt. 48, 11 L.R.A.(N.S.) 1183, 130 Am. St. Rep. 906, 66 Atl. 893; Stanton v. Miller, 58 N. Y. 192.

Such deposit of the deed not constituting an escrow, plaintiff had the right to recall or revoke same at will. Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592; Cook v. Brown, 34 N. H. 460; O'Brien v. O'Brien, 19 N. D. 713, 125 N. W. 307; Ward v. Russell, 121

Wis. 77, 98 N. W. 939; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Cole v. Cole, 144 Mich. 676, 108 N. W. 101; Cassidy v. Holland, 27 S. D. 287, 130 N. W. 771; Lange v. Cullinan, 205 Ill. 365, 68 N. E. 934.

Where parties deal at arm's length the doctrine of *caveat emptor* applies. Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; Burns v. Lynde, 6 Allen, 305; 1 Devlin, Real Estate, 3d ed. § 310; Lund v. Thackery, 18 S. D. 113, 99 N. W. 856; Maynard v. Davis, 127 Mich. 571, 86 N. W. 1051.

The delivery of the deed as made here did not vest in Lanz any title to the land. It was a homestead transaction, and no prior contract existed. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679; Haynes v. Griffith, 16 Idaho, 280, 101 Pac. 728; Hogueland v. Arts, 113 Iowa, 634, 85 N. W. 818; Bales v. Roberts, 189 Mo. 49, 87 S. W. 914; Roberson v. Reiter, 38 Neb. 198, 56 N. W. 877; Matteson v. Smith, 61 Neb. 761, 86 N. W. 472; Bradford v. Durham, 54 Or. 1, 135 Am. St. Rep. 807, 101 Pac. 897; Houston Land & T. Co. v. Hubbard, 37 Tex. Civ. App. 546, 85 S. W. 474; Morris v. Blunt, 35 Utah, 194, 99 Pac. 686; Wilkins v. Somerville, 80 Vt. 48, 11 L.R.A.(N.S.) 1183, 130 Am. St. Rep. 906, 66 Atl. 893; Virginia Pass. & Power Co. v. Patterson, 104 Va. 189, 51 S. E. 157; Hanley v. Sweeny, 48 C. C. A. 612, 109 Fed. 712, 21 Mor. Min. Rep. 333.

The land was in the open possession of plaintiff's tenant, and plaintiff and his family lived thereon also. O'Toole v. Omlie, 8 N. D. 444, 79 N. W. 849; Dickson v. Dows, 11 N. D. 407, 92 N. W. 798; Shelby v. Bowden, 16 S. D. 531, 94 N. W. 416; Sutton v. Whetstone, 21 S. D. 341, 112 N. W. 850; Everts v. Agnes, 6 Wis. 453; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; Ogden v. Ogden, 4 Ohio St. 182; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179; Henry v. Carson, 96 Ind. 412; Golden v. Hardesty, 93 Iowa, 622, 61 N. W. 913; Jackson v. Lynn, 94 Iowa, 151, 58 Am. St. Rep. 386, 62 N. W. 704; Seibel v. Higham, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 987.

Purcell, Divet & Perkins, for respondents.

When documents or deeds are placed in escrow, the maker or grantor

loses all control over them. They are simply left to await the happening of some event or the keeping of some condition. They cannot be recalled, nor the escrow disturbed. Nichols & S. Co. v. First Nat. Bank, 6 N. D. 406, 71 N. W. 135.

The statute of frauds has no application to an escrow agreement. All that is necessary is a valid contract, either oral or written. Lewis v. Prather, 14 Ky. L. Rep. 749, 21 S. W. 538; Cannon v. Handley, 72 Cal. 133, 13 Pac. 315; Hughes v. Thistlewood, 40 Kan. 232, 19 Pac. 629; Baum's Appeal, 113 Pa. 58, 4 Atl. 461; Tharaldson v. Everts, 87 Minn. 168, 91 N. W. 467; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300.

Parol evidence to prove the necessary facts is admissible. Manning v. Foster, 49 Wash. 541, 18 L.R.A.(N.S.) 337, 126 Am. St. Rep. 876, 96 Pac. 233; Johnson v. Jones, 85 Ala. 286, 4 So. 748; Jenkins v. Harrison, 66 Ala. 345; Guild v. Althouse, 71 Kan. 604, 81 Pac. 172; Knopf v. Hansen, 37 Minn. 215, 33 N. W. 781; Hughes v. Thistlewood, 40 Kan. 232, 19 Pac. 629; Arnegaard v. Arnegaard, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797.

Where control over the instrument to the extent of the right to recall it is retained, there is no escrow. Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Nolan v. Otney, 75 Kan. 311, 9 L.R.A.(N.S.) 317, 89 Pac. 690; Hutton v. Cramer, 10 Ariz. 110, 85 Pac. 483.

If a contract satisfying the statute of frauds must exist as a foundation for an escrow, the deed itself is a sufficient memorandum of the contract. Moss v. Atkinson, 44 Cal. 16.

Letters addressed to third persons, telling what the oral contract was, may be received in evidence to prove the oral contract. Browne, Stat. Fr. § 353; Singleton v. Hill, 91 Wis. 51, 51 Am. St. Rep. 868, 64 N. W. 588; Jones v. Lloyd, 117 Ill. 597, 7 N. E. 119; Drury v. Young, 58 Md. 546, 42 Am. Rep. 343; Gibson v. Holland, L. R. 1 C. P. 1, 1 Harr. & R. 1, 35 L. J. C. P. N. S. 5, 11 Jur. N. S. 1022, 13 L. T. N. S. 293, 14 Week. Rep. 86; Lee v. Cherry, 85 Tenn. 707, 4 Am. St. Rep. 800, 4 S. W. 835; Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536.

The statute of frauds is only concerned with evidence by which an agreement can be established, and it matters not to whom the letters

were addressed. Warfield v. Wisconsin Cranberry Co. 63 Iowa, 312, 19 N. W. 224; Barry v. Coombe, 1 Pet. 640, 650, 7 L. ed. 295, 300; Ryan v. United States, 136 U. S. 68, 84, 34 L. ed. 447, 453, 10 Sup. Ct. Rep. 913.

The depositary of an escrow is the agent of both parties. 16 Cyc. 575, and note 95; Davis v. Clark, 58 Kan. 100, 48 Pac. 563; Cannon v. Handley, 72 Cal. 133, 13 Pac. 315; Tharaldson v. Everts, 87 Minn. 168, 91 N. W. 467.

The deed here was signed by both husband and wife, and the contract was fully expressed therein. Johnston v. Jones, 85 Ala. 286, 4 So. 748; Thayer v. Luce, 22 Ohio St. 62; Ryan v. United States, 136 U. S. 84, 34 L. ed. 453, 10 Sup. Ct. Rep. 913; Nichols & S. Co. v. First Nat. Bank, 6 N. D. 404, 71 N. W. 135.

All that is necessary is that there be a note or memorandum signed by the party to be charged. Rev. Codes 1905, § 5407; Worrall v. Munn, 5 N. Y. 246, 55 Am. Dec. 330; McPherson v. Fargo, 10 S. D. 615, 66 Am. St. Rep. 723, 74 N. W. 1057; Gira v. Harris, 14 S. D. 537, 86 N. W. 624; Fitch v. Bunch, 30 Cal. 208; Stanton v. Miller, 58 N. Y. 192.

The contract here, however, is sufficient for all purposes, when followed up with the deed. Instruments executed together, or referring to each other, will be considered together to show the whole transaction. Page, Contr. § 1116; 13 Cyc. 614, and notes; Rev. Codes 1905, § 5346; Stuyvesant v. Western Mortg. & Invest. Co. 22 Colo. 28, 43 Pac. 144; Thayer v. Luce, 22 Ohio St. 62; Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; Lee v. Cherry, 85 Tenn. 707, 4 Am. St. Rep. 800, 4 S. W. 835; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Bayne v. Wiggins, 139 U. S. 210, 35 L. ed. 144, 11 Sup. Ct. Rep. 521; Johnston v. Jones, 85 Ala. 286, 4 So. 748; Epperly v. Ferguson, 118 Iowa, 47, 91 N. W. 816; Kettering v. Eastlack, 130 Iowa, 498, 107 N. W. 177, 8 Ann. Cas. 357.

We are dealing with the husband regarding his property. He made a contract that was thereafter ratified by his wife when she joined in the deed. Hughes v. Thistlewood, 40 Kan. 232, 19 Pac. 629; Manning v. Foster, 49 Wash. 541, 18 L.R.A.(N.S.) 337, 126 Am. St. Rep. 876, 96 Pac. 233; Howes v. Burt, 130 Mass. 368.

Blank spaces in deeds may be filled in by the grantor. The grantee

may, after delivery, fill in the name. Lockwood v. Bassett, 49 Mich. 546, 14 N. W. 492; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; Exchange Nat. Bank v. Fleming, 63 Kan. 139, 65 Pac. 213; 16 Century Dig. "Deeds," § 64, col. 70; Montgomery v. Dressler, 38 L.R.A.(N.S.) 423, and note, 90 Neb. 632, 134 N. W. 251; Note to McCleerey v. Wakefield, 2 L.R.A. 529.

After a party has rejected a conveyance upon a repudiation of the whole transaction, he will not be allowed to afterward rely upon some special undisclosed ground. Wold v. Newgard, — Iowa, —, 94 N. W. 859; Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623; Baker v. Hall, 158 Mass. 361, 33 N. E. 612; Harris v. Chipman, 9 Utah, 101, 33 Pac. 242; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693.

A bill of particulars, under our statute, may be required in all cases. The right to demand such bill is not limited to actions for money. Rev. Codes 1905, § 6868; Abbott, Trial Brief, p. 1943 and cases cited; Tilton v. Beecher, 59 N. Y. 176, 17 Am. Rep. 337.

The purpose of a bill of particulars is to limit the scope of inquiry, as well as to define the issues. Abbott, Pl. p. 1294, and cases in note 1; Tourgee v. Rose, 19 R. I. 432, 37 Atl. 9; McDonald v. People, 126 Ill. 150, 9 Am. St. Rep. 547, 18 N. E. 817, 7 Am. Crim. Rep. 137; Com. v. Snelling, 15 Pick. 321.

A bill of particulars shows the theory of the case in the lower court. No departure therefrom will be allowed on appeal. Schuyler v. Wheelon, 17 N. D. 165, 115 N. W. 259; Ugland v. Farmers & Merchants' State Bank, 23 N. D. 536, 137 N. W. 572; Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 97, 128 N. W. 690; William R. Smith & Son v. Bloom, 159 Iowa, 592, 141 N. W. 32; Baker v. Hall, 158 Mass. 361, 33 N. E. 612.

The defendant Van Schoiack, the present record title holder, is a bona fide purchaser, and plaintiff is estopped to question his title based upon the deed executed by himself. Red River Valley Land & Invest. Co. v. Smith, 7 N. D. 240, 74 N. W. 194; Schumacher v. Truman, 134 Cal. 430, 66 Pac. 591; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Jenks v. Moppin, — Tex. Civ. App. —, 80 S. W. 390.

Where a vendor remains in possession after conveyance, such possession is not notice that he claims any right inconsistent with the con-

veyance he has made. Cook v. Travis, 20 N. Y. 400; Van Keuren v. Central R. Co. 38 N. J. L. 167; Eylar v. Eylar, 60 Tex. 315; Sprague v. White, 73 Iowa, 670, 35 N. W. 751; Abbott v. Gregory, 39 Mich. 68; Groton Sav. Bank v. Batty, 30 N. J. Eq. 126; Watkins v. Sproule, 8 Tex. Civ. App. 427, 28 S. W. 356; Jinks v. Moppin, — Tex. Civ. App. —, 80 S. W. 390; Dodge v. Davis, 85 Iowa, 77, 52 N. W. 2; Note to Garbutt v. Mayo, 13 L.R.A.(N.S.) 117, and cases heretofore cited; Gray v. Harvey, 17 N. D. 1, 113 N. W. 1034; Humphreys v. Richmond & M. R. Co. 88 Va. 431, 13 S. E. 993; Provident Life & T. Co. v. Mercer County, 170 U. S. 593, 42 L. ed. 1156. 18 Sup. Ct. Rep. 788; Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722; Landon v. Brown, 160 Pa. 538, 28 Atl. 921; Hubbard v. Greeley, 84 Me. 340, 17 L.R.A. 511, 24 Atl. 799; Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392; Pratt v. Holman, 16 Vt. 530.

Where one places the indicia of title to property with another, he is estopped as against a bona fide purchaser. Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478; Simson v. Bank of Commerce, 43 Hun, 156; Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392; Hubbard v. Greeley, 84 Me. 340, 17 L.R.A. 511, 24 Atl. 799; Bailey v. Crim, 9 Biss. 95, Fed. Cas. No. 734; Haven v. Kramer, 41 Iowa, 382; Palmer v. Bates, 22 Minn. 532; Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722.

Where the description of the land in a deed or other conveyance is sufficient to enable one by the aid of inquiries to locate it, it is good. Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536; Ford v. Ford, 24 S. D. 644, 124 N. W. 1108; Ryan v. United States, 136 U. S. 68, 84, 34 L. ed. 447, 453, 10 Sup. Ct. Rep. 913; Schuyler v. Wheelon, 17 N. D. 161, 115 N. W. 259.

Title passes to a grantee in escrow upon the performance of the conditions upon which delivery should be made. Hughes v. Thistlewood, 40 Kan. 232, 19 Pac. 629; Shirley v. Ayres, 14 Ohio, 307, 45 Am. Dec. 546; 16 Cyc. 588, and note 88.

BURKE, J. Plaintiff is a farmer living in Sargent county, North Dakota. In June, 1910, he desired to sell his farm, and talked to a real-estate dealer named Brixsley. After some preliminary negotia-

tions, Brixsley told him that the defendant Lanz had a Wisconsin farm which he desired to trade. Shortly thereafter, plaintiff and Brixsley went to Canton, Wisconsin, and examined a tract of land containing 169 acres. After such examination the three went to North Dakota, examined the 161 acres owned by plaintiff, and on the 28th of June went to Newark, South Dakota, where exhibit F, hereinafter referred to, and constituting what is alleged to be an agreement for the trade of the two farms, was executed in duplicate, and where plaintiff and his wife executed a warranty deed to his land, running to the defendant Lanz, and where he then and there deposited the same with one Nelson, cashier of one of the banks. The circumstances surrounding this deposit are in sharp dispute, and will be treated later in this opinion. Lanz repaired to Minneapolis, where he and his wife executed a deed to the Wisconsin land, and forwarded the same to the bank. It is plaintiff's contention that his deed was delivered to the cashier of the bank, subject to his further orders, and that he had the right to recall the same at any time. On the other hand, defendant insists that the deed was deposited in escrow, and that when Lanz had complied with certain conditions upon his part to be performed, the title to the land passed by operation of law to Lanz. In any event, the plaintiff became dissatisfied with his bargain, and attempted to withdraw the deed from the possession of Nelson, who, however, refused to return the same, but delivered it to Lanz, who later sold it to the defendant Haug, who in turn sold to the defendant Van Schoiack. A trial was had in the court below, which resulted favorably to the defendant. This appeal necessitates a trial *de novo* in this court.

(1) Appellant insists that the deposit of the deed with Nelson did not constitute an escrow, because at the time of the delivery plaintiff expressly reserved dominion over the instrument. Plaintiff and his wife testify that at the time of the deposit plaintiff told Nelson that the deed should not be delivered until plaintiff had personally, or by written order, authorized such delivery. This is in a slight measure corroborated by one Gallagher, who testifies that at a later date, in his presence, plaintiff asked Nelson if he had not so claimed, and Nelson had answered "Yes." On the other hand, Nelson testifies

that the deed was deposited with him to be delivered when Lanz should have sent or brought a deed from himself and wife covering the Wisconsin land, together with the $100 which was to be paid in addition. Brixsley's testimony corroborates that of Nelson. The testimony of plaintiff does not appeal to us. For instance, he admits that, two or three days after he had left the deed with the bank, he went and asked Nelson if the Lanz deed had been received. He further admits going back to the bank a few days later, and again inquiring if the deed had come. He also testifies that he might have said to Nelson that he was afraid that Lanz was going to back out, and then a minute later he swears positively that he did not make that admission. He also testifies he expected the deed to be sent to a bank at Cogswell, North Dakota, although he inquired twice for it at Nelson's bank. He also testifies that he went to Wisconsin to examine the land, in company with Brixsley and Lanz, and walked something like 2 miles over the tract, examined the buildings, and noticed the same were dilapidated, and yet made the claim that he had been defrauded by those two parties in that they misrepresented the value of the land to him. We will give a short extract from the testimony along this point:

At the time you entered into this contract, you knew what the land was, from having seen it, didn't you?

A. I didn't know what it was. I went by what Brixsley told me.

Q. You what?

A. I went by what Brixsley told me.

Q. You had seen it yourself?

A. How could I see it by running across it?

Q. You went clear from here to Wisconsin to look at this land, and then you say you ran across it so fast that you could not see it?

A. Yes, sir.

Q. You forgot what you went down there for?

A. Almost, I guess. I believe almost.

Again, plaintiff testifies that in case the deal made was satisfactory to him he was to give to the agent Brixsley a certain commission, and

that shortly after the signing of exhibit F he satisfied the same by giving to Brixsley a colt. Upon this point he testifies:

Q. At the time you came here, you thought the deal was through, and turned over the colt to him?

A. I turned over the colt to him, like a fool.

Q. How long was that after your deed had been put in the bank?

A. Only a day or so.

Q. You were still satisfied at that time?

A. I was partly satisfied.

Again he testified relative to the buildings upon the Wisconsin farm.

Q. They (the buildings) looked pretty bad?

A. They looked pretty tough.

Q. You saw that the first time that you were there?

A. Yes.

Q. Tough looking farm all around?

A. Yes.

Q. And the buildings were all run down?

A. Yes.

Q. And the land was all stony?

A. Well, that is what you asked me before; there were lots of stones. I thought there were lots of stones, and they told me there were just a few here and there.

Q. When you got there and saw the farm you thought there were lots of stones; where did you get that impression—did you see some stones?

A. Yes, I saw some.

Q. And you thought there must be some more where you saw them?

A. Yes, sir.

Q. You were hurrying along?

A. Yes, you bet. That is what we were.

Q. You didn't get suspicious?

A. I was getting suspicious.

Q. When you got suspicious, why didn't you stop and take more time?

A. That is what I ought to have done.

Q. Why didn't you?

A. Because they were helloing for me to come.

Q. Do you mean to say that when you went from here, three or four hundred miles to Canton, to look at this piece of land, you went out and ran over the land so fast that you couldn't tell whether it was stony, but thought you did see some rocks on it?

A. Yes.

Again he testifies:

Q. Do you know a man by the name of Deitz in your neighborhood?

A. Yes.

Q. Do you remember of having a talk with him about a week or so after getting back from looking at that land?

A. May be, I talked with him.

Q. Do you remember of telling him that it was a fine country down there? That it would be a great deal better for dairying than this was,—and asked him to go down and look it over, and see if he could get a quarter lying west of the one you got?

A. At that time I did not know that they were lying to me so.

Q. You did say that, then, to Deitz?

A. Yes, I did say that.

Q. About a week after you got back from your trip?

A. Something like that.

Again he testifies:

Q. That is all you told Brixsley,—that he was selling the land for too much?

A. Yes, sir.

Q. It wasn't worth that much?

A. No, it wasn't.

Q. That is the only reason that you ever stated to Brixsley why you were not carrying out the deal, isn't it?

A. I wasn't satisfied.

Q. In other words, you changed your mind about wanting to trade, didn't you?

A. I guess I did.

Q. That is the sum and substance of it, isn't it?

A. When I found out how things were.

Q. Made up your mind you didn't want to give up your land for that land, didn't you?

A. Yes, sir.

Neither is the testimony of plaintiff's wife convincing. She did not hear all of the conversation, and was unlikely to have remembered the same in detail. The testimony of the witness Gallagher is not entirely inconsistent with that of Nelson. The foregoing testimony raises a strong conviction in our minds that, at the time of the deposit of the deed, plaintiff was satisfied with the trade that he had made, and this in turn indicates an irrevocable deposit of the deed. We have therefore reached the conclusion that the trial court was correct in its finding that plaintiff deposited the deed with Nelson to be delivered to Lanz upon his paying $100 and furnishing a deed to the Wisconsin land.

(2) Appellant next insists that, even if the deposit were made under the circumstances outlined in the foregoing paragraph, it would not amount to a deposit in escrow because there was no pre-existing contract of sale of the land in controversy. His position as stated in the brief is that "without a legal, binding, and enforceable contract to sell and buy the property, a conveyance thereof cannot be delivered in escrow," and in support of his contention we are cited to Fitch v. Bunch, 30 Cal. 208; Stanton v. Miller, 58 N. Y. 192; Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427, and other cases. This question is extremely complicated. It seems that to constitute an escrow there must be a pre-existing contract of sale antedating the escrow agreement itself. Otherwise, the deed so deposited could be withdrawn. It is this difference of irrevocability that distinguishes an escrow from an option or offer of sale. It is stated at 16 Cyc. 562, that "in the great majority of cases, the instrument deposited, together with the stipulation as to the condition or the event upon performance or happening of which the instrument is to take effect, constitutes a contract; indeed, by the general rule there must be a valid agreement between the parties, containing all the elements of a contract; and, as in other contracts, the consideration may be either a benefit to the promisor or a detriment to the promisee. There is, however, a class of cases where no contract exists, as where an instrument for the conveyance of land is deposited with a third person to be delivered to the grantee upon the death of the grantor." In the case note to Manning v. Foster, 18 L.R.A.(N.S.) 337, it is stated: "It seems to be well settled that that rule of evidence which prohibits a written contract to be contradicted

or varied by parol evidence has no application to a delivery of a deed in escrow,—that is, a delivery to a third person to take effect upon the happening of some condition,—as all the authorities are agreed that the condition upon which a deed is thus delivered may rest in and be proved by parol." Willard's Eq. Jur. page 267, says: "The only exception to the rule with respect to mutuality is when an agreement under the statute of frauds has only been executed by the party sought to be charged. In this class of cases, although the plaintiff has not signed the agreement, . . . yet he can enforce it against the other party, by whom it has been executed." See also Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Gira v. Harris, 14 S. D. 537, 86 N. W. 624. The holding of those cases seems to be that, to constitute an escrow and render the deposit irrevocable, there must be a contract between the proposed purchaser and proposed seller, which in turn, to satisfy the statute of frauds, must be evidenced by a memorandum in writing signed by the party sought to be bound thereby. However, the contract, in so far as it affects the second party, who has made no deposit in escrow, need have no memoranda to satisfy the statute of frauds because he has not deposited evidence of title to land, although, forsooth, he may bring to the bank a deed as a measure of payment. In other words, Seifert is the party who has made a deposit in escrow. This deposit must be preceded by a binding contract between himself and Lanz. Otherwise, it would be a mere offer to sell, or option, and would be revocable. To be irrevocable and an escrow, it must be preceded by a contract enforceable against Seifert; otherwise, it would run contrary to the statute of frauds. But Lanz had made no deposit of a deed, and the contract, so far as he is concerned, need have no memoranda in writing, although part of the purchase price which he was to pay to Seifert was a deed to Wisconsin lands.

(3) Accepting the law as outlined in preceding paragraphs, we apply it to the facts at hand. As stated before, the agreement was made in writing between Lanz and Seifert; is designated in the record as exhibit F, and reads as follows:

Newark, S. Dak., June 27, 1910.

Received of Fred Seifert on account of purchase made by him this day to the undersigned, Otto W. Lanz, of the following described real

estate situated in Sargent county, state of North Dakota (describing North Dakota land), for the sum of $6,700 upon the following terms: The sum of $10 at or before the execution of this contract. $100 on July 11, 1910. The balance to be a quarter of land (161 acres) located near Canton, Wisconsin, purchased of Joseph Floor, same being the land shown by Lanz to Seifert and Brixsley as being the land to be delivered, both tracts of land being executed subject to the encumbrance now against them, namely $2,500 against the land now owned by Seifert, and $1,800 against the land now owned by Lanz, said lands being the same lands above described. Each party to this contract is to deliver his land with all interest and taxes paid to date.

A reasonable time, not exceeding ten days, after delivery of abstract, is to be allowed for examination of title, and the form of conveyance is to be warranty deed in each case, title to each contract of land to be marketable, and in case the title shall be ascertained to be unmarketable to such an extent as to warrant the purchaser in refusing the same, and he shall so refuse the same upon that ground, or the owner refuses to accept sale, the vendor shall not be liable for any damages, and the said sum of $10 paid by the purchaser shall be returned to him, and if the title is found to be marketable, and this trade—the deed or contract being tendered—is not closed within the time as herein named, said earnest money is forfeited as a consideration paid for this agreement, and said vendor shall be considered to have fully performed his part of this agreement, and may declare this contract terminated, and in case of any encumbrance on this land the purchaser agrees to assume the same and take it from the purchase price. Time is made the essence of this agreement. Said purchasers hereby accept the conditions of the foregoing contract. In testimony whereof said parties have hereunto respectively set their hands and seals, the day and year above mentioned.

(Signed) Otto W. Lanz,
Fred Seifert.

Appellant insists that this agreement does not constitute an enforceable contract as outlined in paragraph two of this opinion, because: (a) The land in controversy was a homestead, and plaintiff's wife did not contract to convey; (b) Defendant Lanz was a married man, and his wife did not join in the contract; (c) that it appears from exhibit

F itself that it was terminable at will by either party; and (d) said contract did not describe the Wisconsin lands. After long and careful consideration we have reached the conclusion that none of these objections are valid. As to the first, it is sufficient to say that when the wife joined in the deed which was deposited with exhibit F in escrow, she bound herself as effectually as though she had signed exhibit F also, and that the plaintiff herein is likewise estopped to assert this objection. See Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; Bayne v. Wiggins, 139 U. S. 210, 35 L. ed. 144, 11 Sup. Ct. Rep. 521; Knopf v. Hansen, 37 Minn. 215, 33 N. W. 781; Hughes v. Thistlewood, 40 Kan. 232, 19 Pac. 629; Manning v. Foster, 49 Wash. 541, 18 L.R.A.(N.S.) 337, 126 Am. St. Rep. 876, 96 Pac. 233; Johnston v. Jones, 85 Ala. 286, 4 So. 748; Epperly v. Ferguson, 118 Iowa, 47, 91 N. W. 816; Kettering v. Eastlack, 130 Iowa, 498, 107 N. W. 177, 8 Ann. Cas. 357; 13 Cyc. 614.

Thus exhibit F, reinforced by the signature of the wife upon the deed, is valid as against this attack. We do not believe there is anything in Arnegaard v. Arnegaard, 7 N. D. 478, 41 L.R.A. 258, 75 N. W. 797, nor Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544, inconsistent with this holding. Appellant makes an ingenious argument which is hard to answer upon this very proposition, but we believe the equities of the case, as well as the great weight of the decisions, are against his position, and we so hold. As to the second proposition, that Mrs. Lanz had not signed exhibit F, it need only be said that the deed to the Wisconsin land was not deposited in escrow, and comes under an entirely different rule; besides, Mrs. Lanz actually signed the deed to the Wisconsin land before it was offered. As to the third proposition, that exhibit F shows upon its face that it is terminable at will by either party, the instrument speaks for itself, and we do not believe it bears the interpretation claimed by appellant. And, fourth, the description of the Wisconsin land while not sufficient for a deed, is sufficient to cover the initial contract. There is no contention that the deed offered by Lanz did not cover the identical tract shown to Seifert and described in exhibit F. It is our conclusion that exhibit F was a sufficient contract to support the escrow agreement, and that as against this attack the deed deposited by plaintiff was deposited as an irrevocable escrow.

(4) Appellant next says that, "even assuming exhibit B to have been deposited by plaintiff with Nelson in escrow, the escrow terminated when plaintiff, because of the fraud of the defendant Lanz, timely rescinded the transaction." Without setting forth more of the evidence, we state that in our opinion no fraud has been shown upon which to base a rescission, thus rendering unnecessary a discussion of the law upon that subject.

(5) Appellant next says that, "even assuming exhibit B to have been deposited by plaintiff with Nelson in escrow, the escrow terminated upon Lanz's failure to comply with the conditions of the escrow agreement within the time thereby limited." The evidence upon this is also lengthy and of no public concern. We will content ourselves with saying that an examination of the same convinces us that the deposit was in fact made within ten days.

(6) Lastly, it is contended that the description of the Wisconsin lands was filled in, in part, at least, after it had been signed by Mrs. Lanz. By delivering the deed to her husband with part of the description in blank, she authorized him to supply the deficiency. This presents an altogether different question than one wherein there is an entire absence of description. Minor details of a description of a particular piece of land may be supplied, where the intention of the grantor has been already fully expressed. The foregoing disposes of all of the objections of the appellant.

Our conclusion is that the deed, exhibit B, was deposited in escrow; that all the terms of the same have been fully met by the defendants; that the delivery of the deed by Nelson to Lanz was proper and the title duly passed thereunder. Judgment of the District Court is in all things affirmed.

STATE OF NORTH DAKOTA v. GEORGE L. NELSON and A. M. Baker.

(150 N. W. 267.)

Section 174 of the Constitution of North Dakota prohibits the expenditure of more than 4 mills on the dollar of the assessed valuation of property within

the state. The legislature of 1913 made appropriations which if allowed *in toto*, would exceed this limit. The state board of equalization scaled such appropriations to make the same lawful. Thereupon the educational institutions brought mandamus in the supreme court to compel the payment to them of their full share. Pending such hearing the defendant Nelson published an editorial wherein it was alleged that the supreme court and the members of the board of equalization had entered into a conspiracy to render a fake decision before election to influence the re-election of the governor of this state, and to reverse its decision after election.

Mandamus — supreme court — proceedings — when pending — contempt of court — publication of slanderous article — pending litigation.

1. The mandamus proceedings originated in this court, and will be considered pending until this court has lost power to change or modify its decision. The mandamus proceedings reviewed, and *held*, that the same was pending until the 19th of November, 1914, while the article in question was published November 13, 1914. The publication in question was calculated to prejudice the rights of the litigants, and to prevent a fair and impartial hearing in this court, and is therefore contempt of court.

Rights of litigants — of public — reason for punishment — courts — free speech — publication — truth of article — opportunity to show — silence of accused — effect.

2. The reason for punishing such contempts is that said publications interfere with the rights of the litigants and of the public. Litigants are entitled to have their controversy settled without interference with, or intimidation of, the court itself. The right of free speech is sacred, but at times must give way to other rights even more sacred. The right of free speech will not protect a man in invading a church and haranguing the audience during religious services, nor will it protect him in disturbing social or political gatherings. Neither will it protect him in interfering with the orderly conduct of courts of justice. Free speech does not give the right to vilify and scandalize. It is as much a crime to assert charges which one knows to be untrue as it is to remain silent if the same are believed to be true. When given an opportunity to prove the truth of the article in question, the defendant Nelson refused to give any reason, weak or strong, why he believed such article to be true. This, in effect, is an admission that the same was untrue.

Explanation by accused — declining to give — privileged communication.

3. In considering punishment this court wished to consider the provocation or other excuses of the defendant, but was prevented in this case by the conduct of the defendant, who stated: "I decline to state from what source or authority or information I obtained the facts or inference leading me to believe the same to be true, for the reason that it was a privileged communication." This does not meet the burden of proof required of him to show the truth of the charges made, and is an admission, in effect, of the falsity of the article.

The punishment is, however, limited to a small part of that which might be inflicted. Defendant Nelson is found guilty and imprisoned for ten days and fined $200.

Statement of accused — writing article — lack of knowledge of same — publication — preventing same.

4. The defendant Baker states under oath that he did not write the article in question, did not know it was being written; and could not have prevented its publication had he known. Although the circumstances throw much doubt upon these assertions, the court has neither the time nor the inclination to continue the inquiry, and Mr. Baker will not be punished

Opinion filed December 29, 1914.

Andrew Miller, Attorney General of the State of North Dakota, for plaintiff.

L. N. Miller and *F. O. Hellstrom,* for defendants.

BURKE, J. Section 174 of the Constitution of North Dakota limits the amount which may be yearly expended by the state to 4 mills on the dollar of the assessed valuation of all taxable property in the state. The legislature of 1913 made certain appropriations for the educational institutions, wolf bounty, bovine tuberculosis, glandered horses, terminal elevators, and agricultural training schools, which apparently exceeded the possible income leviable under this constitutional limit. The state board of equalization refused to levy the full amount of such appropriations, but scaled the same to come within the constitutional limit aforesaid. Hearing was had October 22, 1914, on the question, among others, of whether the state tax levy as made and apportioned by the state board of equalization, and which reduced the educational institutional tax levy below 1⅛ mills was valid, and, if so, was justifiable as necessary, when the state's total possible income from taxation and from all other sources was apportioned to its total disbursements authorized by specific appropriations, and its auditor's estimate of all other necessary and legal expense as authorized by various statutes. This court, not being conversant with the figures, appointed a referee before whom testimony might be taken to establish the exact amounts. Such referee called as a witness the state auditor, and requested him to furnish such estimates. In compliance therewith, the auditor fur-

nished an estimate covering many pages of items, and showing that the general expense of running the state, together with the appropriations in dispute, were well within the constitutional limit of 4 mills on the dollar. Based upon this estimate, this court handed down its decision on the 28th of October, 1914, holding with the educational institutions. Thereafter, on the 5th of November, 1914, the board of equalization made application for a rehearing, alleging that, owing to the haste with which the estimate had been prepared, items aggregating the sum of $300,000 had been omitted from the estimate, and that in truth and fact the appropriations demanded were in violation of the Constitution as aforesaid, and in excess of the limit. Upon this showing, a rehearing was granted; the state auditor was recalled, and allowed to supplement the estimate already furnished by additional evidence of items which proved conclusively that the appropriations mentioned if allowed *in toto* were in violation of the Constitution of this state, and could not be paid. An opinion on rehearing was accordingly filed to that effect on November 12, 1914. See State ex rel. Lenhart v. Hanna, 28 N. D. 583, 149 N. W. 573. The same day application was made to this court for a still further hearing, which was granted, and upon the following day, November 13, 1914, the court held such hearing, and the educational institutions and the board of equalization appeared by their attorneys, and still further argued the case. Thereafter the case was further considered by this court until the 19th of November, 1914, when a final determination was had, and an order entered refusing to modify the opinion on rehearing.

The Co-operators' Herald is published at Fargo, North Dakota, and owned by a corporation, the entire stock of which we are advised is owned by five persons, of whom the defendants Baker and Nelson constitute two. They claim between 5,000 and 6,000 circulation. A. M. Baker is the manager, and George L. Nelson the editor, of such publication. In the issue for November 13, 1914, in a double column article, in a conspicuous place on the first page, is an editorial signed by George L. Nelson, entitled:

Levy Decision, Gauzy Frame-up. The Foxy Boss and Henchmen Pull Off Lovely Frame-up Stunt and Bamboozle Voters.

It has been persistently whispered that the supreme court hearing

and opinion on the tax levy case was purely a frame-up to appease the state educational institutions of the state, and ward off a real hearing on the merits of the case until after election. We heard this rumor, but could give it no credence, and gave it no publicity before election, because we could not believe that the highest tribunal of the state could be inveigled into a conspiracy of such a character. We feel at perfect liberty to say that at no time had we a very exalted opinion of the personnel of that body, but we could not bring ourselves to believe that its members would besmirch their high office by resorting to the tricks of ordinary machine politics, and dirty politics at that, in order to save the political scalp of the "foxy boss."

Apparently the whole reactionary bunch, governor, attorney general, auditor, deputy auditor, treasurer, et al., not forgetting the members of the board of equalization and supreme bench, were in the plot to hold a fake hearing before election, and appease the heads of the educational institutions with a favorable opinion, in order to hold them in line, with the secret understanding that the board of equalization would demand a rehearing after election, and that it would be granted and the ways all greased for the supreme court to be able to gracefully reverse itself and knock the educational institutions out. . . . It is a foregone conclusion that the supreme court will reverse itself, in fact it may have done so before this issue reaches our readers.

On the 18th of November, 1914, the attorney general of the state laid information against A. M. Baker, business manager, and George L. Nelson, editor, charging them with contempt. After citation and plea of not guilty, the defendants filed an answer wherein it was stated: "The contention of defendants is that at the time of the publication of the alleged contemptuous article as set forth in the information, and admitted in the information to have been published on the 13th of November, A. D. 1914, was published after a final and complete determination of the controversy to which the article referred."

(1) Thus the first and principal controversy is whether or not the case of State ex rel. Lenhart v. Hanna was pending in this court at the time of the publication of the article aforesaid. As already stated, an opinion had been filed October 28, 1914, and an opinion on rehearing on November 12, 1914, both prior to the publication aforesaid, but

being an original proceeding in this court there could be no remittitur to a lower court, and the subject-matter remained under our jurisdiction. Immediately upon the filing of the opinion upon rehearing, November 12, 1914, application was made upon behalf of the board of equalization for a still further hearing, which was granted, and upon the 13th day of November, 1914, this court sat in public session all day, listening to arguments by both parties and their attorneys. This session was attended by a great many people, approximately fifty, and lasted until about the time the newspaper in question went to press. Upon the following and several succeeding days, this court discussed the matter in chambers, and finally, on the 19th of November, 1914, an order was entered, declining to make any further modification in the opinion. During all of those days this court could, had it so desired, have withdrawn its original opinion and the opinion on rehearing, and have modified or entirely changed the same. It is thus manifest that the article in question was published while the case was under consideration by this court. In fact, the language of the article itself shows this to be the case, for it is therein stated that "it is a foregone conclusion that the supreme court will reverse itself, in fact, it may have done so before this issue reaches our readers." That courts have the power to protect themselves against this kind of interference is apparent to anyone who gives the matter the slightest thought, and such has been the holding of all the authorities which we have been able to find. At 9 Cyc. page 20 (L), it is said: "Publications concerning a pending cause, trial, or judicial investigation, calculated to prejudice or prevent fair and impartial action, which seek to influence judicial action by threats or other form of intimidation, which reflect upon the court, counsel, parties, or witnesses respecting the cause, or which tend to corrupt or embarrass the due administration of justice, constitute contempt." In support of this text there are cited in the main volume of Cyc., together with the 1913 permanent Annotations and the 1914 Annotations, approximately one hundred cases, covering most of the states of the Union, the Supreme Court of the United States, England, and Canada. We have found no citations to the contrary. In the light of this holding it is unnecessary to determine whether or not the article in question would have constituted contempt of court had it been published after a final determination of the said case.

It will be time enough to determine such proposition when it is reached.

(2) The reason for punishment of contempt of court is that such acts tend to obstruct the administration of justice. From the earliest days such ruling has been enforced. In Reg. v. Wilkinson, 41 U. C. Q. B. 47, it is said: "The object of preventing, and, if necessary, of punishing, publications calculated to affect prejudicially the interest of suitors, is that there may be a fair trial; that the stream of justice shall be allowed to flow unruffled by extraneous influences." And in Rex v. Parke, [1903] 2 K. B. 432, it is said: "The reason why the publications of articles like those with which we have to deal is treated as a contempt of court is because their tendency, and sometimes their object, is to deprive the court of the power of doing that which is the end for which it exists,—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court, which has to try the case, to impotence." And in Fellman v. Mercantile F. & M. Ins. Co. 116 La. 723, 41 So. 49, it is said: "There is an obvious reason which appeals to the common sense of mankind, why outside influences should not be allowed to interfere with the conduct and decision of a cause or with the execution of a judgment, and that is that every individual, whether he be prosecuted criminally or be a litigant in a civil action, is guaranteed by the fundamental law a trial according to law, and protection by and under the law, for life, liberty, and property; and he is denied those rights, just as certainly as one who is hanged by a mob is denied them, if every interested, meddlesome, or malicious person who may choose to do so is allowed to intimidate his witnesses, corruptly influence the jurors to whom his case is submitted, denounce the judge for his rulings as the trial progresses, and obstruct the execution of judgment when obtained." See also Globe Newspaper Co. v. Com. 188 Mass. 449, 74 N. E. 682, 3 Ann. Cas. 761; Lord v. County Comrs. 105 Me. 556, 75 Atl. 126, 18 Ann. Cas. 665,—interesting footnotes being given in each of the annotated cases.

Applying such law to the facts at hand, we find two litigants, the board of equalization of the state of North Dakota upon one side, and the educational institutions upon the other, contending in this court for a statutory construction under the Constitution of this state, both

sides admitting that no more than 4 mills upon the dollar of the assessed valuation of the state may be spent, and one contending that a certain appropriation made by the last legislature was a violation of the provisions of this Constitution, and the other insisting that such money may be spent without such violation. This court did not seek this litigation, and only responded when the parties appeared in court demanding their legal rights. The parties to this controversy, as well as the taxpayers of the state at large, are entitled to have this question decided by the supreme court without any interruption or intimidation by any person whomsoever. While in the midst of the deliberation, under the guise of the sacred right of free speech, a newspaper editor sends broadcast over the state an accusation that the members of this court had entered into a criminal conspiracy with the governor of the state, the state auditor, the state treasurer, the attorney general, and the commissioner of agriculture and labor, to render a mock decision therein, and that this conspiracy had for its object the re-election of the governor of this state. Such a charge certainly tends to embarrass the court in its decision. If the decision finally be in favor of the board of equalization, it will allow the same editor to point to the fact as corroboration of his claim that such conspiracy had existed, while if the decision be in favor of the State University, well might the charge be made that the court had been intimidated by the charge made against it. The wrong done by the publication of the article is not so much against the court or the members thereof as against the litigants, against the taxpayers, and against the sacred foundations of justice, upon which the liberties and lives of all citizens rest.

Much has been said of the sacred rights of free speech. It is always conceded that the right is sacred, but at times such sacred right must give way to others even more sacred. It has never been claimed that it will protect a man in invading a church and interrupting the sermon with his free speech. The free right of speech will not protect a man in obstructing the streets of a crowded city; the free right of speech may not be used to interrupt even social gatherings or political meetings. Should it, then, be allowed to interrupt the courts of justice? Surely there must come a time when the rights of the free speaker are overshadowed by the rights of other men to unhampered justice. The right of free speech and the freedom of the press are as sacred to the

members of this court as they are to the defendant, and, we dare say, will be longer upheld by them than by him; but such rights must not be considered unbridled license to vilify and scandalize. It is as much a crime to assert charges which one knows to be untrue as it is to remain silent if he believes some offense to have been committed. When given an opportunity to prove the truth of the article which he had published, the defendant Nelson remained silent. When asked to state any reason, weak or strong, why he had even believed such article to be true, he replies that he must not tell because to do so would violate a confidential relation. In this he merely imitates the thief who, caught with the goods upon him. insists that he has just purchased them from "a tall, light-complexioned stranger."

(3) We come, now, to the question of punishment. The defendant Nelson in answering the interrogatories assumed the whole responsibility for the publication of the article aforesaid. When asked to state any reason why he had published the same, or any circumstances which had caused him to believe the same to be true, he replies: "I decline to state from what source or authority or information I obtained the facts or inference leading me to believe the same to be true, for the reason that it was a privileged communication, and for the further reason that if I divulged the source from which I received the information it would be a gross breach of professional ethics."

In determining the punishment we would like to consider the provocation which induced the same, but in doing this we are completely obstructed by the defendant himself. The burden of proof was upon the defendant to show the truth of the allegations alleged by him. This he positively refused to attempt, thereby, in effect at least, admitting their falsity. This is, of course, a serious offense, but we are inclined to leave his true punishment to his conscience and an enlightened public opinion. We do not believe the offense will be repeated. Therefore we will impose but a slight portion of the punishment which might be inflicted. It is the judgment of this court that George L. Nelson be confined in the Burleigh county jail for a period of ten days commencing at noon, November 23, 1914, and that he pay a fine of $200; and that in case such fine is not paid, he be confined in said jail for an additional period of twenty days.

(4) The case of the defendant Baker is different. He states under

oath that he did not write the article in question, did not know it was being written, and could not have prevented it had he known, and was in no manner responsible for its publication. Although the circumstances throw much doubt upon these assertions, and it seems improbable that the business manager of the paper did not read the same before it went finally to press, yet we have neither the time nor the inclination to continue the inquiry. Mr. Baker was one of the owners of the paper, and as such could probably be held upon this charge. See State Bd. of Law Examiners v. Hart, 104 Minn. 88, 17 L.R.A.(N.S.) 585, 116 N. W. 212, 15 Ann. Cas. 197; McDougall v. Sheridan, 23 Idaho, 191, 128 Pac. 954. Also see an interesting discussion in State ex rel. Crow v. Shepherd, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79. Certainly after the knowledge gained from this trial, neither Baker nor the other owners of the paper will be able to excuse themselves upon this ground, should a similar offense be committed in the future.

STATE OF NORTH DAKOTA v. C. E. BARNES.

(150 N. W. 557.)

A criminal complaint was laid in justice court against defendant Barnes, charging him with assault and battery, a misdemeanor. He pleaded guilty, and paid a fine and costs imposed on judgment. Subsequently he was prosecuted for felony,—assault and battery with intent to kill. On trial thereon the jury found him guilty of the included offense charged, of assault and battery, a misdemeanor. The prosecution for felony was based upon the same acts committed upon the same person as was the first prosecution for misdemeanor in justice court, to which the plea of guilty was entered. When defendant was called for judgment on the verdict of guilty of assault and battery, he moved an arrest of judgment, asserting for the first time that he had been once before convicted and punished for that same offense, and that under the statutes and the state and Federal Constitution the court was without jurisdiction to render a judgment of conviction. The motion was denied, and a sentence of fine and imprisonment was imposed. He applies to the supreme court, asking for a writ of habeas corpus directing his discharge from custody, claiming he is being illegally restrained of his liberty under a void sentence. It is *held:*

Information — felony — plea — former jeopardy — prior conviction — same offense — determination of — question for jury — verdict.

1. That under the statutes, defendant in pleading to the information for felony should also have interposed a plea of former jeopardy arising from prior conviction for the same offense, to the included misdemeanor charged in the information. The statutes contemplate that the jury shall determine as a fact whether prior conviction has been had, and find either for the defendant or for the state on that question, in addition to their general verdict of guilty or not guilty.

Failure to interpose such plea — waiver of defense of former conviction.

2. That the failure to interpose the plea of prior jeopardy prior to verdict was a waiver of the defense of former jeopardy arising from such former conviction.

Arrest of judgment — motion in — former jeopardy not included.

3. That the statutes defining and providing for motion in arrest of judgment prevent former jeopardy being interposed in arrest of judgment.

Constitution — former jeopardy — immunity — must be claimed by plea.

4. That § 13 of the state Constitution, that "no person shall be twice put in jeopardy for the same offense," merely prescribes immunity from a second prosecution, and is not a bar thereto unless the immunity given is claimed by a plea of former jeopardy and prior to verdict.

Federal Constitution — applies only in Federal proceedings — state Constitutions — state statutes — not restricted.

5. That the 5th Amendment to the Federal Constitution, that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," applies only to proceedings in Federal tribunals, and in no way restricts or prescribes the limits of the constitutional provisions and statutory enactments of the several states.

Habeas corpus — remedy of — merits.

6. Habeas corpus is assumed to be the proper remedy, without that question being decided, the court preferring to place its decision upon the merits.

Opinion filed January 2, 1915.

Original application for habeas corpus denied.

F. H. Register and *J. M. Hanley,* for petitioner.

H. R. Berndt, State's Attorney, and *Theodore Koffel,* Assistant State's Attorney, opposed granting of writ.

Goss, J. Defendant was informed against for assault with intent

to kill. By verdict he was found guilty of the included offense of assault and battery. His plea was not guilty. When called for judgment upon the verdict, he interposed a motion in arrest of judgment. It was based upon the alleged ground that he had been once before in jeopardy for the same criminal offense because of a judgment of conviction and sentence thereunder rendered in a magistrate's court, finding him guilty of assault and battery upon the same person and because of the same acts as charged in said information. Certified copies of the record and judgment of the magistrate's court were filed in support of this motion to arrest judgment. It is thus disclosed that a written criminal complaint charging defendant with assault and battery was taken and filed by said magistrate, who thereon issued a warrant of arrest; that defendant was brought or appeared before the court, entered his plea of guilty of assault and battery, and upon said plea was sentenced to pay a fine of $5 and costs as the judgment of said court, and which defendant paid. Subsequently defendant was complained against for felonious assault, held for trial, and tried thereon, as heretofore stated, upon his plea of not guilty. In opposition to the motion in arrest of judgment, the state filed affidavits charging that the purported judgment rendered in the magistrate's court was collusive and void as procured by arrangement of the defendant and the prosecuting witness, with plea taken and entered, and sentence imposed without any examination into the facts by the magistrate, as alleged to be required by law. The state also contends here, as it did before the district court on argument of the motion in arrest of judgment, (1) that habeas corpus is the wrong remedy, being used as a substitute for appeal; and (2) regardless of the propriety of the writ as a remedy when so invoked, the writ should not issue to discharge defendant, because there is no record of which the court can take notice, there being no valid grounds shown upon which to base the motion made in arrest of judgment, for the reason that the defense of former jeopardy, to be such and available at all, must be raised on the record prior to verdict, and be presented by plea, putting in issue the question of former jeopardy, upon which the jury must find as a fact by their verdict; and that unless so interposed by plea it is waived for all purposes. The questions raised are important, and should be determined, and the propriety of the remedy will therefore be at first assumed,

and former jeopardy attempted to be raised on arrest of judgment, passed upon.

The statutes involved, directly or incidentally, are § 10934 and kindred sections, concerning what a defendant may show against judgment, upon being called for sentence; § 10921, defining and declaring when, and the grounds upon which, a motion in arrest of criminal judgment may be made; §§ 10881–9–90 as to verdicts; §§ 10746 & 7–69 as to pleas and joinder of issues of fact by plea for presentation to the jury; with §§ 10754 and 10865, declaring the effect of former jeopardy resulting from conviction or acquittal; with § 10881, prescribing the form of verdict to be returned where a plea of former jeopardy arising from former conviction or acquittal has been entered. Section 10889, prescribing the form of verdict on the similar question of trial on a second offense charged, might also be mentioned. Many other sections of the Code of Criminal Procedure are more or less related, but these are sufficient, from which to determine this case, taken in connection with common-law rules, of which the statutes are, in the main, if not entirely, but declaratory. The defendant invokes § 13 of our state Constitution, providing that "no person shall be twice put in jeopardy for the same offense," and the similar provision of the 5th Amendment to the Federal Constitution, that, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," and asserts that these constitutional guaranties secure to defendant the right to invoke the benefit of former jeopardy after plea and at the time urged herein, that is, in arrest of judgment; and that a suggestion of former jeopardy may be made after verdict, and when supported, as here, by record proof of former jeopardy because of former conviction for the same offense, the court is thereby devested of jurisdiction and power to pronounce any judgment whatsoever except that of acquittal because of former jeopardy.

Under § 10746 there are but four possible pleas to be entered to an information or indictment, the third and fourth of which have relation to prior conviction or former jeopardy thereby. No reference is made to pleas required under § 9480 to the specific degree of crime where homicide is charged. The statute, § 10747, prescribes even the form of entry of the plea of former jeopardy upon the minutes of the court; § 10881 also requires an additional or different form of verdict or

finding, where the plea of former jeopardy is interposed, as it does likewise under a plea of insanity. The statutes contemplate the presentation of the issue to the jury as one of fact under the section cited, and also § 10769, declaring that "an issue of fact arises (1) upon a plea of not guilty; (2) upon a plea of former conviction or acquittal of the same offense; or (3) upon a plea of once in jeopardy;" and § 10770 inhibits waiver of a jury as to issues of fact in all felony cases. Under these statutes and § 10822, as construed in State v. Barry, 11 N. D. 428–447, 92 N. W. 809, defendant could require the submission of such issue of fact to the jury, the sole arbiter of fact whenever a plea of not guilty is entered.

The general scheme shown by the statutory requirements cited is that the question of fact of former jeopardy shall be presented to the jury upon a separate plea of not guilty because of former jeopardy arising from former acquittal or conviction. On such plea the jury determines guilt by its general verdict, which is accompanied by an additional verdict finding either "for the state" or "for the defendant" upon the specific plea of former jeopardy. Section 10881. The issues of fact usually presented under such a plea are identity of person and offense,—or, as stated in Re Neilsen, 131 U. S. 176, page 190, 33 L. ed. 118, page 122, 9 Sup. Ct. Rep. 672, "that the test is not whether the defendant has been tried for the same act, but whether he has been put in jeopardy for the same offense." Upon identity of offense see State v. Virgo, 14 N. D. 293, 103 N. W. 610, decided on a plea of former acquittal. In logical sequence now follows the question, whether the information for assault with intent to kill includes that of assault and battery as an offense charged in said information. Defendant does not question the validity of the verdict, but contends that it is not charged in the sense that it can be pleaded to as a specific offense, and contends that defendant could not, on the information charging the graver offense, a felony, interpose a plea of former jeopardy to the included offense. Section 10890 provides that "the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the information or indictment, or of an attempt to commit the offense." Petitioner is in error. These statutes are but declaratory of the common law as to included offenses. Thereunder it was the theory that the

included offenses at common law, each and all, were charged as necessary constituent ingredient offenses included in the allegations necessary to charge the gravest,—the felony specifically charged. Thus the information for assault and battery charges assault, a separate crime, the accomplishment of the assault consummating the crime of assault and battery, and merging the assault into the battery. Assault and battery with intent to do great bodily harm, though not a common-law crime, if consummated, carries with it the ingredient offenses of assault, and assault and battery, both of which are merged in the felony and found as ingredient facts, together with the felonious and specific intent constituting the felony. Carrying it one step farther, to assault and battery with intent to kill, the graver crime charged, there is found merged in said charge as necessary ingredient offenses the lesser grade of felony and the two misdemeanors upon each of which verdicts are possible according to the state of the proof made. For authority it is not necessary to go beyond our own reports. See State v. Johnson, 3 N. D. 150, 54 N. W. 547; State v. Marcks, 3 N. D. 532, 58 N. W. 25; State v. Climie, opinion by Justice Cochrane, 12 N. D. 33, 94 N. W. 574, 13 Am. Crim. Rep. 211; State v. Tough, 12 N. D. 425, 96 N. W. 1025; State v. Cruikshank, 13 N. D. 337, 100 N. W. 697; State v. Mattison, 13 N. D. 391, 100 N. W. 1091; and State v. Bednar, 18 N. D. 484, 121 N. W. 614, 20 Ann. Cas. 458. Quoting from State v. Climie: "The rule is that when the offense charged includes another or smaller constituent offense, the charge of such other offense will not render the information double. . . . The statute authorizing the conviction of one accused of any offense necessarily included in that with which he is charged in the information is a legislative recognition of this rule." It is true that the state would not be obliged to accept a plea of guilty to any of the lesser and included offenses charged, as defendant was called upon to plead to the specific felony charged in the information, but that did not prevent defendant from coupling with his plea of not guilty as to said felony charged his additional plea of not guilty of assault and battery because of former jeopardy for that offense, arising from his former conviction; and upon which plea, if the jury found "for the defendant," together with its general verdict of guilty of assault and battery, an acquittal of all crime would result, as the finding of former jeopardy would bar a

judgment of guilty or punishment for such assault and battery. There would be nothing inconsistent in such pleas. Nor would the facts admitted by such plea of former jeopardy as to the included offense admit more than the state would, if the plea be the fact, be entitled to prove against the defendant on the trial for felony as his judicial admission. State v. Hermanson, 22 N. D. 125, 132 N. W. 415, Ann. Cas. 1914A, 1052. Thus the offense of assault and battery was charged in this information, and was one to which the plea of former jeopardy could be made, and, if established and found by the jury, would render the court powerless to do aught but render judgment of acquittal, as the case would be in all such respects analogous in law to that of Re Neilsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672, where such a plea was entered, but held on demurrer thereto to be no bar, and was refused, resulting in reversal on appeal.

Having found, therefore, that the statutes contemplate the presentation of former jeopardy arising from former conviction to the jury by plea, upon which the jury finds the fact as to the same, and renders its finding of fact along with its general verdict; and having determined that, though the plea to the included offense is one which the state was not obliged to accept as a plea on the merits, yet was a plea the state was powerless to reject when made specifically to such included offense,—the question next arises as to whether failure to enter such plea is a waiver of all benefits which might have been thus gained thereunder. The decision as to this must be against defendant under all authorities. "Jeopardy, to be available, must be specifically pleaded, or otherwise it is deemed to have been waived," Wharton's Criminal Law, 11th ed. 526, citing Gue v. Eugene, 53 Or. 282, 100 Pac. 254. To the same effect, see State v. White, 71 Kan. 356, 80 Pac. 589, 6 Ann. Cas. 132, and note, from the latter of which we quote: "It has been held in a number of cases that a person accused of crime waives his privilege of immunity from second jeopardy by failing to plead or otherwise set up the former jeopardy when he is arraigned in the second prosecution,"—citing Jordan v. State, 81 Ala. 30, 1 So. 577; Re Allison, 13 Colo. 525, 10 L.R.A. 790, 16 Am. St. Rep. 224, 22 Pac. 820; Hill v. State, 41 Ga. 484; Hall v. State, 103 Ga. 403, 29 S. E. 915; Powers v. State, 83 Miss. 691, 36 So. 6; State v. Webb, 74 Mo. 333; Davis v. State, 51 Neb. 301, 70 N. W. 984; McBean v.

State, 3 Heisk. 20; Johnson v. State, 26 Tex. App. 631, 10 S. W. 235; Barton v. State, — Tex. Crim. Rep. —, 1898, 43 S. W. 987; Re Barton, 6 Utah, 264, 21 Pac. 998; People v. Stewart, 64 Cal. 60, 28 Pac. 112. And that such plea cannot be considered or raised after verdict, see People v. Bennett, 114 Cal. 58, 45 Pac. 1013; State v. Durein, 70 Kan. 1–13, 15 L.R.A.(N.S.) 908, 78 Pac. 152, and 80 Pac. 987; State v. Washington, 28 La. Ann. 129; Com. v. Maher, 16 Phila. 452. See also note to Stone v. State, 135 Am. St. Rep. 69 at page 74, on former jeopardy first raised by motion in arrest of judgment, citing State v. McFarland, 121 Ala. 45, 25 So. 625; Bedee v. People, 73 Ill. 320; People v. M'Kay, 18 Johns. 212; State v. Stephens, 13 S. C. 285; Brown v. State, 43 Tex. Crim. Rep. 272, 64 S. W. 1056; Hill v. Nelms, 122 Ga. 572, 50 S. E. 344; and see same note in 135 Am. St. Rep. at page 79, on waiver and abandonment of benefit of former jeopardy by failure to interpose it by plea,—citing Dalton v. People, 224 Ill. 333, 79 N. E. 669; People v. McGinnis, 234 Ill. 68, 123 Am. St. Rep. 73, 84 N. E. 687. In many, if not all, of these cases, the same question of immunity from second jeopardy under state constitutional provisions has been urged as here, and the claim made that such immunity is a constitutional right incapable of being waived. This argument overlooks the fact that the Constitution merely offers an immunity which must be claimed, to be available; and concerning the procedure and time of asserting of such claim the state alone has the say in state prosecutions, and also that the rights guaranteed amount to immunity only, and do not constitute alone a constitutional bar to a second prosecution unless claimed as provided by statute. Under both our state Constitution and statutes, former jeopardy must be raised by plea, and cannot be raised by motion in arrest of judgment.

But counsel has urged that the 5th Amendment to the Federal Constitution, earlier quoted, operated to devest the trial court of jurisdiction whenever, before sentence, former jeopardy is established. Sufficient is the answer that former jeopardy is not established by the record, and cannot be established by or upon a motion in arrest of judgment, where the first conviction was in a different court from that in which former jeopardy is urged as a bar to second judgment, as the court cannot, on the motion made, know the fact by means of judicial notice taken of its own record. See note in 6 Ann. Cas. 134. But a

further all sufficient answer exists to petitioner's contention, and that is that the 5th Amendment to the Federal Constitution "applies only to proceedings in Federal tribunals, and does in no way restrict or prescribe the limits of the constitutional provisions and statutory enactments of the several states,"—quoting from note in 135 Am. St. Rep. 70, citing Brantley v. State, 132 Ga. 573, 22 L.R.A.(N.S.) 959, 131 Am. St. Rep. 218, 64 S. E. 676, 16 Ann. Cas. 1203, 217 U. S. 284, 54 L. ed. 768, 30 Sup. Ct. Rep. 514; Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622; Barker v. People, 3 Cow. 686, 15 Am. Dec. 322; United States v. Keen, 1 McLean, 429, Fed. Cas. No. 15,510. From the last citation the following is taken: "The provision in the Constitution that 'no person shall be subject for the same offense to be twice put in jeopardy of life or limb' was designed, as the language clearly imports, for the security of the citizen. It was intended to shield him against oppression and injustice. In the case of People v. Goodwin, 18 Johns. 187, 9 Am. Dec. 203, the court inclined to think that this provision was obligatory on the state courts. We think otherwise. It applies to the Federal courts, and to the Federal courts only." And in Brantley v. Georgia, on appeal from the supreme court of that state, in 217 U. S. 284, where the identical contentions here made were advanced, that both the state and the Federal Constitutions were violated where a plea of second jeopardy was overruled, the Federal Supreme Court says: "The contention is absolutely without merit. It was not a case of twice in jeopardy under any view of the Constitution of the United States." With this in mind, Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672, heretofore discussed, is in no wise applicable to prosecutions in state courts, as the principles there enunciated in a prosecution in the Federal court were based on the 5th Amendment to the Federal Constitution. On the merits, petitioner's contentions must be held unsound.

What is said in deciding this case does not pass on whether habeas corpus is the proper remedy. It is unnecessary to pass on that question. The writ is denied.

STATE OF NORTH DAKOTA EX REL. GUNDER OLSON as State Treasurer v. CARL O. JORGENSON as State Auditor.

(150 N. W. 565.)

State auditor — state treasurer — charges and credits — warrants — hail insurance commissioner — taxation — not state fund — function of state government.

1. Chap. 23, Laws of 1911, provided for the establishment of a hail insurance department, to be conducted by the commissioner of agriculture and labor, who was to be known as the commissioner of hail insurance. The funds received from premiums were known as the hail insurance fund, and were placed in the hands of the state treasurer. Such law provided for the hail insurance commissioner drawing warrants for the payment of losses, on the state treasury. The general law regarding the duties of state treasurer and auditor require the auditor to charge the treasurer with funds received by the latter, and to credit him with vouchers exhibited to the auditor. During the months of January, February, and March, 1913, the treasurer paid about $3,800 out of the hail insurance fund on warrants issued by the commissioner of hail insurance, in accordance with the terms of the law referred to. The funds received had been charged to the treasurer by the auditor, on the assumption that the provisions of the general law applied. When the warrants drawn by the commissioner of hail insurance were presented to the auditor for the above sum, he refused to credit them to the treasurer, taking the position that he was the only constitutional officer having the power to draw warrants on the treasurer, that, these having been drawn by the hail insurance commissioner, they were illegal and invalid. It is *held:*

(a) That on the assumption that the general law, requiring the auditor to charge and credit the treasurer with receipts and disbursements, is applicable to this fund, he is not relieved from making such credits of warrants drawn by the hail insurance commissioner, because this fund is not a state fund, as it is not derived from taxation or any of the other sources which constitute it a fund of the state, and is not used in carrying on any function of government.

(b) That, assuming that the auditor only can draw warrants on state funds in the hands of the treasurer, that duty may be placed upon any other suitable person or official as to any fund in the hands of the treasurer, which is not a state fund.

(c) That the treasurer is the custodian of the hail insurance fund for those who contributed it.

State auditor — hail insurance fund — duty of keeping account — charges and credits.

2. The state auditor, if under the law authorized to keep any record of the hail insurance fund, which is not determined, does so by virtue of holding the office of auditor for the time being, and not because the individual happening to hold that position is any specified person; and the appellant, having accepted the burden, and assumed to act by reason of his incumbency of the office of auditor, and having made the charges against the treasurer, cannot escape the duty of completing the act by crediting the amount of the vouchers exhibited to him.

Mandamus — compel the performance of a duty.

3. If, however, the law in question does not contemplate the auditor keeping the record of this fund, he is not relieved from making the credit when he has assumed to make the charges against the treasurer; and mandamus in either event will lie to compel him to cancel the charges and clear the record of the treasurer.

Constitutionality of law — state auditor's duties thereunder.

4. Neither the constitutionality of the hail insurance law as a whole is determined, nor the constitutionality of any provision permitting any official, other than the state auditor, to draw warrants against state funds.

Opinion filed January 2, 1915.

Appeal from the District Court of Burleigh County; *W. L. Nuessle*, J.

Affirmed.

Barnett & Richardson, for appellant.

The state auditor is a constitutional officer. An auditor is one who is authorized to examine accounts, compare charges and vouchers, examine parties and witnesses, allow and reject charges, and state a balance. People ex rel. Benedict v. Oneida County, 24 Hun, 413; Cavin v. Brooklyn, 5 N. Y. Supp. 758; People ex rel. Myers v. Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; People ex rel. Cochran v. Pelham Bd. of Auditors, 74 Hun, 83, 26 N. Y. Supp. 122.

It was the clear instruction of the framers of the Constitution and of the laws of the state, that the auditor should have and exercise discretion in the examination and adjustment of claim against the state, with power to reject the same, and the people must answer for his stewardship. Sawyer v. Mayhew, 10 S. D. 18, 71 N. W. 141.

If the legislature has power to authorize the hail insurance commissioner to write his warrants direct on the state treasurer, then it has power to authorize any other state officer to do likewise, and thus eliminate the office of the state auditor from all consideration in the adjustment and payment of claims. State ex rel. Proudfit v. Hastings, 10 Wis. 525; Ex parte Corliss, 16 N. D. 475, 114 N. W. 962.

Andrew Miller, Attorney General, and *Alfred Zuger* and *John Carmody,* Assistant Attorneys General, for Respondent.

The state treasurer must keep and state all accounts in which the state is interested. Rev. Codes 1905, § 101, subdivs. 6–9, § 111.

Moneys shall be paid from the state treasury only upon the warrant or order of the auditor. Rev. Codes 1905, § 381.

This is only a statutory provision, and may be amended or repealed at the will of the legislature. But the legislature may and it has provided a different method of disbursement of these funds. Com. v. James, 135 Pa. 481, 19 Atl. 950.

SPALDING, Ch. J. The legislative assembly of 1911, by chapter 23 of its acts, provided for establishing a hail insurance department in this state; that is, it provided a method whereby owners of growing crops might insure them by the means provided through the department, and participate, in case of loss, in a fund designated and known as the hail insurance fund, in the hands of the state treasurer.

This law provided that the state treasurer should pay out of such fund only upon warrant issued and signed by the commissioner of hail insurance, in accordance with the terms of that act. Section 12 required the commissioner of hail insurance to draw his warrants on the state treasurer when he had ascertained the whole year's business, to be paid out of the hail insurance fund, such warrants to be forwarded to the various county treasurers where losses had occurred.

During the months of January, February, and March, 1913, the state treasurer paid about $3,800 out of this fund upon warrants issued by the commissioner of hail insurance, in accordance with the provisions referred to. Such warrants did not go through the hands of the state auditor, but after payment they were presented by the state treasurer to the auditor, and credit demanded therefor. The auditor refused to allow such credit or to receive such warrants, claim-

ing that the law as a whole was invalid, and in any event the provisions of the act referred to were unconstitutional and void in so far as they provided that the hail insurance commissioner, rather than the auditor, draw his warrants upon the state treasurer to pay losses. The auditor had theretofore charged the amount in said fund to the treasurer, claiming to act under the general law in doing so. Nothing is involved in this case except the warrants specifically referred to, as the legislative assembly of 1913 amended the law, and provided that the auditor should draw the warrants covering the losses, instead of the commissioner of hail insurance.

This proceeding was instituted by the state treasurer as relator to compel the auditor to receive the warrants referred to and paid by the state treasurer, and issue to said treasurer his receipt therefor, and to credit him with all sums paid from said fund upon such warrants. The facts are not controverted. In the district court an alternative writ was first issued, and on the return day it was made peremptory, commanding the defendant as state auditor to immediately receive such warrants, etc. From the judgment of the district court an appeal has been taken to this court.

Although it appears that in the district court it was contended by the appellant that the entire act was unconstitutional and void, the record does not disclose the grounds upon which that court granted the writ. In this court appellant only contends that the provisions for the commissioner of agriculture and labor, acting as the commissioner of hail insurance, drawing the warrants to pay losses, are invalid. The ground is that the auditor is a constitutional officer, and the only person who can be authorized by the legislative assembly to audit accounts and draw warrants on the state treasurer for the payment of state funds. In determining this appeal we shall therefore assume, without deciding the question, that the law as a whole is a valid legislative enactment, and proceed to determine whether it was within the power of the legislative assembly to so provide for the drawing of warrants against the hail insurance fund on the state treasurer. We shall assume for the purposes of this case that the state auditor is the only official who may be empowered to draw warrants upon the treasurer for the payment of state funds, or funds belonging to any of the departments of the state, on deposit with the treasurer.

The fund known as the hail insurance fund is composed of moneys which do not belong to the state, and which are not state funds. That fund is not used in carrying on any function of government. It is not raised by taxation, by the payment of fees, is not received from the sale of lands, or for interest on land contracts, or in any other manner which constitutes it a state or public fund, and is not the property of the state. It is derived from premiums paid by owners of crops within the state, which premiums are held by the state treasurer and disbursed, after paying expenses provided for by the act in question, to pay losses from hail, incurred by the persons whose crops have been insured, and no appropriation is necessary to authorize its disbursement. See State ex rel. Stevenson v. Stephens, 136 Mo. 537, 37 S. W. 506. The payments made by crop owners are not obligatory. They need not take this insurance. Their action is voluntary, and when they make payments such payments go into a fund to be disbursed by whomsoever may be at the time the state treasurer, on the order of the person who happens for the time being to be the commissioner of agriculture and labor, and therefore hail insurance commissioner. The treasurer is the custodian of the fund, not a state fund, but a fund belonging to those who contributed it for the purpose named. The commissioner of agriculture and labor is made the commissioner of hail insurance, and is given charge of the bookkeeping and the administrative features necessary to carry out the purposes of the act, and has charge of the apportionment and the disbursement of this fund, after determining to whom it is to be paid, and how much of it is to be paid to each claimant. He acts, not on a fund raised as state funds are provided, but by reason of the legislative assembly having permitted him and attempted to authorize him to act in another and different capacity, when owners of crops voluntarily request him so to do and make the necessary payments. In the same sense the treasurer is the custodian of the fund. The legislature might with equal propriety have made any other state, county, or township officials the custodians and administrative officials of this or corresponding funds, or it might undoubtedly have constituted some other official, and very likely a private individual, the administrative officer of the fund and business. They have selected the state treasurer and the commissioner of agriculture and labor because there are always

incumbents of these offices, and the nature of the duties harmonize with those of the state officials named. That is, the duties are of a similar character. These were undoubtedly among the controlling considerations which induced the legislature to name these officials, rather than other persons who might have been named.

It may aid in considering this to ascertain the definition of an auditor, that is, an auditor as applied to a state official. The powers and duties of a governmental auditor are thus defined: "An officer of government whose function it is to examine, verify, and approve or reject accounts of persons who have had the disbursement of government moneys, or have furnished supplies for government use." 1 Abbott's Law Dict. 111. Bouvier thus defines it: "An officer of the government whose duty it is to examine the accounts of officers who have received and disbursed public moneys by lawful authority." 1 Bouvier's Law Dict. 195. These definitions are approved in State v. Brown, 10 Or. 216. A definition applicable to the state auditor, under our system, may be found in State ex rel. Proudfit v. Hastings, 10 Wis. 525. We quote: "As used in our Constitution it signifies an officer whose business is to examine and certify accounts and claims against the state, and to keep an account between the state and its treasurer." This definition clearly implies that his strictly official duties only relate to matters pertaining to the state government and funds, and that if, as we have assumed, the legislature has no power to designate any other person to draw warrants on state funds, this restriction does not apply to funds which clearly have nothing to do with those derived from taxation or any other public source, and which do not belong to the state as such, and cannot be used for any public purpose. The legislative assembly was therefore under no constitutional compulsion to name the state auditor as the party who should draw the warrants, and the provisions authorizing the commissioner of hail insurance to do so are therefore not in conflict with the provision of the state Constitution providing for the election of such official. The subject is an interesting one, and would be worthy of more extended treatment, were this much more than a moot case, and did our time permit full elaboration of the principles involved. We content ourselves with referring to State ex rel. Stevenson v. Stephens, 136 Mo. 537, 37 S. W. 506, a case directly in point, in which it was

held that money deposited with the state treasurer by investment companies, under an act of the legislature for the protection of investors, is not money belonging to the state. That court said:

"It is manifest that these provisions only apply to money 'belonging to the state.' The money in question, though it was deposited with the treasurer, was for the specific purpose of making good the security intended for the protection of those dealing with bond investment companies, and was not money belonging to the state within the meaning of the Constitution. The securities, whether in money, bonds, or notes, are held by the treasurer in trust, not for the use or benefit of the state, but for the protection of those who may hold the bonds, certificates, or debentures of bond investment companies which are authorized to sell such securities on the partial payment or instalment plan."

But appellant urges that, if we should arrive at the conclusion reached, mandamus will not lie because, perforce of such conclusion, the auditor is not such a state officer as may be the subject of a writ compelling him to act. We think there is no merit in this contention. This fund is placed in the hands of the treasurer, and if we assume, as is assumed by both parties to this appeal, that the provisions of the general law, requiring the state auditor to charge moneys received by the state treasurer to that official, and, on his exhibiting vouchers, credit him for the amounts paid out, are applicable, then on this assumption these acts are done by virtue of these persons being state officers. They are, by virtue of their offices, the custodian and bookkeeper of the fund. The persons to perform these duties are not named in the act. They are persons who, for the time being, happen to occupy the official position of treasurer and auditor, and it is by virtue of those positions that they handle this fund, and the auditor, having accepted the burden and assumed to act in accordance with legislative directions, should not be heard to deny that he is acting by reason of his incumbency of the office of auditor, and thereby escape the duty of completing the act which he has already partially performed; that is to say, he has made the charge, and now refuses to make the credit.

There is, however, another consideration to which attention may be called. Chapter 23, supra, nowhere mentions the auditor in connection with the duties pertaining to the hail insurance fund or business.

As we have said, it was assumed that the general law regarding the accounting between the treasurer and the auditor was applicable. We are by no means certain that the legislature intended it to be so, but if it did not,—and we do not determine this question,—no different conclusion could be reached in view of our holding that the funds derived from insurance premiums are not state funds. No method of procedure, except mandamus, occurs to us, by which, when having assumed to do a part of an act assumed to be required of the auditor by law, he can be compelled to complete the record of the transaction. In the Stephens Case, supra, it was held that mandamus was the proper remedy to compel the state treasurer to pay out the funds held by him as custodian or trustee. The judgment of the District Court is affirmed, without costs.

GEORGE McKENZIE v. G. N. HOPKINS, H. N. Tucker Company, a Corporation, John R. Jones, Farmers & Merchants State Bank of Kensal, a Corporation, Kensal Implement Company, a Corporation, and Langworthy Lumber Company, a Corporation.

(150 N. W. 881.)

Land lease — employee — verbal oral contract — crops — indebtedness — new contract — chattel mortgages.

1. Defendant Hopkins had a lease of land belonging to the appellant for the year 1908 and prior years. He farmed the land during the years 1909, 1910, and 1911. It is contended by appellant that Hopkins furnished the teams and machinery and did the work as his employee during the year 1911, under a verbal contract to that effect, and providing that appellant should take all the crop, and credit Hopkins with the proceeds of one half thereof on indebtedness due him from Hopkins. Hopkins gave mortgages to the other defendants on a half interest in the 1911 crop. *Held*, from an examination of the evidence, that no new contract was made; that Hopkins was the tenant of appellant for the years 1909, 1910, and 1911, and that the chattel mortgages referred to attached to one half the crop.

Deposit — order of court — application for — crops — proceeds of — depositary — statute — method of procedure.

2, Section 6995, Rev. Codes 1905, being § 7594, Comp. Laws 1913, makes pro-

vision for application to the court for an order directing the deposit of money or delivery of property or effects, and for an order designating a depositary with whom such property, money, or effects may be deposited by the applicant having it in possession, during the pendency of litigation between different claimants for the same, to be disbursed or delivered in accordance with the result of the litigation. In the case at bar the appellant sold Hopkins's share of crops, on which were various chattel mortgages running to respondents. Before paying for the same the purchaser gave notice and made application for the court to designate a depositary, which the court did, and such proceeds were paid to and retained by such depositary. Appellant brought this action to determine the ownership of the fund so deposited. *Held*, that the statute referred to is applicable to this controversy, and furnishes a method of relieving an innocent party from litigating the ownership of the fund as between different claimants, and that the trial court did not err in adjudging the defendants entitled to the amounts covered by their respective chattel mortgages.

Opinion filed January 4, 1915.

Appeal from District Court, Fifth Judicial District, of Stutsman County; *Hon. James A. Coffey*, J.

Affirmed.

Thorp & Chase, for appellant.

Hopkins was a tenant; he was a mere servant; no tenancy was proved; he had no interest in the land, and was not in possession. Heywood v. Fulmer, 158 Ind. 658, 18 L.R.A. 491, 32 N. E. 574; Todhunter v. Armstrong, 6 Cal. Unrep. 27, 53 Pac. 446; Kloke v. Wolff, 78 Neb. 504, 11 L.R.A.(N.S.) 99, 111 N. W. 134; McCutchen v. Crenshaw, 40 S. C. 511, 19 S. E. 140, 24 Cyc. 78.

Where one raises a crop upon land of another under contract for a particular part of the crop, he is a mere "cropper." Where there is a joint occupation, which does not exclude the owner of the land from possession, the contract is a mere "letting." The relation of landlord and tenant does not exist. 24 Cyc. 877, 878, 1464; 12 Cyc. 779; Christian v. Crocker, 25 Ark. 327, 99 Am. Dec. 223; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415; 32 Century Dig. title Landlord & Tenant, and all cases cited under § 1399; Ferris v. Hoglan, 121 Ala. 240, 25 So. 834; Adams v. McKesson, 53 Pa. 81, 91 Am. Dec. 183; Pom. Eq. Jur. § 1048.

The property must have been impressed with the trust before the mortgages would attach to the proceeds. Sharp v. Goodwin, 51 Cal. 221; Scott v. Umbarger, 41 Cal. 411; Price v. Reeves, 38 Cal. 457; Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 153; 2 Story, Eq. Jur. §§ 1258, 1259 and 1260.

The right to follow and reclaim a trust fund is always based upon the right of property, and is never based upon the theory of preference by right of an unlawful conversion. Ferris v. Van Vechten, 73 N. Y. 113; Bromley v. Cleveland, C. C. & St. L. R. Co. 103 Wis. 562, 79 N. W. 741; Dowie v. Humphrey, 91 Wis. 98, 64 N. W. 315; 39 Cyc. 529, 541; Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694; Twohy Mercantile Co. v. Melbye, 78 Minn. 357, 81 N. W. 20; Third Nat. Bank v. Stillwater Gas Co. 36 Minn. 75, 30 N. W. 440; Seybold v. Grand Forks Bank, 5 N. D. 460, 67 N. W. 682; Farmers' & T. Bank v. Kimball Mill. Co. 1 S. D. 388, 36 Am. St. Rep. 739, 47 N. W. 404.

The cropper's mortgage of ungrown crops passes no title to his interest if he subsequently fails to request a division and delivery of any part of the crop. Savings Bank v. Canfield, 12 S. D. 330, 81 N. W. 630.

A mortgage cannot shift from one piece of property to another. Bidgood v. Monarch Elevator Co. 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561; Hawk v. Konouzki, 10 N. D. 37, 84 N. W. 563; Omlie v. Farmers' State Bank, 8 N. D. 570, 80 N. W. 689.

Where one party lived with the owner on his farm, and helped in raising the crops, this fact does not overcome the presumption of ownership in the owner. Thurston v. Osborne-McMillan Elevator Co. 13 N. D. 508, 101 N. W. 892; Olson v. O'Connor, 9 N. D. 504, 81 Am. St. Rep. 595, 84 N. W. 359; Meacham v. Herndon, 86 Tenn. 366, 6 S. W. 741; Ferris v. Hoglan, 121 Ala. 240, 25 So. 834.

J. D. Carr and *Knauf & Knauf*, for respondents.

Where a landowner has rented his farm to another under written lease for a specified term, and the tenant goes into possession and farms the land for the full term, and for other succeeding years without any new lease or further agreement, the landowner thereby elects to treat him as a tenant in accordance with the terms of the contract. Merchants' State Bank v. Ruettell, 12 N. D. 519, 97 N. W. 853.

Under such circumstances the law implies a renewed lease under the same terms. Abraham v. Nicrosi, 87 Ala. 173, 6 So. 293; Quinlan v. Bonte, 25 Ill. App. 240; Bollenbacker v. Fritts, 98 Ind. 50; Foucher v. Leeds, 2 La. 403; DeYoung v. Buchanan, 10 Gill & J. 149, 32 Am. Dec. 156; Johnson v. Doll, 11 Misc. 345, 32 N. Y. Supp. 132; Scott v. Beecher, 91 Mich. 590, 52 N. W. 20; Wolffe v. Wolff, 69 Ala. 549, 44 Am. Rep. 526.

The crops were impressed with the lien of the mortgage. The proceeds of the sale of the crops constituted a trust fund. Such trust may be followed and the property recovered, either in its original or substituted form, when it can be clearly traced or identified in some specific fund or property. Northern Dakota Elevator Co. v. Clark, 3 N. D. 26, 53 N. W. 175, and cited cases; Farmers' & T. Bank v. Kimball Mill. Co. 1 S. D. 388, 47 N. W. 405.

It makes no difference in reason or law, into what other form, different from the original, the property may have gone, if it and the proceeds can be clearly traced. Scott v. Surman, Willes, Rep. 400; Whitecomb v. Jacob, 1 Salk. 161; Rev. Codes 1905, §§ 5707, 5710, 5742.

SPALDING, Ch. J. This action was brought to determine the ownership of the proceeds of a certain crop raised by one G. N. Hopkins upon land belonging to the plaintiff and appellant during the year 1911. The defendants, other than Hopkins, are claimants each to a portion of said proceeds under chattel mortgages, upon Hopkins's share of the crop, duly executed and filed, given by said Hopkins to secure indebtedness owed by him to such defendants respectively. The claim of the plaintiff is that he employed Hopkins to sow and harvest the crop in question, and was to pay him, as compensation for his labor and that of his teams and the use of his machinery, one half the proceeds of the crop so raised, and that the whole of such one half was to be applied upon indebtedness owing from Hopkins to him.

The case is here for trial *de novo,* and we find the facts to be that the plaintiff was the owner of the land; that for several years preceding the year 1909 defendant Hopkins had been plaintiff's tenant on said land, one half the crop raised each year belonging to Hopkins. No formal lease was executed for the years 1909, 1910, and 1911, but

Hopkins remained on the land, and continued to cultivate it, with no new agreement or contract. In the meantime he gave separate mortgages on his half of the crop of 1911 to each of the defendants, as follows: September 22, 1910, to the defendant Farmers & Merchants Bank, at Kensal, to secure $335.61, payable October 1, 1911; on the 3d of October, 1910, to the Kensal Implement Company to secure his note for $705.73, due October 1, 1911, on which the sum of $149 was paid in November, 1911; on October 12, 1910, to defendant H. M. Tucker Company, to secure his note for $128.05, on which $50 was paid October 12, 1911. Each of said mortgages was properly filed on or about the date it was given. It is found that said McKenzie had sold crops aggregating in value more than the amount involved in this litigation, and appropriated to his own use the proceeds; that about the 7th day of November, 1911, he shipped to the Minnekota Elevator Company a portion of said crop belonging to the defendant Hopkins, for sale; that said elevator company sold the same, and that the net proceeds thereof were $1403.23; that subsequently and while said elevator company still retained possession of the proceeds of such crop so belonging to said Hopkins, it caused to be presented to the district court of Stutsman county, and filed in the office of the clerk thereof, an affidavit stating the amount of money in its hands derived from the crop so sold, that there were conflicting claims thereto, and setting forth the mortgages of the defendant hereinbefore described, and that it was unable to determine to whom said proceeds of said grain rightfully belonged, or who was entitled to the possession thereof; whereupon the court made its order designating the Stutsman County Bank of Courtney as a depositary with which said sum of money might be deposited, and directing notice to be given to all parties holding conflicting claims thereto, pursuant to § 6995, Rev. Codes 1905; that thereupon said Elevator Company deposited said sum with said bank.

Hopkins furnished all the teams and machinery and most of the labor for the production of the crop, incurred indebtedness to other defendants for supplies, with the knowledge of McKenzie, with no prospect of being able to pay if appellant's version is correct, unless the one half of the crop paid more than the debt due him; and when appellant learned that the mortgages in question had been given, and

one half the crop insured as belonging to Hopkins, he said nothing to the mortgagees. There was no crop in 1909 or 1910.

We cannot reproduce the evidence in full, showing the grounds for our conclusion, but call attention to some of its salient features. The appellant's family lived in Jamestown during all the time in question, and he testifies that he was on the farm during the farming season most of the time; that he raised the crop; that nobody else had any interest in it; that he was the owner of the proceeds; that he was on the farm while the crop was being put in and harvested; that there was no written contract for the year 1911, or for the years 1909 and 1910; that he did not rent it for 1909 and 1910 to anybody; that the agreement was that Hopkins was to farm it, and after appellant got the crop he was to give Hopkins credit on a debt he was then owing, for the amount received from one half the crop; that this applied to the three years, 1909, 1910, and 1911, but that in the spring of 1911 he had no agreement with Hopkins as to what share of the crop he was to receive. After thus testifying, he further states that in the spring of 1909 he had a talk with Hopkins, and it was arranged in such talk that he was to work there, and have for his work the money received from half the crop, to be applied on the indebtedness of Hopkins to appellant; that he had the same talk in the spring of 1911 as to the crop for that year; that he supposed that there was nothing said as to what should be done with the surplus, if there was grain enough to pay the indebtedness, but that it was his intention to give the balance of that half to Hopkins, but that appellant was to handle the crop entirely.

These extracts from the testimony of McKenzie we quote:

Q. At that time (spring of 1911) you had no agreement with him as to what share of the crops he was to receive?

A. No, sir.

Q. But I believe you said you expected to give him credit for one half the proceeds thereof upon his indebtedness, if he received any crop?

A. Yes, sir.

Q. That was true during 1909 and 1910?

A. Yes, sir.

And again:

Q. Now, when did you tell Mr. Hopkins for the crop of 1911 that he was not to have any interest in that crop?

A. I do not know that I ever told him that.

Q. You never told him that?

A. I do not know as I did.

Q. You never told him in the spring of 1911 to that effect?

A. No.

Q. Nor in the fall of 1910?

A. I do not remember that I did say anything to him about the 1911 crop in 1910.

Q. And in 1910 you did not tell him that before harvest, did you?

A. I do not remember that I ever did.

The defendant Hopkins testified that it was his horses and machinery that were used to farm the land; that he thought he made an arrangement with McKenzie for farming the land in 1911, about the 1st of April of that year; that he was then living on the farm; that he had no settlement in 1909; that in 1911 he got from McKenzie about $150 for hired help, and McKenzie did not agree to give him any interest in the crop; that he had never had any settlement with him; that McKenzie was the boss; that he himself did not engage threshers to thresh the crop; that he did not expect to get anything for his wages and use of his teams and machinery, if there was no crop. A long examination was had with reference to the amount of Hopkins's indebtedness to McKenzie, but he testified that there had been no settlement, and that he did not know what it was; that there was nothing said about how much feed he was to furnish nor when he was to have a settlement; that he was to have his pay when the grain was threshed, but that he had never said anything about getting his pay, but went to Canada immediately after selling his stock, in the fall, after threshing in 1911, without any settlement; that he did not ask McKenzie about selling the crop.

One Nichols, cashier of the defendant Farmers & Merchants State Bank of Kensal, testified that on or about the 23d of September, 1910, he took a mortgage to the bank from Hopkins; that Hopkins told him

he was to stay on the place in 1911, and that about harvest time in 1911 he had a talk with McKenzie, the appellant, relative to such mortgage on the crop; that he told McKenzie that the bank had a first mortgage, and he would like for him to see that Hopkins paid, and McKenzie informed him that he did not know whether Hopkins was farming the land on shares or working by the month that year; that McKenzie never told him that Hopkins had no interest in the crop.

One Feckler testified that he was a member of the Kensal Implement Company, defendant, the holder of one of the mortgages on the crop; that on the 3d of October, 1910, he had a talk with Hopkins, and was informed by him that he was to continue to work the land on shares, and would give him a one-half mortgage on the crop of 1911; that he thereupon took the mortgage; that in January or February he had a talk with appellant McKenzie regarding the crop grown in 1911, wherein he asked McKenzie if there was no way to settle the matter without going into court and avoid expenses, and McKenzie said that there had been no written lease for the last two years, and that there was no equity for him in the grain and crops; that during a talk in 1910 Hopkins informed him that he was going to work the farm on shares, and that McKenzie told him to work the land as he had been.

J. S. Carr, an attorney, testified, among other things, that during October or November, 1911, he had a conversation with McKenzie regarding the grain involved in this action; that he notified McKenzie of the chattel mortgages held by the Implement Company and the Bank, and inquired of McKenzie if Hopkins was his renter, and that McKenzie's reply was that he did not know whether he was his renter or hired man that year; that he then asked McKenzie if Hopkins had been renting his land the last year, 1910, and that he said yes, that this year it was different but he guessed he had not made any new agreement, that on another occasion he was employed to present a bill to McKenzie for collection, and, among other things McKenzie told was that he guessed he would make Hopkins his hired man for the year 1911. Carr also testified that in the latter part of June or fore part of July, 1912, after Hopkins had returned from Canada to serve as a witness in this case, he had a talk with him, and Hopkins informed him that he worked the land in 1911 as a renter, or at least

that he, Hopkins, understood so; that he understood he was working it in 1911 as he had in 1910; that he said he did not have any agreement.

One Holmes testified that Hopkins came to him in the fall of 1910, and asked him to do the threshing on the McKenzie lands, on which he had a crop in 1911.

One Croonquist testified as to conversations he had with reference to taking hail insurance on Hopkins's share of the crop, and again about a conversation when Hopkins was threshing when he was informed by Hopkins that he had shipped a car of flax, and when he got returns he would pay the money; that he shipped it because McKenzie wanted to ship it all.

Hopkins testified on cross-examination that in the spring of 1911 McKenzie told him to go ahead and work on the farm with the horses and machinery, and he would furnish the men, pay him one half the crop, to be credited on what he owed McKenzie; that he did not expect to get anything for his work if he raised no crop.

McKenzie denied in some cases having made statements that he did not know whether Hopkins was his renter or hired man, and in others disclaimed any recollection of such statements. The mortgages in question were proved and introduced as exhibits, and it was shown that about harvest time in 1911 McKenzie had gone to the register of deeds' office and made a list of such mortgages; that also on the 12th of June, 1911, Hopkins had applied for hail insurance on his half of the crop, and obtained a policy later. Among the mortgages disclosed on Hopkins's half of the crop for 1910 was one given by Hopkins to McKenzie, securing $1,500, dated October 1st, 1909, and another securing $1,569.35, covering much personal property and an undivided interest in the crops for the year 1905, and bearing date of October 1st, 1905. Affidavits of McKenzie renewing this mortgage are in evidence and bear date of March 5th, 1908, and February 7th, 1911, and the security was sold under foreclosure on the 17th of November, 1911. There was then claimed to be due on the debt secured thereby $1,862.59, and the net proceeds were $1,292.41.

Of course, the testimony showing what Hopkins told different witnesses not in the presence of McKenzie is not competent for all purposes, but it was admissible to show Hopkins's understanding at the

time the mortgages were given, and the conversations to show his understanding that he was a lessee of McKenzie, and not his hired man. There is much testimony, a great deal of which is conflicting or evasive, which, as we have indicated, it is impossible to set forth.

As an illustration of the examination of Hopkins we quote as follows from the record:

The Court: What were you going to get for your wages if you did not get any crop?

The Witness: A. I did not expect to get anything, the same as I had for four or five years. I owed George there, and he told me I would have a chance to pay it off in that way.

The Court: You just depended entirely on raising a crop if you got anything there.

The Witness: Yes, sir.

The Court: Did you owe him for that money he advanced in 1911 to you?

The Witness: I do not know. I have not kept account of anything.

The Court: And you want to tell the court that you did not know anything about what that contract is between you and Mr. McKenzie; we want to know the truth about it?

The Witness: Which contract?

The Court: Do you know you owe him anything for the money advanced for you?

The Witness: What money?

The Court: Do you owe him any of that money?

Mr. Thorp: I want to ask what móney the court means?

The Court: The money advanced to pay the hired men. Do you owe him anything paid hired men?

The Witness: No, sir.

The Court: Do you owe him any other money advanced in 1911?

The Witness: No, not that I remember of.

The Court: You don't owe him a thing for 1911?

The Witness: Yes, as much as it is.

The Court: State what it is.

The Witness: I do nòt know what it is.

The Court: You don't know what it is?

The Witness: No, sir.

The Court: Well, was he to furnish everything there on the place?

The Witness: To furnish the men.

The Court: Did he hire the men?

The Witness: No.

The Court: You hired the men?

The Witness: Yes, told me to hire the men.

The Court: When was this contract, this statement, first entered into between you and Mr. McKenzie?

The Witness: About the first of April. I believe he was over there to buy some feed and seed.

The Court: Was there anything said about how much you were to furnish there?

The Witness: No, sir.

The Court: Was there anything said about how much you were to put in?

The Witness: Yes, sir. I believe there was.

The Court: When you were to have a settlement or not, anything said about that?

The Witness: No, not anything in particular.

The Court: Was there anything said about when you were to get your pay for your work?

The Witness: When the grain was threshed.

The Court: Have you ever asked for it?

The Witness: No, sir.

Mr. Knauf: Q. You went up to Canada immediately after selling your stock, did you not?

A. Yes, sir.

Q. That was along about the 1st of November, 1911?

A. No, I think it was about the 18th or 20th of December.

Q. And before you went you did not have any settlement with Mr. McKenzie?

A. No, sir.

Q. He did not pay you any money, or you give him any?

A. No, sir.

A consideration of the entire record cannot fail to impress the reader

with a conviction that Hopkins remained on the place during the years 1909, 1910, and 1911 without any new contract; and that the theory that he was using all his horses and machinery, boarding himself and family, and incurring considerable other expense besides his own labor, for the purpose of making payment on his indebtedness to McKenzie, and with the probability of leaving him nothing on which to live or keep up his belongings, was thought of after McKenzie discovered the mortgages to the defendants named, in the office of the register of deeds. After the crop was harvested he foreclosed on the personal property; Hopkins went to Canada without any settlement, and, as each of them testify, without knowledge of the amount due or whether it had all been paid by the foreclosure and the share of the crop. No effort was made at settlement. No demand for one was made by Hopkins. Altogether the theory of appellant seems wholly improbable, and the contract, one that no man in poor circumstances, hard pressed, and, as shown, without funds, as Hopkins was, would make. Furthermore, as near as can be computed from the evidence, half the crop brought a considerable sum more than enough to pay the indebtedness due McKenzie, and in this connection it must be said that the $1,500 mortgage on the 1910 crop is shown by the record to have been given with a view to defrauding creditors, and accepted by McKenzie for that purpose. This shows the disposition of the parties. McKenzie was repeatedly questioned about the indebtedness, and, when recalled after other witnesses had testified, was still unable to state the amount, and had evidently made no attempt to ascertain it. While this court is required to find the facts on the record before us, without regard to the findings of the trial court, yet the character of the testimony is such that the trial court had a great advantage over this court in determining the facts, and we feel that any doubt should be resolved in favor of the findings made. Among such findings was the following:

"That said Hopkins was the renter, tenant, and lessee of said lands in 1911, and that he had said lands so rented from said McKenzie, under and by virtue of which rental said McKenzie was to receive an one-half of the grains maturing on said lands in 1911, and the said Hopkins to receive an one-half thereof; that all of the grains raised on said land in 1911 were sold by said McKenzie; that said grains were of the value and sold for the sum of $4,200.29 and therefrom said

McKenzie received the sum of $2,797.06, all of which he appropriated to his own use, and that the balance of the value of said grains and for which said sold was $1,403.23, which said sum was deposited in said Stutsman County Bank of Courtenay, as aforesaid, and that said Hopkins was the owner of all of the grain for which said $1,403.23 was received from the said grain belonging to said Hopkins, and matured in 1911 upon said lands, by reason of his tenancy upon said lands."

A further statement of the conflicting and indefinite statements of both appellant and Hopkins on the subject would serve no useful purpose, and is therefore not made. The circumstances—the fact that appellant surrendered possession during all the years, his apparent disinclination or his inability to disclose the amount of the debt due from Hopkins, and the latter's total lack of knowledge on that subject, as well as many other circumstances—all support our conclusion that Hopkins was cropping the farm under no new contract. Section 5531, Rev. Codes 1905, reads: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year." Having found that the evidence does not justify a finding that there was a new contract providing for the employment of Hopkins by appellant, § 5531, supra, directly applies. There was a lease for prior years, that is, years prior to 1909, and Hopkins remained on the land with no new contract during the years 1909, 1910, and 1911, and appellant received rent for said premises from Hopkins during the year 1911; thereby a renewal of that lease took place from year to year. Wadsworth v. Owens, 21 N. D. 255, 130 N. W. 932. In saying that there was a lease for years prior to 1909, we adopt the designation of the contract for such years made by parties and counsel. The contract is not in evidence.

The only other question is whether the plaintiff mortgagees can recover their interest in the fund, now in the hands of the depositary designated by the court, in this action. The contention of appellant is that, if the crop belonged to Hopkins, a conversion took place, and that the defendants are not entitled to have the ownership of the fund on deposit determined in this action. This question is briefed at con-

siderable length. It, however, appears to us to require but brief notice. Section 6995, Rev. Codes 1905, reads as follows: "Whenever two or more persons make claim for the whole or any part of the same money, personal property, or effects in the possession or control of any other person as bailee or otherwise, and the right of any such claimant is adverse to the right of any other claimant, or is disputed or doubtful, and the bailee, custodian, or person in control of any part of such property, money, or effects is unable to determine to whom the same rightfully belongs, or who is rightfully entitled to the possession thereof; or whenever such bailee, custodian, or person in control has notice or knowledge of any right or claim of right of any person in or to any part of such property, money, or effects adverse to the right of any other claimant therefor; or whenever any debt, money, property, or effects owing by or in the possession or under the control of any person may be attached by garnishment or other process, and there is any dispute as to who is entitled to the same or any part thereof; in any such case the person in the possession or control of any such property, money, or effects, when an action in any form has been commenced for an account of or growing out of the same or in which the same has been attached as aforesaid, may pay such money or deliver such property or effects to the clerk of the court in which any such action having reference to said money, property, or effects, or the value thereof, may be pending, or out of which any garnishment or other process may issue with reference thereto; or if no such suit is commenced he may apply to the district court of the district where such property, money, or effects may be situated, and upon showing to the satisfaction of the court the existence of facts bringing him within the operation of this section, said court shall make an order designating a depositary with whom said property, money, or effects may be deposited by the applicant for such order. In either case such person in the possession or control of such property, money, or effects shall at once notify personally or by registered mail all persons of whose claims he may have notice or knowledge, having or claiming any interest, property, lien, or right in, to or upon such property, money, or effects, of such deposit; and upon giving such notice the person so depositing the same shall thereupon be relieved from further liability to any person on account of such property,

money, or effects; provided, that such depositor may be required upon the application of any party interested therein to appear and make disclosure before the court in which any such action may be pending, or by which any order designating a depositor may be made, concerning the said property, money, debts, or effects held, controlled, or owed by him. If the address of any persons having or making any claim as aforesaid cannot be ascertained, an affidavit to that effect shall be filed with the depositary, and the giving of such notice shall not be required in such case." The consignee or bailee of the crop in question, before paying the proceeds thereof to appellant, learned of the conflicting claims of the several parties thereto, and made application to the court, under the provisions of the foregoing section, to be permitted to deposit the proceeds thereof in some bank to be designated by the court, and such designation was made by order. Had the elevator company failed to make such application, it would probably have become involved in expensive litigation with all the parties to this action. It might have been liable for conversion or in other forms of action. The statute, it appears to this court, was intended to obviate this risk on the part of the elevator company. The company was willing to pay the proceeds of the crop to such person or persons as were lawfully entitled to the same, and by making the application and the deposit in accordance with the order of the court the fund could be preserved intact and the elevator company relieved of liability to either of the several claimants. Such claimants could then litigate between themselves the question of ownership in the fund, or the effect of their liens thereon. It appears to be a very salutary provision, and intended by the legislature to apply to claims of the nature here exhibited. A case could hardly arise where it would be applicable if it is not so in the case at bar. There is no question of the identity of the fund. The proceeds of the crop were paid to the bank immediately upon sale and the entry of the order by the court. Such proceeds constitute a fund in the hands of the bank, subject to distribution to such claimants as may be entitled thereto, or to any part thereof, as determined in legal proceedings, in the absence of any waiver on the part of one or more claimants. McKenzie, the plaintiff and appellant, brought this suit, selecting his own form of action for determining to whom it should be distributed. In his complaint he

sets out his claim to ownership and the facts relating to the consignment, sale, amount received, the application to and order of the court appointing the bank a depositary, the giving of notice by the elevator company to the various claimants, as required by law, and the fact that the defendants named claim some right, title, or interest in and to said fund adverse to the claims of plaintiff. He then denied that the defendants had any right, title, or interest therein, or to the flax from which said fund was derived, and averred that their claims were subordinated to and inferior to his rights. He demanded an order from the court directing said depositary to pay him the entire fund in its hands, and that the claims of the defendants and each of them be adjudged null and void and inferior to the rights of the plaintiff. The defendants answered separately, setting up in detail the liens under which they claimed and the amount due on their respective liens, and that the fund in the hands of the bank was the proceeds of a crop on which their liens existed, and each demanded judgment for the payment by the bank to him of the sum due on his separate lien. It seems to us that all the pleadings in the action, taken together, fully set forth the facts on which the respective parties rely for recovery, and that by whatever name the action is denominated no more appropriate method could be devised for determining the rights of the parties than by the form of action and defense employed. The question is, Who is entitled to the funds in the hands of the depositary? The facts necessary to a determination of this question are set forth in the pleadings. The elevator company presumably was the innocent consignee of the crop. It sought to be relieved from litigation and costs and the liabilities incident to a retention of the proceeds by itself, and those which might arise if payment was made to appellant. In the absence of the statute heretofore quoted, it is impossible that some of the contentions of appellant might be important, but, as indicated, the statute seems to be intended for cases like the one before us, and to furnish a method of relieving an innocent party from expensive litigation, and providing for claimants to the fund or property bearing the burden of ascertaining their own legal rights. We are satisfied that the judgment of the trial court is correct. It is therefore affirmed.

BURKE, J., dissenting. No questions of law are involved in this case, it being merely a trial *de novo* in this court. The statement

of facts is, in my opinion, inaccurate, and for that reason I set forth a new statement, quoting from the record itself, and giving the folios of the abstract on file in this office, so that any person interested can verify the same.

The plaintiff, McKenzie, is a farmer, and part of the land in question was his government homestead. In the fall of 1904 he was elected register of deeds of Stutsman county, and removed his family to the county seat, at Jamestown. At the same time he rented his farm to the defendant Hopkins and his brother, for the years 1905 and 1906. At the same time he sold to Hopkins upon credit the farm machinery in stock which he had theretofore used upon said farm, and to secure such indebtedness took back a mortgage upon said property and also upon Hopkins's share of the crops to be grown during the years 1905–6. In the fall of 1906 McKenzie was re-elected register of deeds, and renewed his lease with Hopkins for the years 1907 and 1908. At the end of that time McKenzie retired to private life.

At folio 71 of the abstract he testifies:

Q. Mr. McKenzie, since you left the farm, did you rent it to somebody?

A. Yes, sir.

Q. That includes the land in 16?

A. Yes, sir.

Q. Who did you rent it to?

A. George Hopkins and Thomas Hopkins for the years 1905 and 1906.

Q. And for the years 1907 and 1908, to whom did you rent your land?

A. To Hopkins.

Q. What Hopkins?

A. George.

Q. George Hopkins?

A. Yes. I don't remember if Thomas was included in that contract or not. You can tell by looking at the contract.

Q. *In 1909 and 1910, to whom did you rent the land?*

A. *I did not rent the land to anybody.*

Q. In the years 1909 or 1910?
A. No, sir.
Q. In 1911, who had it?
A. I had it.
Q. You had it in 1909 and 1910?
A. Yes, why, I had it.
Q. In 1909?
A. Yes, sir.
Q. And 1910?
A. Yes, sir.
And at folio 75:
Q. Who run the place? Mr. Hopkins run the place in 1909 and 1910, did he not?
A. No, sir.
Q. Did he work on shares?
A. No, sir.
Q. Is it not a fact that in 1909 and 1910 he had it in on contract?
A. No, sir.
Q. You got part of the crop and he a part?
A. No, sir.
Q. Is it not a fact that in 1911 that he had it in on shares?
A. No, sir.
Q. In 1909 and 1910 he farmed it, did he not?
A. For me.
Q. Farmed it there with his own horses and machinery?
A. Yes, sir.
Q. And under what kind of an agreement did he farm it?
A. *I was to pay him money,* allow him so much on account of what he owed me on working the land.
And at folio 84:
A. He was to be allowed one half of the proceeds in money of the crop.
Q. After you got the crop?
A. Yes.
Q. And for 1910?
A. It would be the same thing.
Q. For 1911, what was you to allow him?

A. It would be the same thing.

Q. 1911, that was last year?

A. Yes, sir.

Q. And each year, you expected, as I understand it, to charge his half of the crop, or the proceeds of the half of the crop, upon his indebtedness, and credit it upon his indebtedness to you?

A. Yes, sir.

At folio 87:

Q. In 1908, he had a contract in writing for the land?

A. Yes, sir.

Q. That was for one half the crop?

A. Yes, sir.

Q. *That was what we call the half-crop contract plan?*

A. Yes, sir.

Mr. Thorp: That was in 1908?

Witness: A. 1908, yes, sir.

Mr. John Knauf: Q. Have you got that contract?

A. Yes, sir.

Q. Produce it, please. (The witness produces paper and hands to Mr. Knauf.)

And at folio 211 the record reads:

Q. You testified this morning, Mr. McKenzie, that up to and including the year 1908, you had a written contract with Mr. Hopkins?

A. Yes, sir.

Q. When was that concluded, what was the last year you had a written contract?

A. 1908.

Q. Did you have any talk with Hopkins after the expiration of the 1908 contract with reference to his conducting the farm for the year 1909?

A. In the spring of 1909, I had a talk with him.

Q. That was about the work he was to do on this farm?

A. Yes, sir.

Q. What was that arrangement, what was said?

A. He was to work there and to have for his work, I was to allow him, the money received from half of the crop.

Q. And what was you to do with those proceeds?

A. I was to apply it on his account, what he owed me.

Q. Did you make any arrangement whereby he was to have any interest in the crop at all?

A. None.

Q. Who paid the hired help, did you furnish the money for to pay the hired help?

A. I did.

Q. Now, in the spring of 1911, did you have any talk about farming operations that year?

A. That same as we had in 1909.

Q. You hired the men to work for you that year?

A. Yes.

Q. His compensation was to be regulated from the proceeds of the crop?

A. Yes, the crop raised.

Q. Did you pay the hired help the season of 1911?

A. I did, advanced the money to pay the thresh bill.

Q. Did you boss the crop yourself?

A. Yes, sir.

Q. Did you work the land yourself?

A. Yes, sir.

Q. Boss the job yourself?

A. Yes, sir.

Q. Now, have you ever got enough proceeds out of the 1911 crop to pay for what Mr. Hopkins owed you?

A. No, I don't think there is—I never figured it up closely.

At folio 225:

Q. When was it that you made the arrangement with him that he was to farm your land for 1911, and you were to take one half of the crop, and give him half of the crops or proceeds from a half of the crop?

A. In the spring of 1911.

The defendant Hopkins, the tenant, was also a witness, and testifies as follows, at folio 232:

Q. You are the identical person who farmed on this land on sections 9 and 16 in controversy in this action, in 1911, are you?

A. I was living there.

Q. You farmed that land?

A. For Mr. McKenzie.

Q. Your horses and machinery, whose horses and machinery were used in farming that land?

A. Mine.

Q. Did you have any written agreement for farming or not in 1911?

A. No, sir.

Q. Did you have any oral agreement for farming in 1911?

A. Yes, sir.

Q. And when did you make that agreement?

A. I think it was about the 1st of April, I believe, 1911.

At folio 280:

Q. You say you had a verbal agreement for 1911?

A. Yes, sir.

Q. The spring of 1911?

A. Yes, sir.

Q. What was it?

A. Why, Mr. McKenzie told me to go ahead and work on the farm with the horses and machinery, and he would furnish the men and pay me half of the crop I got, to be paid on what I owed him.

Q. You mean to say he would pay you half the money from the crop, net?

A. Would give me credit for it on what I owed him.

Q. Did he agree to give you any interest in the crop?

A. No, sir.

Q. You owed him at that time, did you?

A. I did.

Q. Did he agree to give you the crop or the money?

A. He did not say.

Q. Have you ever had any complete settlement with him?

A. No, sir.

At folio 284:

Q. Who was to run the farm—who was the boss?

A. He was the boss.

Q. Did you do all he told you to do?

A. Yes, sir.

Q. Did what, when, and where he told you to do?

A. Yes, sir.

Q. Worked your teams when and where he told you to?

A. Yes, sir.

Q. The value of your services were to be regulated by the value of the crops?

A. Yes, sir.

Q. That was all there was to it?

A. Yes, sir.

Q. Did Mr. McKenzie work there in 1911?

A. He did.

Q. Did he pay the thresh bill?

A. I suppose so, I did not have anything to do with it.

Q. Did he hire the thresher.

A. Yes, sir.

Q. And boss the threshing?

A. Yes, sir.

Q. Told you where to haul the grain and what to do with it?

A. Yes, sir.

At folio 296:

Q. Well, was he to furnish everything there on the place?

A. To furnish the men.

Q. Did he hire the men?

A. No.

Q. You hired the men?

A. Yes, told me to hire the men.

Q. When was this contract, this statement, first entered into between you and Mr. McKenzie?

A. About the 1st of April, I believe, he was over there to buy some feed and seed.

In the face of the evidence above set forth, is it not fair to ask what value is the finding of the majority of this court in the second paragraph of the opinion which reads as follows: "No formal lease was executed for the years 1909, 1910, and 1911, but Hopkins remained on the land and continued to cultivate it *with no new agreement or contract.*" Remember, in this connection, that those are the only two men who knew anything about this contract, and that they are not

contradicted by any other witness or record, and only incidentally by some of the circumstances, which, however, upon a careful reading corroborate rather than contradict them.

It seems that Hopkins was unable to pay for the farm machinery and stock which he had bought during the four years that he had this farm lease, on account of the crops being struck by hail, and his indebtedness to McKenzie was increasing yearly.

At folio 102 McKenzie testifies:

Q. In 1908, Mr. Hopkins was indebted to you in a considerable sum of money?

A. Yes, sir.

Q. Do you know how much?

A. I do not know how much, have not figured it up.

Q. In 1910, was he still indebted to you on the same indebtedness?

A. Yes, sir.

Q. With some interest added?

A. Yes, sir.

Q. In 1911, was he indebted on the same indebtedness, with some interest?

A. Yes, sir.

And at folio 107:

Q. And at that time, of that sale, how much was Mr. Hopkins owing you?

A. On the mortgage?

Q. Altogether?

A. I do not know just exactly.

Q. Give it approximately.

A. *Being all matters, twenty-five hundred to three thousand dollars, or such a matter.*

Q. Do you remember what the, what his machinery, farm outfit, and equipment sold for at that mortgage sale?

A. I don't remember. I think I have a paper here showing the exact amount. (Witness produces paper.) The total amount that it sold for was $1,434.75.

Q. Was that the amount which you received?

A. No.

Q. What did you receive from the sale?

A. Well, there was the expenses and expense bill out of that. I think $1,292.41, that was after the expense bill was taken out.

At folio 189 Mr. McKenzie testified:

Q. If you would have given Hopkins one half of the receipts of this crop in question, for his work out there in 1911, for the use of his teams and machinery, would your indebtedness against him have been paid?

A. No, I don't think it would have been.

Q. If you had given him credit for all of the proceeds of one half of your crop, would he still be owing you?

A. Yes, he would.

And at folio 433:

Q. George (McKenzie) won't you please state to the court the amount now that was owing to you from Mr. Hopkins, in the fall of 1911?

A. I could not exactly without figuring it up.

Q. How?

A. I could not exactly without figuring it up. I have never made out a statement or had any settlement whatever since this flax has been held up.

At folio 453:

Mr. Knauf: If the court please, would like to have those items, as we need them.

Mr. McKenzie: If I had the items I would furnish them. The first two years he rented the land for cash rent, and the second year he *could not pay his cash rent,* that was $1 per acre. He paid a little of it, I do not know how much now. There was some of it on that. And from that time on during the next two years, the time he had the two years' contract for half crop, I furnished the feed and seed. I furnished feed and furnished seed for the period of the first two years. I furnished seed the second year, left seed on the place.

The majority opinion mentions, as an incident unfavorable to McKenzie, that he did not produce the exact figures after being recalled, but it is only fair to add that the trial was being held at Jamestown, some 30 miles from McKenzie's home, where he states that he had the

slips going to show the different items due him from Hopkins, and it was not possible for him to produce them on a few hours' notice.

At folio 441, McKenzie testifies:

A. Well, at the time I let him have the farm, I left 1,320 bushels of barley in the granary and elevator on the land, also left 1,400 or 1,500 bushels of oats there, and besides there must have been 25 bushels of potatoes left in the cellar.

Q. And he owed you some for those?

A. Yes, and also a binder was not sold at the sale that I sold to a Mr. Meagers up there, and he kept the money and did not turn in a cent of the money.

Q. And how much was that stuff worth at that time?

A. I do not know at that time. I did not figure selling it. I figured on holding it along until I felt like selling. I did not need the money.

Q. What other debts did he owe you for?

A. Other moneys advanced him during the four years. Did not have any crop, and advanced money to get the crop in.

Q. How much?

A. I could not tell you how much. I never made an itemized statement of it.

Q. Can you do so for it?

A. *I do not know as I have got the account. I have little notes and slips that I have at home.*

In this connection it is worthy of notice that the defendant Hopkins, although a witness in the case, *made no claim that he had paid McKenzie,* or that the crop for 1911 would pay the indebtedness in full. Of what value, then, may I ask, is the finding of the majority that "half of the crop brought a considerable sum more than to pay the indebtedness due McKenzie?"

Keeping in mind all the foregoing facts, we come to the circumstances outlined in the majority opinion, which tend to support the same, with the idea of reconciling the same with other parts of the record. The quotations given in the majority opinion from the testimony of McKenzie were upon cross-examination and largely play about the proposition of whether or not McKenzie had promised Hopkins an

interest in the *crop,* rather than in the *proceeds.* For example, in the majority opinion, is the following:

"Q. At that time (spring of 1911) you had no agreement with him as to what *share of the crop* he was to receive? A. No sir." McKenzie had all the time claimed that Hopkins had no share in the *crop,* but was to be paid wages *to the amount of one half of the proceeds of* the crop, and it was upon this point that he was being examined, yet the majority opinion sets out this catchy question and answer, rather than the testimony of the witness McKenzie which I have given in this dissenting opinion, which shows positively that there was an agreement in 1911, but not such an agreement as would give Hopkins *an interest in the crop.* Again, the majority opinion mentions the fact that McKenzie took a mortgage upon Hopkins's interest in the crop for 1911. Unexplained, this seems a strong corroboration of their finding, but when we remember that in 1905 and 1906 Hopkins had leased the land for a cash rental, and had bought the farm machinery and stock, and given his mortgage therefor, and that said mortgage had been several times renewed, and that the mortgage to which the majority opinion points was merely a renewal of this old mortgage, the inference that Hopkins had an interest in the crop is much weakened.

At folio 437 McKenzie testifies that these chattel mortgages were merely renewals. I quote:

A. Why, it is a chattel mortgage given for horses, and machinery and harnesses at the time of the sale, in March 15th, 1905.

Q. Who—signed by whom?

A. George N. Hopkins and T. A. Hopkins, his brother.

Q. To whom?

A. George B. McKenzie.

Q. Yourself?

A. Yes, sir.

Q. And exhibits 2A, 2B, 2C, and 2D, constitute renewals of that same chattel mortgage shown in exhibit 2, and made by you?

A. Yes, sir.

Another circumstance pointed out in the majority opinion is that McKenzie failed to notify the machine companies that Hopkins had no

right to mortgage the crop. I have examined the testimony of all of the witnesses, with care, and in my opinion there is absolutely not a contradiction between McKenzie and any of the other witnesses sworn.

For example, McKenzie was asked as to his conversation with Nichols, cashier of the bank. Folio 153:

Q. That talk occurred between you and Nichols at Kensal, North Dakota?

A. Yes, sir.

Q. At that time, is it not a fact, you stated to Nichols in sum and substance as follows: I do not know how Hopkins and I are farming this land in 1911, whether he is a renter or hired man or not; did not you state in sum and substance such language to Nichols?

A. I don't think I stated that exactly.

Q. Will you swear that you did not?

A. It is barely possible I did not (?) make any such statements.

And at folio 176:

Q. When Nichols told you that he had a mortgage upon that crop, you did not tell him at that time that Hopkins did not have any interest in the crop, did you?

A. I might have told him, I don't remember it.

Q. You did not tell Feckler of the Kensal Implement Company, or anyone for them, that Hopkins did not have any interest in that crop, did you?

A. I don't remember, John, whether I did or not.

Q. You did not tell Tucker Company that Hopkins had no interest in it, did you?

A. I never talked with the Tucker Company.

Q. You did not inform any of these people holding mortgages from Hopkins that he did not have any interest in the crop, did you?

A. I don't remember that I did.

Q. Your best recollection is that you never told any one of them?

A. No.

Nichols testifies at folio 319:

A. I had a conversation with McKenzie.

Q. You may state what he said to you about it.

A. Nothing more than I notified him in regard to our mortgage on the crop. I told him about our having a first mortgage, and said I would like for him to see that he paid, and he said that he did not know if Hopkins was farming that on the shares or working by the month this year.

This is not a contradiction of McKenzie. At most, it can only be said that McKenzie had forgotten such conversations if he had them, but was too conscientious to deny having made them. And the conversations themselves, even if had, were in no manner inconsistent with his present contention. Being a farmer and not a lawyer, it was only natural that he should have some doubt as to the exact relationship with Hopkins. The record shows that the first time that McKenzie had any knowledge that Hopkins was given chattel mortgages upon his crop was during the harvest of 1911, and that upon the first intimation he went to the office of the register of deeds, and looked up such mortgage, and made a pencil memorandum thereof, and shortly thereafter foreclosed the mortgage upon Hopkins's horses and machinery, and finished his business relations with him.

As to the presumption that Hopkins was a tenant because he gave the mortgages upon McKenzie's crop, it is well to examine the evidence to see whether or not Hopkins had any such intention. Take, for instance, the testimony of Nichols, cashier of the bank, at folio 316:

Q. You may state to the court what, if any, conversation you had with Hopkins at that time regarding the property contained in the mortgage, and state to the court generally what was said at that time?

A. I called Hopkins into the bank about the 22d day of September, and asked him if there was any chance for him to pay anything he owed us that fall, and he said there was not, and I asked him if he was to stay on the place another year, on the land there, and he said he was, and I drew up the mortgage and renewed the note.

Q. And he signed them at that time?

A. He did, yes, sir.

Regarding the same matter, Hopkins testifies as follows, at folio 270:

A. The Farmers & Merchants State Bank.

Q. And if it was signed on or about the date it bears?

A. Yes, I expect so, I don't remember.

Q. And that exhibit which I just showed you covers the same lands which you farmed of George McKenzie's in 1911, does it not?

A. The land I worked for him.

Q. And you had these same lands in crop in 1911?

A. I helped farm it.

Chattel mortgages obtained in this way do not appeal to me as going very far to show that Hopkins believed he had an interest in the crop, or even knew that he was giving a mortgage to the bank. The same may also be said of the application for hail insurance, but I have not time to set forth this testimony. Just one other thing occurs to me, and that is this: Hopkins had the land upon a cash basis in 1905 and 1906. In 1907 and 1908 there was a written contract on the half-contract plan. This contract was placed into the hands of the attorney for the defendants, and is therefore presumed to have been unfavorable to them, or it would have been offered in evidence. This contract has a significance all its own in the courts of this state as a cropper's contract, and carries with it an implication that there is a reservation of title of the crop in the landowner until all indebtedness due him from the tenant had been paid. If the majority of this court insists upon continuing this contract for the years 1909, 1910, and 1911, they must also continue this clause, and thereunder McKenzie would have a right to hold all the crop until he had been paid the amount due him from the so-called tenant Hopkins. The testimony is undisputed that the entire crop would not pay this indebtedness. Another factor or two, which corroborate my conclusion, might be mentioned. One is that McKenzie, being an able farmer and good manager himself would not be liable to rent a farm during the years 1909, 1910, and 1911. While he was register of deeds, of course, he needed a tenant. Thereafter he would certainly wish to run the farm himself. And lastly, while nominally Hopkins owned the farm machinery and stock, they were really owned by McKenzie. He had sold them to defendant Hopkins on time, and the indebtedness had been allowed to increase year by year. For the foregoing reasons, I respectfully dissent.

VILLAGE OF PAGE v. WILL FARMERY.

(150 N. W. 471.)

Courts — judicial notice — incorporated villages — allegation — proof.

1. The courts will take judicial notice of the fact of the incorporation of the villages of the state; and such being the case, no allegation or proof of the fact is necessary upon a trial.

Incorporated village — poll tax — collection — enforcement.

2. Under article 6 of chapter 267 of the Laws of 1907, being § 3888 of the Compiled Laws of 1913, an incorporated village has the same power to enforce the collection of poll taxes within its borders as has the township in districts which are not within the area of incorporated cities and villages.

Collection of poll taxes — action — name of city — complaining witness — officer.

3. Where a village undertakes to enforce the collection or working out of its poll taxes under the provisions of § 3888 of the Compiled Laws of 1913, §§ 1426, 1428–1430, 1432, 1433, 1435, and 1436, Rev. Codes 1905, being §§ 2010, 2017–2019, 2021, 2022, 2024, and 2025 of the Compiled Laws of 1913, such action may be brought in its name; and it is immaterial whether the complaining witness states that he is road overseer of the village, or street commissioner thereof, as under § 3888, Compiled Laws of 1913, the powers of township overseers of highways are conferred upon the corresponding officers of incorporated villages.

4. The proceedings provided for in § 2022, Compiled Laws of 1913, are *sui generis*, and no formality in the pleadings is required.

Opinion filed January 4, 1915.

Appeal from the District Court of Cass County; *Pollock*, J.

Action to recover penalty for failure to comply with the statutory provisions relating to the poll tax. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an appeal from an order overruling a demurrer to a complaint. The action is one to recover the statutory penalty for failing to appear and to work out a poll tax. The complaint is made by one J. A. Egan,

who alleges that he is the road overseer for the village of Page, and the plaintiff in the action is the village. The matter was appealed from the justice court on questions of law and of fact, and on such appeal a written demurrer was interposed. The district court overruled the demurrer and ordered judgment affirming the decision of the justice court, which was against the defendant. The transcript and pleadings in the case are as follows:

Complaint.

J. A. Egan, being duly sworn, says that he is road overseer for the village of Page, Cass County, N. D., and was during 1913; and on the 14th day of July, 1913, at Page, N. D., he notified one William Farmery, a resident of said road district, in said village, to appear and work his poll tax on the 18th day of July, 1913; but said Farmery then and there refused, and has failed to appear and work said poll tax, though a resident of said village and duly assessed to work on said roads. Wherefore affiant asks that a summons issue, and that said Farmery be cited to appear and show cause why the law should not be enforced against him.

J. A. Egan (Jurat)

Transcript of Justice Docket.

Complaint against defendant was made by J. A. Egan, the overseer of highways, for failure to appear and work on the road of said district. Summons was issued on the 18th day of July, 1913, returnable on the 24th day of July, 1913. At the time set the parties appeared. The plaintiff, the village of Page board, and J. A. Egan, and W. J. Courtney as attorney. After hearing the evidence I find the defendant, Wm. Farmery, is and has been a resident of the village of Page for more than five years last past; that it is the only place he has voted and claimed a residence; that he was during the past year a resident of said village, and liable to pay his poll tax in this district, and that under the law is liable to a fine of $12 for six days of failure to appear after being warned out, and costs taxed at $2.75; total judgment against the

defendant of $14.75 in favor of the village of Page. Judgment is entered accordingly.

Dated July 24—1913.

E. H. Treneman, Justice of the Peace, Village of Page.

Pfeffer & Pfeffer, for appellant.

There is a defect of parties plaintiff. This is a case in the nature of a civil action to recover a penalty imposed by statute. The complaint is made by a so-called "road overseer" for the village. The law makes no provision for such officer for a village. Rev. Codes 1905, §§ 1432, 2864, 7394, 7395; State v. Messner, 9 N. D. 186, 82 N. W. 737.

A village can exercise no power which is repugnant to the common or statute law of the state. Haywood v. Savannah, 12 Ga. 404; State v. Burns, 45 La. Ann. 34, 11 So. 878; Jersey City Supply Co. v. Jersey City, 71 N. J. L. 631, 60 Atl. 381, 2 Ann. Cas. 507; Weith v. Wilmington, 68 N. C. 24; Re Tax-Receipts, 12 Phila. 637; Lafayette v. Cox, 5 Ind. 38; Henderson v. Covington, 14 Bush, 312; Port Huron v. McCall, 46 Mich. 565, 10 N. W. 23; Leonard v. Canton, 35 Miss. 189; Cleveland School Furniture Co. v. Greenville, 146 Ala. 559, 41 So. 862; Joplin v. Leckie, 78 Mo. App. 8.

A road district is not a corporation. Rev. Codes 1905, §§ 1443, 2892; Sebrell v. Fall Creek Twp. 27 Ind. 86; Denver v. Myers, 63 Neb. 107, 88 N. W. 191.

The village of Page may be a road district, or may form a part of one; yet this would not authorize a road overseer to institute action to recover the penalty named. Denver v. Myers, 63 Neb. 107, 88 N. W. 191; Rev. Codes 1905, §§ 1404, 1443, 3058; McManus v. Weston, 164 Mass. 263, 31 L.R.A. 174, 41 N. E. 301; Lynch v. Rutland, 66 Vt. 570, 29 Atl. 1015.

The allegation of the complaint must clearly show a right to the penalty in the plaintiff. Facts sufficient to cover and embrace both the letter and spirit of the statute must appear. State v. Messner, 9 N. D. 186, 82 N. W. 757; Western U. Teleg. Co. v. Kinney, 106 Ind. 468, 7 N. E. 191; Hadley v. Western U. Teleg. Co. 115 Ind. 191, 15 N. E. 845; Reese v. Western U. Teleg. Co. 123 Ind. 294, 7 L.R.A. 583, 24 N. E. 163.

W. J. Courtney, for respondent.

This action is brought for the road district, and by and through its proper officer. Rev. Codes 1905, §§ 7394, 7395.

The highway officer has full authority. Rev. Codes 1905, § 1433.

BRUCE, J. (after stating the facts as above). This opinion is filed upon a rehearing. It is claimed by defendant (1) that under the provisions of § 7395, Rev. Codes 1905, § 8015, Compiled Laws of 1913, penalties can only be recovered by the party for whose benefit the recovery can be had; (2) that although §§ 1433–1435 and 1436, Rev. Codes 1905, §§ 2022–2024 and 2025, Compiled Laws of 1913, make provisions for the imposition of penalties in proper cases for failure to perform work at the command of a road overseer, which penalty when recovered is to be paid to the road overseer of the district, to be by him expended in improving the roads and bridges in his district, and although the complaint alleges that the complaining witness is road overseer for the village of Page, there is no provision in the statute providing for the appointment of overseers of highways by the board of trustees of an incorporated village; (3) that even if it be assumed that the village of Page is an entire road district of Page township, and that the complaining witness is the overseer of such district, yet the district is not itself a legal entity and has no capacity to sue, and that the road overseer is not an officer of the district or of the village but of the township, and that the penalty, if recoverable at all, can only be recovered by the said township; (4) that the plaintiff and respondent, the village of Page, is an incorporated village, and that the court will take judicial notice of the fact, yet the complaint fails to allege any such incorporation; and (5) that under §§ 1428 and 1432, Rev. Codes 1905, §§ 2017, 2021, Compiled Laws of 1913, every person liable to work on the highways may elect to commute for the same or some part thereof, and that the complaint fails to allege whether or not the defendant elected to so commute; and (6) that under § 1433, Rev. Codes 1905, § 2022, Compiled Laws of 1913, no complaint is authorized unless the defendant has failed to render a satisfactory excuse, and that there is no allegation as to whether such excuse has been furnished or not.

There is certainly no merit in point 3, that the village of Page is

incorporated, and that the court will take judicial notice of the fact, and yet there is no allegation to that effect. Counsel is correct in his assumption that the court will take judicial notice of the fact of the incorporation of the cities and villages of the state. See subdiv. 18, § 7319, Rev. Codes 1905, § 7938, Compiled Laws of 1913. Such being the case, however, no allegation or proof was necessary. See 31 Cyc. 47; French v. Senate of California, 146 Cal. 604, 69 L.R.A. 556, 80 Pac. 1031, 2 Ann. Cas. 756; Re Chope, 112 Cal. 630, 44 Pac. 1066.

Nor is there any merit in the proposition that although the complaint alleges that the complaining witness is road overseer for the village of Page, there is no provision in the statute providing for the appointment of any such officer by the board of trustees of an incorporated village, and that therefore the penalty, if recoverable at all, can be recovered by the township alone. The proceedings, it is true, were taken in the manner prescribed by §§ 1426, 1430, 1432, 1433, 1435, and 1436, Rev. Codes 1905, being §§ 2010, 2019, 2021, 2022, 2024, and 2025, Compiled Laws of 1913, and these sections relate primarily to proceedings which are brought by the townships and by the township road overseers. Section 2864, Rev. Codes 1905, being § 3861, Compiled Laws of 1913, however, gives to the board of trustees of incorporated villages the power "to appoint street commissioners," while § 2888, Rev. Codes 1905, being § 3893, Compiled Laws of 1913, gives to such trustees the power "to superintend the grading, paving, and improving of streets."

Section 6 of chapter 267 of the Laws of 1907, being § 3888 of the Compiled Laws of 1913, provides that "the same powers and duties in regard to the levy, collection, and expenditure of road taxes, which are now by law conferred and imposed upon township supervisors, township road overseers, justices, and constables, are hereby conferred and imposed upon the corresponding village officers, in so far as such powers and duties do not conflict with the provisions of this article."

There can be no doubt that under the provisions of the Revised Codes of 1905, and prior to the enactment of chapter 267 of the Laws of 1907, the position of appellant would have been tenable, and that actions of this sort would have had to be brought in the name of the township and by the township road overseer. There can be no doubt, however, that now and since the passage of chapter 267 of the Laws of 1907,

such actions may be brought by the corresponding village officials and in the name of the village. We cannot, in fact, read the chapter without being convinced of the clear intention to adopt the provisions contained in §§ 1426, 1428–1430, 1432, 1433, 1435, and 1436, Rev. Codes 1905, being §§ 2010, 2017–2019, 2021, 2022, 2024, and 2025 of the Compiled Laws of 1913, and which relate to townships and township officers, and to apply them to highways which are contained within the limits of incorporated villages, giving to the corresponding village officers the same powers and duties which are conferred by the sections above-mentioned upon township road overseers, and imposing the duties of levying and collecting the taxes upon the village, rather than upon the township. The demurrer admits that the complaining witness is in fact "the road overseer of the village of Page." Section 3888 of the Compiled Laws of 1913 gives to the corresponding officer of the village the same powers as are conferred upon the township road overseer. It is immaterial, therefore, what the specific title of the officer may have been.

When we come to consider the 5th point, which is that the complaint fails to state whether or not the defendant elected to commute, and whether he did or did not fail to present a satisfactory excuse to the road overseer, and the contention that the complaint fails to state a cause of action under the general rule "that where there is an exception in the enacting clause of a penal statute, or in the clause which defines the offense, the plaintiff suing under it must show that the defendant is not within it, we are of the opinion that the point is not well taken, nor is the rule applicable in the proceeding under consideration in the case at bar. We are satisfied, indeed, that it was the intention of the legislature that no formal pleadings should be required under the proceedings authorized by the statute before us, and that such proceedings are *sui generis*." Section 2022, Compiled Laws of 1913, merely provides that the road overseer shall *make complaint* to one of the justices of the peace, while § 2023 provides that, on such complaint being made, the defendant shall be summoned "to show cause why he should not be fined according to law." It is to be noticed that the collection of this road tax is a matter in which the state's attorney cannot be called upon to act, nor is there any other public attorney provided by law whose duty it is. The duty devolves entirely upon the road overseer, who in

the great majority of cases must necessarily be one who is unacquainted with the strict forms of legal procedure. It would seem unreasonable to require such person to pay for the services of an attorney, and there is no provision anywhere for such expenditure. The statute speaks of showing cause, rather than of interposing a defense. We are satisfied that the procedure was intended to be *sui generis*, and that all that is required is that the defendant shall have a fair hearing and be fully informed of the charges which are made against him. The record in this case conclusively shows that the point urged by appellant was neither urged in the justice's court nor in the district court, and that the defendant had a full hearing upon the other questions which we have passed upon. He therefore had his day in court and a fair hearing, and this, we believe, is all that the statute requires. It is, too, to be noticed that the summons which was made out by the justice of the peace and served upon the defendant contains the negations which appellant claims should have been made in the complaint, and as fully informed the defendant of the issues as could any formal complaint.

The judgment of the District Court is affirmed.

FRED BISMARCK STRAUSS, Executor of the Last Will and Testament of Fred Strauss, Deceased, v. W. P. COSTELLO, Judge of the County Court in and for Burleigh County, North Dakota.

(150 N. W. 874.)

County court — order of — final account — approving — appealable order — remedy.

1. Under the provisions of §§ 8599 and 8600, Comp. Laws of 1913, an order of a county court denying an application for the entry of a decree approving a final account and ordering a final distribution of an estate, on the sole ground that the inheritance tax provided by chap. 185 of the Laws of 1913, has not been

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Note.—The question of the constitutionality of inheritance taxes that discriminate between relatives is considered in a note in 33 L.R.A.(N.S.) 593, and the authorities there reviewed sustain the rule that the constitutional requirements of uniformity and equality in taxation do not invalidate reasonable discriminations among relatives or between relatives and strangers.

paid, is an appealable order. *Held*, further, that the provision for an appeal from such order furnishes a remedy in the ordinary course of law.

Mandamus — legal remedies — procedure.

2. A writ of mandamus cannot be employed to supersede legal remedies, but is intended to furnish a remedy where no adequate legal remedy is provided.

Mandamus — prerequisites to issuance — relator — right to performance of duty asked — no plain, speedy, or adequate remedy.

3. The prerequisites necessary to the issuance of a writ of mandamus are, first, that it appears that the relator has a clear legal right to the performance of the particular duty; second, that the law affords no other plain, speedy, and adequate remedy.

Trial court — application in — denial — judgment — mandamus lies only to direct performance.

4. When a trial court takes cognizance of an application in a proceeding therein pending, and denies it on the ground that facts are not shown entitling the petitioner to relief demanded, the court has exercised its judgment, and mandamus will not lie to direct the judge what judgment to enter, as to do so would be directing his action, instead of only directing him to act.

Constitution — inheritance tax — discrimination.

5. The constitutionality of the provision of chap. 185, Laws of 1913, imposing an inheritance tax of 5 per cent upon property descending to nephews and nieces, claimed to be an arbitrary discrimination in favor of cousins whose inheritance is taxed only 3 per cent, is not decided. See last paragraph in opinion for intimation on the subject.

Opinion filed January 4, 1915.

Appeal from an order of the District Court of Burleigh County; *W. L. Nuessle*, J.

Affirmed.

F. E. McCurdy, for appellant.

The statute in question, "inheritance tax law," is unconstitutional. It is class legislation. It is arbitrary. Kentucky R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; Yickwo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 111, 46 L. ed. 92, 109, 22 Sup.

Ct. Rep. 30; Michigan C. R. Co. v. Powers, 201 U. S. 245, 293, 50 L. ed. 744, 761, 26 Sup. Ct. Rep. 459; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 571, 46 L. ed. 679, 694, 22 Sup. Ct. Rep. 431; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Nicol v. Ames, 173 U. S. 509, 521, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; Cooley, Taxn. 3d ed. 77; State ex rel. White House School Dist. v. Readington Twp. 36 N. J. L. 66; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A. (N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101.

No state has power to make a law for taxation purposes which arbitrarily discriminates in favor of one as against another of the same class of persons, and such a law is in violation of primary rights. People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 160, 24 L.R.A.(N.S.) 208, 85 N. E. 1070; Re New York, 190 N. Y. 350, 16 L.R.A.(N.S.) 340, 83 N. E. 299, 13 Ann. Cas. 598; Bush v. New York L. Ins. Co. 63 Misc. 91, 116 N. Y. Supp. 1056; Lee v. O'Malley, 69 Misc. 218, 126 N. Y. Supp. 778; Re McKennan, 27 S. D. 147, 33 L.R.A.(N.S.) 625, 130 N. W. 33, Ann. Cas. 1913D, 745; People ex rel. Duryea v. Wilber, 198 N. Y. 1, 27 L.R.A.(N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626.

It is necessary to make such excises uniform as to the entire class of collateral. It must not tax one and exempt another in the same class.

Note to State v. Hamlin, 41 Am. St. Rep. 580; Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947; Re Wilmerding, 117 Cal. 284, 49 Pac. 181; State ex rel. Fath v. Henderson, 160 Mo. 216, 60 S. W. 1093; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 290, 42 L. ed. 1037, 1041, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 41, 56, 44 L. ed. 969, 975, 20 Sup. Ct. Rep. 747; see also note to State ex rel. Schwartz v. Ferris, 30 L.R.A. 218; Drew v. Tifft, 79 Minn. 175, 47 L.R.A. 525, 81 N. W. 839; note to Elton v. O'Connor, 33 L.R.A. 525; Lodi Twp. v. State, 51 N. J. L. 402, 6 L.R.A. 56, 18 Atl. 749; State, Alexander, Prosecutor, v. Elizabeth, 56 N. J. L. 80, 23 L.R.A. 529, 28 Atl. 51; Weaver v. Davidson County, 104 Tenn. 329, 59 S. W. 1105; Darcy v. San Jose, 104 Cal. 647, 38 Pac. 500; Wagner v. Mil-

waukee County, 112 Wis. 608, 88 N. W. 577; Longview v. Crawfordsville, 164 Ind. 122, 68 L.R.A. 625, 73 N. E. 78, 3 Ann. Cas. 496; Kraus v. Lehman, 170 Ind. 420, 83 N. E. 714, 84 N. E. 769, 15 Ann. Cas. 849; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; Edmonds v. Herbrandson, 2 N. D. 274, 14 L.R.A. 725, 50 N. W. 970; Plummer v. Borsheim, 8 N. D. 568, 80 N. W. 690; Angell v. Cass County, 11 N. D. 265, 91 N. W. 72; Re Connolly, 17 N. D. 550, 117 N. W. 946; State ex rel. Mitchell v. Mayo, 15 N. D. 327, 108 N. W. 36; Justice Dickman, Fayette County v. People's & D. Bank, 47 Ohio St. 503, 10 L.R.A. 196, 25 N. E. 697; Allen v. Louisiana, 103 U. S. 80, 85, 26 L. ed. 318, 319; Pollock v. Farmers' Loan & T. Co. 158 U. S. 636, 39 L. ed. 1125, 15 Sup. Ct. Rep. 912.

The extent to which the courts may go, in reading into or out of legislative enactments words or phrases, in order to determine the legislative intent and meaning, is limited. Paxton & H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co. 45 Neb. 884, 29 L.R.A. 853, 50 Am. St. Rep. 585, 64 N. W. 343; State ex rel. Patterson v. Bates, 96 Minn. 110, 113 Am. St. Rep. 612, 104 N. W. 709; State ex rel. Foot v. Bazille, 97 Minn. 11, 6 L.R.A.(N.S.) 732, 106 N. W. 93, 7 Ann. Cas. 1056.

H. R. Berndt, State's Attorney, *Andrew Miller,* Attorney General, and *Geo. E. Wallace, L. E. Birdzell, Theo. Kafell,* for respondent.

Mandamus is not the proper remedy here. The petitioner should have appealed from the order of the county court. Such order is appealable. The lower court has expressed its judgment. If the court was wrong, it is but a judicial error. No mere ministerial act is required to be performed. 13 Enc. Pl. & Pr. 539; People ex rel. Meminger v. Sexton, 24 Cal. 79; Francisco v. Manhattan Ins. Co. 36 Cal. 283; Davis v. Wallace, 4 Cal. Unrep. 949, 38 Pac. 1107; State ex rel. Child v. Smith, 19 Wis. 531; Ex parte Des Moines & M. R. Co. 103 U. S. 794, 26 L. ed. 461; Ex parte Hurn, 13 L.R.A. 120, and note, 92 Ala. 102, 25 Am. St. Rep. 23, 9 So. 515; Territory ex rel. County Comrs. v. Cavanaugh, 3 Dak. 325, 19 N. W. 413.

The higher court has no power to tell a lower court what its interpretation and judgment of the law shall be. Benedict v. Howell, 39 N. J. L. 221; Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep.

149; Re Parsons, 150 U. S. 150, 37 L. ed. 1034, 14 Sup. Ct. Rep. 50; State ex rel. Northern P. R. Co. v. Stutsman County Dist. Judge, 3 N. D. 43, 53 N. W. 433; Re Morrison, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246; Ex parte Baltimore & O. R. Co. 108 U. S. 566, 27 L. ed. 812, 2 Sup. Ct. Rep. 876; Shine Presiding Judge v. Kentucky C. R. Co. 85 Ky. 177, 3 S. W. 18; Ex parte Des Moines & M. R. Co. 103 U. S. 794, 26 L. ed. 461; Ex parte Newman, 14 Wall. 152, 20 L. ed. 877; Cattermole v. Ionia Circuit Judge, 136 Mich. 274, 99 N. W. 1.

All that any court will ever do by mandamus to an inferior court is to direct that it take jurisdiction and act. Roberts v. Holsworth, 10 N. J. L. 57.

The appellant had a plain, speedy and adequate remedy at law, by appeal. Ex parte Elston, 25 Ala. 72; Ex parte Hutt, 14 Ark. 368; People ex rel. Flagley v. Hubbard, 22 Cal. 34; Marshall v. State, 1 Smith (Ind.) 17; State ex rel. Menge v. Rightor, 36 La. Ann. 200; State v. Gibson, 36 Ind. 394, 10 Am. Rep. 42; State ex rel. Patterson v. Marshall, 82 Mo. 484; State ex rel. Combination Silver Min. Co. v. Curler, 4 Nev. 445; Shelby v. Hoffman, 7 Ohio St. 450.

If petitioner had proved payment of the tax, and the county court had refused to allow his account, mandamus would lie. People ex rel. Green v. Dutchess & C. R. Co. 58 N. Y. 153; Johnson v. Lucas, 11 Humph. 306; State ex rel. Walker v. Judge of Orphans' Court, 15 Ala. 740; Rosenthal v. State Canvassers, 50 Kan. 129, 19 L.R.A. 157, 32 Pac. 129; Clark v. Buchanan, 2 Minn. 346, Gil. 298; Ross v. Lane, 3 Smedes & M. 695; Gillespie v. Wood, 4 Humph. 437; Hall v. Steele, 82 Ala. 562, 2 So. 650; Cook v. Candee, 52 Ala. 109.

Performance of an unlawful act cannot be compelled by mandamus. Cooley, Taxn. 3d ed. 1350, and note 2; 14 Am. & Eng. Enc. Law, 100; People ex rel. Hall v. San Francisco, 20 Cal. 592; State ex rel. Atty. Gen. v. District Ct. 13 N. D. 211, 100 N. W. 248.

In any event, such questions as are here presented will only be determined upon a full hearing of all interested parties in a proper proceeding. Mandamus will not permit such consideration. State ex rel. Lytle v. Douglas County, 18 Neb. 506, 26 N. W. 315; State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 47 La. Ann. 1679, 47 L.R.A. 512, 18 So. 746.

SPALDING, Ch. J. The appellant herein, Fred Bismarck Strauss, is the executor of the last will and testament of Fred Strauss, late of Burleigh county, deceased. The respondent is the judge of the county court in and for Burleigh county. It appears from the petition that everything had been done necessary to entitle the petitioner to have his final report and account as executor allowed and the final decree of distribution made, except that he had not paid the inheritance tax provided for by chap. 185 of the Laws of 1913, chap. 10 of Probate Code, Compiled Laws of 1913.

Application was made for the final decree of distribution without paying such inheritance tax. Such application was denied on the sole ground that such tax had not been paid, the court finding that all other things necessary and prerequisite to the issuance of such final decree had been done and performed, and its order was entered on the 28th day of March, 1914, denying the application. Thereupon appellant applied to the district court of Burleigh county, setting forth in his petition all the facts, for the issuance of a writ of mandamus commanding the judge of said county court to issue such final decree without the payment of the inheritance tax. An alternative writ was issued, and on the return day respondent filed an answer and motion to quash, in which he admitted that appellant had done everything prerequisite and necessary to the entry of the final decree of distribution, except to pay the inheritance tax referred to, and alleging that an order had been entered in the county court on the 16th day of December, 1913, determining the amount of the inheritance tax due from the petitioner and one Cora Minnesota Strauss, sole legatees and devisees under the will of the deceased, as the sum of $1,477.32. Upon the failure of petitioner to pay the same, and upon the hearing, the district court quashed the alternative writ, and denied the application, for the reason that such inheritance tax had not been paid. From this order the case is here on appeal.

At the threshold of proceedings in this court we are met with the objection that mandamus is not the proper remedy to bring the questions involved before the district court, for the reason, among others, that such writ will, under § 8458, Comp. Laws 1913, only issue where there is not a plain, speedy, and adequate remedy in the ordinary course of law. We regret that, under the provisions of the statute and the de-

cisions of this court, we are required to determine this appeal upon this question of practice, but we have no alternative. Section 8600, Comp. Laws 1913, designates the parties to a proceeding and persons in county court who may appeal to the district court, and it includes any party to the proceeding, or other person having or claiming a right or interest affected by the order or decree appealed from. Section 8599, Comp. Laws 1913, is as follows: "Any party or other person specified in the next section, who deems himself aggrieved, may appeal as prescribed in this article, from a decree or from any order affecting a substantial right, made by a county court, to the district court of the same county."

That the order complained of affected a substantial right, and was therefore appealable, is not open to question. The petitioner therefore had a remedy in the ordinary course of law. This remedy by appeal was as speedy and adequate as in any case where an appeal is provided. If any incidental delay occasioned by an appeal would justify the issuance of the writ of mandamus, then procedure by means of that writ would be warranted in almost any case which might arise, and the statute providing for appeals would become obsolete. The law seems to be well established that the writ of mandamus cannot be employed to supersede legal remedies, but is intended to furnish a remedy where no adequate legal remedy is provided. The prerequisites necessary to warrant a court in granting the writ are, first, that it appears that the relator has a clear legal right to the performance of the particular duty, second, that the law affords no other plain, speedy, and adequate remedy. State ex rel. Wiles v. Albright, 11 N. D. 22, 88 N. W. 729; State ex rel. Atty. Gen. v. District Ct. 13 N. D. 211, 100 N. W. 248; Vilas v. Circuit Ct. 24 S. D. 298, 123 N. W. 841; Farnham v. Colman, 19 S. D. 342, 1 L.R.A.(N.S.) 1135, 117 Am. St. Rep. 944, 103 N. W. 161, 9 Ann. Cas. 314; State ex rel. Ellis v. Atlantic Coast Line R. Co. 53 Fla. 650, 13 L.R.A.(N.S.) 320, 44 So. 213, 12 Ann. Cas. 359; Stegmaier v. Goeringer, 218 Pa. 499, 67 Atl. 782, 11 Ann. Cas. 973; State ex rel. Hunter v. Winterrowd, 174 Ind. 592, 30 L.R.A.(N.S.) 886, 91 N. E. 956, 92 N. E. 650.

In the case cited in 13 N. D., without discussion of the subject, this court held that mandamus is not available where there is another plain, speedy, and adequate remedy in the ordinary course of law, to accomplish the purpose. In Vilas v. Circuit Ct. it was held that mandamus would

not lie where the plaintiff might have maintained an ordinary action in equity to vacate a judgment, or might have appealed from an order refusing to vacate it.

But it is contended by the appellant that the county court refused to act, and that the writ will lie to compel action. We do not so construe the attitude of the judge of the county court. He did act. He took jurisdiction of the application for the granting and entry of a decree of final distribution, and acted thereon, holding that the petitioner had not shown facts entitling him to such decree. If the judge was in error, it constituted an erroneous decision on an application, of which he had taken cognizance, and was an error in judgment reviewable on appeal, and was not a refusal to take jurisdiction or to act. Mandamus does not lie to review errors of law occurring in the course of proceedings in an inferior court. Having assumed jurisdiction, the only function the writ could serve, if issued, would be to direct the judge of the county court what character of judgment to enter. This is seldom, if ever, proper. The superior court may command the inferior court to act, but may not direct its action.

We therefore conclude that the judgment of the district court must be affirmed.

When the inferior court has acted upon the application, its action is a judicial determination of a matter properly before it, and the applicant's remedy is by an appeal (see State ex rel. Atty. Gen. v. District Ct. 13 N. D. 211, 100 N. W. 248, where a review of authorities will be found, also Farnham v. Colman, 19 S. D. 342, 1 L.R.A.(N.S.) 1135, 117 Am. St. Rep. 944, 103 N. W. 161, 9 Ann. Cas. 314); and some courts hold that mandamus will not lie when the object is to test the validity of a statute: see State ex rel. Hunter v. Winterrowd, 174 Ind. 592, 30 L.R.A.(N.S.) 886, 91 N. E. 956, 92 N. E. 650, and authorities reviewed therein.

We will, however, add that the purpose of this proceeding was to test the constitutionality of that provision in chap. 185, Laws 1913, being chap. 10 of the Probate Code, Comp. Laws 1913, which imposes an inheritance tax of 5 per cent upon property descending to nephews and nieces, it being claimed that, because a rate of only 3 per cent is attached to inheritances by cousins, the law arbitrarily and unjustly discriminates in favor of those more remotely related to the decedent. The members

of the court have given this question sufficient consideration so we can say, without deciding, that at least a majority of the court are of the opinion that the claim of such invalidity cannot be sustained. The order of the District Court is affirmed.

MRS. J. E. F. BROWN v. F. E. BALL.

(150 N. W. 890.)

Civil action — arrest of defendant insufficient cause — must appear by affidavit — remedy.

1. Before an order for the arrest of a defendant in a civil action may be properly issued, the plaintiff must make it appear by affidavit that a sufficient cause of action exists, and that the case is one authorizing a resort to the provisional remedy of arrest and bail.

Remedy of arrest and bail — harsh — statute — strict compliance with.

2. The provisional remedy of arrest and bail is extremely harsh, and a plaintiff wishing to avail himself of such remedy will be held to a strict compliance with the statute governing such remedy.

Complaint in — affidavit for order — detriment and loss — facts must appear — order vacating.

3. Construing the complaint, which was incorporated into and made a part of the affidavit on which the order of arrest was based, and which complaint the plaintiff elected to treat as stating a cause of action to recover damages for fraud and deceit, it is held that it fails to allege any facts showing that plaintiff has suffered any detriment resulting therefrom. It is accordingly held that the trial judge properly vacated the order of arrest.

Opinion filed January 6, 1915.

Appeal from District Court, Cass County; *Charles A. Pollock*, J.

From an order vacating an order of arrest issued in a civil action, plaintiff appeals.

Affirmed.

Taylor Crum, for appellant.

The affidavits upon which an order is made should be filed promptly

with the clerk after having been submitted to the judge. The writ issues upon the judge's order, which is based upon such affidavit. Wert v. Strouse, 38 N. J. L. 184.

Where the complaint states facts sufficient, it is competent to make it a part of the affidavit for the order of arrest. Ligare v. California Southern R. Co. 76 Cal. 610, 18 Pac. 777; Ex parte Howitz, 2 Cal. App. 752, 84 Pac. 229.

A new cause for arrest cannot be set up as a defense against a motion to vacate the order, where the same was not originally set forth. Cady v. Edmonds, 12 How. Pr. 197.

Such is the mere exception to the rule, but it does not apply in this case. Scott v. Williams, 23 How. Pr. 393.

Where one injured sues for the tort, his election to bring such suit affirms the contract set forth, as a continuing obligation. Sonnesyn v. Akin, 14 N. D. 257, 104 N. W. 1026; Thompson v. Thompson, 10 N. D. 567, 88 N. W. 565.

Where the cause of action and the ground for arrest are identical, the whole matter should go to the jury, unless, upon motion to vacate the order of arrest, the proof strongly preponderates in favor of the defendant. Frost v. M'Carger, 14 How. Pr. 131.

Even if the action sounded in tort, the contract was not eliminated from the case. Sonnesyn v. Akin, 14 N. D. 257.

Whether the action is merely for deceit, or is brought to set aside the contract and recover back the money loaned under it, the plaintiff was entitled to the order of arrest and the defendant can only be relieved by establishing his defense upon the trial. Nelson v. Blanchfield, 54 Barb. 630.

The truth or falsity in an action of tort, should never be decided upon a motion. Barret v. Gracie, 34 Barb. 20; Union Bank v. Mott, 6 Abb. Pr. 318; Stelle v. Palmer, 7 Abb. Pr. 181.

It is not a ground for vacating the order, that the case made by the complaint varied from that made by the affidavits, if the affidavits are in themselves sufficient, and disclose a ground of arrest consistent with the allegations of the complaint. McBride v. Langan, 18 N. Y. Civ. Proc. Rep. 201, 10 N. Y. Supp. 552, 554; Humphrey v. Hayes, 94 N. Y. 594.

In such a case it is not necessary for plaintiff to show defendant's

insolvency. Defendant does not deny that he transferred his property to his wife; he merely denies wrong intent. This presented no issue upon the motion. Nothing could condone defendant's fraud except plaintiff's acceptance of payment of the claim. McClure v. Levy, 22 N. Y. Supp. 1006; Nelson v. Blanchfield, 54 Barb. 630.

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

The statute authorizing arrest in civil actions is a harsh one; it is penal in its nature, and those who invoke its aid must bring themselves strictly within its terms. The facts upon which the order is asked must appear to the court; that is, must be sufficient and must bring the applicant clearly within the statute. Kaeppler v. Red River Valley Nat. Bank, 8 N. D. 411, 79 N. W. 869; Thompson v. Thompson, 10 N. D. 568, 88 N. W. 565; Clarke v. Lourie, 82 N. Y. 580; Liddell v. Paton, 67 N. Y. 393; Wright v. Brown, 67 N. Y. 1; Towle v. Richardson, 63 Vt. 96, 20 Atl. 925; Spice v. Steinruck, 14 Ohio St. 213.

If the affidavit is based in any degree upon information and belief, the grounds therefor must be set forth fully in order to make it appear, and to enable the court to determine whether or not such belief is well founded and reasonable. Moore v. Calvert, 9 How. Pr. 474; Dreyfus v. Otis, 54 How. Pr. 405; Mechanics' & Traders' Bank v. Loucheim, 55 Hun, 396, 8 N. Y. Supp. 520; Whitlock v. Roth, 5 How. Pr. 143; Crandall v. Bryan, 15 How. Pr. 48; City Bank v. Lumley, 28 How. Pr. 397; Pierson v. Freeman, 77 N. Y. 589; People ex rel. Hackett v. Wayne Circuit Judge, 36 Mich. 334; Kaeppler v. Red River Valley Nat. Bank, 8 N. D. 412, 79 N. W. 869.

Plaintiff's showing of facts is not sufficient; it is not reasonable; it is not well founded; it cannot sustain the order. Martin v. Gross, 24 Jones & S. 512, 4 N. Y. Supp. 337; Markey v. Diamond, 46 N. Y. S. R. 283, 19 N. Y. Supp. 181, 1 Misc. 97, 20 N. Y. Supp. 847.

Where the complaint is made a part of the affidavit for the order of arrest, and such affidavit refers to such complaint as "stating a good and sufficient cause, as fully appears from the verified complaint," such affidavit is insufficient, because it merely states the opinion of affiant, and not a statement under oath of the truth of the matters set forth in the complaint. Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135.

An affidavit failing in any essential particular to meet the requirements of the law is insufficient to give the court jurisdiction. Ex parte

Yonetaro Fkumoto, 120 Cal. 316, 52 Pac. 726; Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860; Hall v. Justice's Ct. 5 Cal. App. 133, 89 Pac. 870.

Such affidavits must be filed with the clerk of court at the time and in the manner provided by statute. Rev. Codes 1905, § 6892; Phillips v. Wood, 31 Vt. 322; Parkhurst v. Pearsons, 30 Vt. 705; Wert v. Strouse, 38 N. J. L. 184.

Such affidavit must be in custody of the law; it must be such that perjury can be predicated upon it if false. Parker v. Ogden, 2 N. J. L. 146.

Where the contract of guaranty contains any condition precedent to the guarantor's liability, the performance of this condition must be alleged in the complaint against the guarantor. Mickle v. Sanchez, 1 Cal. 200; 20 Cyc. 1487; Rev. Codes 1905, § 6890, ¶ 4, § 6892.

The affidavit must make it appear that a good cause of action exists, or it must fail. Pindar v. Black, 4 How. Pr. 95; Muller v. Perrin, 14 Abb. Pr. 95; 3 Cyc. 934, 944; Hart v. Grant, 8 S. D. 248, 66 N. W. 323; Reinboth v. Ederheimer, 134 N. Y. Supp. 16; Vock v. Auterbourn, 66 Misc. 222, 122 N. Y. Supp. 1024; Parker v. Ogden, 2 N. J. L. 146; Schwenk v. Naylor, 17 Jones & S. 98; Sheridan v. Briggs, 53 Mich. 569, 19 N. W. 189.

On motion to vacate an order of arrest, the question is as to the existence of grounds of arrest, and not as to what plaintiff believes. 3 Cyc. 971; Sonnesyn v. Akin, 14 N. D. 256, 104 N. W. 1026; 3 Elliott, Ev. § 2137, p. 636; Nelson v. Grondahl, 12 N. D. 133, 96 N. W. 299; Hoy v. Duncan, 1 Jones & S. 555.

If the facts set forth are not sufficient to call into exercise the jurisdiction of the court, then, even though the order has issued, the sufficiency of the affidavit may be questioned, for it was never judicially passed upon. Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426, 21 L.R.A. 278, 56 N. W. 9; Fischer v. Langbein, 103 N. Y. 84, 8 N. E. 251; Bonesteel v. Bonesteel, 28 Wis. 245; Marble v. Curran, 63 Mich. 283, 29 N. W. 725; Mudrock v. Killips, 65 Wis. 622, 28 N. W. 66; Bryan v. Congdon, 29 C. C. A. 670, 57 U. S. App. 505, 86 Fed. 221; Whitlock v. Roth, 5 How. Pr. 143; Lay v. Superior Ct. 11 Cal. App. 558, 105 Pac. 775; 3 Cyc. 934.

On motion to vacate order of arrest, the affidavit cannot be amended;

Jones v. Platt, 60 How. Pr. 73; Adams v. Mills, 3 How. Pr. 219; Howe Mach. Co. v. Lincoln, 24 Kan. 123; 3 Cyc. 949–950.

It clearly appears from all the records in the case that defendant has not been guilty of any fraud, and the action must fall. Sniffen v. Parker, 8 N. Y. Civ. Proc. Rep. 393; Frost v. M'Carger, 14 How. Pr. 131; McClure v. Levy, 68 Hun, 525, 22 N. Y. Supp. 1006; Hoy v. Duncan, 1 Jones & S. 555; Lorillard F. Ins. Co. v. Meshural, 7 Robt. 308; Tallman v. Whitney, 5 Daly, 505; Royal Ins. Co. v. Noble, 5 Abb. Pr. N. S. 54; Levins v. Noble, 15 Abb. Pr. 475; Griswold v. Sweet, 49 How. Pr. 171; Stuyvesant v. Bowran, 3 Abb. Pr. N. S. 270, 34 How. Pr. 51; Blakelee v. Buchanan, 44 How. Pr. 97; Claflin v. Frank, 8 Abb. Pr. 412; Merritt v. Heckscher, 50 Barb. 451; Thompson v. Thompson, 10 N. D. 564, 88 N. W. 565; Caldbeck v. Simanton, 82 Vt. 69, 20 L.R.A.(N.S.) 844, 71 Atl. 881.

A party cannot sustain an action of this character where no harm has come to him; deceit and injury must concur. Fuller v. Hodgdon, 25 Me. 243; Alden v. Wright, 47 Minn. 225, 49 N. W. 767; Sonnesyn v. Aikin, 14 N. D. 256, 104 N. W. 1028; McKernan v. McDonald, 27 N. J. L. 541; Griswold v. Sweet, 49 How. Pr. 171.

Where the evidence is capable of an interpretation which makes it as equally consistent with defendant's innocence as with his guilt, that meaning must be placed upon it which accords with his innocence. 20 Cyc. 121, 123; Nelson County v. Northcote, 6 Dak. 378, 6 L.R.A. 230, 43 N. W. 897; Anderson v. Hunt, 55 How. Pr. 336.

FISK, J. This is an action to recover damages for fraud and deceit. At the time of the commencement of such action plaintiff applied for and obtained an order of arrest under our arrest and bail statute, pursuant to which order the defendant was arrested and held to bail in the sum of $1,500. He immediately furnished such bail, and thereafter moved the district court to vacate the order of arrest, which motion was granted after due hearing and consideration, and the order vacated. Plaintiff appeals from such order, serving with his notice of appeal the following statement of errors of law and insufficiency of the evidence, to wit:

"1st. The affidavits submitted by and on behalf of the plaintiff were

sufficient in law and fact to sustain the order of arrest which was vacated by the court.

"2d. That no evidence was submitted by the defendant which was sufficient in law or fact to justify the court in vacating the order of arrest and exonerating the bail of the defendant.

"3d. That the evidence is insufficient for the reason that it does not in any manner positively dispute the allegations of the plaintiff, that the defendant was without authority, and knew he was without authority, to sign the name of the Columbia Land Company to the contract, 'exhibit B;' and was hearsay, and not the best evidence as to whether defendant was in fact the vice president of said Columbia Land Company.

"4th. That the basis of the order of arrest and the plaintiff's cause of action being identical, it was the province of the jury to determine the facts in controversy, which were raised by defendant's and plaintiff's affidavits on the hearing of the motion; and that in any event the evidence is of such a character that the vacating order should be set aside as a matter of discretion, in order that the whole case may be investigated by the taking of depositions as to matters it was impossible to prove by affidavits."

The learned trial court, in making the order complained of, filed an elaborate memorandum decision or opinion, which has been brought to our attention by counsel. Such memorandum decision has served to materially lighten the burdens of this court in clearly pointing out the various contentions of counsel in the court below, and the holding of that court on each of such contentions. This practice is an admirable one, and we commend it to the other trial judges of the state, for it is of incalculable benefit to have such information.

We deem it unnecessary to pass upon the numerous practice questions raised and decided in the court below and argued in this court in the briefs of counsel, for, as we view the case, the order appealed from was correct, and must be affirmed upon the ground that the affidavit upon which the order of arrest was based fails to disclose that a sufficient cause of action exists, as required by § 7491, Compiled Laws of 1913. This section provides: "The order may be made whenever it appears to the judge by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of

those mentioned in § 7489. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest is made, the affidavit must be filed in the office of the clerk of the court."

We shall therefore direct our attention solely to this one point.

The affidavit presented as a basis for the order reads as follows, omitting formal parts: "Mrs. J. E. F. Brown, being duly sworn, says that she is the plaintiff in the above-entitled action; that a sufficient cause of action exists against said defendant and in favor of said plaintiff for the recovery of damages in an action arising on contract, wherein the defendant has been guilty of a fraud in contracting the debt and incurring the obligation for which the action is brought; and is a cause of action mentioned in § 6890, Revised Codes of North Dakota 1905; that the facts upon which said action is based are stated and set forth in the verified complaint herein, a copy of which is hereto attached, sworn to, and made a part of this affidavit to the same effect as though such facts were again repeated at length herein." It is apparent that such affidavit, considered apart from the complaint, sets forth no facts from which it was made to appear to the judge that a sufficient cause of action existed to authorize the issuance of such order of arrest. We must therefore look to the complaint, which is made a part of the affidavit, to determine whether such necessary facts were made to appear. Such complaint is quite lengthy, and, instead of setting the same out in full, we shall content ourselves by adopting in main the condensed statement thereof made by appellant's counsel as follows:

"1st. That some time during the summer of 1909, while the defendant was doing dental work on the plaintiff's teeth, he commenced negotiations with her, and recommended that she purchase some land from the Inland Irrigation Company, in the state of Oregon.

"These negotiations continued along until about the 14th day of January, 1910, when a contract was drawn up, but was not signed until January 28th, 1910.

"2d. The plaintiff had doubts of the reliability of the Inland Irrigation Company, and also of her ability to perform the conditions set forth in the proposed contract, and refused to enter into the same unless full assurance was given that any money she paid upon the

contract would be refunded to her if the same did not prove satisfactory to her, or if she was unable to carry out the provisions of the contract.

"3d. That the defendant, for the purpose of inducing plaintiff to contract and pay over money, represented that he and the Columbia Land Company were interested as agents; that he was not only agent but vice president of the Columbia Land Company; that he was authorized and empowered by said company as its vice president to sign its corporate name; that he would personally and individually act as plaintiff's agent and trustee; that he would cause the Columbia Land Company to act as her agent and trustee, and that he individually and the Columbia Land Company would refund plaintiff's money to her within three months after demand if the plaintiff became dissatisfied or was unable to carry out the terms of the contract.

"4th. That plaintiff believed said statements, and relied upon them, and in consideration thereof executed the contract and paid over her money.

"5th. That she so paid over in the aggregate the sum of $1,029.75, and that said money was so paid by reason of plaintiff's reliance in and upon the statements and contract of said F. E. Ball and the pretended agreement of the Columbia Land Company.

"6th. That the defendant was guilty of fraud and deceit in this; that with intention to defraud the plaintiff he falsely, knowingly, fraudulently, and deceitfully represented and stated, for the purpose of misleading and defrauding the plaintiff, that he was vice president of the Columbia Land Company, and was authorized to sign its corporate name to a contract which he executed—exhibit 'B' of the complaint—as its vice president; when in truth and in fact the defendant very well knew that such statements were false, and that he had no authority to make such contract on behalf of the Columbia Land Company.

"7th. That the sources of plaintiff's information concerning the said fraud were letters from the Columbia Land Company, signed by its president; from the Commissioner of Corporations of the State of Oregon, and certain attorneys in Portland, Oregon, and statements of one H. E. Rorke.

"8th. That she was informed and verily believed that the defendant had transferred his property with intent to defraud his creditors. This allegation is solely on information and belief.

"That the Columbia Land Company is in no way liable upon the agreement made by the defendant.

"The sources of this information were letters from the Columbia Land Company, signed by its president, and statements of H. E. Rorke, an employee of the company.

"9th. That the plaintiff had demanded the return of her money, and that the defendant had only refunded $75 thereof, and refused to refund any further amount whatsoever.

"10th. That plaintiff was unable to get an affidavit from the president of the Columbia Land Company, as appears by letters and telegram from attorneys in Portland, Oregon.

"11th. That said defendant had not only refused to refund plaintiff's money, but had stated that if any effort was made to collect it, he would take bankruptcy, and threatened to scandalize plaintiff if she attempted to collect."

In addition to the above the complaint contains the following allegations: "That both the defendant, F. E. Ball, and the Columbia Land Company, have neglected and refused, for more than three months after such demand, to refund any part of said money to this plaintiff, save and except the sum of $75, refunded by the defendant, F. E. Ball; $50 thereof on the 3d day of April, 1911; and $25 thereof on the 5th day of September, 1911, leaving a balance due and not refunded of $954.75, with interest thereon at 5 per cent per annum from and since the 28th day of January, 1910, and the same and the whole thereof has been by said defendant, F. E. Ball, in the course of his said agency for this plaintiff, fraudulently converted to plaintiff's damage, $954.75, with interest at 5 per cent per annum from and since January 28, 1910. That plaintiff has demanded said sum last named from said defendant, F. E. Ball, but he has not paid nor accounted for nor refunded the same, nor any part thereof, and wholly refuses so to do."

This constitutes the sole allegation with reference to the plaintiff's damages, and it is manifestly insufficient, as we shall attempt to demonstrate. It requires no argument in support of the justness of the well-recognized rule that the provisional remedy of arrest and bail is an extremely harsh one, and consequently a plaintiff who wishes to avail himself of such remedy is held to a strict compliance with the statute. One of the essentials exacted of him by the statute is that he "make it

appear to the judge . . . that a sufficient cause of action exists, and that it is one of those mentioned in § 7489."

After carefully examining the complaint, which was incorporated into and made a part of the affidavit upon which the order of arrest was based, we are not surprised that the trial judge had difficulty in determining whether the plaintiff's cause of action was on contract, or in tort to recover damages for alleged fraud and deceit. The plaintiff was required to elect which ground she relied on for recovery, and her counsel made his election to rely on fraud and deceit. In making such election counsel's attention was expressly called by the trial judge to the language of this court in the case of Sonnesyn v. Akin, 14 N. D. at page 256, 104 N. W. 1026, as follows: "If one is actually defrauded by a false statement which induced him to enter into a contract, he has his remedy for the injury. The contract thus procured is not void, but voidable. 9 Cyc. 431; 14 Am. & Eng. Enc. Law, 156, and cases cited. He may either rescind the contract and recover any sums paid upon it, or property delivered pursuant to it, or he may affirm the contract, take such benefits as are obtainable under it, and recover damages for the injuries sustained by reason of the false statement. Tice v. Zinsser, 76 N. Y. 549; Krumm v. Beach, 96 N. Y. 398; Gifford v. Carvill, 29 Cal. 589, 6 Mor. Min. Rep. 558; Herrin v. Libbey, 36 Me. 350; Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692; Purdy v. Bullard, 41 Cal. 444. These alternative remedies, it will be seen, are inconsistent, and are not available in the same action; for one is based upon a rescission of the contract, and the other upon an affirmance of it; one upon a contract implied by law obligating the wrongdoer to restore whatever of value he has received; the other in tort for damages for the injury done by the false statement. When the person injured elects the latter remedy, *i. e.*, to sue for the tort, he affirms the contract, thus continuing it as a binding obligation."

Construing the complaint in the light of such election and the rule thus announced in Sonnesyn v. Akin, the learned trial judge reached the conclusion that it fails to allege facts sufficient to constitute a cause of action for fraud and deceit. In his memorandum decision, among other things, he says: "The court is first led to inquire: What are the charges of fraud set forth in the complaint; because that forms the ground work of the affidavit, and is considered in connection with it?

The allegations of the affidavit are purely legal conclusions, save and except as they are based upon the allegations of the complaint, and the objections above given are therefore in the nature of a demurrer to the complaint. As stated in ¶ 6 above, the right to have the warrant of arrest issued rested wholly upon the allegations in the affidavit, and if there are not sufficient facts set forth, then the court would not have jurisdiction to grant such order.

"This is an action for fraud and deceit. To establish actionable fraud, the proofs must show:

"1. The fraud must be material. It must relate distinctly and directly to the contract, and affect its very essence and substance.

"2. The standard requires proof to show that the contract would not have been entered into if the fraud had not been practised. If the proof is such as to show or make it probable that the same thing would have been done in the same way, or substantially so, in absence of fraud charged, then it is not material.

"3. The misrepresentations must have been made with the design to impose upon the opposite party and to induce him to act in the premises.

"4. That the complaining party relied upon the representations or statements made.

"5. That the representations were such, or were made under such circumstances, that the injured party had a right to rely upon them in full belief of their truthfulness.

"6. That the complaining party has been, as a result of the fraudulent transactions, injured. 3 Elliott, Ev. § 2137, p. 636.

"In Sonnesyn v. Akin, supra, the court says: 'The fact that the evidence fails to show that the false statement was followed by injury is fatal to a recovery. . . .'

"Adopting the liberal rule which is required in considering the pleadings, I am satisfied that there are sufficient allegations to cover all the first five requirements as above set forth in the quotation from Elliott on Evidence, but I have looked in vain to discover where, upon the tort side of the action, there is any allegation of damage whatsoever. The only allegation that could in any way be considered as referring to damages appears in the latter part of ¶ 7 of the complaint, but the statements there are based upon and have reference wholly to the

amount due on the contract, and if they could be said to refer to the tort side of the case, it would be the conclusion of the pleader, without the statement of any facts showing such damage, or upon which the court could draw such conclusion of fact. It sets forth the amount that has been paid, and demands judgment for the amount which was paid, as would appear her right under the contract.

"Having elected to sue for the tort, it would become necessary to show that there was no value whatever in the contract, exhibit B. Prima facie it has value, and without suitable allegations to show that there was no value it would follow, by the plaintiff's own showing, she was not damaged. The allegation in the complaint, made upon information and belief, as to the lack of responsibility on the part of Mr. Ball, would not support such an allegation when used as an affidavit, because the sources of the information were not given. So the affidavit upon which the order of arrest was obtained stands in the situation of having no charge against the responsibility of Mr. Ball, and presumptively he is responsible. Judge Mitchell, in the case of Grosse v. Cooley, 43 Minn. 188, 45 N. W. 16, says: 'Solvency is always presumed until insolvency is proved. The presumption is that the purchaser was able to perform the obligations assumed by his contract,'—citing authorities. See also Hart v. Hoffman, 44 How. Pr. 168.

"The case of Hawke v. Fletcher, 4 Dak. 42, 22 N. W. 593, was a case very similar to the one at bar, where the court says: 'The complaint gives no description of the mortgage, nor of the property mortgaged, nor of its value. . . . In an action like this, the complaint should more fully describe the mortgage [in this case it would be the contract], in what it is worthless, and especially the value of the security. If the security was of no value, and the plaintiff knew it, what is the measure of his damage in the action at bar?'

"Cooley on Torts, p. 90, makes use of the following language: 'If one by means of false warranty is enabled to accomplish a sale of property, the purchaser may have his remedy upon the contract of warranty, or he may bring suit for the tort. The tort consists in his having been, by fraud and falsehood, induced to make the purchase. It is a broken contract, but it is also something more. It is deception to the injury of the purchaser in procuring the contract to be made. Suit may be brought on the contract, ignoring the fraud, but it may also be

brought for the fraud, and then the contract will not be counted on, though it will necessarily be shown, in order to make apparent how the deception was injurious.'

"If these observations and tests which have been made are correct, it follows that the affidavit for the order of arrest was fatally defective in failing to allege that there was any damage, and did not give the court jurisdiction to issue the warrant. From this it follows that said order should be vacated."

We are entirely satisfied with both the reasoning and conclusion of the trial court and adopt the same as our own. We desire to supplement his opinion upon the point that no damage is alleged or shown, by stating that the allegation with reference to such damage merely relates to an alleged conversion of the money claimed to be due from defendant to plaintiff under the contract. After alleging defendant's neglect and refusal after demand to refund to plaintiff a balance of $954.75 paid by her on the contract, and which she claims a contract right to have refunded, the complaint reads: "And the same and the whole thereof has been by said defendant, Ball, in the course of his said agency for this plaintiff, fraudulently converted, to plaintiff's damage $954.75, with interest."

Manifestly, such allegation of damage is restricted to and inseparably connected with such alleged conversion of the money claimed to be due, and cannot be treated as an allegation of damages suffered as the result of the alleged fraud and deceit. It logically follows, as a necessary conclusion, that if the complaint as a whole discloses that there was no conversion, this allegation of resulting damage occasioned thereby must fall, or be treated as mere surplusage. Not only does the complaint refute the theory of a conversion, but it is refuted by the plaintiff's election to treat the action as one for fraud and deceit, and under the rule in Sonnesyn v. Akin, supra, this is an affirmance of the contract, and plaintiff can recover only such damages as she is able to prove resulted to her by reason of such fraud and deceit. She has shown no such damage at all in her affidavit or complaint. Having affirmed the contract, and thereby elected to retain any benefits accruing to her thereunder, it requires no argument to demonstrate that she cannot recover back what she parted with, either on the theory of conversion or otherwise. The complaint is silent as to the value of that which she has elected

to retain, and consequently she does not show that she has suffered any detriment through the alleged wrongful acts of the defendant. If, instead of affirming the contract and retaining the benefits, if any, thereunder, plaintiff had, upon discovering the alleged fraud, disaffirmed or rescinded the same by restoring what she received thereunder, she might, under the views of the writer as expressed by him in Sonnesyn v. Akin, supra, have maintained an action to recover the money which she parted with through such fraud, even upon the theory of the conversion of such moneys by the defendant; but she has seen fit by her election to affirm the contract and to ask damages for the fraud and deceit, and, as before stated, she is precluded by such election.

One other point requires slight notice. Appellant's counsel contends that under § 7515, Compiled Laws 1913, which provides that if the motion to vacate the order of arrest is made upon affidavits upon the part of defendant, the plaintiff may oppose the same by affidavits or other proofs in addition to those on which the order of arrest was made, that his proposed amendment to the complaint, made at the time of the hearing of the motion to vacate such order, would relate back and cure any deficiency in the affidavit upon which the order was issued. Such contention is, we think, unsound. If the original affidavit is fatally defective in any essential particular required by § 7491, it is our understanding that it cannot be remedied by supplemental affidavits produced at the hearing of the motion to dissolve. 3 Cyc. 934; Hauss v. Kohlar, 25 Kan. 640.

The order appealed from is affirmed.

BARTELS NORTHERN OIL COMPANY v. T. W. JACKMAN as State Inspector of Oils for the State of North Dakota.

(150 N. W. 576.)

Injunction — test validity of statute — lawfulness of powers conferred on public officers.

1. When other conditions warrant it, injunction will lie to test the validity of a statute or the lawfulness of the exercise of the powers conferred upon an officer of the law charged with executing it.

"Officers of the law" — peace officers.

2. The term "officers of the law," employed in subdiv. 4, § 7214, Comp. Laws 1913, is synonymous with "peace officers."

Federal Constitution — State officers — suits against — State courts — State has no power to prohibit suits.

3. Provisions of the Federal Constitution cannot be nullified by the state prohibiting suits in its own courts against state officers to prevent their enforcing unconstitutional statutes.

State oil inspector — oil in transit from other states — inspection — fees for — nonpayment — excessive — remedy.

4. Injunction will lie to prevent the state oil inspector and his deputies from holding up oil in transit from other states into this state, for nonpayment of inspection fees, if such fees are materially in excess of the amount necessary to pay the expense of inspection, when none of the ordinary actions at law would furnish an adequate or complete remedy for the damages which could be sustained by the plaintiff.

Action for conversion — claim and delivery — damages — inadequate remedies.

5. Where the plaintiff is receiving almost daily shipments of oil and gasolene, and is selling the same to consumers, and must depend on such shipments to supply his customers, and they are unlawfully held up by the oil inspector, neither an action for conversion, claim and delivery nor for damages, furnishes an adequate remedy for the injury to his property and business.

Courts — equity — law — jurisdiction.

6. When courts of law and equity were separate and distinct courts, neither one had jurisdiction over subjects within the jurisdiction of the other; but in this state the same court has jurisdiction of proceedings in both law and equity, and it is not necessary to as clearly and completely differentiate between the two as formerly.

Prevention of unlawful act — action by injunction — favored.

7. Unless clearly prevented by constitutional or statutory provisions, proceedings which will prevent an evil should be favored, rather than to compel a party to wait until the wrong has been done, and then to seek a remedy by action for the damages occasioned thereby.

Continuous wrongs — injunction — compensation.

8. Although a legal remedy may be adequate for any single act of trespass or any single wrong, yet when such acts or wrongs are continuous in their nature, and the entire wrong may be prevented by injunction, that form of proceeding is preferable to one at law, because full compensation for the entire wrong cannot be obtained in one action at law.

Irreparable injury — ground for injunction — meaning of term — adequate compensation — measure of damages.

9. Irreparable injury, in the sense that it furnishes a ground for the issuance of an injunction, does not mean that the injury is beyond the possibility of repair or compensation for damages, but rather that it is of such constant and frequent recurrence that the injured party cannot be adequately compensated for damages, or that the damages resulting cannot be measured by any certain pecuniary standard, but only by conjecture.

Inspection of commodities during transit — Legislative provision for — fees for — costs of inspection — limited to — when greater, a revenue measure — Federal Constitution — commerce provisions.

10. When the legislature provides for the inspection of commodities during transit, brought from other states into North Dakota, and fixes the fee for such inspection materially greater than the cost thereof, the measure becomes not only a police measure, but also a revenue measure; and to the extent that the fees exceed the reasonably necessary cost of inspection the tax is invalid as in conflict with the commerce provisions of the Federal Constitution.

United States Supreme Court decisions — control state courts — same questions — taxes — police measure.

11. The decisions of the Supreme Court of the United States on Federal questions are absolutely controlling, when the same questions are presented in state courts, and the latter have no alternative but to follow the Federal authorities. In D. E. Foote & Co. v. Stanley, 232 U. S. 494, the Supreme Court of the United States had under consideration the validity of a tax provided by a police inspection law of the state of Maryland. The facts and principles were in all respects identical with those in the case at bar, except that the revenue derived from the inspection fee was less in proportion to the cost of inspection than under the law which we are considering. The Supreme Court of the United States held the tax or inspection fee invalid. This decision is controlling, and must be followed by the courts of this state.

Excessive fee for inspection — tax on property — revenue measure — not uniform.

12. If on proof the allegations of the complaint in the case at bar, with reference to the excessiveness of the fee charged for inspecting oil and gasolene, are found correct, such fee is a tax on proprty, not according to its true value in money, and to the extent that it exceeds the cost of inspection is a revenue measure, and in conflict with § 176 of the Constitution, which provides that laws shall be passed taxing by uniform rule all property according to its true value in money. See Malin v. Lamoure County, 27 N. D. 140.

Injunction — motion to vacate — discretion.

13. It is *held* that the district court did not abuse its discretion in denying

the motion to vacate the temporary injunction, granted at the beginning of this action.

Opinion filed January 7, 1915.

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

Affirmed.

Statement by SPALDING, Ch. J.

A synopsis of the allegations of the complaint of the respondents in this case shows them to be to the effect that the plaintiff is a domestic corporation doing business in this state in the sale of oils from six different plants located in different counties, with its principal place of business at Grand Forks; that by chap. 214 of the Laws of 1913, a process and proceedings for the inspection of refined petroleum oils and gasolenes were provided, and a state inspector of oils created to make inspection of all oils and gasolene coming within the state, and requiring him to collect fees aggregating ½ cent per gallon, and making such fees a charge against the person, firm, or corporation shipping such oils into the state. It is alleged that the plaintiff handles large quantities of such oils; that the inspection fees for which it is responsible to the inspector or state under said law, if legal, aggregate from $100 to $500 per month; that such fee is largely in excess of the amount reasonably necessary for the payment of the expenses of the enforcement of the inspection law referred to; that the cost of inspection of such oils under said law runs from $10,000 to $12,000 per year, while the receipts from such inspection fees aggregate from $80,000 to $100,000 per annum; that all oils which are or have been inspected by said inspector are interstate shipments of oils; that no oils are produced in the state for such inspection; that the exorbitant charge is a direct attempt on the part of the state to levy and impose a tax upon property which is the subject of interstate commerce, and is an interference with interstate commerce, and an unlawfully imposed duty upon goods shipped into the state from other states. It is further alleged that said chapter 214 is to a greater or less extent a re-enactment of chapter 171 of the Laws of 1909, and that the fee charged is identical; that under the provisions of said chapter 171, which had been in effect about four years at the time of

the enactment of said chapter 214, from $60,000 to $100,000 per year had been received by the oil inspection department for such inspections over and above the amount expended in the enforcement of such law; that the legislature had, at the time that said chapter 214 was passed, full knowledge of the fact that said inspection fee was greatly in excess of the amount necessary for the carrying into effect of the law, and had notice and knowledge that the law, which had been in effect nearly four years theretofore, had produced revenues far in excess of the amount necessary for use in the inspection of oils and the enforcement of said law; that the same was fully explained to the committee of the legislature having the measure in charge, and was well known to the whole legislature, but that the legislature for the year 1911, by chapter 198, made provision for transferring such excess to the general fund of the state. It is then alleged that such charge is in conflict with the Constitution of the state and the Constitution of the United States, and that it is not a bona fide inspection law; that the excess which is transferred to the general fund of the state is not used in any manner which will particularly benefit persons required to pay the inspection fees. Plaintiff also alleges that it buys from day to day, and has placed in its storage tanks, at its several places of business in the state of North Dakota, large quantities of kerosene, gasolene and other oils, and from such tanks furnishes the same directly to the consumer; that the inspector has notified plaintiff of his intention to hold, and he is holding, all shipments of oils and gasolene made to plaintiff, as security for the payment of about $400 or $500 of inspection fees, which plaintiff has refused to pay, and that he refuses to deliver such oil shipped to this plaintiff to plaintiff or its order until all such fees, which are charged against this plaintiff, have been by it paid, in addition to whatever may become due upon the oil so held by him; that by reason of such facts the business of plaintiff is being interfered with, and, unless the inspector is restrained from taking any such action, plaintiff will be unable to obtain any oil for the purpose of supplying its trade and its patrons, and that thereby its business will be damaged and it will suffer irreparable injury. It is further alleged that there is no provision of law or otherwise whereby it can obtain possession of such oil without the pay-

ment of such excessive tax, and that it has no adequate remedy at law or otherwise by which it can protect itself against such imposition, other than by making this application. Injunctive relief is prayed for, and a restraining order asked during the pendency of the action. A restraining order was granted *ex parte,* restraining the inspector from holding up or interfering with the shipment of any petroleum oils or gasolenes to plaintiff during the pendency of the action. On the 3d day of September, 1914, the attorney general demurred to the complaint upon the grounds that it did not state facts sufficient to entitle plaintiff to a temporary or any other restraining order, and on the ground, among others, that it attempts to restrain a public officer of the state from performing his official duties, and that plaintiff has a speedy and adequate remedy at law. This motion was argued and denied, and on the direction of the court a new and increased undertaking was given by the plaintiff to protect the state. The court overruled the demurrer of the state, and separate appeals were taken from the order refusing to dissolve the restraining order, and from the order overruling the demurrer. They are argued together in this court.

We will first consider the appeal from the order overruling the demurrer. The oil inspection law, being chap. 214, Laws of 1913, covers eleven printed pages, and we need not consider its provisions in detail. As far as material to an understanding of this decision, it provides: (1) For the appointment of a person to be known as oil inspector, and for his appointing deputies at all points designated as ports of entry; (2) they are given the right, and it is made their duty, to enter into and upon the premises of any manufacturer, dealer, or vendor of refined petroleum oils or gasolene, at any time and inspect any books or papers of such persons, or of transportation companies, pertaining to the shipment of oils or gasolene, also all receptacles for the same; (3) the salary of the inspector is fixed at $2,500 per year, and that of deputies at ports of entry, where the total number of barrels inspected is in excess of 8,000, $50 per month, where in excess of 15,000 per annum, $75 per month, where in excess of 25,000 per month, $125 per month, and for other deputies salaries not less than $10 or more than $30 per month, according to the judgment of the inspector; (4) a report to the auditor is required of the inspec-

tions made on or before the 5th of each month, and the auditor furnishes the state treasurer with a summary of fees due and the names and addresses of consignors and the amount of fees, on or before the 10th of each month, whereupon the treasurer notifies the inspector of the name and address of any person, firm, or corporation failing to pay the fees provided, and it is made the duty *of the state inspector or his deputies, on receipt of such notice, to hold any and all future shipments of petroleum, illuminating oils, gasolenes, or other petroleum products, consigned by any such person, firm, or corporation, until all delinquent fees have been paid;* (5) the fees provided are required to be paid directly to the state treasurer on or before the 15th of each calendar month; (6) shippers of oil into the state are required to execute a bond to the state, in the penal sum of $500 or more, to insure the payment of inspection fees; (7) the inspector is required to provide and furnish apparatus for making tests, and is authorized to pay the necessary travel and other expenses of the department; (8) all illuminating oils, the products of petroleum or into which petroleum or any product of petroleum enters, whether manufactured in this state or not, are required to be inspected before being sold or offered for sale or used for illuminating purposes; gasolenes are also provided to be inspected, and the character of the test is prescribed for each, as well as brands for marking the containers; a form of certificate is provided and penalties affixed for sale of products not tested; (9) the inspector is required to give each transportation company whose lines enter the state, and the state auditor, a list of the ports of entry created from time to time, together with the names of the deputies at each port; (10) each such transportation company is required to stop and hold for inspection at ports of entry all consignments of such goods; (11) a fee of 25 cents for testing each barrel of 50 gallons or less is required to be paid by the consignor; (12) it is made the duty of the state's attorneys of the respective counties to prosecute violations of the act; (13) for making inspection other than at ports of entry the inspector and deputies are entitled, in addition to the fees prescribed, to their actual traveling expenses, to be paid by the consignor. Chap. 171, Laws of 1909, was a similar law, differing in details, but providing the same fees for inspection. Said chapter was repealed by the act in question.

Hon. Andrew Miller, Attorney General, *Alfred Zuger* and *John Carmody,* Assistant Attorneys General, for appellant.

An attempt to enjoin the execution of a public statute for a public benefit by officers of the law will not be allowed, or where the party has an adequate remedy at law. Franklin v. Appel, 10 S. D. 391, 73 N. W. 259; State ex rel. Kenamore v. Wood, 155 Mo. 425, 48 L.R.A. 596, 56 S. W. 474; 22 Cyc. 769; 16 Am. & Eng. Enc. Law, 2d ed. 352; De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352; Robinson v. Gaar, 6 Cal. 274; Trinity County v. McCammon, 25 Cal. 117; Hager v. Shindler, 29 Cal. 48; Bucknall v. Story, 36 Cal. 67; United Lines Teleg. Co. v. Grant, 137 N. Y. 7, 32 N. E. 1005; Richards v. Kirkpatrick, 53 Cal. 433; Birmingham v. Cheetham, 19 Wash. 657, 54 Pac. 37; Gibbs v. Green, 54 Miss. 592; High, Inj. 4th ed. § 1326; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Kellett v. Ida Clayton & G. W. Wagon Road Co. 90 Cal. 210, 33 Pac. 885.

Where there exists an adequate and speedy remedy at law, injunction will not lie. 22 Cyc. 769; 16 Am. & Eng. Enc. Law, 352.

This is a personal tax purely. Equity has no jurisdiction to restrain the collection of a personal tax, even though the tax be illegal. Williams v. Detroit, 2 Mich. 560; Henry v. Gregory, 29 Mich. 68; Heywood v. Buffalo, 14 N. Y. 534; Kellett v. Ida Clayton & G. W. Wagon Road Co. 90 Cal. 210, 33 Pac. 885; State ex rel. Kenamore v. Wood, 155 Mo. 425, 48 L.R.A. 596, 56 S. W. 474; People ex rel. Atty. Gen. v. Shasta County, 75 Cal. 181, 16 Pac. 776; Merriam v. Yuba County Supers. 72 Cal. 517, 14 Pac. 137; Wynn v. Shaw, — Cal. —, 25 Pac. 244; 27 Century Dig. 1778–1783.

The complaint contains no averments which would authorize equitable relief. Burton v. Walker, 13 N. D. 149, 100 N. W. 257; General Oil Co. v. Crain, 209 U. S. 211, 229–231, 52 L. ed. 754–766, 28 Sup. Ct. Rep. 475.

Frank B. Feetham, for respondent.

The constitutionality of the law in question is clearly raised by the defendant's motion to vacate the injunction. If the oil inspection law is constitutional, the order was improvidently issued; if not, the order should be upheld and the injunction continued. Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; D. E. Foote & Co. v. Stanley, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377.

The fees provided for and charged under the oil inspection law are excessive, and in reality amount to a tax. As a tax, they are void because not imposed by uniform rule according to true value in money. Malin v. Lamoure County, 27 N. D. 140, 50 L.R.A.(N.S.) 997, 145 N. W. 582.

Injunction is the only effective remedy by which a "public officer" may be prevented from the performance of an act essentially wrong, and by which the law governing such act may be tested. There is no other plain, speedy, or adequate remedy. State v. Collins, 12 R. I. 478; Gordon v. State , 2 Tex. App. 158; 6 Words & Phrases, p. 4951; State ex rel. Ladd v. District Ct. 17 N. D. 285, 15 L.R.A.(N.S.) 331, 115 N. W. 675.

An unconstitutional legislative act is no law. It is void from the beginning, and a "public officer" who undertakes to carry out and enforce its provisions may be stopped by injunction. State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724.

Such a public official as an oil inspector is not in that class of "officers of the law" who may not be enjoined. Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.

An officer of the state may be enjoined from executing a statute of the state which is in conflict with the Constitution of the United States, when such execution would violate rights and privileges of the complainant, guaranteed to him by the Constitution. Osborn v. Bank of United States, 9 Wheat. 859, 6 L. ed. 233; Pennoyer v. McConnaughy, 140 U. S. 363, 35 L. ed. 363, 11 Sup. Ct. Rep. 701; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Davis v. Gray, 16 Wall. 220, 21 L. ed. 453; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258; McConnell v. Arkansas Brick & Mfg. Co. 70 Ark. 568, 69 S. W. 559; Chesapeake & O. R. Co. v. Miller, 19 W. Va. 408; Starr v. Chicago, R. I. & P. R. Co. 110 Fed. 3.

A remedy at law is not, of itself, a bar to an action for injunction. The remedy must be speedy, plain, and adequate, to furnish proper relief for the complainant. The test is, What remedy will prevent and preclude the commission of a wrong, will cause correct, legal, and

proper action in the quickest and easiest manner? Pom. Eq. Jur. 3d ed. §§ 1356, 1357.

In many cases—in fact in the case at bar—the fact that a legal remedy will give damages for a wrong act affords no reason for denying the right to injunction, especially where the act or acts of which complaint is made are of a continuing nature. Note to § 1357, Pom. Eq. Jur. 3d ed. and cases cited; 22 Cyc. 771; Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 581; Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655; Corning v. Troy Iron & Nail Factory, 39 Barb. 311, 40 N. Y. 206; Sumner v. Crawford, 91 Tex. 129, 41 S. W. 994; Denny v. Denny, 113 Ind. 22, 14 N. E. 593; Bishop v. Moorman, 98 Ind. 1, 49 Am. Rep. 731.

That remedy which prevents a threatened wrong is far greater and more efficient than a remedy which permits the wrong to be done, and then directs the injured party to seek his redress in a court of law in the form of damages. There are wrongs for which pecuniary damages afford no adequate relief. 3 Pom. Eq. Jur. § 1357; Champ v. Kendrick, 130 Ind. 549, 30 N. E. 788; Xenia Real Estate Co. v. Macy, 147 Ind. 568, 47 N. E. 148; Wilcox v. Wheeler, 47 N. H. 493; Niagara Falls International Bridge Co. v. Great Western R. Co. 39 Barb. 224; Clark v. Jeffersonville, M. & I. R. Co. 44 Ind. 261.

SPALDING, Ch. J. (after stating the facts as above). The attorney general, for the purposes of this decision only, admits the unconstitutionality of the law, and contends that the court has no jurisdiction of the subject of this action. The first ground for this contention is that it is an attempt to enjoin the execution of a public statute by officers of the law for the public benefit.

1. Assuming that the respondent has no adequate remedy at law, a suit for an injunction will lie to test the validity of a statute or the lawfulness of the exercise of the powers conferred upon the officer charged with executing it; and we are of the opinion that subdiv. 4, § 7214, Comp. Laws 1913, which provides that injunction will not be granted to prevent the execution of a public statute by officers of the law for the public benefit, cannot be made to apply in any event to this statute. It will be noted that it is "officers of the law" who under that section cannot be enjoined. There are authorities defining "officer

of the law," and there seems to be a clear distinction between an officer of the law and a public officer, an officer of the law being defined as synonymous with peace officer, referring only to judges, justices, sheriffs, and constables. See authorities cited in 6 Words & Phrases, 4951. This conclusion is supported by an inspection of Field's Civil Code, which furnishes the basis of our Code. In Field's Code the term used is, "nor to prevent the execution of any statute in this state, nor the exercise of any public office." We are disposed to hold that a change in the phrase was made in recognition of a distinction between a public officer and an officer of the law, and to enlarge the function of the remedy by injunction. This court, however, without having this distinction called to its attention, has passed upon the principle involved in this objection, in State ex rel. Ladd v. District Ct. 17 N. D. 285, 15 L.R.A.(N.S.) 331, 115 N. W. 675, where it was held that the legality of the acts of the pure food commissioner might be tested in an action to enjoin him, and not to preclude an inquiry by the courts into the legality of official acts of such officer in such suit. There is, however, another, and if possible a stronger reason why this prohibition is not applicable in the instant case. It is contended that this law is in violation of the commerce provisions of the Federal Constitution. A Federal question is therefore involved. In the determination of such question, which we shall later examine, decisions of the Supreme Court of the United States are controlling where that court has expressly passed upon the same question, and this court has no alternative, but must follow the decisions of the highest court of the land. In General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475, this same argument was advanced. The statute of Tennessee, construed in that case, provided that "no court in the state of Tennessee has, nor shall [it] hereafter have, any power, jurisdiction, or authority to entertain any suit against the state or any officer acting by the authority of the state, with a view to reach the state, its treasury, funds, or property. . . ." And it was held that provisions of the Federal Constitution and Amendments could not be nullified by the state prohibiting suits in its own courts against state officers to prevent their enforcing unconstitutional statutes. See also Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 701; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed.

623; Osborn v. Bank of United States, 9 Wheat. 859, 6 L. ed. 233; Minneapolis Brewing Co. v. McGillivray, 104 Fed. 272.

Referring to actions in our own courts again, and without citing specific cases, it is well known to the profession that the courts have entertained and sustained from the very beginning suits to enjoin the execution of state laws, not only because claimed to be unconstitutional, but for many other reasons. On of the most important cases of this character was State ex rel. Rusk v. Budge, 14 N. D. 582, 105 N. W. 724, wherein it was sought to enjoin the defendants, as members of the Board of State Capitol Commissioners, from building a new state capitol, on the ground that the law establishing such commission and authorizing the construction of a new capitol was unconstitutional. Dismissing this point with this brief discussion, we hold it not well taken, and that a suit for injunction may be entertained when in other respects the complaint states a cause of action, having for its purpose the enjoining of officers of the law from executing an unconstitutional act of the legislature, or to determine whether an act is valid.

2. It is next urged that the complaint is insufficient to give the court jurisdiction, because the plaintiff has a plain, speedy, and adequate remedy at law, and that irreparable injury to the respondent is not shown.

(a) It is stated that "the plaintiff has a complete remedy at law, either by an action of conversion or claim and delivery or for damages, and it is argued that, if the law is invalid, the inspector and his deputies are trespassers, and liable as such to the plaintiff for damages it may sustain." The allegations of the complaint are sufficient to show that it is doing a continuous business; that it is constantly receiving and selling oil or products of petroleum. The statute requires the inspector to hold at the port of entry shipments for nonpayment of fees. It needs no discussion to show that, should an action for conversion be brought against the inspector or deputy on one shipment of the commodity, it would furnish no protection on the next and succeeding shipments. The same would be true if the remedy by claim and delivery were invoked, or actions for damages. The remedy by law must not only be adequate, but it must be plain and speedy. Authorities are cited by defendant to sustain his position, but an inspection discloses that such authorities involve facts materially different from

those pleaded in the case at bar. They were where one act only was in question, instead of a succession of acts. It appears reasonably clear that in the case at bar injunction is much more prompt and efficient than either of the legal remedies suggested, that in fact none of those named would be adequate to meet the dangers sought to be guarded against. In Corning v. Troy Iron & Nail Factory, 39 Barb. 311, the court, in passing upon an injunction sought against trespass on a running stream, says: "It is said that equity will not grant an injunction if there is an ample remedy at law. I think the rule, according to the modern decisions, is subject to some qualification; but, assuming its entire correctness, is it true that here is an ample remedy at law? It is said an action at law lies to recover the damages. . . . [if so] such actions may be indefinitely repeated, and each successive day may witness the commencement of a new one;" and the court sustained the injunction, and in affirming the decision the court of appeals in 40 N. Y. 206, said: "If equity refuses its aid, the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of the plaintiffs to the equitable relief sought is established by authority as well as principle." Many authorities are to the same effect, and see Sumner v. Crawford, 91 Tex. 129, 41 S. W. 994; Denny v. Denny, 113 Ind. 22, 14 N. E. 593; Champ v. Kendrick, 130 Ind. 549, 30 N. E. 788. The law is in a measure a progressive science, although not an exact one. When courts of law and equity were separate and distinct courts, there was very strong reason for a close distinction between actions at law and suits in equity. Neither court had jurisdiction over the other subject. But since the abrogation, in most states, of forms of action, and jurisdiction being granted in both classes of cases to the same court, it is not necessary to as clearly and completely distinguish between the two as formerly, although care must, of course, still be taken not to invade the right to trial by jury. It is universally coming to be recognized in other subjects that "an ounce of prevention is worth a pound of cure." Why should not this apply with equal force to the law? And, unless required

by constitutional or statutory provisions to adopt and follow a specified course of action, such proceedings as will prevent the evil should be favored, rather than to permit the damage to be done, and then seek a subsequent remedy by action for damages or some corresponding course. In line with this it is said in 4 Pomeroy's Equity Jurisprudence, §§ 1356, 1357, that "if the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts taken by itself may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then, also, the entire wrong will be prevented or stopped by injunction on the ground of avoiding a repetition of similar actions. . . . The injunction is granted, not merely because the injury is essentially destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages. . . . The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong . . . committed." See also Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 581. We are satisfied that neither of the forms of law action suggested would furnish an adequate remedy for the wrong committed by the defendant in obeying the law, and holding successive shipments of products of petroleum consigned to the plaintiff, if the law in question is invalid, and that therefore injunction, so far as this objection is concerned, is a proper proceeding to test the question.

(c) It is next urged that irreparable injury to plaintiff is not disclosed by the complaint. The allegations of the complaint in this regard do not seem to us as complete as they might have been made, but we are satisfied that they state enough to inform the court of the character of the threatened injury which plaintiff seeks to guard against, and warrant it in holding that it is irreparable in a legal sense. Irreparable injury in the sense that it furnishes a ground for the issuance of an injunction does not mean that the injury is beyond the possibility of repair or of compensation for damages, but rather that it must be of such constant and frequent recurrence that the injured party cannot be adequately compensated for any damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard, but only by conjecture. Eau Claire Water Co. v. Eau Claire,

127 Wis. 154, 106 N. W. 679; Columbia College v. Tunberg, 64 Wash. 19, 116 Pac. 280; Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; Heine v. Roth, 2 Alaska, 416. For variations of this definition see 2 Words & Phrases, 1206. The complaint in the case at bar states facts indicating with sufficient minuteness that the business of the plaintiff would suffer irreparable injury if it were required to resort to either of the legal remedies suggested. It is constantly receiving at its different stations shipments of petroleum products, and as constantly disposing of them to its customers. The consumption of such products in this state is enormous, and it is evident that the stoppage of the receipts of the plaintiff would of necessity cause a discontinuance of its sales, work a loss of customers and business, that its customers would be driven to patronize other dealers immediately on the supply in any one of plaintiff's stations being exhausted. For this injury an action at law would furnish no adequate remedy, and the injury would be irreparable in the same sense. Injury would occur to the business of the plaintiff, and lessen the value of its franchise. This character of injury is within the contemplation of the law regarding irreparable injury. See State ex rel. Ladd v. District Ct. 17 N. D. 285, 15 L.R.A.(N.S.) 331, 115 N. W. 675. As a result of the foregoing considerations we conclude that the district court had jurisdiction of the subject of the action in the case at bar.

3. In view of the attitude of the state upon argument we shall not devote much space to a consideration of the validity of the tax. In many cases that question may be determined by an inspection of the statute itself, but in other classes of cases,—and among them falls this case,—it must be determined by the practical workings of the law. This has been so in several cases decided by this court, and among them the coal rate cases. When those cases first went to the Supreme Court of the United States that court declined to fully pass upon the question, because the law had not been in operation long enough to demonstrate its validity or invalidity, and it was remanded to this court, with leave to the plaintiffs to have the case reopened and take further testimony when the law had been in operation a sufficient time to demonstrate its effect. See Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423. We shall not, however, determine the validity or legality of this fee on the pleadings alone. We think

that, if the allegations of the complaint are proved by evidence on trial, the fee is invalid, that is, whenever the fees are to any considerable extent in excess of the expenses of administering the law. At such time the statute becomes not simply an inspection measure, but also a revenue law, and the legislature, as alleged in the complaint, intended it to be such. Our discussion of the constitutional question is on the assumption only that the allegations of the complaint regarding the relative amount of expenses and fees are borne out on trial, and is for the guidance of the trial court in case the allegations of the complaint are put in issue. The Federal decisions on this question appear to have been somewhat conflicting, but no longer ago than February 24, 1914, the question was settled by the Supreme Court of the United States in a case in every respect on principle like the one before us. The facts were the same, except as to the subject of the inspection.

In D. E. Foote & Co. v. Stanley, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377, the Supreme Court of the United States reversed the supreme court of Maryland, and held the fee provided by an oyster inspection law void,—in conflict with the provisions of the Federal Constitution. The facts, so far as material to the case before this court, were as follows: Plaintiffs were engaged in packing oysters, which were taken from the waters of Virginia and New Jersey, as well as from Maryland, and shipped to Baltimore. The oysters were unloaded from vessels in Baltimore, where they were inspected and then distributed to customers of the plaintiff. A fee of 1 cent per bushel was imposed for inspection. The facts were stipulated, and showed that the salaries of the inspectors amounted to about $14,000 per annum, and that the total receipts from the fees were something over $43,000 per annum, leaving a surplus or excess of between $28,000 and $29,000. Under the law the surplus was used for keeping and maintaining sufficient police regulation for the protection of fish and oysters in Maryland waters, and the payment of the officers and men, and keeping in repair and supplying the necessary means of sailing the boats and vessels of the state fishery force. This law was enacted in 1910, and prior to its enactment a similar law had been in force on the subject, providing the same fee for inspection, and the court had before it, as in the case at bar, the knowledge of the receipts and expenditures under the preceding law. The Supreme Court held that

there was a difference between policing and inspection, that while the two duties might sometimes overlap, if the state imposed upon one set of officers the performance of the two duties, and paid the whole or a part of the joint expenses out of inspection fees, it must be made to appear that the tax did not materially exceed the cost of inspection, and that the burden in such was on those seeking to collect the combined charge, because if the cost of inspection was so intermingled with other charges as to make it impossible to separate the two, interstate commerce might be burdened by fees collected both for inspection and revenue,—for a lawful and for an unlawful purpose. In the case at bar the excess over the cost of inspection goes into the general fund of the state treasury, and is appropriated by the legislature to pay the general expenses of government, the same as are funds derived from general taxation. The only difference in this respect between our statute and the Maryland statute is that under the latter the excess was applied to a definite purpose more nearly related to the oyster industry than the excess in our own case is to the oil industry. The court also held that, if the fees exceeded the cost by a sum not unreasonable, no question could arise as to the validity of the tax, so far as the amount of the charge was concerned; that, even if this appeared, courts would not immediately interfere, because the presumption was that the legislature would reduce the fees to a proper sum. It then says,—and this is literally applicable to the case before this court, because of the former law in the case having provided the same fee,—"But when the facts show that what was known to be an unnecessary amount has been levied, or what has proved to be an unreasonable charge is continued, then we are obliged to act in the light of those facts, and to give effect to the provisions of the Constitution prohibiting the collection by a state of more than is necessary for executing its inspection laws;" and the courts will not enter into any nice calculation as to the difference between cost and collection, nor will they declare the fees to be excessive unless made clearly to appear that they are obviously and largely beyond what is needed for the inspection services rendered, but, on the contrary, it was held that if it was shown that the fees were disproportionate to the service rendered, or that they included the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void, because such costs, by neces-

sary operation, obstruct the freedom of commerce among the states; and it was held that the act included the cost of something beyond legitimate inspection; it held also that "the question of reasonableness of the fee may be considered in the light of the practical operation of the law, with a view to determining with reasonable certainty the permanent relation between the amount collected and the cost of inspection;" and that the tax was void as a burden on interstate commerce, when levied upon oysters coming from other states. As we have before said, we have no discretion on this phase of the case. The foregoing authority is the last word by the Supreme Court of the United States on the subject, and is absolutely controlling on the question before us. We must therefore hold that, if the facts alleged in the complaint, and which were only admitted as true for the purpose of determining the demurrer interposed by the state, are shown to be substantially true, or that the amount collected in fees is largely in excess of the necessary expenses of making inspections, the tax is invalid.

The state cites and relies upon General Oil Co. v. Crain, decided by the Supreme Court of the United States in 1908, and found in 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475. On first inspection the facts in that case seem to make it an authority, but on close reading it appears that the inspection fee there held valid only related to the inspection of oil shipped into the state and afterward commingled with the general property of the state: that is, it was shipped in, unloaded, and placed at rest, perhaps to be thereafter shipped out of the state, but it was held that, in view of its being placed at rest in the state and the inspection being thereafter made, it had ceased to be an interstate commodity, and that the provisions of the Federal Constitution were not applicable.

If, however, the Crain Case would otherwise be an authority, it must be considered as superseded by the Foote Case, from which we have quoted, which stands as the law applicable until overruled by the same court. Many authorities are cited from state courts, some apparently sustaining the state's contention, although most of those appearing to be directly in point contain very brief discussions of the subject, and the fee was much smaller. And all were decided prior to the decision of D. E. Foote & Co. v. Stanley, supra, hence in so far as they are in conflict with that authority, are of no force or weight.

4. It is also contended by respondent that the provisions fixing the amount of the fee are in conflict with various sections of the state Constitution, and particularly with § 176, which provides that laws shall be passed taxing by uniform rule all property according to its true value in money. We need not dwell upon this point, because if the evidence adduced on trial sustains the allegations of the complaint as to the relative amount of fees and expenses, it is a revenue measure, and comes within the terms of the decision recently made by this court in Malin v. Lamoure County, 27 N. D. 140, 50 L.R.A.(N.S.) 997, 145 N. W. 582, where this subject was fully considered.

5. With reference to the preliminary injunction granted at the beginning of this litigation without notice to the state, we find that no question is before us on that order prior to the hearing of a motion to dissolve such restraining order. This motion was made and heard shortly after the initiation of this litigation, on the complaint, and on the same objections which we have considered above. The state submitted no affidavits, but stood upon the naked legal propositions which we have decided. The application for the temporary restraining order was supported by the affidavit of Charles Bartels, manager of the plaintiff, wherein he restated most of the allegations contained in the complaint, and also that it was necessary to have delivered to plaintiff the oils and gasolenes shipped, from time to time, from points without the state, and that there was then in transit, billed to it, a number of cars of such oils and gasolenes, which were being held by the defendant in his official capacity as state oil inspector, under the provisions of the inspection law of 1913; that its business was continuous; that it was absolutely necessary for the protection of its interests that no interference be made by defendant with its receipts of such oils and gasolenes shipped to it from time to time; that he had been notified as manager of the plaintiff that it was the intention of the inspector to hold any and all such oils then or thereafter shipped to it, and not deliver the same to plaintiff, or permit them to be delivered, without the payment of all delinquent fees for inspection; that if such course were permitted, its business would be interrupted, its proceeds depleted, and that it would suffer irreparable injury. Plaintiff tendered to the oil inspector an undertaking in due form to protect the state and insure the payment of any and all fees, together with costs

and disbursements for which the court might find plaintiff liable. It is well established that the granting or refusing of a temporary restraining order in such cases lies within the sound legal discretion of the court to which application is made. The statute provides for such order. See § 7529, Comp. Laws 1913, and from the date of the order entered on the motion to dissolve the temporary injunction, which is the order appealed from, that injunction stands on the same basis as though there had been a hearing on the original application. The court exacted and the plaintiff furnished adequate protection to the state, and under the circumstances the same reasons sustain this order that are applicable to the main contention.

The members of this court fully appreciate the gravity of the situation occasioned by our conclusions, and also that all doubts should be resolved in favor of the validity of the tax. We have carefully considered and analyzed the authorities cited by the state, claimed to sustain its position, but they furnish no justification for sustaining the tax in the light of the Federal authority to which we have made reference, and which is absolutely controlling on the Federal question involved. It is possible that we might have gone further, and held the tax invalid on the face of the law, considering the disproportion between the salaries of the deputy inspectors and the income derived from the number of barrels which form the basis of such salaries at the different ports of entry, but there are indefinite and undisclosed expenditures authorized by the law, so we feel that we should not determine this with reference to the salaries alone. For this reason, and that the state may have the benefit of every doubt on the subject, we deem it proper to remit the case to the trial court for further proceedings, if the state desires to take them. To that end it is given thirty days from the filing of the remittitur in the trial court in which to answer, for the purpose of showing, if possible, that the amount received in fees is not sufficiently in excess of the expenses necessarily incurred in executing the law and making inspections to constitute it a revenue measure. The orders of the District Court are affirmed.

BURKE, J., concurring in part. While I concur in much that is said in the foregoing opinion, it may be of some aid to review the case in a much shorter manner than is possible in writing an official opinion.

As I understand it, there is no doubt that the state may under its police power enact an oil inspection law for the protection of its citizens, and the only objection to chapter 214, Comp. Laws 1913, is the unreasonableness of the fees demanded for such inspection. While the state does not expressly concede the figures stated in the complaint of the oil company, the records of this state, of which this court has a right to take judicial cognizance, show that the fees exacted for the inspection are almost ten times as large as the costs of inspection. It is thus apparent that the said chapter is not only an inspection law, but, under the circumstances, also a revenue-producing law. It is too clear for argument, that the state has no authority to levy taxes in this manner. Those oils presumably are already taxed, and it is a discrimination against them to be required in this manner to further contribute to the support of the state. This has been repeatedly held by the Supreme Court of the United States, as pointed out in the majority opinion, and will compel this court to set aside the law, unless amended, when it comes before us upon direct attack. If the legislature desires to continue the oil inspection, it is therefore its duty to immediately amend the law by reducing the inspection charge.

COUNTY OF SARGENT v. S. A. SWEETMAN.

(150 N. W. 876.)

County judge — marriage record book — licenses — certificates — fees — may retain.

1. Section 10, chapter 91, Laws of 1890, Rev. Codes 1905, § 4039, requires the county judge to keep a marriage record book containing a correct copy of all marriage licenses issued by him, and also a record of all marriage certificates returned to his office, and then provides: "And for each license and the record herein required he shall be entitled to a fee of $1 to be paid by the party applying for the same." *Held*, that the legislative intent was to authorize such official to collect and retain this fee as compensation for such newly added duties.

Amendatory statutes — county judge — salary — law fixing is general — special statute for special subject.

2. Appellant's contention that § 10, chapter 91, Laws of 1890, was impliedly

repealed by chapter 68, Laws of 1899, Rev. Codes 1905, § 2586, held untenable. Chapter 68, while not purporting on its face to be an amendatory statute, in effect merely amends chapter 50, Laws of 1890, fixing a salary for county judges, and it merely adopts the assessed valuation, in lieu of the population of the county, as the basis for computing the salary, and also reduces the maximum salary. This law, as well as chapter 50, Laws of 1890, is general, and relates to the salary of the county judge; and it is *held* that it was not the legislative intent, by the enactment of chapter 68, to amend or repeal § 10 of chapter 91, Laws of 1890, which latter statute makes special provision covering a special and particular subject.

Implied repeal of laws — not favored — repugnance between old and new law.

3. Implied repeals are not favored. There must be a clear repugnancy between the provisions of the new and those of the old statute to such an extent that the necessary implication arises that it must have been the legislative intent, in the enactment of the later statute, to repeal the former.

County judge — duty of — fees for special acts.

4. There being no statute making it the duty of the county judge to furnish certified copies of his records when required, and fixing a fee therefor, it is *held*, for reasons stated in the opinion, that it is not incumbent upon him to account to the county for sums collected for such service.

Opinion filed January 9, 1915.

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

Action to recover fees alleged to belong to the county. From a judgment in defendant's favor, the county appeals.

Affirmed.

E. W. Bower, State's Attorney, and *Wolfe & Schneller*, for appellant.

A person accepting a public office with fixed salary is bound to perform the duties of the office for the salary, and cannot collect and retain fees provided to be charged and collected for certain special acts of the officer. 19 Am. & Eng. Enc. Law, 528 and notes; Decatur v. Vermillion, 77 Ill. 315; Miami County v. Blake, 21 Ind. 32.

Every act required to be done by virtue of his office, or in the name of his office, must be done by the officer for the compensation fixed; and he is not permitted to retain fees for any special act done in his capacity. 19 Am. & Eng. Enc. Law, 528, and notes; Hannah v. Chase, 4 N. D. 351, 50 Am. St. Rep. 656, 61 N. W. 18.

The legislature has power to impose new and additional work or burdens. Wilson v. Cass County, 8 N. D. 456, 79 N. W. 985; Miller v. Kister, 68 Cal. 142, 8 Pac. 813.

Engerud, Holt, & Frame, for respondent.

The fees for these special services belong to the officer, and not to the county. The duties required are no part of his general duties, for which he receives a general salary, as fixed by law. O'Gorman v. New York, 67 N. Y. 486.

The law as to county treasurers does not purport to prescribe a general salary for all services; it merely refers to part of his duties, and prescribes what his compensation shall be therefor. Laws of 1893, chap. 118, § 43.

The law contemplates that the collection of school land money is a distinct and separate duty from the treasurer's services to the county, and was to be paid for by the state. Love v. Baehr, 47 Cal. 364; Melone v. State, 51 Cal. 550; State ex rel. Tzschuck v. Weston, 4 Neb. 244; Cornell v. Irvine, 56 Neb. 665, 77 N. W. 114; State v. Roddle, 12 S. D. 436, 81 N. W. 980; State ex rel. Howell v. La Grave, 23 Nev. 383, 48 Pac. 674; 30 Cyc. 1130, and cases cited.

The legislature, in passing an act directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend, by subsequent general enactment, to derogate from its own act, without expressed intention so to do. Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co. 2 S. D. 546, 51 N. W. 342; Finch v. Armstrong, 9 S. D. 255, 68 N. W. 740; La Grande County v. Cutler, 6 Ind. 354; Banks v. Yolo County, 104 Cal. 258, 37 Pac. 900; Rice v. Goodwin, 2 Colo. App. 267, 30 Pac. 330; Jackson v. Washington County, 34 Neb. 680, 52 N. W. 169; Re Taylor, 3 App. Div. 244, 38 N. Y. Supp. 348; Homer v. Com. 106 Pa. 221, 51 Am. Rep. 521; State ex rel. Swerdfiger v. Whitney, 12 Wash. 420, 41 Pac. 189; State ex rel. Smith v. Parker, 12 Wash. 685, 42 Pac. 113.

Fisk, J. This is an action to recover from the defendant, as county judge, certain fees collected by him and for which he has not accounted. A jury was waived and the facts stipulated, from which it appears that defendant collected $25 for making certified copies of his records, and $100 for issuing marriage licenses, no part of which he has paid

over to the county. The trial court's conclusions of law were favorable to the defendant, holding that he was entitled to retain such fees in addition to his salary as fixed by article 3, chapter 29, of the Political Code of 1905.

But two questions are presented. First, do the fees of the county judge for issuing and recording marriage licenses belong to him?

Second, must the county judge account for moneys received by him for making certified copies of records?

An affirmative answer must, we think, be made to the first, and a negative answer to the second question, and we will briefly state our reasons for this holding.

At the outset it may be stated that we do not in the least disagree with appellant's counsel with reference to the fundamental rules and principles invoked by him pertaining to the compensation of public officers and the construction of laws fixing such compensation. Such rules and principles are stated in State v. Stockwell, 23 N. D. 70, 134 N. W. 767, and in the more recent case of State ex rel. Braatelien v. Drakeley, 26 N. D. 87, 143 N. W. 768, as well as in other kindred cases decided by this court, and it is unnecessary to repeat them here.

With these principles in mind we approach a consideration of the case at bar.

By chapter 91, Laws of 1890, the duty was placed on the county judge to issue marriage licenses and record marriages; and § 10 of such act provides: "* * * and for each license and the record herein required he shall be entitled to a fee of $1, to be paid by the party applying for the same." This language is plain. It clearly means that the county judge, as compensation for the imposition of such newly added duties, which were foreign to the ordinary duties of his office prior thereto, shall be entitled to the fee prescribed, and such intent must be given effect by us. Appellant's counsel tacitly admit the force of this, if the above statute is still in effect, but they assert that it is inconsistent with, and hence impliedly repealed by, chapter 68, Laws of 1899 (Rev. Codes 1905, § 2586). Such contention is without merit. It is apparently predicated upon the assumption that the county judges were, in 1899, for the first time placed upon a salary in lieu of a fee basis. This assumption is unwarranted, for the same legislature which enacted chapter 91, supra, also enacted chapter

50, Laws of 1890, fixing a salary for such judges. The latter became a law prior to the former, and, of course, if any inconsistency exists between them the last enactment must control. Chapter 68, Laws of 1899, aforesaid, merely adopts the assessed valuation, in lieu of the population of the county, as the basis for computing the salary, and it also reduces the maximum salary. The only object of this act, no doubt, was to make these two changes in chapter 50 of the 1890 Laws. It does not purport to supplant such prior act, but in effect it merely amends certain portions, leaving the remainder in force. Repeals by implication are not favored, and unless there is an unavoidable repugnancy between the later law and the former one, no repeal by implication is effected. As we view it, there is no inconsistency between chapter 68, Laws of 1899, and § 10, chapter 91, Laws of 1890. The provision in the latter, which we have above quoted, is a special provision which entitles the county judge to a fee of $1 for the marriage license and the record thereof. Being a special provision covering a special and particular subject, it must be deemed to have been the legislative intent, in the enactment of chapter 68 of the Laws of 1899, to except the same from the general provisions in the latter act. O'Gorman v. New York, 67 N. Y. 486; Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co. 2 S. D. 546, 51 N. W. 342, 344; Finch v. Armstrong, 9 S. D. 255, 68 N. W. 740, 741; La Grange v. Cutler, 6 Ind. 354; Banks v. Yolo County, 104 Cal. 258, 37 Pac. 900; Rice v. Goodwin, 2 Colo. App. 267, 30 Pac. 330; Jackson v. Washington County, 34 Neb. 680, 52 N. W. 169; Re Taylor, 3 App. Div. 244, 38 N. Y. Supp. 348; Homer v. Com. 106 Pa. 221, 51 Am. Rep. 521; State ex rel. Swerdfiger v. Whitney, 12 Wash. 420, 41 Pac. 189; State ex rel. Smith v. Parker, 12 Wash. 685, 42 Pac. 113.

This rule of statutory construction also has the support of our highest judicial tribunal, and it is very clearly stated by Mr. Justice Matthews in his opinion in Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396, from which we quote: "Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old. Wood v. United States, 16 Pet. 342, 10 L. ed. 987; Daviess v. Fairbairn, 3 How. 636, 11 L. ed. 760; United States v. Tynen, 11 Wall. 88, 20 L. ed. 153; South

Carolina v. Stoll, 17 Wall. 425, 21 L. ed. 650. The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *Generalia specialibus non derogant.* 'The general principle to be applied,' said Bovill, Ch. J., in Thorpe v. Adams, L. R. 6 C. P. 135, 'to the construction of acts of Parliament, is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in Fitzgerald v. Champneys, 30 L. J. Ch. N. S. 782, 2 Johns. & H. 31–54, 'that the legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend, by a general enactment afterwards, to derogate from its own act, when it makes no special mention of its intention so to do.'"

Applying the above rule to the case at bar, we have reached the conclusion, which we think is inevitable, that the fees for issuing and recording marriage licenses belong to the county judge, and not to the county.

We are equally clear that amounts charged and collected by such officer for furnishing certified copies of records in his office may also be retained by him. It is not contended that there is any statute requiring such county judge to make and certify copies of such records, nor is there any statute prescribing any fee for such service. This being true, the act of furnishing such certified copies is not an official act exacted of him by law, but is a mere voluntary labor performed outside of his official duties and for the accommodation merely of persons desiring such copies. In other words, in furnishing such copies he acts in his individual rather than in his official capacity. It is true he makes the certificate by virtue of his official position, but he does nothing more than any other official might do who has power to certify to the correctness of copies made by him. We think respondent's counsel is entirely correct in their contention that the making and furnishing of such copies of records not being any part of his legal duties for which his salary is his compensation, he was at liberty to make any contract he saw fit in the way of compensation for such service, to be paid by the person employing him, and that such compensation belongs

to him individually, and not to the county. In support of this see Leavenworth County v. Brewer, 9 Kan. 307, 317, 318; Huffman v. Greenwood County, 23 Kan. 281. See also, as lending support to our views: State v. Roddle, 12 S. D. 436, 81 N. W. 980; Cornell v. Irvine, 56 Neb. 665, 77 N. W. 114; Reif v. Paige, 55 Wis. 496, 42 Am. Rep. 731, 13 N. W. 473; Harris v. More, 70 Cal. 502, 11 Pac. 780.

The judgment of the District Court is affirmed.

FRED SCHMIDT, J. E. Greenfield, and Samuel Crumpton v. J. M. ANDERSON, as President of Equity Co-Operative Exchange, and G. A. Thiel, as Secretary and Treasurer of Equity Co-Operative Exchange.

(150 N. W. 871.)

Domestic corporations — records of — stockholders — inspection by — refusal — misdemeanor — statute — mandatory.

1. Section 4560, Comp. Laws 1913, requires that all the records of a domestic corporation, together with its stock and transfer books, must be kept open to the inspection of any stockholder, member, or creditor; and § 10016 makes officers or agents of such corporations, who have in custody any such record, book, paper, or document, and who refuse to give a stockholder or member an opportunity, during office hours, to inspect the same, guilty of a misdemeanor. It is *held* that the terms of said provisions are mandatory, but that the courts will not lend their aid to parties seeking to perpetrate a crime, when it is clear that they are endeavoring to make use of the examination of corporate records to aid them in so doing.

Stockholder — inspection of books and records — object of, immaterial — it is his right to do so.

2. The fact that a stockholder desires to make use of the information which

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Note.—While at common law the right of a stockholder to inspect the books of the corporation is not an absolute one, but depends upon his motive in seeking the inspection, the authorities are not agreed as to the effect of his motive when seeking to exercise a right of inspection conferred by statute. This is shown by a review of all the authorities, in notes in 45 L.R.A. 446; 20 L.R.A.(N.S.) 185; 30 L.R.A.(N.S.) 291; and 42 L.R.A.(N.S.) 332.

A stockholder's right to inspect the books of the company is also the subject of a note in 107 Am. St. Rep. 674.

he acquires from an inspection of the books and records of the corporation in which he holds stock, to aid a rival in business, or to aid him in litigation which he may desire to institute against the corporation, is no defense to his right under the statute.

Common law — rule — abrogated by statute — examination of records by stockholder — motive.

3. The statutes referred to were enacted in the light of and to abrogate the rule at common law, which permitted officers of the corporation to sit in judgment on the motives of the applicant for desiring to make an examination, and to protect minority stockholders and prevent the delays incident to determining, through legal proceedings, the motives of those desiring to examine corporate records; and it is not for the courts to read into a plain statute qualifications which would destroy its effect.

Mandamus — application for — evidence conflicting — rule — findings — verdict of jury — supreme court — practice.

4. On an application for mandamus, where the evidence is conflicting, the same rule applies to the findings of the court as is applicable to the verdict of a jury. It is not for the supreme court to determine in whose favor the evidence preponderates, but whether there is substantial competent evidence to sustain the findings.

Examination of records — lawful purpose — evidence.

5. The trial court found that the plaintiffs sought the examination of the books of the corporation, of which the defendants are president and secretary, for lawful and proper purposes, and at a proper time. *Held* that the record discloses ample evidence to sustain such finding of the trial court.

Opinion filed January 9, 1915. On petition for rehearing January 30, 1915.

Appeal from the District Court of Cass County; *Honorable C. A. Pollock.*

Affirmed.

Robinson & Lemke, M. D. Munn, Benjamin Drake, and *W. H. Stutsman,* for appellants.

J. M. Witherow and *Engerud, Holt, & Frame,* for respondents.

SPALDING, Ch. J. The defendants in this case are president and secretary-treasurer of the Equity Co-operative Exchange, a domestic corporation organized to handle and deal in grain and farm products for profit, and having a paid-up capital cash stock of $23,675, and

$13,300 paid by notes. Each of the plaintiffs is a stockholder in said corporation. As between the plaintiffs, Greenfield and Crumpton, and the defendants, there exists a controversy as to the amount of indebtedness owed by the Equity Exchange to said plaintiffs. All three plaintiffs, by their separate attorneys, made application for leave to inspect the books of the exchange. When such inspection was in progress, the defendants refused to permit plaintiffs to complete it, whereupon this proceeding was instituted in the district court of Cass county to compel the defendants to permit plaintiffs to complete their examination of the books of the corporation.

Detailed reference need not be made to the very lengthy pleadings. The taking of testimony consumed several days, and the typewritten record of testimony covers 394 pages. In addition to this, the exhibits cover many additional pages of closely printed matter. The plaintiffs seem to have proceeded in the introduction of testimony on the theory that they would ascertain in the proceeding, if by no other means, the financial condition of the exchange and its methods of doing business. The defendants introduced hundreds of pages of evidence in an attempt to show what had been said at congressional and legislative investigations, at farmers' meetings, and in other places; some of it, if competent, having a tendency to show that the Chamber of Commerce of Minneapolis, and its members, were not altogether fair in their dealings with customers; the whole record showing conclusively that strong rivalry or competition exists between the exchange and said Chamber of Commerce, and that the exchange was trying to instruct the farmers that it was to their interest to ship their grain to it.

The defendants pleaded that said Chamber of Commerce was engaged in an unlawful conspiracy with the Chamber of Commerce of Chicago and the Board of Trade of Duluth to maintain a monopoly in the grain trade, and offered testimony to show that an inspection of the books might be used to aid the Minneapolis Chamber in its competition with the exchange. The statute of this state regarding the right of a stockholder to inspect and examine the records and books of the corporation in which he holds stock is found in § 4560, Comp. Laws 1913, and reads as follows: ". . . All such records shall be open to the inspection of any director, member, or stockholder or creditor of the corporation. . . . Such stock and transfer book must be kept open

to the inspection of any stockholder, member or creditor. . . ." § 10016, Comp. Laws 1913, provides: "Every officer or agent of any corporation having or keeping an office within this state, who has in his custody or control any book, paper, or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same or any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor." As we construe the briefs and arguments of counsel, there is little, if any, controversy as to the meaning of § 4560, supra, except that appellants insist that it should be construed only as a declaration of the common law, and that the object and motive of the stockholder, who desires to make the inspection, may be inquired into, whereas the respondents contend that it does not admit of such inquiry. We are satisfied that, under the great weight of authority, it is mandatory. However, we may add that courts will not lend their aid to parties seeking to perpetrate a crime, when it is clear that they are endeavoring to make use of the examination to aid them in so doing. Many authorities are cited by counsel, both with reference to the common-law rule and the rule laid down by the different courts, under statutes like or similar to the foregoing provisions of our own. Where the terms of the statute are mandatory, like ours, it is immaterial that the stockholder desires to inspect the books in the interest of a rival corporation, or to aid him in securing business which otherwise might go to the corporation whose books he seeks to inspect, or to get information on which to predicate litigation which he may desire to institute against the company. Kimball v. Dern, 39 Utah, 181, 35 L.R.A.(N.S.) 134, 116 Pac. 28, Ann. Cas. 1913E, 166, is a case in which the facts were almost identical with the facts in the case at bar, and the supreme court of Utah, in a well-considered opinion, sustains the right of the stockholder to examine the books, and holds that his object does not forfeit his statutory right. Weihenmayer v. Bitner, 88 Md. 325, 45 L.R.A. 456, 42 Atl. 245, is another case where the stockholder desired to inspect the books for the purpose of getting information to be used in the interest of a rival corporation and to the injury and loss of the corporation whose books he sought to examine, and it was held that he had a right to make the examination. See also Re Steinway, 159 N. Y. 250, 45 L.R.A. 461, 53 N. E. 1103, where in such a case it is

held that, when an absolute right is conferred by statute, nothing is left to the discretion of the court. Mutter v. Eastern & M. R. Co. L. R. 38 Ch. Div. 92, 57 L. J. Ch. N. S. 615, 59 L. T. N. S. 117, 36 Week. Rep. 401, is a case where the applicant acquired the legal title of the stock for the sole purpose of enabling him to inspect the records for the benefit of a rival concern, yet mandamus was granted by the trial court and affirmed on appeal, on the ground that it was an absolute statutory right. See Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 48 L.R.A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033. Also see authorities cited in Kimball v. Dern, supra; Johnson v. Langdon, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050; Hobbs v. Tom Reed Gold Min. Co. 164 Cal. 497, 43 L.R.A.(N.S.) 1112, 129 Pac. 781. At common law the rule is that a stockholder has the right of inspection, when he desires to do so for proper purposes and with proper motives. It appears that this rule resulted in the officers or stockholders sitting in trial on the motives of the applicant for desiring to make the examination, and in the case of minority stockholders it frequently resulted in their being deprived of their lawful rights to inspect or examine property in which they owned an interest. The statutory provisions were undoubtedly enacted for the protection of minority stockholders, and to prevent the delays incident to determining through legal proceedings the motives of those desiring to examine the corporate records. It is not for courts to read into a plain statute qualifications which would destroy the meaning of its plain language.

We need not enter into further discussion of the authorities. It would serve no purpose, in view of the issues herein. The trial court found that the plaintiffs sought the examination of the books of the exchange for lawful purposes and at a proper time. After carefully examining the hundreds of pages of evidence taken, most of which is wholly incompetent for any purpose whatever, we are satisfied that there is sufficient competent evidence to sustain the findings of the trial court. The question before us is not one of the preponderance of evidence, but whether there is any substantial competent evidence to sustain the findings. For latest authority on this, see State ex rel. Trimble v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 621, 150 N. W. 463. It is patent that it would be impossible to set out the evidence in detail. Even such as is competent is so intermingled with hearsay, as to con-

troversies between outside parties and business interests, that it would require the work of weeks to separate it and place the competent evidence by itself. All that it is necessary to decide here is the question of evidence to sustain the findings. Having determined that there is ample evidence to sustain them, we can do naught but affirm the trial court, which granted the writ commanding the defendants to permit a complete examination of the books of the corporation of which they are officers. It is affirmed.

On Petition for Rehearing.

PER CURIAM. Counsel for appellants have filed a petition for a rehearing, but they urge nothing which was not urged and fully considered on the first hearing. Notwithstanding this we have, in view of the importance of the case, carefully re-examined the questions involved, and after such reconsideration we see no reason to change our views as above expressed.

Counsel in their petition contend that the rule announced by this court in the case at bar is contrary to the holding of the United States Supreme Court in the case of Guthrie v. Harkness, 199 U. S. 156, 50 L. ed. 133, 26 Sup. Ct. Rep. 4, 4 Ann. Cas. 433. Counsel are clearly in error in such contention. That decision, both in the lower court and in the supreme court of the state, as well as in the United States Supreme Court, was decided under the common-law rule, and not under the statute of Utah, like that in North Dakota, and this, for the obvious reason that it involved the right of a stockholder to examine the books of a national bank, and the rule of the statute was therefore inapplicable. It was conceded by counsel that the state statute did not give the right to examine the books of a national bank, and the common-law rule was therefore invoked by the court. It is clearly apparent, therefore, that such decision is not in point here.

To avoid any erroneous inferences from this opinion, let it be stated that no approval is placed upon the conduct of either party to this action, nor of the practices of stock exchanges or chambers of commerce of Minneapolis and Duluth, which defendants have sought to connect with plaintiff, and incidentally attempted to try out in this action, wherein such associations are not parties. Even though plaintiffs may belong to

them, and may intend to assist them in competing for business against defendants, or assist them in injuring defendants, yet that is no defense. That a right may be flagrantly abused does not destroy the right, or the privilege of its enforcement in the courts. When the abuse amounts to the commission of a crime the penal laws apply to the perpetrators, and equity will not permit abuse of its process to aid in crime. But no such question is here under any proof made. There is proof conceding without questioning its admissibility that such third parties, nonresident associations, or its members or officials, have pursued a course of oppressive and vindictive conduct by advertising this suit and its purposes and misrepresentation to the probable injury of defendants. There are also charges that abuses and misconduct of such board of trade toward the grain growers of this state exist to an extent demanding, imperatively, Federal supervision and the strong arm of the Federal government to protect the grain growers of this agricultural state, whose market is beyond their control, and now probably a subject of private exploitation. This is mentioned that it may not be assumed that the members of this court are not alive to all the possibilities and probabilities discussed, and also that no comfort may be taken from this decision by any third party wrongdoers who may be indirectly permitted license resulting in abuse thereby. This is but incidentally and not necessarily involved. This case strikes deeper than all this, and directly involves the rights of every minority stockholder of corporate stock in every domestic corporation in this state to inspect at all times the books of the corporation of which he is such stockholder, and that, too, without question or delay, which in practice may amount to denial. To illustrate application of the rule announced, it may be observed that the stockholder rights of every member of this defendant association holding stock are likewise adjudged and guaranteed by this very holding as against usurpation or infringement or question by the majority, as are also those of every minority stockholder in every other association, whether it be an elevator, creamery, coal mining, stock raising, mercantile, or state banking corporation. The rule measuring rights must be uniform as to all similarly situated. That the motives of defendant may have been commendable in denying inspection of its books, while the right of inspection may have been sought to further oppression and abuse, yet motives are insufficient to warrant a denial

of inspection when to do so is to jeopardize the rights of every minority stockholder, as it is indisputable that the right to question the motive of any stockholder desiring inspection of corporate books carries with it the power to pass judgment on his motives, and on that right of judgment, however erroneous or wrongfully asserted, virtually deny a right of inspection altogether by compelling resort to the courts whenever a majority of stockholders may elect to force the minority to get their rights only at the end of a lawsuit. The legislature, entirely familiar with the exigencies of this and other similar situations, has declared the policy to be pursued by its mandate, that minority rights shall be respected and enforced even under a situation identical with that of the majority stockholders, the defendants.

The petition for rehearing is denied.

FARMERS SECURITY BANK OF PARK RIVER, N. D., a Corporation, v. FLORENCE B. MARTIN and Charles B. Martin.

(L.R.A. —, 150 N. W. 572.)

This opinion decides two appeals. Plaintiff foreclosed two mortgages, exercising power of foreclosure under the mortgages, because of failure of the mortgagors to pay the real estate taxes prior to delinquency, after which time plaintiff paid them, and immediately foreclosed because of such defaults. Defendants contend that, because of defective descriptions of the land in the assessment roll, the taxes are invalid and insufficient as a basis for any foreclosure proceedings. ***Held:***

Tax description — action to assail taxes — void.

1. That the tax description would be void in an action wherein the tax could be assailed; but —

Mortgages — land covered by mortgage — paying taxes thereon — validity of tax — assumed — equity — mortgagor — benefited by payment of taxes — estoppel to assert invalidity.

2. A mortgagee is authorized to act on the assumption that the tax is valid where no actual notice is had that the assessment was defective; and the land being subject to taxation, the payment made by the mortgagee discharged the land from liability for taxation for that year, while otherwise it would have been subject to reassessment and retaxation; that the mortgagee had the right

to pay taxes to preserve his security; that in an action to foreclose a mortgage because of nonpayment of such taxes by the mortgagors, equity will not allow the mortgagors, to whose benefit the payment made by the mortgagee inured, to assert the invalidity of the taxes so paid in good faith to protect its security.

Opinion filed January 9, 1915.

From the judgment of the District Court of Walsh County, *Templeton,* Special Judge, dismissing these actions, plaintiff appeals.

Reversed and judgment for foreclosure ordered.

Engerud, Holt, & Frame, and *E. Smith-Peterson,* for appellant.

The plaintiff had the right to pay the delinquent taxes and declare the whole debt secured by the mortgage immediately due. The mortgages in express terms so provide. Such terms in the mortgages do not create a penalty or forfeiture. They merely accelerate the date of payment, and confer valuable rights on the mortgagee. Gray v. Robertson, 174 Ill. 242, 51 N. E. 248; Stanclift v. Norton, 11 Kan. 218; Hodgdon v. Davis, 6 Dak. 21, 50 N. W. 478; Washburn v. Williams, 10 Colo. App. 153, 50 Pac. 223; Northwestern Mut. L. Ins. Co. v. Allis, 23 Minn. 337; Hoodless v. Reid, 112 Ill. 105, 1 N. E. 119; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231; Plummer v. Park, 62 Neb. 665, 87 N. W. 534; National L. Ins. Co. v. Butler, 61 Neb. 449, 87 Am. St. Rep. 462, 85 N. W. 437; Condon v. Maynard, 71 Md. 601, 18 Atl. 957; Hockett v. Burns, 90 Neb. 1, 132 N. W. 718.

The mortgagors, by necessary implication, agreed to pay the taxes on the premises. They expressly gave the mortgagee the right to pay them. Bonner Springs Lodge & Sanitarium Co. v. McClelland, 59 Kan. 778, 53 Pac. 866.

The personal covenant of the mortgagors to make a refund for such payments was not necessary. Rev. Codes 1905, § 6126; Foster v. Furlong, 8 N. D. 282, 78 N. W. 986; New England Mortg. Secur. Co. v. Vader, 28 Fed. 265; Bonner Springs Lodge & Sanitarium Co. v. McClelland, 59 Kan. 778, 53 Pac. 866; Beckman v. Skaggs, 59 Cal. 544; Farwell v. Bigelow, 112 Mich. 285, 70 N. W. 579.

After such payments it was not necessary for plaintiff to notify defendants. No such notice is required by the mortgages. Ellwood v. Wolcott, 32 Kan. 526, 4 Pac. 1056; Washburn v. Williams, 10 Colo.

App. 153, 50 Pac. 223; Hoodless v. Reid, 112 Ill. 105, 1 N. E. 119; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231.

The option in the mortgages to declare the whole debt due having once been exercised, the default becomes fixed, and it cannot be cured by tender of payment after foreclosure is begun. Plummer v. Park, 62 Neb. 665, 87 N. W. 534; Rosche v. Kosmowski, 61 App. Div. 23, 70 N. Y. Supp. 216; Stanclift v. Norton, 11 Kan. 218; Hockett v. Burns, 90 Neb. 1, 132 N. W. 718.

The defendant cannot make a collateral attack upon the validity of the taxes paid by the plaintiff as a defense to this action. Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Power v. Bowdle, 3 N. D. 120, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Beggs v. Paine, 15 N. D. 444, 109 N. W. 322; Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; Windett v. Union Mut. L. Ins. Co. 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 751; Southard v. Dorrington, 10 Neb. 119, 4 N. W. 935.

Defendants are estopped to question the validity of these taxes in these actions. The defendants had ample opportunity to investigate the regularity and validity of the assessments and the acts of the various taxing officers, and they are presumed to know the state of these affairs. Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Nind v. Myers, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335; Williams v. Hilton, 35 Me. 547, 58 Am. Dec. 729; Bates v. Peoples' Sav. & L. Asso. 42 Ohio St. 655.

Plaintiff had no actual knowledge of the defects of which complaint is made. The taxes were presumptively legal. The duplicate tax list in the treasurer's office correctly described the land. Plaintiff had the right to rely upon these records. Bates v. Peoples' Sav. & L. Asso. supra.

Such payments of taxes by mortgages to preserve their security are viewed with favor by courts of equity. Windett v. Union Mut. L. Ins. Co. 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 751; Southerd v. Dorrington, 10 Neb. 119, 4 N. W. 935; Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; Williams v. Hilton, 35 Me. 547, 58 Am. Dec. 729; American Nat. Bank v. Northwestern Mut. L. Ins. Co. 32 C. C. A. 275, 60 U. S. App. 693, 89 Fed. 615; Bates v. Peoples' Sav. & L. Asso. 42 Ohio St. 655; Almy v. Hunt, 48 Ill. 45.

The taxes in question are valid taxes. The test of the validity of an assessment is, Do the assessment rolls contain sufficient data to clearly identify the lands in question? Beggs v. Paine, 15 N. D. 444, 109 N. W. 322; Nind v. Myers, 15 N. D. 403, 8 L.R.A.(N.S.) 157, 109 N. W. 335; Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Power v. Bowdle, 3 N. D. 120, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404.

Gray & Myers, for respondents.

The right to accelerate the time of payment of an otherwise immatured obligation for the payment of money only, and to proceed to an immediate foreclosure of the mortgage security, can only exist by virtue of some contractual stipulation to that effect. A stipulation which provides that the whole debt may be declared due, and authorizing foreclosure upon failure to pay taxes when due, means valid taxes, —enforceable taxes. Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68; Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241; Herriott v. Potter, 115 Iowa, 648, 89 N. W. 91.

A tax that cannot be exacted by any remedy is no tax at all. Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Morrill v. Lovett, 95 Me. 165, 56 L.R.A. 634, 49 Atl. 666.

The word *"due"* has been construed to mean or imply the quality of legal enforceability. Griffith v. Speaks, 111 Ky. 149, 63 S. W. 465; Barnes v. Arnold, 45 App. Div. 314, 61 N. Y. Supp. 85; Re Ray, 2 Ben. 53, Fed. Cas. No. 11,589.

An express covenant to pay taxes means legal taxes. Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N. W. 624; Clark v. Coolidge, 8 Kan. 189; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524; Hartsuff v. Hall, 58 Neb. 417, 78 N. W. 716; Vermont Loan & T. Co. v. Tetzlaff, 6 Idaho, 105, 53 Pac. 104.

In this state and in many others the rule has become a settled rule of property, that a valid assessment of land, evidenced by a record officially made, is an essential prerequisite to a valid tax. Its omission is jurisdictional, and fatal to the tax. Sheets v. Paine, 10 N. D. 106, 86 N. W. 117; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Re Davis, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711; O'Malley v. Fricke, 104 Wis. 280, 80 N. W. 436; Aldrich v. Steen, 71 Neb. 33,

98 N. W. 445, 100 N. W. 311; Chicago, B. & Q. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97; Jewett v. Iowa Land Co. 64 Minn. 531, 58 Am. St. Rep. 555, 67 N. W. 639.

The validity of a tax may be collaterally impeached; and a mortgagor is not estopped to contest such validity, in an action like the case here. 9 Enc. Pl. & Pr. 436; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524; Hartsuff v. Hall, 58 Neb. 417, 78 N. W. 716; Atwater v. West, 28 N. J. Eq. 361; De Leuw v. Neely, 71 Ill. 473.

The pretended tax here is based upon an insufficient description of the land in the assessment roll, and is void. It is indefinite and uncertain. Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Nind v. Myers, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335.

By the decisions of our supreme court upon this question, a rule of property has been established in this state. Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Wright v. Jones, 23 N. D. 191, 135 N. W. 1120.

Goss, J. This opinion covers two separate appeals having the same record and involving the same issues. Complaints are in the usual form, seeking foreclosure of commission mortgages securing a portion of interest on ten-year loans, which interest matures in yearly instalments for ten years. Nine instalments were unmatured. One has been paid. Both commission mortgages are held by plaintiff. The instalment of interest due on each mortgage prior to April, 1911, had been paid, and no payment under either mortgage would fall due until the following fall of 1911. Both mortgages contain the following stipulation: "First: But if default be made in the payment of money or the interest or any part thereof or in payment of taxes on said real estate when due, then the mortgagee, its successors or assigns, may declare the whole principal sum due and payable, and this mortgage may be foreclosed at once. (2) And in case of the failure of the mortgagors to pay said taxes, then the mortgagee, its successors or assigns, may pay the same, and such sum paid shall become a part of this mortgage indebtedness, and draw interest at the same rate." The taxes falling due December 1, 1910, and delinquent March 1, 1911, on the two quarter sections covered by the two mortgages, had not been paid until

the mortgagees, without notice to defendants, paid them on April 19, 1911, amounting to $61.62, for which the usual county treasurer's tax receipt was delivered. These actions were begun less than a week afterwards, by service of summons and complaint, basing the right of foreclosure upon the default of the mortgagors in failing to pay these taxes. Mortgagees elected to, and did, declare the full amount of both mortgages immediately due and payable. The brief of respondents contains but two contentions: First, that the taxes were void, and, second, "that the right to accelerate time of payment of an otherwise immatured obligation, and to proceed to an immediate foreclosure of the mortgage security, can only exist by virtue of some binding contractual stipulation to that effect," and hence acceleration cannot be founded on failure to pay void taxes, under a stipulation that the mortgagors will "pay taxes when due,"—in other words that mortgagors were not in default in failing to pay the void taxes, for nonpayment of which the default is claimed as the basis of the right to accelerate interest instalments not otherwise matured.

There is no conflict in the testimony. Defendant testifies that he knew his taxes were delinquent and unpaid, and in response to inquiry as to why they were allowed to become delinquent said: "I did not have the money the 1st of March, and I went to the bank to borrow the money to pay it, and the bank explained to me where I would be a little ahead on interest by letting it go until fall and paying the penalty on it, and I came to the conclusion it would be all right. It was not because I would not pay the taxes." The bank referred to was not the plaintiff bank.

Assuming for the present that the taxes were valid, their payment on or before delinquency was stipulated for in the mortgage, and the right was there given the mortgagee, should the mortgagors default in their payment on or before delinquency, to declare "the whole principal sum due and payable" and to immediately foreclose. The mortgagee could also, at its election, pay said taxes, and reimburse itself by using its mortgage to enforce collection of the taxes on the property by foreclosure at once or at its pleasure. Real estate taxes are due December 1, and delinquent March 1. Upon delinquency in 1911 (and prior to chap. 299, Session Laws 1909, becoming effective) a penalty of 3 per cent attached in addition to the tax unpaid on March 1st, and to that

extent, with additional penalty accruing from time to time on and after March 1st, the mortgage security was gradually becoming impaired by nonpayment of taxes. Whether foreclosure could be instituted prior to March 1st need not be determined, but any time thereafter, in the absence of equitable reasons preventing it, defendants were in default under the terms of the mortgage, and because of which default the mortgage could be foreclosed under the power granted by the mortgage, and which power is valid and enforceable in equity. It has but recently been held (Doolittle v. Nurnburg, 27 N. D. 521, 147 N. W. 400) that it is not required that the mortgagee, before foreclosure and a declaration thereunder that the amount secured by the mortgage shall be immediately due and payable, shall give notice thereof to the mortgagor, or allow him an opportunity to cure his defaults. Instead, the mortgagee may declare the default without notice, the declaration by foreclosure notice being sufficient; and it follows that a court of equity in which such a foreclosure is asked, the mortgagee having complied with the law, cannot on that ground alone deem the exercise of a legal right, the declaration of default without notice, any defense in itself to the exercise of the right of foreclosure. Hence if the tax be a valid one, without any consideration of the mortgagee's right to act upon an invalid tax as constituting a cloud on the title of his security, in the absence of some defense to this foreclosure cognizable in equity, the plaintiff had a right to declare the default and to foreclose.

The validity of this tax is squarely before the court, and it must be determined whether it is void because based upon an invalid assessment. The assessment for 1910 is identical as to each tract of land. The description is as follows; *viz.:* "Cleveland township, County of Walsh, North Dakota. Name of owner, Florence B. Martin; description N. W. 4, Sec. 1., Twp. 155, Rng. 57." The trial court in its findings found "that said printed description is insufficient to identify the northwest quarter of section 1, township 155, range 57, as the property described," relying upon Power v. Larabee, 2 N. D. 141, 49 N. W. 724, and Power v. Bowdle, 3 N. D. 120, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404, and the many decisions of this court upon descriptions in assessments and taxation matters. The time has come when the rule must be followed under present statutes and concerning recent assessments, or a different rule announced as to taxes and assess-

ments of 1897 and subsequent years, including those in question. A brief *résumé* of the holdings of this court on descriptions by abbreviations is now in order. In the initial case, Power v. Larabee, 2 N. D. 141, 49 N. W. 724, the description was similar to the one before us, except that the figure intended to qualify the abbreviation for the quarter section was on the line, instead of above it, and was with reference to assessments for 1886–7–8. The assessment was held to be invalid as an indefinite description upon which no valid tax could be based. The attitude of the early court is clearly apparent from a casual examination of early tax cases, and that decision but reflected such attitude. A year later the court was further committed along the same line in Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404. A glance at the page 113 of the 3d volume of our state official report shows the description there given to be identical with the one before us, so far as the placing of the figure to the upper right of the abbreviation of the description is concerned. The same description is again held void five years later, with reference to the 1887 assessments in Iowa & D. Land Co. v. Barnes County, 6 N. D. 601–603, 72 N. W. 1019, citing and following the two Power Cases. The holding is reaffirmed as to 1890 and 1894 assessments in Sheets v. Paine, 10 N. D. 103, 86 N. W. 118, and again in Lee v. Crawford, 10 N. D. 482, 88 N. W. 97, as to 1888 taxes; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357, as to assessment for 1891; State Finance Co. v. Mulberger, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, for tax of 1895; State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76, for taxes for 1892–3–4–6, and State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984, for taxes of 1895 and 1896. To make the list of similar taxation cases complete, we cite Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Hodgson v. State Finance Co. 19 N. D. 139, 122 N. W. 336; Grand Forks County v. Frederick, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, and Wright v. Jones, 23 N. D. 191, 135 N. W. 1120.

Our conclusion, filed before rehearing was had in this case, was to the effect that chap. 126 of the Sess. Laws 1897, § 1600, Rev. Codes 1905, § 2215, Comp. Laws 1913, operated to relieve recent assessments from the rule of property announced in Power v. Bowdle, and the earlier cases decided on assessments prior to those for 1897. This

was upon the supposition that this portion of chapter 126 of the Session Laws of 1897 was new legislation. Instead, this statutory provision was earlier in force as § 94 of chapter 132 of the Session Laws of 1890, and in force from March, 1890, until repealed by the taking effect, January 1, 1896, of the Revised Codes of 1895, and during which period the rule of property had been reaffirmed as to 1890–94 assessments in Sheets v. Paine, 10 N. D. 103, 86 N. W. 117, and State Finance Co. v. Mulberger, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, as to assessments of 1895. As this statute was in force during that period, these assessments cannot be distinguished and validated unless the rule of property in question be overruled. The assessment must be held to be one which, under direct attack by a party in a situation to assail it, would be held void.

But appellants urge that plaintiff, as mortgagee of defendants, having paid what it supposed to be a valid tax under the belief that it was a lien or cloud upon the title of its security, and when such property was legally subject to taxation, and which tax thereon is not shown to be inequitable, and where plaintiff was authorized by its mortgage contract to pay taxes and declare default for the nonpayment of same, plaintiff was placed in a position where, after such payment and exercise of power of default under the mortgage, that the mortgagors should not be heard to urge against the mortgagee the invalidity of the apparent tax thus paid. Search of the authorities lends support to such contention. A mortgagee authorized by the mortgage to pay taxes is not obliged to determine at his peril the validity of an apparent tax regularly appearing upon the proper tax records as a tax lien and cloud upon the title of the mortgage security, when such property was at all times legally subject to taxation, and where, had the proceedings been regular, the tax would have been unassailable. To hold otherwise would make every mortgagee hazard his money against the validity of the tax, while permitting the mortgagor to allow his supposed taxes to become delinquent, and thus indirectly shift upon the mortgagee the burden of suffering a lien or cloud to remain upon his mortgage security, or determine, by suit at his own expense, the validity of the tax any time the mortgagor thus sees fit to assert against him its invalidity. Had the mortgagee allowed this property to have gone to tax sale six months later, and then obtained a certificate on sale of the property,

it would have been protected, even though, as here, the taxes had been under direct attack, void, because defendants would not have been heard to question the tax without a tender of the amount equitably due. Noble v. McIntosh, 23 N. D. 59, 135 N. W. 663; Tee v. Noble, 23 N. D. 225, 135 N. W. 769. Merely because the mortgagee elected to pay the tax, instead of allowing the penalties to increase, should not place it, in equity, in a worse position than it would have been as a purchaser at a sale for said tax. More especially is this true as here it appears that neither the mortgagors nor the mortgagee knew of the irregularities or defect in the assessment. The mortgagors intended to pay this tax. They did not even notify the mortgagee of their reasons for defaulting in its payment. Had they done so, and the mortgagee have consented thereto, a different situation would be presented. The same would hold true had the mortgagors promptly tendered the amount of the tax and penalties paid back to the mortgagee before exercise by it of its power of sale under said mortgage because of such default. It is true that the position of the plaintiff bank as to acceleration of unearned interest by means of this foreclosure seems to be harsh. But this is a case where equity must follow the law, and the basis for the law is in the contract, the mortgage. To hold otherwise would announce a rule of property that might play havoc with settled property rights.

In support of the foregoing conclusions are the following authorities: Southard v. Dorrington, 10 Neb. 119, 4 N. W. 935; American Nat. Bank v. Northwestern Mut. L. Ins. Co. 32 C. C. A. 275, 60 U. S. App. 693, 89 Fed. 610; Williams v. Hilton, 35 Me. 547, 58 Am. Dec. 729; Bates v. Peoples' Sav. & L. Asso. 42 Ohio St. 673; Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; Windett v. Union Mut. L. Ins. Co. 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 751. Judge Maxwell, in Southard v. Dorrington, announces the rule in a case exactly parallel in facts with this to be: "When the payment of taxes assessed on real estate is necessary to protect the security, the mortgagee may pay the same, and have the amount paid added to the mortgage debt as expenses necessarily incurred in protecting the security. . . . But the courts look with jealousy upon the demands of the mortgagee beyond the payment of his debt, as increasing the difficulties in the way of the right to redeem. But where the land is liable to taxation, and taxes, if legally assessed, would be a legal charge upon the same,

and there are no special circumstances showing the tax to be unjust or inequitable, a court of equity will not declare such tax void because some of the formalities necessary to make a tax deed valid have not been complied with. A party relying upon a tax deed relies upon his title, and must stand or fall upon that; but if he seeks to enjoin the collection of taxes, he must offer to do equity by paying, or offering to pay, what in justice he should pay. Nor in such case is the mortgagee required to permit the land to be sold when such sale would impair his security for the debt." And further: "In an action at law for the possession of the premises under a tax deed, the answer would be sufficient in all probability, but not in a proceeding in equity to have the taxes, which appear to have been lawful in themselves, declared null and void. In such case the party must state facts showing his right to equitable relief." And foreclosure was awarded, although the taxes would have been invalid, considered as a foundation for a tax deed. From Windett v. Union Mut. L. Ins. Co. supra, is the following: "The defendant argued that the plaintiff could not be allowed for the taxes, because they had been extinguished by the tax sales and deeds, and could not recover on the tax titles because they were void, and because equity would not enforce them. But the plaintiff did not set up the tax deeds as a ground of suit, but only as evidence of clouds upon his title, arising out of the mortgagor's own neglect to pay the taxes. It is at least doubtful, upon the evidence, whether Gage did not give notice to the tenants of the tax sales; and there is no evidence whatever of any invalidity in the taxes, the sales, or the deeds, in any other respect. In this state of things, the mortgagee was not bound to take the risk of contesting the tax titles; and the sums paid to extinguish those titles were reasonable expenses chargeable to the mortgagor by the terms of the mortgage." The California supreme court, in Weinreich v. Hensley, 121 Cal. 647, page 657, 54 Pac. 254, page 257, has this to say in a parallel case: "Whether the form of the assessment was such as would have defeated an action for its collection, or would have conferred no title upon the purchaser at a sale under a judgment for its foreclosure, is not the test of the plaintiff's right to recover the amount paid for its discharge. The assessment created at least an apparent cloud upon the title to the mortgaged premises, and to the extent of such cloud impaired the sufficiency of the security." Foreclosure was allowed for

assessments concededly void, where the mortgagee had paid the same in good faith and without actual notice of the invalidity. In the instant case, as is said in Bates v. Peoples' Sav. & L. Asso. 42 Ohio St. 655, this property was taxable for the year in question, whether legally taxed or not; and the payment by the mortgagee paid a tax, inasmuch as it relieved taxable property from a liability for a valid tax to which the property could, and presumptively would, have been subjected subsequently on the state discovering the invalidity of assessment for this particular year. In fact, then, this mortgagee has paid what the state must treat as its tax, and to that extent relieved the mortgagors from a tax burden. Had the mortgagors paid this void assessment, they would have discharged a tax liability against them. The act of the mortgagee by their authorization under the mortgage clause likewise inures to their benefit, and is to be treated as their own act in such respect. They should not be heard to deny the legality of such payment, any more than as though they themselves had paid the purported tax, and, later, in other proceedings, should attempt to collaterally repudiate both their act and the tax.

We have examined all the cases cited to the contrary, and some distinction on facts is found in all of them, not present in this case. For instance, in Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N. W. 624, it appears that the property upon which the mortgagee paid taxes was not subject to general taxation, it being held for religious and charitable use. Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524, and Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241, were direct attacks upon the tax itself, the former in an action to foreclose a tax lien, the latter in proceedings to obtain a tax judgment against the land under the 1897 Woods law. The same is true of Morrill v. Lovett, 95 Me. 165, 56 L.R.A. 634, 49 Atl. 666, cited by respondent, where bill in equity was brought to remove a cloud upon real estate erroneously assessed as owned by a dead person, and where the law under which the assessment was made created a personal liability secured by lien on the specific real estate. Clark v. Coolidge, 8 Kan. 189, was on a special assessment. While somewhat parallel the facts are considerably different, and the reasoning is unsatisfactory. That decision seems to have turned upon estoppel arising from the conduct of the parties. Likewise, Vermont Loan & T. Co. v. Tetzlaff, 6 Idaho, 105, 53 Pac. 104,

involving right of foreclosure of usurious mortgage, is not authority, nor is Herriott v. Potter, 115 Iowa, 648, 89 N. W. 91, involving an inheritance tax.

Our conclusion is that the mortgagee had the right to pay this tax as a tax after its delinquency and without actual notice of its invalidity, though the assessment was fatally defective; that in so doing it discharged the land from a taxation liability, and to that extent relieved and preserved the security therefrom; that though the assessment might be held void for indefiniteness of description of property in an action wherein the validity of the tax could be raised, it would be inequitable to permit the mortgagors here to assert that the tax is invalid in this action; that defendants were in default under the terms of the mortgages, and plaintiff mortgagee is entitled to a judgment of foreclosure accordingly.

COUNTY OF SARGENT v. C. H. COOPER.

(150 N. W. 878.)

Action by county against treasurer — commissions received — to recover — state school lands — sales and leases.

1. In an action by a county against its treasurer to recover certain commissions earned and retained by him for collecting moneys due the state on school land sales and leases,—

Held, construing § 43, chap. 118, Laws 1893, and acts amendatory thereof, that it was the legislative intent that the treasurer should retain such commissions as compensation for his services thus rendered to the state.

Legislative enactments — conflict — later act prevails — new amendment — continuation of statute — revision.

2. Construing § 6, chapter 42, Laws of 1889 (Rev. Codes 1905, § 2570), authorizing county treasurers to retain 1 per cent of all funds arising from the sale of bonds for the erection of county buildings as his compensation for receiving and disbursing the same; together with chapter 53, Laws 1891, placing such officer on a salary basis, and fixing a maximum allowance therefor, and acts amendatory of such statutes,—

Held, that an irreconcilable conflict exists between them, and that therefore the former was impliedly repealed by the latter.

Held, further, that the incorporation into and re-enacting of these statutes,

without material change, in the general revision of the laws in 1895, did not operate as a new enactment of them, but only as a continuation thereof, as expressly provided in § 2683, Rev. Codes 1895. Hence, such statutes should be construed the same as though such revision had not been made.

Opinion filed January 9, 1915.

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

From a judgment in defendant's favor on one, and in plaintiff's favor on the other cause of action, both parties appealed.

Affirmed as to each appeal.

E. W. Bowen and *Wolf & Schneller,* for respondent and appellant.

A person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary, and cannot legally claim any additional compensation for incidental services, though such work was subsequently imposed upon such office. Decatur v. Vermillion, 77 Ill. 315; Miami County v. Blake, 21 Ind. 32.

No other compensation than the fixed salary is allowed a public officer, unless expressly provided by law. 19 Am. & Eng. Enc. Law, 528, and notes; Hannah v. Chase, 4 N. D. 351, 50 Am. St. Rep. 656, 61 N. W. 18.

The legislature has power to impose upon a public office additional work. Wilson v. Cass County, 8 N. D. 456, 79 N. W. 985; Miller v. Kister, 68 Cal. 142, 8 Pac. 813.

Engerud, Holt & Frame, for appellant and respondent.

The law as to county treasurers does not purport to prescribe a general salary for all services; it merely refers to part of his duties, and prescribes what his compensation shall be therefor. Laws of 1893, chap. 118, § 43.

The law contemplates that the collection of school land money is a distinct and separate duty from the treasurer's services to the county, and was to be paid for by the state. Love v. Baehr, 47 Cal. 364; Melone v. State, 51 Cal. 550; State ex rel. Tzschuck v. Weston, 4 Neb. 244; Cornell v. Irvine, 56 Neb. 665, 77 N. W. 114; State v. Roddle, 12 S. D. 436, 81 N. W. 980; State ex rel. Howell v. LaGrave, 23 Nev. 383, 48 Pac. 674; 30 Cyc. 1130, and cases cited in notes.

The legislature, in passing an act directed to a special subject, and having observed all the circumstances of the case and provided for

them, does not intend, by subsequent general enactment, to derogate from its own act, without expressed intention so to do. Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co. 2 S. D. 546, 51 N. W. 342; Finch v. Armstrong, 9 S. D. 255, 68 N. W. 740; La-Grange County v. Cutler, 6 Ind. 354; Banks v. Yolo County, 104 Cal. 258, 37 Pac. 900; Rice v. Goodwin, 2 Colo. App. 267, 30 Pac. 330; Jackson v. Washington County, 34 Neb. 680, 52 N. W. 169; Re Taylor, 3 App. Div. 244, 38 N. Y. Supp. 348; Homer v. Com. 106 Pa. 221, 51 Am. Rep. 521; State ex rel. Swerdfiger v. Whitney, 12 Wash. 420, 41 Pac. 189; State ex rel. Smith v. Parker, 12 Wash. 685, 42 Pac. 113.

Fisk, J. Action by Sargent county against its treasurer to recover certain fees and commissions. The facts were stipulated and found by the court as follows:

"I. That between the 1st day of January, 1909, and the 17th day of July, 1911, and acting pursuant to authority conferred upon him by law as such county treasurer, the defendant had collected and received the following sums of money from the following named persons, and from the following named sources, and for the following named purposes, to wit: From the state of North Dakota, as commissions on collections of the proceeds of school lands, $214.29, such aggregate collection being made up in the following sums, to wit: $111.15 received by the defendant on the 12th day of May, 1909, $103.14 received by the defendant on the 29th day of July, 1910.

"II. That before the commencement of this action, and during the official term of this defendant as such county treasurer of said county of Sargent, the said county of Sargent caused to be issued bonds of the said county in the aggregate sum of $50,000 for the purpose of—the proceeds of the money to aid in the construction of a courthouse for said county; that said bonds were sold by the county commissioners of said county in the manner provided by law, and the proceeds thereof, to wit, more than $50,000, were received by the defendant as such county treasurer, and disbursed by him, with the exception of $725 and some cents, and that the defendant charged, kept, and retained of said $725 the sum of $500, that being 1 per cent upon the par value of said county bonds, and charged and retained the same, and still

retains the same, under the claim that he is entitled to charge and retain the same as his commission for services in the handling and disbursements of said proceeds of said bonds.

"III. That the sums of money so received and retained by the defendant, as herein stipulated, were separate and distinct from and in excess of the annual salary of $1800 as such county treasurer."

Judgment was entered in the court below in plaintiff's favor for the recovery of $500 commission on sale of courthouse bonds, but as to plaintiff's right to recover certain commissions on collections on the proceeds of school land sales, that court held with the defendant, denying the relief prayed for by the plaintiff county.

We have before us two appeals: One by the plaintiff from that portion of the judgment denying a recovery of the school land commissions, and the other by the defendant from that portion of the judgment in plaintiff's favor for commissions on sale of courthouse bonds.

What was said by us in the case of Sargent County v. Sweetman, ante, 256, 150 N. W. 876, just decided, as to the general principles and rules of statutory construction with reference to statutes pertaining to salaries and fees of public officers, is equally applicable in this case. Counsel do not differ as to such general principles and rules, and we shall therefore not restate them here.

Our attention will first be directed to plaintiff's appeal involving the question of defendant's right to retain the commissions on school moneys collected by him.

We think it very clear that defendant is entitled to these commissions, and hence that the court below did not err in that part of its judgment challenged by plaintiff's appeal. A careful consideration of the history of the various statutes relating to the compensation of county treasurers serves to firmly convince us of the correctness of our conclusion as above expressed. We deem an extended review of these statutes in this opinion quite unnecessary and useless, but we will briefly refer to them.

As stated by counsel for defendant: "Prior to 1887 county treasurers were paid by fees for services, and they kept all the fees earned. Chap. 20, Laws 1879, Comp. Laws, § 1417; and see Comp. Laws, §§ 1618, 923, 1058, 642.

"In the year 1887 the territorial legislature enacted chap. 50, Laws 1887, Comp. Laws, §§ 632 et seq.

"This act of 1887 required all registers of deeds and county treasurers to keep account of all fees earned, and to deposit the same in the county salary fund. They were each to be paid salaries quarterly by warrants drawn on the salary fund, their salaries not to exceed the amount of fees earned, and not to exceed $2,000 per annum. The salary in a small county was the same as in a big county. Fees for certifying to abstracts, however, were excepted from this arrangement, and the officers were permitted to keep these abstract fees without accounting for them.

"This law of 1887 remained unchanged until the legislative session of 1891.

"In the meantime the territory had been reorganized into states, each with extensive land grants, and by the statute of 1890 (chap. 146, § 11) the county treasurer had been made the local collector of rentals on school lands for the state, and allowed compensation therefor, to be paid by the state.

"At the next session of the legislature a complete change was made of the laws relating to salaries of county auditor, register of deeds, and county treasurer, and §§ 14 and 15 of chapter 10, Laws of 1887, relating to county auditors, were expressly repealed. See § 7, chapter 52, Laws 1891.

"In place of the previous laws on the subject, that legislature substituted chapter 52, Laws of 1891, relating to county auditors and registers of deeds, and chapter 53, Laws of 1891, relating to county treasurers.

"At the next session of the legislature a comprehensive revision of the laws relating to school lands, the sale and leasing thereof, and the disposition of the funds derived therefrom, was enacted in chapter 118, Laws of 1893. Section 43 of that act is the section giving the county treasurer certain commissions for acting as local collecting agent for the state on school land sales and leases. By § 42 provision is made for specific and separate security to the state against defalcations by the county treasurer with respect to school land collections.

"Each of the three last-mentioned acts was specifically re-enacted by the legislature of 1895 as part of the 1895 Code.

"Chapter 52, Laws of 1891, was re-enacted without substantial change as §§ 2073 et seq., Rev. Codes 1895.

"Chapter 53, Laws 1891 (relating to county treasurers, being the law in question here), became §§ 2080 et seq., of Rev. Codes of 1895.

"Chapter 118, §§ 42 and 43, Laws 1893 (relating to treasurers' commissions on school land collections here in question), became §§ 209 and 210, Rev. Codes 1895.

"These two last-mentioned acts (chapter 53 on county treasurer's salary, and §§ 42 and 43, relating to treasurers' commissions on school land collections) have continued ever since without material change. Amendments have been made from time to time, the last one in 1899, changing the classification of counties, and changing the amount of compensation, but these amendments are immaterial to the question at issue.

"The law, so far as material to the question now in issue, is the same now as it was when the legislature re-enacted it as part of the 1895 Code."

It is the contention of plaintiff's counsel that § 210, Rev. Codes 1895, dealing with commissions on school land collections, and which was originally enacted in 1893, is repugnant to the limitation of such compensation as fixed in chapter 67, Laws of 1899, which, he contends, is a later enactment dealing with the specific subject of compensation of the treasurer, and is controlling as working an implied repeal of the former. The fallacy of such contention is apparent for two reasons: First, chapter 67 is not an original enactment. It was first enacted as chapter 53, Laws of 1891, and it does not in its present form materially differ from its original provisions in so far as the question here involved is concerned. Second, as we view it, there is no repugnancy between the two acts. The former is a part of a comprehensive law enacted as chapter 118, Laws of 1893, providing, as its title discloses, "for the management, control, and disposal of university, school and all other public lands of the state, and the management of the funds arising therefrom," etc.; while the latter is a general statute fixing the salary of county treasurers. Therefore, what was recently said in the companion case to this (Sargent County v. Sweetman) with reference to repeals by implication under analogous facts is also applicable here. The question, in its last analysis, is, as

aptly stated by defendant's counsel: "Does the proviso in the treasurer's salary act (chap. 53, § 1, Laws 1891; Rev. Codes 1895, § 2080; Rev. Codes 1905, § 2598), 'provided that no treasurer shall receive more than $1,200 for his personal services in any one year,' etc., limit the maximum compensation for *all services,* or does it limit only the maximum compensation receivable by him for his services for the 'collection and paying over' of all public moneys (*other than school land collections*) 'collected or received *as such county treasurer?*'" We are clear that such proviso was not intended to apply to services performed in making school land collections, and that therefore the contention of plaintiff's counsel must be overruled.

This brings us to a consideration of defendant's appeal, which involves the sole question of his right to charge and retain a commission on the sale, by the county commissioners, of county bonds for building a courthouse.

The statute under which defendant claims the right to retain such commission is § 2570, Rev. Codes 1905, which reads:

"The proceeds . . . of such bonds shall be deposited in the treasury of such county, to be paid out by the county treasurer on the order of such board. The county treasurer shall give an additional bond in double the amount of the bonds so issued and sold, and *shall receive as compensation for the receiving and disbursing of all funds arising from the sale of such bonds 1 per cent of the par value of such bonds, and the compensation herein provided for shall be in lieu of all other* commissions allowed him by law."

This section was originally enacted as § 6 of chapter 42, Laws of 1889, which chapter makes provision for the issuance of bonds for county buildings. It is contended by plaintiff's counsel that such statute, having been passed while county treasurers were on a fee basis pursuant to the provisions of chapter 50, Laws of 1887, that such act is clearly repugnant to a later statute passed as chapter 53, Laws of 1891, which abolished the fee system, and placed such office upon a salary basis, the amount of which was regulated by the amount of public moneys by him collected or received as such county treasurer, and fixing a maximum limit, which latter act repeals all acts and parts of acts inconsistent therewith. It is said that the 1889 act was passed with special reference to the general law for compensation of county

treasurers then in force, but that when such general law was repealed by chapter 53, Laws of 1891 aforesaid, it necessarily effected a repeal by implication of the 1889 act. The 1889 statute, authorizing such commission of 1 per cent on moneys received from the sale of bonds, was in harmony with the prior fee statute, but out of harmony with the later enactment aforesaid, which places such officer on a salary basis.

Defendant's counsel make a very plausible argument to the effect that there was no repugnancy between these two statutes, but that in any event, conceding such repugnancy to exist, the re-enactment of these statutes in the 1895 revision was an *original enactment,* and that it is not permissible to go back of that revision. In other words, he argues that if the 1889 statute was repealed by implication by the 1891 law, then the re-enactment, in the revision of 1895, of the former, must be considered as a "*new* enactment, and not a re-enactment or continuation of the then existing law." Such argument does not appeal to us as sound, nor do they cite any authorities in support thereof. The fact that this old statute was incorporated into the 1895 revision would no doubt have a tendency to show that the legislature deemed it an existing statute at that time, but such fact would not have any tendency to show that the lawmakers, *with knowledge* that the same had been thus repealed, intentionally re-enacted it as a *new* statute. Especially is this true in the light of § 2683, Rev. Codes 1895, providing: "The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." Under this explicit provision we think these old statutes, which were incorporated in such revision, are to be construed in the same way in which they would have been construed had such revision not been had. The supreme court of our sister state of South Dakota, in Hughes v. Lawrence County, 25 S. D. 480, 127 N. W. 613, used language which on its face appears somewhat contrary to these views, but we do not find that in the revision of the laws of that state any such provision as that in § 2683, supra, was incorporated.

The supreme court of South Dakota also had a case before it involving the same question here under consideration, and reached the same conclusion we have reached with reference to a county treasurer's claim to a commission on the sale of courthouse bonds. But it should

be noted that their statute contains a clause not found in that of this state. See Meier v. Sanborn County, 28 S. D. 386, 133 N. W. 695.

The contention of defendant's counsel that this 1891 statute aforesaid is not repugnant to the 1889 law, has been carefully considered by us in the light of the rule of statutory construction established by the authorities cited by them, and we deem such contention without substantial merit. The later statute is very full and explicit to the effect that the amounts therein designated shall cover the treasurer's compensation for receiving and disbursing of all public moneys belonging to the county, and we think it reasonably clear that the legislature did not intend to except from its provisions moneys collected from the sale of bonds for the erection of county buildings.

The judgment of the District Court is in all things affirmed.

STATE OF NORTH DAKOTA v. GEORGE FORTUNE, W. S. Casselman, and Charles Mason.

(150 N. W. 926.)

Criminal case — advancement of on calendar — order — nonappealable.

1. An application for the advancement of a criminal cause on the calendar of this court will be denied where it appears that the order from which the appeal was attempted to be taken is nonappealable.

Changing venue — criminal action — order in — nonappealable.

2. An order made by the district court changing the venue in a criminal action is a nonappealable order, the same not being included in the orders enumerated in § 10,992, Compiled Laws 1913, from which appeals are authorized to be taken.

Opinion filed February 6, 1915.

Appeal from district court, Burleigh County; *Nuessle*, J.

Application for advancement on the calendar of the supreme court. Application denied.

H. R. Berndt, States Attorney, for the motion.

T. R. Mockler, contra.

FISK, Ch. J. This is a criminal action commenced in the district court of Burleigh county. On January 25th last the district court, on motion of the states attorney, made an order changing the venue from Burleigh to Morton county. Thereafter and on the 28th day of January, counsel for defendants served and filed in the office of the clerk of the district court a notice of appeal from such order to this court, and the record on such appeal has been transmitted in accordance with such attempted appeal. On the 29th day of January this court, on an application of respondents' counsel, issued an order requiring the appellants to show cause why the action should not be advanced on the calendar, and the hearing set for an early date. Such order came on to be heard on February 5th, at which time counsel for appellants filed written objections to the application for such advancement, stating numerous grounds why the application should be denied. We deem it unnecessary to consider any of the grounds urged, either for or against the granting of such order, for the obvious reason that the order attempted to be appealed from is not appealable. If such order is not appealable, this court, of course, has no jurisdiction, and obviously this furnishes an all-sufficient reason for denying the application for advancement of the cause.

That such order is nonappealable is, we think, too clear for discussion. It goes without saying that no appeal lies in the absence of a statute conferring such privilege. This is fundamental, and needs no argument or authorities in its support.

Turning to the statute authorizing appeals by a defendant in criminal cases, which is § 10,992, Compiled Laws of 1913, we find that it reads as follows: "An appeal may be taken by the defendant: 1. From a final judgment of conviction. 2. From an order refusing a motion in arrest of judgment. 3. From an order denying a motion for a new trial. 4. From an order made after judgment affecting any substantial right of the party." It is, of course, entirely clear that an order changing the place of trial is not embraced in such section, and it is equally clear that the above statute is the only law designating the particular decisions from which an appeal will lie on the part of a defendant in a criminal action.

Manifestly, therefore, the remedy sought to be invoked by these appellants for a review of such order does not exist in this state. In Zinn

v. District Ct. 17 N. D. 135, 114 N. W. 472, a like order was reviewed by this court on certiorari, but whether that was a proper method for reviewing such order is not before us, nor was such question raised in that case.

We realize that appellants were cited to show cause merely why the appeal should not be advanced for an early hearing in this court, and not to show cause why their attempted appeal should not be dismissed; but manifestly this court will not indulge in the idle ceremony of determining the merits of such application when, as in this case, it clearly appears that it has no jurisdiction because of the nonappealability of the order from which the appeal is attempted to be taken.

It follows that the application for advancement should be denied, and it is so ordered.

SIGURBJORN GUDMUNDSON, Johann S. Gestson, Johann Sigurdson, Sigurjon Gestson, and Sigurgeir Bjornson, as Trustees of Thingvalla Congregation of Pembina County, North Dakota, and Other Members of said Congregation having a Common Interest, v. THINGVALLA LUTHERAN CHURCH, a Religious Corporation of Pembina County, North Dakota, and Magnus Benjaminson, Olafur Olafson, K. G. Kristjanson, Christian Geir, and J. H. Gislason, and Others Associating and Acting with Them.

(150 N. W. 750.)

Verdict — sufficiency of evidence to sustain — criminal action — review on appeal — errors must be specified.

Defendants are charged with departure from the original Icelandic Luther-

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Note.—Schism or division in religious societies has been the cause of a considerable amount of litigation, as shown by the cases set forth in a note in 24 L.R.A. (N.S.) 692, which contains an interesting discussion of the principles applicable to the subject, and a brief summary and comparison of the results reached with respect to a few of the historic schisms in ecclesiastical bodies, as well as an exhaustive review of the authorities. These authorities are, of course, confined to cases in which some property or civil right is involved, since the civil courts in this country have no ecclesiastical jurisdiction; and so long as the effects of a schism are confined to spiritual, religious, or theological matters, it furnishes no basis for interference of the civil courts.

an faith, to promulgate which this church was organized in 1889. It joined the Icelandic Lutheran Synod. Both synod and church had written Constitutions and confessional documents, none of which mentioned any dictrine of inspiration of Scripture. A schism arose in the congregation over the doctrine of plenary inspiration of the Bible. Plaintiffs adhered to that doctrine, alleging it to have been presupposed, and therefore understood to have been a fundamental doctrine, in 1889, of the Icelandic Lutheran faith. This defendants deny, and assert that neither the parent church of Iceland nor their own church has ever been bound to any specific doctrine of inspiration of Scripture. In 1910 plaintiffs, a minority, withdrew from the congregation, and refused to participate with the majority in congregational matters. The majority, the defendants as a congregation on June 5, 1910, withdrew Thingvalla Church from the synod, which body had, by resolution in 1909, for the first time placed itself on record as accepting the doctrine of plenary inspiration. The president of the synod was notified thereof June 5, 1910, by written notice. He deferred action thereon, submitting the withdrawal to the synod, which body, on the protest of the minority, these plaintiffs, disapproved of the withdrawal, and passed a resolution holding that the majority had departed from the original faith, and had violated its constitution in so doing, finding them guilty of heresy toward the Lutheran faith and holding the minority to be the true Thingvalla Congregation. All this was without notice to the majority, or any participation by them in the synod, they having treated their withdrawal as effectual from the date notice thereof was given, and had refused to send a delegate to or participate in the proceedings of the synod. This action is brought by the minority for the recovery of the church property, on the grounds that the plaintiffs are the true Thingvalla Congregation, and charging that the defendants are heretical because they disavow the doctrine of plenary inspiration of the Bible. The trial court received in evidence the record of proceedings had at the synod with its findings, and on that, with other testimony, found that the charge was true, and that the plaintiffs were the true congregation, and entitled as such to recover the church property. Defendants appealed, claiming the synodical proceedings not to be binding upon them, and incompetent as evidence; that the evidence is insufficient to sustain the trial court's findings that the doctrine of plenary inspiration, though not mentioned in the constitutions, confessions, or written creeds of the Lutheran Church of Iceland and this church, was, however, presupposed. *Held:*

Church government — Lutheran form of — synod — withdrawal of congregation from — synodical convention — jurisdiction of.

1. That the withdrawal of the congregation from the synod was complete under the Lutheran congregational form of church government, upon the passage of the resolution and notice thereof to the president; and that the subsequent proceedings of the synodical convention were had without jurisdiction by it over the defendant congregation, and its *ex parte* action thus taken was void as to the defendant congregation, over whom it had no authority.

Synodical convention — proceedings — resolutions — records — not admissible against defendant.

2. The resolution and record of its proceedings were inadmissible in evidence for any purpose over objections taken.

Plenary inspiration of Bible — doctrine of — no evidence of acceptance of, by church congregation.

3. That there is no competent evidence supporting the claim of the plaintiffs that, at the time of organization of this church, the doctrine of plenary inspiration of the Bible was a presupposed and accepted fundamental doctrinal belief of the Icelandic Lutheran Church, and as such presupposed by this church constitution and its confessional documents.

Scriptures — authors — manuscripts — adequately inspired — plenary inspiration — history — science.

4. It is not held that the authors of the original scriptural manuscripts were not adequately inspired, or that the Scriptures are not adequately inspired. But the doctrine of plenary inspiration of the Bible assumes its entire inerrancy and infallibility in all matters (aside from translation), including fact and doctrine, whether contrary to history or science. There are many doctrines of inspiration of Scripture, such as partial, personal, dynamic, adequate, plenary, verbal, and mechanical. It is held that the evidence does not warrant the findings that this church adopted plenary inspiration as one of its fundamental doctrinal beliefs.

Findings — order — judgment — action — dismissal.

5. The findings, order and judgment thereon appealed from are ordered set aside, and judgment directed dismissing this action.

Opinion filed December 12, 1914. Rehearing denied January 11, 1915.

From a decision of the District Court of Pembina County, TEMPLETON, Special Judge, defendants appeal.

Reversed and dismissed.

O. B. Burtness (*H. A. Bergman* and *G. B. Skulason,* of counsel), for appellants.

The doctrine of plenary or verbal inspiration of the Bible is not one of the fundamental doctrines of the Lutheran denomination, and was not such, or adopted as such, by and at the time of the organization of the defendant church congregation, and such doctrine was at no time presupposed by such congregation.

The evidence of theologians and men well versed in the doctrines of the Church of Iceland, and with those of the Lutheran Church, was

and is highly valuable and competent. Young v. Metcalf Land Co. 18 N. D. 441, 122 N. W. 1104; State ex rel. Miller v. Taylor, 22 N. D. 362, 133 N. W. 1046; Rev. Codes, 1905, §§ 5339, 5340, 5347, 5351; Cavazos v. Trevino, 73 U. S. 773, 784, 18 L. ed. 813, 815; Topliff v. Topliff, 122 U. S. 121, 131, 30 L. ed. 1110, 1114, 7 Sup. Ct. Rep. 1057; District of Columbia v. Gallaher, 124 U. S. 505, 510, 31 L. ed. 526, 527, 8 Sup. Ct. Rep. 585; 8 Cyc. 726, 736 and cases cited; 9 Cyc. 588, 772–774 and cases cited; 39 Cyc. 1297 and cases cited; 17 Am. & Eng. Enc. Law, 23–25 and cases cited.

The defendants have at all times adhered to the original position of the congregation on the doctrine of inspiration. The resolutions adopted by defendants are not heretical, and do not violate the constitution of the congregation.

The plaintiffs by calling individual defendants for examination made them their own witnesses, and are bound by the disclosures made. Jones, Ev. § 858, and cases cited; 40 Cyc. 2561 and cases cited.

The congregation had never declared that every part of the Scripture revealed God's word. Adherence to any doctrine of inspiration had not been made a test for membership. East Norway L. N. Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 663; Heckman v. Mees, 16 Ohio, 587; Fort v. First Baptist Church, — Tex. Civ. App. —, 55 S. W. 402, 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 892.

It is not sufficient for plaintiffs to show that there has been a change. They must show that the change, if any, violates the fundamental principles of Lutheranism, and that the new doctrine, if any, is not taught by any Lutheran church. Bennett v. Morgan, 112 Ky. 512, 66 S. W. 287, headnote 1; Boyles v. Roberts, 222 Mo. 613, 121 S. W. 807.

Even if the defendants had adopted a new doctrine of inspiration, it could not be regarded as a substantial departure, as adherence to such doctrine was never made a test of membership. Happy v. Morton, 33 Ill. 398; Church of Christ v. Christian Church, 193 Ill. 144, 61 N. E. 1119.

That the plaintiffs stand with the synod, and have departed from the original position of the congregation on the doctrine of inspiration, affords no basis of complaint or action against these defendants. Sudbury v. Bidgood, 13 Ont. Week. Rep. 1097.

The defendant church congregation was and is supreme, so far as the right to manage and control its property is concerned. Philomath College v. Wyatt, 27 Or. 390, 26 L.R.A. 68, 31 Pac. 206, 37 Pac. 1023; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Westminster Presby. Church v. Presbytery of New York, 142 App. Div. 855, 127 N. Y. Supp. 841; Poynter v. Phelps, 129 Ky. 381, 24 L.R.A.(N.S.) 734, 111 S. W. 702; Jarrell v. Sproles, 20 Tex. Civ. App. 387, 49 S. W. 908; Fort v. First Baptist Church, — Tex. Civ. App. —, 55 S. W. 407, 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 896; Dressen v. Brameier, 56 Iowa, 756, 9 N. W. 194; Duessel v. Proch, 78 Conn. 343, 3 L.R.A. (N.S.) 854, 62 Atl. 154; Schradi v. Dornfeld, 52 Minn. 465, 55 N. W. 50; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; East Norway L. N. Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 663.

In this class of cases it is necessary for plaintiffs to plead and prove what are the particular tenets from which the defendants have departed. They must also allege and prove their own adherence. They must also allege and prove defendants' incorporation. Happy v. Morton, 33 Ill. 398; 24 Am. & Eng. Enc. Law, 358; 31 Cyc. 116, and cases cited; Rev. Codes, 1905, § 7361.

The Icelandic Synod had no jurisdiction to pass upon the matters involved in this action. Their acts in doing so were and are void, and all evidence relating thereto was improperly admitted. Bartholomew v. Lutheran Congregation, 35 Ohio St. 567, and cases cited; Lawson v. Kolbenson, 61 Ill. 405; Pulis v. Iserman, 71 N. J. L. 408, 58 Atl. 554; 34 Cyc. 1141 and cases cited in note 65; Vargo v. Vajo, 76 N. J. Eq. 161, 73 Atl. 647; Schradi v. Dornfeld, 52 Minn. 465, 55 N. W. 50; Heckman v. Mees, 16 Ohio, 583; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; Duessel v. Proch, 78 Conn. 343, 3 L.R.A.(N.S.) 854, 62 Atl. 154.

It is elemental that in such cases the rules of the common law prevail, and that ecclesiastical tribunals have no greater powers than civil courts, and cannot deprive individuals or congregations of their property "without a hearing and trial upon adequate notice." 34 Cyc. 1190 and cases cited; Philomath College v. Wyatt, 27 Or. 390, 26 L.R.A. 68, 31 Pac. 219, 37 Pac. 1022; Kerr's Appeal, 89 Pa. 97; Jarrell v. Sproles, 20 Tex. Civ. App. 387, 49 S. W. 904.

Service of proper notice and formal charges is jurisdictional. 11 Cyc. 666, 667, 671 and cases cited; 23 Cyc. 1074, 1075, and cases cited; Fenton v. Minnesota Title Ins. & T. Co. 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363; 32 Cyc. 448 and cases cited.

The synod is merely an advisory body. Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; East Norway L. N. Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 663.

The rule prevailing in all Lutheran churches is that, notwithstanding a congregation may have joined a synod, it remains supreme so far as the right to manage and control its property is concerned. Dressen v. Brameier, 56 Iowa, 756, 9 N. W. 194; Duessel v. Proch, 78 Conn. 343, 3 L.R.A.(N.S.) 854, 62 Atl. 154; Fadness v. Braunborg, supra; East Norway L. N. Evangelical Lutheran Church v. Halvorson, supra; 8 Cyc. 773 and cases cited.

The jurisdiction of an ecclesiastical tribunal is subject to collateral attack. Note to Mack v. Kime, 24 L.R.A.(N.S.) 702; Bear v. Heasley, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 281; Chase v. Cheney, 58 Ill. 509, 11 Am. Rep. 95; Krecker v. Shirey, 163 Pa. 534, 29 L.R.A. 481, 30 Atl. 440 and cases cited; Boyles v. Roberts, 222 Mo. 613, 121 S. W. 809; 34 Cyc. 1167, note 65, 1186–1187 and cases cited; 24 Am. & Eng. Enc. Law, 349, 350; Ramsey v. Hicks, 44 Ind. App. 490, 87 N. E. 1102, 89 N. E. 597; Baker v. Fales, 16 Mass. 488; Sanders v. Baggerly, 96 Ark. 117, 131 S. W. 56; 3 Cyc. 735; Jones, Ev. § 266; Schnorr's Appeal, 67 Pa. 138, 5 Am. Rep. 415; Roshi's Appeal, 69 Pa. 462, 8 Am. Rep. 275; Baker v. Ducker, 79 Cal. 365, 21 Pac. 764; Rottmann v. Bartling, 22 Neb. 375, 35 N. W. 126.

It was error to admit testimony as to the beliefs of individual witnesses and members of the congregation, or to allow the parties and witnesses to be questioned as to their pri ·te religious beliefs. Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; First Baptist Church v. Fort, 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 896; Mack v. Kime, 129 Ga. 1, 24 L.R.A.(N.S.) 675, 58 S. E. 195; Wigmore, Ev. § 2214 and cases cited; 40 Cyc. 2613, 2614 and cases cited; Searcy v. Miller, 57 Iowa, 613, 10 N. W. 912; Com. v. Burke, 16 Gray, 33; N. D. Const. § 4; State v. Washington, 49 La. Ann. 1602, 42 L.R.A. 553, 22 So. 841;

Pumphrey v. State, 84 Neb. 636, 23 L.R.A.(N.S.) 1023, 122 N. W. 19, 18 Ann. Cas. 979.

It was error to allow certain witnesses to testify as to opinions formerly held by the witness Bergmann and as to writings not in evidence. 40 Cyc. 2719, et seq., 2732, 2747, and cases cited; Jones, Ev. §§ 809, quoted at page 74 supra, 848.

It was error to admit any so-called expert testimony as to the meaning of the various expressions and phrases in the constitution of the corporation, as the same is not a proper subject for such testimony. 8 Cyc. 732 and cases cited; 9 Cyc. 774 and cases cited; 17 Cyc. 596 and cases cited; 36 Cyc. 1137–1138 and cases cited.

The property here in question is not impressed with any express trust, and no trust will be implied. Pulis v. Iserman, 71 N. J. L. 408, 58 Atl. 556; Rev. Codes, 1905, §§ 5333, 5343; Alsterberg v. Bennett, 14 N. D. 596, 106 N. W. 49; Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684; Keyser v. Stansifer, 6 Ohio, 363; 34 Cyc. 1169; 24 Am. & Eng. Enc. Law, 356; Poynter v. Phelps, 129 Ky. 381, 24 L.R.A. (N.S.) 734, 111 S. W. 699; Smith v. Nelson, 18 Vt. 511; Mack v. Kime, 129 Ga. 1, 24 L.R.A.(N.S.) 675, 58 S. E. 184.

The majority, in such cases, has the right to rule, regardless of any change of religious views or teachings. 34 Cyc. 1155, 1158, 1159, and notes 18, 1160, 1165, and note 65 at page 1167; 24 Am. & Eng. Enc. Law, 357, 360 (New York Rule); Calkins v. Cheney, 92 Ill. 463; Watkins v. Wilcox, 66 N. Y. 654; Brundage v. Deardorf, 34 C. C. A. 304, 92 Fed. 214; Harris v. Crosby, 173 Ala. 81, 55 So. 231, head-note 3; Munson v. Bringe, 146 Wis. 393, 131 N. W. 904, Ann. Cas. 1912C, 325; Westminster Presby. Church v. Presbytery of New York, 142 App. Div. 855, 127 N. Y. Supp. 836 and head-note 4; Const. of Congregation, art. 5.

The highest ecclesiastical judicatory in the case of an independent congregation is the majority of such congregation, and civil courts must accept as final, on doctrinal points, such decision. Horsman v. Allen, 129 Cal. 131, 61 Pac. 796.

The constitution of the congregation is in the nature of a contract between the members. Jarrell v. Sproles, 20 Tex. Civ. App. 387, 49 S. W. 904; Bear v. Heasley, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 271; East Norway L. N. Evangelical Lutheran Church v. Halvorson,

42 Minn. 503, 44 N. W. 663; First Baptist Church v. Fort, 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 892; Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684; Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805; Fuchs v. Meisel, 102 Mich. 357, 32 L.R.A. 92, 60 N. W. 773.

It is the law that a constitution cannot provide that a certain article cannot be amended. A legislative body cannot derogate from or abridge the powers of its successors. Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684; Keyser v. Stansifer, 6 Ohio, 363; Horsman v. Allen, 129 Cal. 131, 61 Pac. 796; Saltman v. Nesson, 201 Mass. 534, 88 N. E. 3; Philomath College v. Wyatt, 27 Or. 390, 26 L.R.A. 68, 31 Pac. 206, 37 Pac. 1030.

In adopting a resolution that is in conflict with the constitution, the majority do not secede or forfeit their right to the property. The resolution is simply void. Bear v. Heasley, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 270; Horsman v. Allen, 129 Cal. 131, 61 Pac. 796.

Civil courts have no jurisdiction to pass upon the doctrinal question here involved. Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684; Mack v. Kime, 129 Ga. 1, 24 L.R.A.(N.S.) 675, 58 S. E. 184; Ramsey v. Hicks, 174 Ind. 428, 30 L.R.A.(N.S.) 665, 91 N. E. 344, 92 N. E. 164; First Presby. Church v. First Cumberland Presby. Church, 245 Ill. 74, 91 N. E. 761, 19 Ann. Cas. 275; Clark v. Brown, — Tex. Civ. App. —, 108 S. W. 421; Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 So. 716; Christian Church v. Sommer, 149 Ala. 145, 8 L.R.A.(N.S.) 1031, 123 Am. St. Rep. 27, 43 So. 8; Wehmer v. Fokenga, 57 Neb. 510, 78 N. W. 31; Franke v. Mann, 106 Wis. 118, 48 L.R.A. 856, 81 N. W. 1019; Moseman v. Heitshusen, 50 Neb. 420, 69 N. W. 957; Watson v. Garvin, 54 Mo. 353; East Norway L. N. Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 666; Jarrell v. Sproles, 20 Tex. Civ. App. 387, 49 S. W. 908; Poynter v. Phelps, 129 Ky. 381, 24 L.R.A.(N.S.) 734, 111 S. W. 702; Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805; Sanders v. Baggerly, 96 Ark. 117, 131 S. W. 49; Ark-Mo Zinc Co. v. Patterson, 79 Ark. 506, 96 S. W. 170; Jones, Ev. § 266 and cases cited.

The defendant was duly incorporated under the laws of this state, and the former voluntary association ceased to exist. 34 Cyc. 1157 and cases cited in note 5 and page 1158, 1168, 1196 and cases cited in note 13; Holm v. Holm, 81 Wis. 374, 51 N. W. 579; 24 Am. & Eng.

Enc. Law, 361, 362, and cases cited; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 91; Gewin v. Mt. Pilgrim Baptist Church, 166 Ala. 345, 139 Am. St. Rep. 41, 51 So. 947; Happy v. Morton, 33 Ill. 398; State v. First Catholic Church, 88 Neb. 2, 128 N. W. 657; Rev. Codes 1905, §§ 4539, 4816.

The plaintiff had due notice of the proposed corporation. Dubs v. Egli, 167 Ill. 514, 47 N. E. 768; Klix v. Parish, 137 Mo. App. 347, 118 S. W. 1171, head-note 3; 24 Am. & Eng. Enc. Law, 329, 330 and cases cited; 34 Cyc. 1120 and cases cited in note 27; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; Calkins v. Cheney, 92 Ill. 463; Horst v. Traudt, 43 Colo. 445, 96 Pac. 259; Wilson v. Livingstone, 99 Mich. 594, 58 N. W. 646.

The plaintiffs sue merely as trustees of Thingvalla Congregation, and must succeed or fail in that capacity. Turpin v. Bagby, 138 Mo. 7, 39 S. W. 455; Lawson v. Kolbenson, 61 Ill. 405; Cooke v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 308; Mutual L. Ins. Co. v. Inman Park Presby. Church, 111 Ga. 677, 36 S. E. 880; Movius v. Propper, 23 N. D. 452, 136 N. W. 942; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 92; 32 Cyc. 1426; 34 Cyc. 1133 and note 83, page 1171; 24 Am. & Eng. Enc. Law, 342–343, 359; Fort v. First Baptist Church, — Tex. Civ. App. —, 55 S. W. 402; Bartholomew v. Lutheran Congregation, 35 Ohio St. 567; Long v. Harvey, 177 Pa. 473, 34 L.R.A. 169, 55 Am. St. Rep. 733, 35 Atl. 869; West Koshkonong Congregation v. Ottesen, 80 Wis. 62, 49 N. W. 24; East Norway L. N. Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 663; Rev. Codes 1905, § 4213; Red Polled Cattle Club v. Red Polled Cattle Club, 108 Iowa, 105, 78 N. W. 803; 4 Cyc. 312 and cases cited; 30 Cyc. 27, 29 and cases cited; Dale v. Hunneman, 12 Neb. 221, 10 N. W. 711.

Before passage of the resolution of which complaint is made, plaintiffs had ceased to be members of the congregation, and therefore cannot be heard to complain. Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; First Baptist Church v. Fort, 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 892; Dubs v. Egli, 167 Ill. 514, 47 N. E. 766; Christian Church v. Church of Christ, 219 Ill. 503, 76 N. E. 703; Const. of Congregation, Art. 9, § 1; Lutheran Congregation v. St. Michael's Evangelical Church, 48 Pa. 20; 24 Am. & Eng. Enc. Law, 358; Gewin v. Mt.

Pilgrim Baptist Church, 166 Ala. 345, 139 Am. St. Rep. 41, 51 So. 948.

In any event, such resolution was passed unanimously. Pulis v. Iserman, 71 N. J. L. 408, 58 Atl. 554; Kuns v. Robertson, 154 Ill. 394, 40 N. E. 343; Philomath College v. Wyatt, 27 Or. 390, 26 L.R.A. 68, 31 Pac. 206, 37 Pac. 1022; Vargo v. Vajo, 76 N. J. Eq. 161, 73 Atl. 644; Schlichter v. Keiter, 156 Pa. 119, 22 L.R.A. 161, 27 Atl. 45; Lamb v. Cain, 129 Ind. 486, 14 L.R.A. 518, 29 N. E. 13; Russie v. Brazzell, 128 Mo. 93, 49 Am. St. Rep. 542, 30 S. W. 526; Brundage v. Deardorf, 34 C. C. A. 304, 92 Fed. 214; 4 Cyc. 308 and cases cited; West Koshkonong Congregation v. Otteson, 80 Wis. 62, 49 N. W. 24.

The discharge of the pastor relates to the temporal matters of the church, and does not operate as a change of faith. Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; 24 Am. & Eng. Enc. Law, 352; 34 Cyc. 1146.

The corporation which has the legal title to and possession of the property in question is not in court. Hence any relief granted would be unavailing. Rev. Codes 1905, § 7361; First Baptist Church v. Fort, 93 Tex. 215, 49 L.R.A. 617, 54 S. W. 892; Riffe v. Proctor, 99 Mo. App. 601, 74 S. W. 409; Lawson v. Kolbenson, 61 Ill. 405; Allen v. Duffie, 43 Mich. 1, 38 Am. Rep. 159, 4 N. W. 427.

The resolution adopted does not in any case amount to a fundamental departure from the original position of the congregation on the doctrine of inspiration. 34 Cyc. 1166, 1167 and cases cited; 24 Am. & Eng. Enc. Law, 351, 352; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 95; Happy v. Morton, 33 Ill. 398; Lawson v. Kolbenson, 61 Ill. 405; Watson v. Jones, 13 Wall, 679, 20 L. ed. 666; Note to Mack v. Kime, 24 L.R.A.(N.S.) 714.

Even if this were an equitable action, the equities are against the plaintiffs, and they must fail. Pulis v. Iserman, 71 N. J. L. 408, 58 Atl. 554; Vargo v. Vajo, 76 N. J. Eq. 161, 73 Atl. 644; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; Duessel v. Proch, 78 Conn. 343, 3 L.R.A.(N.S.) 854, 62 Atl. 152.

Sveinbjorn Johnson (*Gislason & Gislason,* of counsel), for respondents.

It is highly proper to call persons as expert witnesses in cases of

this character, to explain, define, and construe technical religious terms and phrases. 17 Cyc. 685; Dunnell's Minn. Trial Book, 269, § 1187; Cargill v. Thompson, 57 Minn. 534, 59 N. W. 640; 1 Greenl. Ev. 16th ed. § 280.

The constitution of Thingvalla Congregation provides that if a division occur in the congregation, the property shall belong to the "portion as adheres to this constitution." The majority of the congregation —these defendants—is guilty of a direct violation of its own constitution. 34 Cyc. 1184 and note 53, cases cited, 1185 and cases cited; State ex rel. Watson v. Farris, 45 Mo. 183; Shannon v. Frost, 3 B. Mon. 253; Gibson v. Armstrong, 7 B. Mon. 481.

Civil courts have no ecclesiastical jurisdiction, and when the general assembly or synod of the church decides, the matter is settled. Mack v. Kime, 129 Ga. 1, 24 L.R.A.(N.S.) 675, 58 S. E. 184, and cases cited; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Chase v. Cheney, 58 Ill. 509.

Civil courts will not review the decisions of church tribunals upon ecclesiastical matters merely to determine their jurisdiction. Such decisions are final, and their regularity will not be inquired into. Trinity M. E. Church v. Harris, 73 Conn. 216, 50 L.R.A. 636, 47 Atl. 116; Robertson v. Bullions, 9 Barb. 65; Bouldin v. Alexander, 15 Wall. 131, 21 L. ed. 69.

If the complaint fails to state a cause of action—is indefinite and uncertain—their remedy was by motion to have the pleading made more certain. They cannot raise such objection for the first time upon the trial. Weber v. Lewis, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; Pom. Code Remedies, § 549; Rev. Codes 1905, §§ 6870, 6883; Tisdale v. Ward County, 20 N. D. 401, 127 N. E. 516; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; Pugh v. Winona & St. P. R. Co. 29 Minn. 390, 13 N. W. 189; St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408; Bauman v. Bean, 57 Mich. 1, 23 N. W. 451; Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 889; South Milwaukee Co. v. Murphy, 112 Wis. 614, 58 L.R.A. 82, 88 N. W. 583; Stenson v. Elfmann, 26 S. D. 134, 128 N. W. 588; Rogers v. Penobscot Min. Co. 28 S. D. 72, 132 N. W. 792, Ann. Cas. 1914A, 1184.

The practice of pleading to the merits, and then at the trial raising an

objection in the nature of a demurrer, is not sanctioned or approved. Norton v. Colgrove, 41 Mich. 544, 3 N. W. 159; Barton v. Gray, 48 Mich. 164, 12 N. W. 30; Lamb v. Jeffrey, 41 Mich. 719, 3 N. W. 204; Burke v. Wilber, 42 Mich. 327, 3 N. W. 861; Rogers v. Penobscot Min. Co. 28 S. D. 72, 132 N. W. 792, Ann. Cas. 1914A, 1184; 31 Cyc. 714, 723; Sheibley v. Huse, 75 Neb. 811, 106 N. W. 1028, 13 Ann. Cas. 376; Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 889.

Defendants are estopped to raise such questions at this time, because they submitted themselves to the jurisdiction of the trial court by voluntary general appearance. Rev. Codes 1905, § 6850; 3 Cyc. 515 (II) and notes; McKillip v. Harvey, 80 Neb. 264, 114 N. W. 155; Farmers' Loan & T. Co. v. Joseph, 86 Neb. 256, 125 N. W. 533; Lillie v. Modern Woodmen, 89 Neb. 1, 130 N. W. 1004; Bestor v. Inter-County Fair, 135 Wis. 339, 115 N. W. 809; Rogers v. Penobscot Min. Co. 28 S. D. 72, 132 N. W. 792, Ann. Cas. 1914A, 1184.

The constitution provides that if a division occurs in the congregation, the property shall belong to such portion as adheres to the constitution. 34 Cyc. 1167, 1168; Venable v. Hoffman, 2 W. Va. 310; Nance v. Busby, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; Krecker v. Shirey, 163 Pa. 534, 29 L.R.A. 476, 30 Atl. 440; Mt. Zion Baptist Church v. Whitmore, 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84.

Either legal or equitable title in the plaintiffs is sufficient to enable them to maintain this action. Conrad v. Adler, 13 N. D. 199, 100 N. W. 722; Rev. Codes 1899, § 5904; Laws 1901, chap. 5, p. 9; Merrill v. Dearing, 47 Minn. 137, 49 N. W. 693; Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068; Hoppough v. Struble, 60 N. Y. 434; Pom. Remedies, 101; 20 Am. & Eng. Enc. Law, 793; Turpin v. Bagby, 138 Mo. 7, 39 S. W. 455; Dale v. Hunneman, 12 Neb. 221, 10 N. W. 711; Rev. Codes 1905, § 6767; Fuchs v. Meisel, 102 Mich. 357, 32 L.R.A. 92, 60 N. W. 778; Sykes v. First Nat. Bank, 2 S. D. 242, 49 N. W. 1061; 34 Cyc. 1170, 1171, 1196; Hall v. Henderson, 61 L.R.A. 621 and syllabi 4 and 5; Arts v. Guthrie, 75 Iowa, 674, 37 N. W. 395; St. Patrick's Roman Catholic Church v. Gavalon, 82 Ill. 170, 25 Am. Rep. 305; First Baptist Church v. Caughey, 85 Pa. 271.

Trustees of associations of this kind have powers coextensive with those of the association. 34 Cyc. 1134, 1173, 1174, 1194, 1195 and notes, 1196 and notes 14 and 15; White v. Rice, 112 Mich. 403, 70 N. W. 1026; Fuchs v. Meisel, 102 Mich. 357, 32 L.R.A. 92, 60 N. W. 773; Fernstler v. Seibert, 114 Pa. 196, 6 Atl. 165; Kreglo v. Fulk, 33 W. Va. 74; Lilly v. Tobbein, — Mo. —, 13 S. W. 1060; Callsen v. Hope, 75 Fed. 758; Drumheller v. First Universalist Church, 45 Ind. 275; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; Schnorr's Appeal, 67 Pa. 138, 5 Am. Rep. 415; 1 Abbott, Forms of Pl. p. 26; Rev. Codes 1905, § 6818; Sykes v. First Nat. Bank, 2 S. D. 242, 49 N. W. 1063.

The property of the congregation was impressed with a trust. A conveyance or bequest to a religious association or trustees for same charges the property with a trust. Marien v. Evangelical Creed Congregation, 132 Wis. 650, 113 N. W. 66, 140 Wis. 31, 121 N. W. 604; Munson v. Bringe, 146 Wis. 393, 131 N. W. 905, Ann. Cas. 1912C, 325; Fuchs v. Meisel, 102 Mich. 357, 32 L.R.A. 92, 60 N. W. 777; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; 4 Cyc. 308 (II.); 34 Cyc. 1164 and 1165 and note 57 citing cases, 1167, 1168 and notes citing numerous cases; Mack v. Kime, 24 L.R.A.(N.S.) 675, and extensive note, 129 Ga. 1, 58 S. E. 184; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666.

All the equities of the case are with the plaintiff. Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363.

The rule of the majority cannot be held to authorize a change of faith and practice by a vote of the majority. All members were expected to either subscribe or assent to the Articles of Faith, and be in harmony with them. This in itself affords an exception to the right of the majority to rule in such matters. 34 Cyc. 1167–1169; Mt. Zion Baptist Church v. Whitmore, 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81; East Norway L. N. Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 663; Nance v. Busby, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874; Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805; Baker v. Ducker, 79 Cal. 365, 21 Pac. 764; Christian Church v. Church of Christ, 219 Ill. 503, 76 N. E. 703; Venable v. Coffman, 2 W. Va. 320; Gable v. Miller, 10 Paige, 627; Den ex dem.

Day v. Bolton, 12 N. J. L. 236; Finley v. Brent, 87 Va. 103, 11 L.R.A. 214, 12 S. E. 228; Krecker v. Shirey, 163 Pa. 534, 29 L.R.A. 476, 30 Atl. 440; Franke v. Mann, 106 Wis. 118, 48 L.R.A. 856, 81 N. W. 1014; Marien v. Evangelical Creed Congregation, 132 Wis. 650, 113 N. W. 66; Yanthis v. Kemp, 43 Ind. App. 203, 85 N. E. 976, 86 N. E. 451; Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 So. 714; Reorganized Church of Jesus Christ, L. D. S. v. Church of Christ, 60 Fed. 937; Sutter v. First Reformed Dutch Church, 42 Pa. 503; Jarrell v. Sproles, 20 Tex. Civ. App. 387, 49 S. W. 904; Hendryx v. People's United Church, 42 Wash. 336, 4 L.R.A.(N.S.) 1154, 84 Pac. 1123, 7 Ann. Cas. 764; Kniskern v. Lutheran Churches, 1 Sandf. Ch. 439; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805; Ferraria v. Vasconcellos, 31 Ill. 46; Robertson v. Bullions, 9 Barb. 126.

Evidence as to the position of the pastors they employed, and as to their teachings from the pulpit, is clearly competent. 3 Chamberlayne, Ev. §§ 1725, 1755; 1 Wigmore, Ev. §§ 265, 266.

Even if such evidence is not proper, the presumption is that the trial court disregarded same. Rev. Codes 1905, § 7020; Jones, Ev. §§ 873, 897; Wigmore, Ev. §§ 43–47; Canfield Lumber Co. v. Kint Lumber Co. 148 Iowa, 207, 127 N. W. 70; Spaulding v. Chicago, St. P. & K. C. R. Co. 98 Iowa, 205, 67 N. W. 227; Borneman v. Chicago, St. P. M. & O. R. Co. 19 S. D. 459, 104 N. W. 211; Waterhouse v. Jos. Schlitz Brewing Co. 16 S. D. 593, 94 N. W. 587; 34 Cyc. 1119.

Where the constitution of a religious association provides that the section thereof which relates to the doctrines of faith cannot be amended, any amendment thereof amounting to a departure from the doctrines of faith laid down therein operates as a diversion of the trust property; and those who attempted to effect such amendment are seceders. East Norway L. N. Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 667; Schlichter v. Keiter, 156 Pa. 119, 22 L.R.A. 161, 27 Atl. 45; Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; 34 Cyc. 1120, 1164, 1165.

The question of jurisdiction and of the right of plaintiffs to proceed as they did is purely a matter of ecclesiastical law, and procedure with which the civil courts will not interfere. Pounder v. Ashe,

44 Neb. 672, 63 N. W. 48; Bonacum v. Harrington, 65 Neb. 831, 91 N. W. 888; State ex rel. Watson v. Ferris, 45 Mo. 183; Gaff v. Greer, 88 Ind. 122, 45 Am. Rep. 449; Chase v. Cheney, 58 Ill. 509, 11 Am. Rep. 95.

Goss, J. This is an action at law for the recovery of the possession of the property and records of the Thingvalla Lutheran Church, a religious corporation. The defendant society had existed as an unincorporated religious association from its organization in 1889 until the summer of 1910. In 1909 a schism arose over different beliefs as to the inspiration of the Scriptures. In May, 1910, plaintiffs, members of the society, withdrew from participation in congregational matters. The defendants, the majority, discharged their pastor, and over the protest of the minority withdrew the congregation from the synod to which it had belonged for years, and then incorporated it. At the request of the minority, and without participation of or notice to the majority, the synod by resolution recognized the minority as the true congregation, and declared that the majority had, because of the views on the inspiration of Scripture, departed from the original religious faith of the association, and had thereby violated the constitution of the Thingvalla Church Society. The minority by its trustees then brought this action, charging the defendant and its membership with a departure from the original faith upon and to promulgate which the religious association was founded. This defendants deny.

A jury was waived. The charge laid was found to be true, and judgment was entered in favor of plaintiffs. Defendants appeal.

The particular findings necessary for consideration are but the third and fourth. The third reads, "that the doctrine of plenary inspiration of the Bible is one of the fundamental doctrines of the Lutheran denomination." The fourth was "that the doctrine of the plenary inspiration of the Bible was one of the fundamental doctrines of the faith of the Thingvalla Congregation at the time of its organization, and that the constitution of the Thingvalla Congregation at that time and ever since has presupposed, and now presupposes, that doctrine." Both findings are challenged on this appeal as unsupported by sufficient competent evidence.

The first requisite in determining whether there has been a departure from the original faith is to determine what that faith was with particular reference to the doctrine of plenary inspiration now asserted to have been a part of it, the abandonment of which is the alleged heresy. Plenary inspiration as a doctrine means more than that the Scriptures are inspired. American Encyclopedia 1914 ed. vol. 11, under "Inspiration," and vol. 13, same work, subjects "Lutheran Church in America," and "Lutheranism," Nelson's Encyclopedia, vol. 6, "Inspiration." Century Dictionary defines plenary inspiration thus: "What is meant by 'plenary inspiration?' A divine influence full and sufficient to secure its end. The end in this case secured is the perfect infallibility of the Scriptures in every part, as a record of fact and doctrine, both in thought and verbal expression." It is defined by experts called herein as meaning that the Scriptures were written by men so fully inspired that whatever they wrote was the word of God himself and without error. Upon this doctrine is predicated the conclusion that no human, therefore, has the right to reject as fallacious or erroneous any portion of the Bible, the perfect work of the Divine. The Bible is therefore above the right of private judgment as to either its authenticity or its verity. This constitutes the doctrinal claim of the advocates of plenary inspiration. On the contrary, defendants *recognizing the Scriptures as inspired,* advocate the right of private judgment as to all matters of Holy Writ, and deny the doctrine of plenary inspiration, and assert that plenary inspiration was never a doctrine, fundamental or otherwise, in either their association or of the Lutheran Church of Iceland, from which it sprang and to which it is alleged to be in conformity according to its very constitution.

This leads to the documentary evidence of the fundamental belief of this society and its parent church of Iceland, followed by a consideration of its relations as a congregation to this synod, its withdrawal from it, and validity of any action taken by the synod in the matter.

The constitution of the congregation as originally adopted is now set forth:

Article 1.—Name.

The name of our congregation is Thingvalla Congregation.

Article 2.—Confession.

The Word of God as it is revealed in the canonical Scriptures is the true fountain and the perfect law of the congregation in matters of doctrine, faith, and morals.

2. The congregation accepts the doctrines of Holy Scriptures in conformity with the Lutheran Church in Iceland as expressed in its confessional documents.

3. The congregation shall be affiliated with the Lutheran Synod of Icelanders in this country, which accepts the same confession as the congregation.

Article 5.—Rights.

1. The congregation has power to decide and make disposition of all congregational matters. The majority rules at meetings.

Article 11.—Property.

The property of this congregation cannot pass into the hands of anyone else, unless the congregation so determines by two thirds of all votes. If a division occurs in the congregation, the property shall belong to such portion as adheres to this constitution.

Article 13.—Amendments.

This constitution cannot be amended unless such amendment be adopted by a two-thirds vote at a congregational meeting. It must, however, have been brought up and discussed at the next preceding meeting. But section 1 of this article 2 can never be amended.

The constitution of the synod, necessary to an understanding of the issues, is set forth:

Article I.

The name of the synod is "The Evangelical Lutheran Synod of Icelanders in America."

Article II.

The purpose of the synod is to further harmony and co-operation of

Christian congregations of the Icelandic nationality on this Continent, and generally to promote Christian life and religion wherever its influence may reach.

Article III.

The synod believes that the Holy Scriptures, that is, the canonical books of the Old and New Testaments, are the revealed Word of God, and the only true and reliable rule of belief, doctrine, and life of men.

Article IV.

The synod recognizes the Ecumenical Confessions of the Church, as well as the unaltered Augsburg Confession and Lutheran's Catechism, as a correct exposition and interpretation of the Holy Word of God.

Article V.

The synod shall have supervision over its individual congregations, and advise them in regard to government, ecclesiastical ceremonies, and the external forms of the Divine services. It shall also exercise a church discipline, pure and in conformity with the Word of God, for the maintenance and promotion of the holy office of the clergy, and further to supervise Christian conduct of its congregations, and require of its pastors and congregations faithfulness to its confession.

Article VIII.

* * * (The president shall) settle disputes which may arise within the congregations, and have supervision over the pastors and congregations of the synod. Congregational matters which according to their nature may come before the synod shall, however, be brought up there for final decision if the parties in interest so desire, in accordance with article XI.

Article XI.

The synod at its annual conventions has the supreme power of decision in all disputes in church matters which may arise between or within its congregations.

Article XIII.

Every Lutheran congregation of Icelanders in America, which desires to join the synod, must (1) accept its constitution, (2) make written application for admission to the synod, and (3) submit its constitution to the convention for examination. If the convention decides that the constitution of the congregation is in harmony with the constitution of the synod, and consents to the admission of the congregation by a two-thirds vote of the delegates present, the congregation is thereby regularly admitted to the synod.

It is noticeable that at no place in these constitutions is there any specific mention of any doctrine of inspiration. In the first paragraph of article 2 of the constitution of the congregation, and article 3 of the synod constitution, is found the foundation for the claim of the plaintiff's that plenary inspiration was a fundamental doctrine, so much so as to be presupposed by these constitutions. Such was found by the trial court to be the fact.

A discussion of the government of this church in its relations to the synod is now in order. Concededly, the congregation came into existence as an independent society, governed by its constitution, which document then constituted the contractual bond or law resulting therefrom between its members and the association. Bear v. Heasley, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 270.

The second paragraph of the confession provides "that the congregation accepts the doctrines of Holy Scriptures in conformity with the Lutheran Church in Iceland, as expressed in its confessional documents." Thus these Icelanders organized their society on the same basis of faith as that prevailing in their mother church in Iceland. And such is all the expert testimony. This brings into consideration, as having an important bearing upon the interpretation of this constitution and the determination of the fundamentals of the religious belief of this society, the position of the Lutheran Church in Iceland with reference to *plenary* inspiration of the Bible. Did that church accept *that* doctrine, or was it unknown or undefined in its faith?

What is involved by respondents as evidence asserted to be both strongly persuasive and conclusive is an alleged decision of the synod. The act of the synod must be held to be either a final and conclusive de-

cision of a church tribunal clothed with jurisdiction to determine the questions of plenary inspiration and departure from the faith, or else, on the contrary it must be regarded as its *ex parte* resolution and devoid of authority, of no binding force, void and wholly inadmissible in evidence. Either it was a decision for all purposes, and as such conclusive, or it was nothing. Note to Mack v. Kime, 24 L.R.A.(N.S.) 692, citing many authorities.

This brings into consideration the church polity of this synod and its constituent congregations. The basis for its ecclesiastical system is the constitutions of society and synod as already given. Therefrom it is plain that this church and synod were not governed by a federated form of government, but, rather, what is usually known as the congregational system, wherein the congregations did not surrender their autonomy to the synod, and which body possessed over them but the advisory powers defined by the constitution of the synod. For similar holdings on Lutheran form of church government, see Schradi v. Dornfeld, 52 Minn. 465, 55 N. W. 49; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; Duessel v. Proch, 78 Conn. 343, 3 L.R.A. (N.S.) 854, 62 Atl. 152.

There are two general systems of church polity: One that may be accurately likened to the government of the United States, wherein the units corresponding to our states, the congregations, are held to a federated government, and possess but little power of their own, with no authority to withdraw, with no independence, and governed through a series of higher governing bodies, legislative, executive, and judicial, and in which the congregation as a unit is insignificant, and with the organization as a whole constituting the church. This is well illustrated by the great Catholic, Methodist Episcopal, and Presbyterian church organizations. The other form of church government is merely a confederation or association of independent congregations, each a more or less autonomous body, and more or less loosely confederated, though possessing one or more higher directing and advisory bodies which may, under certain circumstances, also be the judicatory of the congregations thus confederated. The Congregational churches, Baptist, and Lutheran denominations exemplify this form of church polity. With the first class the governing power and authority is imposed from the top down; the opposite with the latter, power being reserved to the

congregations except as granted to the advisory body. Necessarily, in scanning the law and applying precedent, differentiation must be made according to classification of church system considered. A decision by a general assembly of the Presbyterian Church, or by a conference, state or national, of the Methodist Episcopal Church, is not necessarily applicable to this synodical decision, made under the confederated form of church government. See annotated note to Mack v. Kime, 24 L.R.A. (N.S.) 692. Now to examine the facts and situation under which the action of the synod was taken and to determine its effect:

For twenty years this congregation had remained harmonious, until in 1909. A synodical convention was held that year at which were the delegates of this and the other churches in this synod. A resolution, called the Fridriksson resolution, was there introduced. For some time previous to 1909, there had existed two church organs or newspapers, the Breidablik and the Sameiningin, in the columns of which newspapers much space had been devoted to discussion of the doctrine of plenary inspiration. The latter was the advocate, and the former the opponent, of that theory. Their editors were leaders and men of force, and it is likewise apparent that this question thus presented had been widely discussed throughout the synod. Matters came to a head in the synod at its meeting in 1909, through the passage of the so-called Fridriksson resolution, the third paragraph of which, as understood in the light of events, placed the synod on record as adhering to *plenary* inspiration of the Bible. This Thingvalla Congregation then immediately took steps to dismiss their pastor, an adherent of the plenary inspiration theory. He remained, however. This minority faction of plaintiffs developing in the congregation, they on May 21, 1910, voted to no longer participate with the majority, the defendants, in congregational meetings. The next day a meeting of the majority was held at which it was unanimously agreed that the congregation should send no delegate to the coming synodical convention. Instead, they took steps to amend their constitution, preliminary to a withdrawal from the synod, which amendment was passed at a church meeting held June 5, 1910, together with a resolution, unanimously adopted, that the congregation withdraw from the synod; and also a resolution was passed advocating the right of private judgment, condemned by the synod in 1909. The secretary was instructed to notify the president

of the synod of such withdrawal. This was done by letter of June 6, inclosing a copy of the resolution. The president of the synod received this notification, but, instead of accepting it according to article 8 of the synod's constitution, replied by letter that he was "making no decision in the matter, but am referring it to the convention, to be dealt with and disposed of. This I let you know that those who are concerned will have an opportunity to explain the matter to the convention, if they so desire." The majority faction took no action upon this notice, treating their withdrawal as consummated and their society as no longer a member of the synod. The pastor, however, siding with the minority, procured a written remonstrance dated June 10, to be signed by forty-two of the dissenting members. In it the minority "made claim to be the lawful and only Thingvalla Congregation," and asked the synod to "investigate our case, and decide whether or not we are right in this matter." They sent plaintiff Gudmundson with it and as their delegate to the synod, convening June 17. By resolution on June 21, a committee of the synod was appointed to consider the matter, and later the report of the committee was adopted. This resolution was that the majority had violated their own constitution and that of the synod, and that as they would no longer remain within the synod, and because they had removed their minister because of holding different religious doctrines from him, that the petition of the minority be allowed, and the minority was "recognized as the rightful Thingvalla Congregation," and their delegate seated as a delegate from said congregation.

It is conceded that the action of the synod was taken only on the petition of the minority and without any official notice to the majority, of the presentation of said petition or proceedings to be had thereon. The only notice had by the defendant congregation of what might transpire at the synod was that contained in the letter of the president, that the withdrawal would be referred to the synod. The right of the congregation to withdraw by a resolution of a majority of those adhering to its faith is admitted by all. Its withdrawal severed the congregation from the synod *without necessity of consent of that body.* 34 Cyc. 1141; Vargo v. Vajo, 76 N. J. Eq. 161, 73 Atl. 644; Duessel v. Proch, 78 Conn. 343, 3 L.R.A.(N.S.) 854, 62 Atl. 152; Schradi v. Dornfeld, 52 Minn. 465, 55 N. W. 49; Fadness v. Braunborg, 73 Wis.

257, 41 N. W. 84; Heckman v. Mees, 16 Ohio, 583; Bartholomew v. Lutheran Congregation, 35 Ohio St. 567; Lawson v. Kolbenson, 61 Ill. 405; Pulis v. Iserman, 71 N. J. L. 408, 58 Atl. 554. And the learned trial judge so held. It is contended, however, (1) the synod was conclusively the judge of its own jurisdiction to decide upon the petition of the minority, and (2) because the majority had departed from the faith they were not a part of the true congregation, and the synod had authority to so declare, and, having such authority, its decision was final. As to departure from the faith, what is said later in this opinion applies, wherein it is held that there is no evidence upon which that charge can be supported in fact, when once it is determined that the decision of this synod is void. The synod's constitution provides for its authority, and constitutes the contract under which this and other congregations affiliated in its formation. Its purposes are advisory, and that it has been so construed by the synod itself is shown by its resolution discussing the relations of the congregations with that body. Articles 8 and 11 of the synod's constitution, upon which its power to decide in matters of this kind depend, provide that controversies may be "brought there for final decision if the parties in interest so desire, in accordance with article 11," reading: "The synod at its annual conventions has the supreme power of decision in all disputes in church matters which may arise between or within its congregations." The synod by its action passed upon this matter *ex parte,* without notification, and some weeks after this church had withdrawn from the synod. In the congregational form of church government majorities control as to identity of organization, and so long as the majority adhere to the fundamental faith they constitute the legal entity, the congregation. If the synod could pass upon their guilt of heresy weeks after they had withdrawn from it and without notification, it could convict them of that charge, and do as it did. But no authority seems to support its right to do so. Where a matter of jurisdiction to decide is properly before such a tribunal, its decision taking jurisdiction is as conclusive as its decision on the merits, and had this church the federal form of government, and defendant been unable to withdraw from the synod, the action of that body might have been effective. Under such circumstances the court could refuse to pass upon the matter, and compel the parties to litigate before their church tribunal. But here

the defendant congregation, having withdrawn, has no such tribunal. It also has the right to remain aloof as an independent organization, and therefore can demand that the civil courts decide this matter so far, and so far only, as its property rights are involved. Note to Mack v. Kime, 24 L.R.A.(N.S.) 692. Carried to its logical end, if these defendants are bound by this action of the synod, a majority of that advisory body may, in disregard of its own constitution and those of its congregations, by this simple method of declaring any congregation withdrawing (by due action of a majority thereof) to be guilty of heresy or a violation of their constitution, and by recognizing a minority, however small, may nullify altogether the congregational right of withdrawal, and place the church by such action virtually under a federated form of church polity. To the extent that these constitutions are intelligible to any except the expert, courts must construe them as they would any instrument, and thus limit the power of the synod. The *ex parte* declaration of that body is not conclusive, and not a decision, which, if valid, would be *res judicata* on the merits.

But is the declaration of this body receivable in evidence over the objections made? The learned trial court held that it was not a decision, but accepted it as "very persuasive evidence tending to establish the correctness of plaintiff's contention." If evidence at all, it is to be taken at its face. It is either inadmissible as evidence, or else conclusive. There are no authorities supporting the trial court's theory and the one here advanced by the respondents. On the contrary, many authorities hold the action of the synod void, as of a body without jurisdiction, and as inadmissible for any purpose. Bartholomew v. Lutheran Congregation, 35 Ohio St. 567; Lawson v. Kolbenson, 61 Ill. 405; Pulis v. Iserman, 71 N. J. L. 408, 58 Atl. 554. Respondents cite as to the contrary, Pounder v. Ashe, 44 Neb. 672, 63 N. W. 48, which is authority that a church of federated form of government may, after trial, remove a minister of one of its congregations in accordance with its general church laws. The action of the annual church conference at which the minister charged with the infraction of church discipline "was notified of the time of trial, and appeared before the court or investigating committee at the time appointed for the hearing, and took some part in the proceedings, read what in the evidence is stated to have been a protest against the action then taken, listened

to a small portion of the testimony, and then withdrew. The committee adjudged him guilty," which was duly approved and ratified by the conference. As he did not appeal from such decision expelling him from the ministry. It needs no comment to show this decision to be such and not an authority supporting the *ex parte* action of this synod. Bonacum v. Harrington, 65 Neb. 831, 91 N. W. 886, cited, is a decision sustaining the expulsion of a Roman Catholic priest from that church. Gaff v. Greer, 88 Ind. 122, 45 Am. Rep. 449, is also cited by respondents. This was a decision of a presbytery of the Presbyterian Church, wherein "the appellants had several times been before the presbytery, and had filed a written statement that had invoked the judgment under discussion." Counsel fail to discriminate between forms of church government in the citation of such authority. Same is true of State ex rel. Watson v. Farris, 45 Mo. 183, a standard authority on the conclusiveness of judgments of the general assembly of the Presbyterian Church, but it likewise has no application here. And certain language used in Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363, would seem from a casual reading to support the reception in evidence of this synodical resolution, but what was there said was pure *obiter,* unnecessary to the decision, and an examination will disclose the decision was placed upon the fact that both litigants had submitted their controversy to the church tribunal having original jurisdiction, and later appealed, and again both participated. The defeated faction then sought to repudiate both decisions of the church tribunals. The comment relied upon by appellants, however, even under these circumstances, casts doubt upon the conclusiveness of even this double adjudication, where, as there, the form of church polity was congregational. But the parties were held bound as by a submission to arbitration. This case may be considered as an authority against the validity of the synod's action to the extent that it is questioned, instead of the contrary. Bouldin v. Alexander, 15 Wall. 131, 21 L. ed. 69, also cited, is not a holding even touching the admissibility of a resolution such as of this synod. There the church trustees were attempted to be ousted by the summary and void action of a mere minority of the congregation. The question arose whether such trustees had not withdrawn from their church, and placed themselves in the position of seceders. The holding determines

they were not, but still belonged to the congregation, and remarked that the fact that they had applied to the higher governing body of the Baptist Church for relief against the arbitrary conduct of the minority was some evidence that they considered themselves as still within the Baptist church in question. No decision of the higher body was either relied upon or upheld. Comment is only made upon the fact that they thus had appealed for protection, and had been recognized in so doing, as circumstances harmonizing with their conduct and tending to negative secession, the issue before the court.

This synodical resolution offered is clearly a self-serving declaration, as it is admitted the synod is much interested in the event of this action, the testimony of its president establishing the authorization of contributions from the congregations of the synod to assist in defraying the expense of plaintiffs. The resolution was inadmissible for any purpose.

Examination is now in order, of testimony on whether the particular doctrine of plenary inspiration, as distinguished from any and all other doctrines of biblical inspiration, was a part of the fundamental belief of this congregation at the time it was organized, in 1889, either as contained in the constitution or presupposed as a doctrine of the Lutheran Church of Iceland.

Rev. Olafson, plaintiff's first expert, testifies as follows: "By verbal inspiration of the Bible I understand the dictation theory to be meant, that the Bible had been dictated by God so that the men who wrote the Bible were as instruments, as a pen in a man's hand. The synod and the church by their confession and doctrines are not bound by that interpretation. The synod does not hold that view. Plenary inspiration of the Bible, as I understand it, is that God's Holy Spirit so guided and directed holy men in the writing of the Scripture that we have a true and correct account. . . . The delegates at the convention and the pastors at the convention who voted in favor of the Fridriksson resolution made a confession for themselves and also for the synod. . . . The Fridriksson resolution was in the nature of a reiteration of a confession of faith. It might be used as the expression of a man's faith, or the expression of a church of its position. . . . Under the constitution of the synod and the confessions of faith there is no specific declaration in favor of any particular inspiration theory. It

is simply an acceptance of the inspired word of God. The synod has gone on record as believing the Bible as stated in its confession. In this country there are over twenty denominations or divisions of the Lutheran Church, calling themselves Lutheran, and they have taken the Augsburg Confession and the Bible as their foundation." About the Church of Iceland, the witness says: "The Seminingin, the synod organ, has charged the Bishop of Iceland with heresy, something to that effect. . . . The Church of Iceland is Lutheran in name at least, and is a state church. The Seminingin also took the position that the church organ of the Church of Iceland was an advocate of the new theology. That is the position of the Church of Iceland today. . . . The defendants in this case are undoubtedly in sympathy with many of the opinions of the Bishop of the Church of Iceland. I do not consider them good Lutherans. I would not consider the bishop a good Lutheran. The defendants with their views are not good Lutherans by any true Lutheran standard. They are as good Lutherans as the bishop of the church. The thing that marks the Lutheran Church as distinctly Lutheran is the confession of the church, and nowhere in the Augsburg Confession, or in any other confession of the Lutheran Church, is there a statement of any particular doctrine of inspiration. The whole Lutheran Confession is founded on that each Lutheran has the right to interpret the Bible as he chooses. . . . Luther's position was that he had the right, without the assistance of anyone else, to go to the Bible and interpret from it its doctrine, and he conceded that right to every individual. . . . The Church of Iceland and the synod have the same confession of faith, and the synod was organized originally for the sake of teaching on this continent the Lutheran doctrine according to the confession of the Church of Iceland. And the Church of Iceland, or at least a large number of the members of it, including the bishop, took the position that the religious consciousness of the individual had something to do or something to say about the acceptation and rejection of certain passages in the Bible. They take it that its confessions are merely what the framers of the confessions understood the Bible to teach, and state that the church, like any other organization, is bound to grow and develop, and if in the light of modern research the individual has come to the conclusion that some of the statements of the doctrine in the confession of faith con-

flict with the Bible, then he should follow the Bible, and not the confession of faith, and he would still be a good Lutheran. I have no reason to believe that the defendants in this case have gone a step further than the Bishop of the Church of Iceland and the dean of the theological seminary in Iceland and this other instructor. I have always stated that according to the teachings of the Church of Iceland as taught by the bishop, the defendants are good Lutherans. . . . The organizer of the synod, Bjaranson, received his theological training in the Church of Iceland. When the Icelandic Synod was organized, it was organized with Bjaranson as president." . . . The witness also testifies that in 1910 an invitation was extended by the synod to those who had left to rejoin the synod with certain specifications. The synod has gone on record since 1909 as not favoring verbal inspiration. The construction had been put on the action of the synod in 1909 that they had adopted verbal inspiration.

Plaintiff's next expert witness, Rev. Jonsson, testified on this subject: "Have been president of the synod since June, 1908, succeeding Rev. Bjaranson. The Icelandic Synod has no connection with the Church of Iceland, was organized in 1885, consists of several Icelandic Lutheran congregations in this country, thirty-five or forty churches belong to it now. . . . The synod decidedly holds to the plenary inspiration of the Holy Scripture as absolutely true in all particulars and in all matters is fully inspired. . . . The synod has declared that it adheres to the full inspiration of the Bible. . . . I agree with the definition of the plenary inspiration doctrine as given by Rev. Olafson. The synod has not anywhere gone on record in any manner as adhering to any particular theory of inspiration of the Bible. It has not done so by any constitution or in any of its confessions of faith, but it was the understanding of the synod. I do not know of any resolution prior to the Fridriksson resolution, in 1909, where a formal statement of this fact was made. I understand that resolution to mean that the synod rejects the right of the individual to elevate his religious conceptions over and above Holy Scripture. Anyone rejecting parts of the Scripture would be putting himself outside the pale of Lutheran Christianity. . . . There is no decree of the synod to the effect that anyone who refuses to accept every portion of the Bible becomes a heretic to the Lutheran faith. . . ."

Upon the foregoing testimony, together with the constitutions of the church and the synod, and the record of the synodical convention, and its resolution recognizing the minority as the Thingvalla Congregation, the plaintiffs rested their case, whereupon defendants moved for a dismissal because plaintiffs "have wholly failed to show any clear fundamental change of faith or departure from the confessions of faith by the defendants as evidenced by the constitution of the congregation and of the synod, or by any official declaration, or by document by either of these parties." And clearly the motion was well taken, and should have been granted. However, it was denied, and defendants submitted proof. It is noticeable that to this point not one word appears in either pleading or proof of the contention now advanced and found by the trial court, *i. e.,* that these constitutions presupposed and were accepted under a presupposed belief in the plenary inspiration of the Scriptures. Defendants offered but little testimony, only two witnesses testifying to about five pages of printed record, of the hundreds of pages of evidence as finally introduced. Both sides rested the case, whereupon defendants renewed their motion for dismissal, which was again denied. An adjournment was then taken from March until October, during which interval a decision was rendered in favor of the defendants, but was subsequently set aside and the case reopened for the taking of further testimony at Grand Forks, the first hearing having been held at Pembina. Rev. Jonsson was then recalled for cross-examination. He testifies: "There is a theory of inspiration known as that of mechanical inspiration of the Bible." He was asked: "Is such a doctrine (the doctrine of mechanical inspiration of the Bible) recognized by the Lutheran denomination?" to which he answered: "Not as I understand mechanical inspiration. Mechanical inspiration is that theory of inspiration whereby it is held that the sacred authors in writing lost their personality and identity, became as mere instruments in the hand of God, so that they were as the pen in the hands of the writer, but their personal consciousness had nothing to do with what they produced. This theory is not the accepted theory or doctrine of inspiration of the Lutheran Church." Q. "Then you have already explained to the court the doctrine of plenary inspiration, I believe; and that is the doctrine that is held by the synod?" to which witness answered: A. "The synod has never adopted one theological term

officially in its confession. The terms, 'plenary,' 'verbal,' and 'dynamic,' are used, if I may explain, also in different senses by different teachers; and I think it is the definition of the inspiration doctrine, more than the name it is called by, that we in the synod lay stress on. . . . A man rejecting any part of the Scripture would not be considered a Lutheran." Under direct examination he testifies: "I don't know of any Lutheran church which adheres to the doctrine of mechanical inspiration as I define it on the stand. It has never been held by the Icelandic Synod of America, or by any congregation within that synod, to my knowledge. I can state positively that no Icelandic Lutheran congregation in America has adhered to such a doctrine, and I know of no Lutheran church which has for its confessional the Ecumenical Creed, the Augsburg Confession, and Luther's Catechism, that has ever adhered to the doctrine of partial inspiration of the Bible. Such a doctrine has never been recognized by the Icelandic Synod. The canonical books came down to the Lutheran Church as an inheritance. . . . The Missouri Lutheran Synod did at one time adhere to the doctrine of mechanical inspiration, but seemed to be changing." The views of the Missouri Synod are important for their historical bearing, this being the first Lutheran synod in Western America, although German, having a theological school. Counsel for appellants lay great importance on their claim that because the Icelandic Lutheran Synod of America had no theological seminary, many of its new pastors, young men succeeding the old ones, came from the Missouri Synod and general council imbued with less liberal views on the doctrine of inspiration of Scripture than ever prevailed in the parent church of Iceland. And that, through this cause, the synod had gradually departed from the faith of its fathers and founders, instead of any departure by the Thingvalla Congregation from such original faith.

Defendants then offered testimony on the charge of heresy, to the effect that, quoting from the testimony of witness Rev. Robertson, "the exercise of the right of private judgment is compatible with the doctrine of plenary inspiration of the Bible," assuming that form of inspiration to mean "the full and adequate inspiration of Scripture." Dr. Halfyard testifies: "As a theologian I see no conflict between the declaration that a man accepts the word of God as revealed in Holy

Writ as the supreme rule, and the further declaration of the right of private judgment in interpreting Scripture." Rev. Bergman, ordained a minister of the Icelandic Lutheran Church in 1886, and in continuous service of that church as a minister ever since with the exception of two years in work and in this synod, testifies to having been spokesman of that portion of the synod having parallel religious views to those of defendants, and was at the conference in 1909 and opposed the Fridriksson resolution. He testifies at great length and to the effect that the Lutheran Church of Iceland is not committed to the doctrine of plenary inspiration of the Scriptures. That inspiration of the Scriptures is presupposed, but "that is an entirely different thing from claiming that inspiration contains also the idea of *infallibility* or *inerrancy.*" He says: "I would say that a man throwing away the inspiration of the Bible is an irreligious man. Inspiration of the Bible is impossible of definition. I do not know of any other man who has been able to define it. I never had any theory of inspiration. I believe in the inspiration of the Bible, and I believe that it is inspired, all of it so far as it contains religion. There are parts of the Bible that do not contain any religion, and I do not see any reason why I should say that these portions were inspired. They are like any old record, and I do not see any inspiration there. But there is inspiration all through the books of the Bible as far as the Bible preaches,—is the very breath of religion. I do not believe that all of the Bible is inspired. I do not believe, for instance, that some of the genealogies in the Book of Chronicles are inspired. I would not say that they were not written entirely without any inspiration or aid of the Holy Spirit. But I find no reason to connect them with the idea of inspiration at all. What I mean is this: That if I find that these genealogies are conflicting and untrustworthy I do not believe them any more because they are standing in the Bible than if they were standing in any other book. That is what I mean. I do not doubt the Bible as a whole. The most of the Bible, as I said, contains the very breath of religion, and that is with me the great proof of its inspiration. I know any man studying the Bible must have some opinion. But it is impossible to draw the limits where inspiration starts and where it ends. That is one reason that it is entirely impossible to define inspiration. Whenever something in the Bible appeals to your conscience as truth, then

you are sure that that is inspired. I determine that (inspiration) by its appeal to my conscience." This excerpt illustrates the claims of the defendants as to their doctrines on inspiration, as they are concededly in harmony with the views of this theologian. It is interesting that this witness considers that of the Old Testament, the Mosaic law "bears strongest witness of divine verity." The defendants then rested, and the plaintiffs put in their case as to inspiration on rebuttal.

The testimony of Professor Ness, an expert from the Lutheran Church of Norway, is offered by plaintiffs. Concerning inspiration this expert testifies: "The Lutheran Church does not, so far as I know, anywhere officially declare for any particular form of inspiration of the Bible. I think this quotation from vol. II, page 586 of the New International Encyclopedia . . . comes pretty near the truth (in stating): 'The Lutheran Church is a singular body in this, that none of its symbols either prescribe the canon of Holy Scripture or define inspiration.' I find that Scripture speaks of inspiration. I refer to what is stated in 2d Timothy, 3, 16, 'Through all or every Scripture, God breathed.' It is tacitly understood in my synod that the confessions of the church are binding. I do not know of any official declaration to this effect. It is leaning toward the plenary theory." The witness was allowed to express his opinion as an expert upon whether the adoption by resolution of the right of private judgment, as done by this congregation on the same day they withdrew from the synod, would constitute a departure "from the faith of any and all Lutheran churches having these confessional documents," and stated that it would be a departure from the faith. The fair conclusion from all of his testimony is, as he states, "The Lutheran Church is not committed to any particular form of inspiration of the Bible."

Rev. Fossmark, a graduate of the Missouri Theological Seminary at St. Louis, testified in behalf of the plaintiffs, that "for many years the Norwegian Lutheran Church has accepted the theory of verbal inspiration," which form of inspiration witness defines to be "that God has not only inspired the thoughts contained in the Bible, but he has also guided these men whom he used as instruments to write the different books to such an extent that he has helped them to make the correct selection of words, so that every part of it is, by our denomination, considered to be the *word* of God; that not only the word of God is

contained in the Bible, but the Bible is the Word of God as a whole," and that his church opposed the so-called right of private judgment. That a congregation passing the resolution adopted by the majority on June 5, 1910, would not be admitted to the Norwegian Lutheran Church, and that the same would constitute a departure from the faith as the witness would interpret the meaning of § I. of art. 2 of the constitution of the Thingvalla Congregation, which the witness testifies to understand that it is thereby meant that the "Bible as a whole is the inspired word of God in its entirety." Witness, however, stated: "To-day there is a great difference between my church and the church of Norway as to the interpretation of some of the fundamentals of Lutheranism. Every one hundred years Christianity changes. The state of the church to-day in Norway is exceeding deplorable. I understand that the church of Norway is somewhat in the same deplorable condition as the church of Iceland, and the same sad truth is true of the church of Germany. It is here the humbug starts every time. Then it goes over to Norway, then to Denmark, and finally to Iceland, about twenty-five years afterwards. The position of the Methodist Episcopal Church of the United States is not, and never was, the same as that of my church with reference to the doctrine of inspiration. All reformed churches have as their guide their reason. They accept what they think is reasonable, and reject what they don't like. The Methodist Episcopal Church of the United States is afflicted with the same humbug as the Lutheran Church of Germany is on this point. You can go further, and even say that they are full-fledged Unitarians. Many of them reject the Deity of Christ. I would not say anything on this point as to the position of the Presbyterian Church in this country. I know it is the most Calvinistic of them all. This humbug is something that has been repeated and repeated once every century; it is nothing new." This witness does not express any opinion as to whether this "humbug" existed in the church of Iceland in 1889, or whether it, instead of the doctrine of plenary inspiration, might have been a fundamental doctrinal belief of Thingvalla Congregation when organized.

Witness Olafson was recalled, and testifies to practically the same as Professor Ness, adding, "there is nothing specific in the confession about inspiration, because the doctrine of inspiration was not in dispute

when the confessions were written, and for that reason it is taken for granted or presupposed, the presumption being based upon the understanding of the parties to the confessions, historically." All of these witnesses testify as to the different attitudes of Luther toward the Scriptures. But there is nothing in Rev. Olafson's testimony now given concerning inspiration, that conflicts with his testimony of many months before as a part of the main case, that "under the constitution of the synod and confessions of faith there is no specific declaration in favor of any particular inspiration theory. It is simply an acceptance of the inspired word of God." And the testimony of this witness, though called on rebuttal and with full knowledge of what was essential to establish that these defendants he terms as "dissenters and not Lutherans any more" had departed from the faith, failed to testify to or upon the crucial point, and by his testimony afford any specific evidence of the facts necessary to a deduction of such departure from the faith.

Rev. Walper, of the German Lutheran Church of the Missouri Synod was next called, and testifies to the belief of his church in the verbal inspiration doctrine. "I cannot say that the Lutheran Church the world over is in harmony of doctrinal matters with the position that Luther took in his latter years. Our synod is in harmony with that position. We have the same confessional documents in my church as in this church in question. The ministers of my church are bound to teach according to the confessions. The confessional documents say nothing explicitly about the doctrine of inspiration. The Lutheran Church construes the lack of any specific declaration of these documents as to the inspiration of the Bible to the effect that it was generally accepted, at the time these confessions were written, that the whole Bible was the inspired word of God, based on the presupposition that the prophets generally accepted by the church that the Old Testament, that with the prophets the Old Testament was closed; that the writings of the Apostles of Christ composed the New Testament, 2 Timothy, chap. 3, 16th verse, which says: 'Every Scripture is inspired of God' as meaning that all Scripture is inspired by God, verbal inspiration. That is the position taken by my church. So far as I know it is also taken by the Lutheran Church generally in this country." On cross-examination witness testified that he made no "distinction between the

verbal and plenary inspiration. It means that every word in the Bible is literally true. . . . So far as the results of philosophical and scientific inquiry of modern times are against the Bible in the sphere of geology, archæology, history, geography, biology, and astronomy, I repudiate them. In my judgment any man who believes in the verbal or plenary inspiration doctrine of the Bible must repudiate them." This testimony, offered for the purpose of establishing that the doctrine of plenary inspiration was the presupposed faith of the Lutheran Church of Iceland and of this particular congregation, falls far short of making proof for which it was offered. It may be that Lutheran churches in America generally take the position referred to, but it is no proof as to the position of the parent church mentioned in the constitution of this particular church congregation, nor proof of the position of this congregation on the matter, unless we do what the witness would not do, and construe his testimony as specific where he intends it to be general. Had this witness information that the Church of Iceland and that of this particular congregation adopted its constitution with no presupposed belief in plenary or verbal inspiration, still he could truthfully have testified exactly as he did, conceding the truth of all he has uttered.

Witness Glenn testifies on rebuttal for plaintiffs,—he is a member of the United Lutheran Church,—that "I do not know that our church has ever finally declared itself on any theory of inspiration, but the generally accepted theory, I believe, is what is commonly known as the plenary, but as some have stated the verbal, not the mechanical. . . . As far as I know there is no theory of inspiration given in these confessions (referring to the confessions of his particular church), I would say that the church takes inspiration for granted." He draws the conclusion from his interpretation of the constitution of the Thingvalla Congregation, that when they passed the resolution respecting the right of private judgment they departed from the faith of the congregation, though he admits that "I don't think that (the constitution) of the congregation refers to inspiration." That his conclusions are drawn from what the Lutheran Church concludes. But again is the proof lacking as to the original belief of the parent church and the particular one, on inspiration.

Plaintiff Gudmundson then testified to Rev. Bergman, defendants'

expert, having been the first pastor of Thingvalla Congregation, and remained its pastor for twelve or thirteen years, and that he taught, as witness understood him, "that all the Bible was God's inspired word." Witness does not attempt to be specific on the subject.

Rev. Thorlackson was called to testify to the belief of Rev. Bjaranson in 1889, and states: "I can't say what his inspiration theory was or is, but I can state that he believed in the word of God as revealed in the Bible, the true word of God in its entirety. I mean that he accepted the Bible and the whole of it and as fully inspired, as the word of God. I have held the same position, and that is the position he has been holding ever since I have been acquainted with him. I do not know that the synod has had any other position. . . . The reason that nothing is said of inspiration in the confessions is that the confessions are based on scriptural principles, adopted that the Holy Bible was the supreme authority of the confessions, rested upon the Holy Scripture, and was presupposed as being such. It is presupposed that all Scripture is the inspired word of God. This is based upon the testimony of the Scripture itself and of our Lord Himself. I refer to the passage in 2 Timothy, which has been quoted here. I construe it to mean that all the Scripture of the Old Testament canon are inspired. The phrase 'Word of God' is synonymous with 'Scripture,' and means the canonical books. I will say that the phrase of, 'Bible is the word of God,' and this 'the word of God as revealed in the canonical books of Scripture,' mean the same thing. I have understood it to be so accepted and taken by our church. I have been a pastor in the Icelandic Lutheran congregations in this country since I was ordained in 1887. I fully understood that the congregations which I have served at different times in this country have been obliged to conform to the confessional or doctrinal standards of the Church of Iceland as expressed in the confessions adopted by the Icelandic Church, as well as by the congregations that I have served in the synod to which I belong." Witness expressed his opinion that in passing the resolution of June 5 this congregation would not be acting in conformity with the doctrines of faith of the Lutheran churches having for their confessional documents the same as Thingvalla Congregation. On cross-examination witness testifies that the synod "was organized to teach the Lutheran Christianity taught at that time in Iceland and according

to the confessions and the Holy Scripture. . . . The people from Iceland, of course, would know how these confessional documents were interpreted in the Church of Iceland. . . . That it was the same Christianity taught. I am not aware of any disharmony at the present time between the Icelandic Lutheran Synod and the Norwegian Synod. I know that Rev. Bjaranson contended before our synod was organized that there were certain fundamental doctrinal differences between the Church of Iceland and the Norwegian Synod, and the difference was that the Norwegian Synod was not so liberal in doctrinal matters as the Church of Iceland; that he thought the Norwegian Synod was too orthodox; Rev. Bjaranson was very liberal in doctrinal matters when he first came to this country. There has been a change since those early days in the position of Bjaranson in the direction of becoming more spiritual, more faithful to the word of God and to the confessions of the Lutheran Church from my point of view. . . . I think that in this controversy with my brother he contended that he himself represented correctly the position of the Church of Iceland, and that my brother was the representative of the Norwegian Synod. I could not say whether there has been any material change in the Church of Iceland on the doctrine of inspiration since 1906, but I can say this, that liberalism in Iceland has been growing more and more as represented by Lutherans in Iceland, by the bishop and the professor at the university." On redirect examination, witness testifies: "As I have looked upon it, there is a difference in the Church of Iceland now on the doctrine of inspiration and its position on that point twenty-five years ago; liberalism has been growing. I would say that a great change has taken place on this point in the last ten or fifteen years principally." Rev. Jonsson was then recalled by the plaintiffs for the third time, and testifies that in 1885 Bjaranson, as witness understood him, "held very strictly to the full inspiration of all of the Bible," and the witness testifies to substantially the same as Rev. Thorlackson, that Bergman's "conception of inspiration as given in his testimony, as I understand it, is different from the accepted doctrine of inspiration, or inspiration as I have ever heard it presented by any theologian or know of its being presented by any theologians of the Lutheran Church. The mere declaration on the part of the individual to the effect that he entertains and believes in the right of private

judgment in religious things is not heresy. If a man in the exercise of that right rejects one of the canonical books of the Bible, for instance, he departs from the accepted standards."

Many pages are in evidence of articles from the Breidablik by Bergman, that reflect a disbelief of much of the miraculous contained in the Scriptures. There is also in evidence an article entitled, "Necessary Thought Awakener," published by Rev. Bjaranson in 1879, of fifty printed pages. Much of this is devoted to a defense of liberalism in his teachings as against the charge that he was promulgating "heretical innovations" in doctrine. He severely handles the German Theological Seminary of the Missouri Synod at St. Louis, stating that "the Missouri Synod is by far the most narrow-minded Lutheran synod that has hitherto appeared in the human race. If anything is breathed against the theology of this synod, it is as if the very heart of the Norwegian Synod had been touched," and the Norwegian Synod is by the reverend writer placed in the same class. Both are charged with "manufacturing dogma." "That as soon as the Lutheran Pope, Walther in St. Louis, speaks, the echo is immediately heard reverberating from every hill and elevation where the pastors of the Norwegian Synod live, and likewise, if silence reigns in the dogma factory of the Missouri Synod there is silence also in the synod." And many so-called "manufactured dogmas" are dealt with. In it we find the following: "Concerning the inspiration of the Bible, for example, not a single theologian of the Lutheran Church of the present day now teaches the same as the Missouri Synod has 'established,' and this one point is enough to make the Lutheran theologians outside of the Missouri Synod, and those synods which have become subjects to it, heretics" according to Missouri Synod standards. "The worst feature of the Norwegian Synod is perhaps not in the fact that it has copied from the Missouri Synod so many crooked and unhealthy doctrines and advocates them with so much vehemence and impetuosity, but the fact that it always obstinately maintains that it is planting here in America the unaltered doctrine of the Lutheran Church of Norway; and this in spite of the fact that it has received so many protests from the most eminent theologians, both among the pastors and university professors in Norway. . . . It is more than unfortunate that Icelanders should be led into the Norwegian Synod before they

become acquainted with other Lutheran synods in this country; but in order that that portion of the Icelanders which think and is intelligent need not in the future be led blindly into this synod, I have written this eye-opener. I consider it is my plain duty to show people into what they are going, who throw themselves into the arms of the Norwegian Synod." This is important as showing Bjaranson's trend of ideas back six years before organization of this synod, in 1886, on whether in fact the synod with him as its president adopted the doctrines of the Norwegian synods, condemned by Bjaranson. This but epitomizes the testimony consisting of 400 printed pages.

It is established beyond controversy, accepting the testimony of the experts at face, that there is no unanimity on the doctrine of inspiration among the Lutheran churches in America having similar constitutions and confessions; also that from the constitutions and confessional documents of this church and the parent church it cannot be said that any particular doctrine of inspiration was adopted by them. And all experts except those from the Missouri Synod recognize the right of private judgment, but disagree only on the extent to which that right may be invoked. Every expert admits that neither of these constitutional provisions has specific reference to or constitutes a declaration in favor of any particular inspiration theory. Resort is had to presupposition on that score. And in establishing presupposition as a foundation for alleged heresy, plaintiffs are met with the difficulty that their own experts do not stand on the same theory of inspiration. It must be kept in mind that it is not enough that any accepted doctrine of inspiration of Scripture be established or taken as a premise. There is a distinction between "full or adequate inspiration," "verbal," "mechanical," "dynamic," and "plenary inspiration" doctrines. Likewise, inspiration of the Scriptures "in its entirety" is insufficient to meet the measure here required, that it must be proven that these constitutions presupposed "plenary," not "verbal," "mechanical," "dynamic," "irradiant," "partial," or "personal" inspiration. Analysis of the testimony of the experts is interesting. Jonsson, president of the synod, repudiates both verbal and mechanical inspiration, and strikes the nail on the head when he testifies (as did Robertson also) that the terms definitive of different theories of inspiration and the term "inspiration" are used "in different senses by different teachers," and that

"it is the definition of the inspiration doctrine, more than the name it is called by," that is important. Likewise, Bergman for the defendants agrees with plaintiffs that "inspiration of Scripture is presupposed," but adds: "But that is an entirely different thing from claiming that inspiration contains the idea of *infallibility* or *inerrancy*," and asserts that a man throwing away "the inspiration of the Bible is an irreligious man." Thus the alleged arch-heretic agrees with the president of the synod *that the Scriptures are inspired.* "Inspiration," with reference to the Bible, is in a sense a relative term. It is only when some particular kind, degree, manner, or means, as here designated, "plenary inspiration" is asserted and claimed to have been a fundamental to this congregation's original belief, that particularity in the use of the term is called for. And the experts but verify this conclusion when their testimony is scrutinized. Repeatedly they testify that those Lutheran churches having the same constitution and creeds as this association would hold the defendants guilty of heresy to this Lutheran faith because of the resolution of June 5. Yet when that expert is asked his particular theory of inspiration, which must necessarily be the yardstick used by him in determining such question of heresy, no unanimity is found in the measure, the viewpoint of the particular expert. When the particular kinds of inspiration are thus called for and shown to be at variance one with the other, the conclusions of the experts as to whether the facts constitute heresy are accordingly rendered worthless and resolve into a failure of proof. Examine the specific belief of each of these reverend experts as to inspiration, the measure from which he determines heresy. Notice, too, the different Lutheran churches and synods so represented to be speaking on the subject, but all denominated as Lutheran. Only two, Olafson and Thorlackson, besides Jonsson, are from this Icelandic Synod. Professor Ness from the Norwegian Lutheran Synod agrees with Rev's. Olafson and Thorlackson to the extent that he will not say that he believes in plenary inspiration. Olafson and Thorlackson content themselves with asserting that the Bible "in its entirety" is inspired, a generalization only when their testimony is considered to the effect that no particular form of inspiration is declared by the constitution of this church or this synod, or of the parent church of Iceland. As close as Professor Ness will come to stating his views on inspiration is that his

own church (Norwegian Lutheran) is "leaning toward the plenary inspiration theory." Whether it is squarely upon that theory, or where it was twenty years ago with reference to plenary inspiration, he does not venture to assert. Rev. Fossmark has the same church, the Norwegian Lutheran, committed to "verbal" inspiration, meaning, as he has testified, that God selected the very words used throughout the entire Bible; a theory virtually as rigid as mechanical inspiration under which Deity wrote with the hand of man the Bible from cover to cover. Rev. Walper, of the German Lutheran Church and from the Missouri Synod, like Fossmark, who got his views from the German Theological Seminary in Missouri, also asserts his church to be grounded upon adherence to "verbal" inspiration. Both of these witnesses admit that the constitutions and creeds are blank on the question, but supplement them by 2 Timothy, chap. 3, verse 16, admittedly having reference only to the Old Testament. And here it may well be remarked that the difference between the belief of Ness and Olafson, both of whom repudiate verbal and mechanical inspiration and are ministers in the same church as Fossmark, who on the contrary declares verbal inspiration to be the theory of that same church, but well illustrates as it verifies also the fact contended for by appellants, that the Missouri Synod and General Council have narrowed the original liberal belief of the Norwegian and Icelandic Lutheran churches where it has come in contact with them, by training for the ministry the young pastors of the Icelandic and Norwegian Lutheran faiths. Thus the experts themselves have demonstrated unawares, from their very attitude on the doctrine of inspiration, that historically the probability is that the Icelandic Lutheran Synod has gradually become less liberal through the above influences than it was when founded. If anything can be said to be established, this must be so taken. Rev. Glenn, of the United Lutheran Church, repudiates mechanical, but has his church adopting both plenary and verbal. His testimony but well illustrates that even in theological circles the truth is, as plaintiffs' own expert Jonsson declares, that the terms are used in "different meanings by different teachers," that is, ministers. The inevitable result of all this is that, when the testimony is carefully studied, it is all in harmony with the conclusion that must inevitably be drawn, that no particular or specific theory of inspiration is enunciated by the con-

stitutions of either the church or the synod or the confessions of the Church of Iceland, all of which adopt and have always presupposed an adequate inspiration of the entire Bible. When seven experts called to establish *plenary* inspiration of the Bible to have been a fundamental doctrine of Lutheranism, and by inference this particular Church, demonstrate, as they have, the want of unanimity among Lutheran churches even of the same denomination, it is impossible to conclude that the Icelandic Lutheran Church believes in any particular presupposed doctrine of *plenary* inspiration; and this being true of the present, it cannot be inferred that it was any different twenty years ago. *Plenary* inspiration has been a topic for theological discussion since Luther's day. Vol. 5, Encyclopedia Britannica, 1914 ed. page 348B, subject, "Carlstadt," from which we quote: "In 1520 he (Carlstadt) still, however, maintained the doctrine of verbal inspiration and attacked Luther for rejecting the Epistle of James." See Nelson's Encyclopedia, vol. 6, page 451. And when the question of present departure from even the present alleged faith of the Icelandic Lutheran Synod is viewed from the standpoint of the expert and under his particular doctrine of inspiration, his conclusion that the defendants have departed from the faith amounts to naught as proof of the fact. In other words, that a believer in mechanical inspiration finds this church to be heretical to Icelandic Lutheranism means no more than that he would find the entire Icelandic Church heretical from his viewpoint of the inspiration doctrine. In fact one expert does not hesitate to assert this to be the fact, and includes all of the Protestant churches, except possibly the Presbyterian, in the classification as being virtually Unitarian. Each expert according to his particular idea of inspiration pronounces judgment, until the one having the least crystalized views on the subject of the specific kind of inspiration of the Bible, as classified in the evidence, does not hesitate to assert that the defendants are heretics, but in the same breath admits that they are no more so than the Bishop of the Icelandic Lutheran Church, the head of the state church of Iceland.

As judicial notice may be taken of authorities on the subject under discussion, reference may be made with propriety to certain deductions from the evidence drawn from an historical standpoint. It is well known that the state church of Iceland, as well as several other European

countries, is the Lutheran Church. It is historically true that the documentary creed of a state church is usually broad, and often purposely indefinite except as to fundamentals of faith. This is to enable all believers in religious fundamentals, but holding divergent views on degrees of orthodoxy, to nevertheless belong to and remain within the one state church. This is well stated in Encyclopedia Britannica, 1914 ed. vol. 17, pages 141, 142, under the subject, "Lutherans," in discussing the European state churches of that faith. We quote: "The divergences in ritual and organization, the principles underlying all the various ecclesiastical unions, *viz:* to combine two different confessions under one common government, and resulting from it the possibility of changing from one confession to another, have all combined to free the state churches from *any rigid interpretation of their theology formulas.* A liberal and conservative theology (rationalistic and orthodox) exist side by side within the churches, and, while the latter clings to the theology of the 16th century, the former ventures to raise doubts about the truth of such a common and simple standard as the apostolic creeds." This well explains historically that there was method in the admitted omissions of any reference to any particular doctrine of inspiration of the Bible in the written fundamentals of the Icelandic Lutheran Church. Any supposition, as asserted by plaintiffs, that said church presupposed plenary inspiration as a fundamental belief, is probably contrary to fact, historically, especially when it is remembered that this subject of plenary inspiration was a live one at Luther's time. Witness Walper was right in asserting that this doctrine is nothing new. We quote with approval and as applicable the statement in the opinion in Bear v. Heasley, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 270, at page 280, with reference to the constitution and confessional documents of the Thingvalla Congregation and those of the Icelandic Lutheran Church: "The creed was agreed to, not only by reason of what it expressed, but also because of what it omitted." The findings challenged on this appeal are wholly unsupported by any competent evidence. The judgment appealed from is accordingly ordered reversed, and this action dismissed.

FISK, J., concurring. I fully concur in the views above expressed by Judge Goss, but I deem it proper to here briefly emphasize my per-

sonal views. The question is largely one of fact, involving primarily a construction of the constitution of the Thingvalla Congregation, which is the governing and controlling contract between these parties, and must measure their respective rights. Was it the intention of these contracting parties to adopt, and did they knowingly adopt and agree to, the doctrine of plenary inspiration of the Bible? It seems plain to me from this record that such question must be answered in the negative, and that the learned trial court's finding to the contrary is without support in the proof.

No one contends that such constitution or contract expressly stipulates in favor of the doctrine of plenary inspiration, for there is not the least foundation in such instrument for such contention, but it is contended, as I understand it, that such doctrine was "presupposed," or, in other words, inferred or implied. As I construe such instrument, however, there is no warrant for reading into it such implied or inferred stipulation or presupposed doctrine of faith; for it is or must, I think, be conceded that up to that time the Icelandic Lutheran Church had not adopted any definite doctrine or creed upon the subject. On the contrary, it affirmatively appears that the so-called mother church of Iceland professed and adhered to no such doctrine in its confessional documents, or otherwise. I am therefore inevitably forced to the conclusion that if the parties to this compact intended such a radical departure from the doctrines of the mother church they no doubt would have, in unmistakable language, so stipulated. This is but reasonable. They did not deem it necessary, however, to insert any express stipulation on so vital and important a matter, although matters of much more minor importance were carefully covered. The truth is, as I read and construe the record, that no particular doctrine of faith respecting the inspiration of the Bible was ever thought of by them, much less considered. They merely took it for granted that all accepted the doctrine of the inspiration of the Bible. In other words, it was "presupposed" that the Bible was inspired, but in what specific manner it was thus inspired did not, at that time, concern them. If it had, is it not reasonable to presume that they would have covered the subject by express stipulation? It is very apparent that when, some years later, the question arose as to the particular belief of the congregation respecting the doctrine of verbal, mechanical, or plenary inspiration of the Bible,

there was a very decided divergence of views, not only in such congregation, but in the synod as well, which disagreement resulted in a prompt disruption of both organizations. Did such sudden divergence of views necessarily mean that the members of one faction or the other had departed from their views as previously entertained? Clearly not, and if this be true, it serves as a most persuasive answer to the contention that the members of Thingvalla Congregation intentionally agreed, by the adoption of their constitution, to a doctrine of inspiration thus so emphatically and promptly repudiated by the majority after it was first brought to their notice. While one person may suddenly change his views, even on so important a question as religion, it is contrary to all experience that a majority of a large church congregation would do so. If the majority did not change their views, then they entertained such views at the date the congregation was organized, and it is difficult to believe, therefore, that they intentionally subscribed to and adopted a theory of inspiration contrary to their beliefs. Furthermore, it is quite unnatural and improbable that the organizers of this congregation, who had emigrated so recently from their mother country, Iceland, and who did not do so on account of any difference in religious views, would intentionally depart from the views entertained and taught by the mother church. From a careful consideration of the record, I am firmly impressed with the belief that there is no testimony showing that at the date Thingvalla Congregation was organized there was any definite and generally recognized doctrine or belief on the part of the Icelandic Lutheran Church, either in Iceland or America, respecting the different theories of inspiration of the Bible. It was merely taken for granted, or, in other words, presupposed, that the Bible was the inspired word of God. Further than this there was nothing taken for granted or presupposed. How, then, can it be successfully contended that the minds of these parties ever met and agreed in their contract to the doctrine of *plenary* inspiration?

I am unable to discover any competent evidence in the record to warrant a finding that defendants departed from the faith of their congregation. Certain of plaintiffs' witnesses, such as Professor Ness, Rev. Fossmark, and Rev. Walper, it is true, gave it as their bald conclusions that the adoption of the resolution of June 5th constituted a departure from the faith of the congregation as promulgated by article

2 of the constitution. Such testimony is entitled to no weight, for it is wholly incompetent. It was the province of the court, and not these witnesses, to draw the proper conclusions from the facts. These witnesses clearly usurped functions belonging to the court. They might just as properly have given it as their conclusion that plaintiffs were entitled to win in this lawsuit. They should have been restricted to a statement of the facts, leaving the court to draw its own conclusions therefrom. This is an elementary rule of evidence.

Entertaining these views of the record, I feel constrained to differ from the findings and conclusions of the learned trial judge.

BRUCE, J., dissenting. I am unable to concur in the opinion of the majority of this court. The action was in the nature of the common-law action of ejectment, and though the case was tried to the court in the place of a jury, the findings of fact of that court must be given the same weight and effect as if they had been those of a jury. So, too, the question at issue is not, as stated in the majority opinion, whether the defendants have departed from the original Icelandic Lutheran faith, but whether or not they have departed from the original faith of the Thingvalla Congregation, and have violated its constitution. The decision involves an interpretation of that constitution, and ultimately and specifically an answer to the question as to whether or not by adopting the instrument the congregation, no matter what the original faith of Martin Luther or of the Icelandic Church might have been, accepted, as far as it was concerned, the Bible as fully and plenarily inspired, and made this belief a necessary and fundamental feature of its congregational faith. The questions presented are questions of fact, rather than of law, or, at the most, are mixed questions of law and of fact. Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82; Gibson v. Morris, 28 Tex. Civ. App. 555, 67 S. W. 433; Wiswell v. First Cong. Church, 14 Ohio St. 32; First Baptist Church v. Rouse, 21 Conn. 160. They are therefore for the jury, or for the court acting as a jury, and not for the court as a court, to pass upon. 38 Cyc. 1524; Mantz v. Maguire, 52 Mo. App. 136; School Dist. v. Lynch, 33 Conn. 330; Primm v. Haren, 27 Mo. 205; Young v. Stephens, 66 Mo. App. 222; Carp v. Queen Ins. Co. 104 Mo. App. 502, 79 S. W. 757; Bass v. Jacobs, 63 Mo. App. 393; M'Kean v. Wagenblast, 2 Grant, Cas. 462; Reynolds v. Richards,

14 Pa. 205. And if there is in the record competent evidence in support of the findings of the trial court, we are powerless to set aside these findings, even though there may be much, and perhaps equally conclusive, evidence in opposition thereto. The learned trial judge found "that the Thingvalla Congregation was organized in 1889 as a Lutheran congregation, adhering to the doctrine and tenets of faith embraced by that denomination; that the doctrine of plenary inspiration of the Bible was one of the fundamental doctrines of the faith of the Thingvalla Congregation at the time of its organization, and that the constitution of the Thingvalla Congregation at that time, and ever since, has presupposed and now presupposes that doctrine; that the defendants do not accept the doctrine of the plenary inspiration of the Bible, but at the time of the commencement of this action adhered to, and now do adhere to, a doctrine materially different, namely, that each individual may choose or reject portions of the Bible as inspired or as not inspired, and that the defendants have materially and fundamentally departed from the faith of the congregation which it held when organized in 1889, and which it has since held and now holds, and from the doctrines and tenets of faith of the said congregation as expressed in its constitution."

Though much of the testimony of the defendants is directed towards showing the position of the Church of Iceland and even of Martin Luther himself toward the doctrine of plenary inspiration, the real question to be determined is the attitude of the Thingvalla Congregation at the time of the adoption of its constitution in 1889, and whether at that time the congregation, and the synod to which it belonged, believed in the plenary doctrine, and considered a belief in it to be necessary and fundamental.

Though there is evidence to the contrary, there is much in support of the findings of the trial judge, and such being the case this court, which is sitting merely as an appellate tribunal, in a law case cannot interfere therewith.

Article 2 of the Constitution of the Thingvalla Congregation provided: "That the word of God as it is revealed in the canonical Scriptures is the true fountain and perfect law of the congregation in matters of doctrine, faith, and morals. 2. The congregation accepts the doctrines of Holy Scriptures in conformity with the Lutheran

Church in Iceland as expressed in its confessional documents. 3. The congregation shall be affiliated with the Lutheran Synod of Icelanders in this country, which accepts the same confession as the congregation."

In 1889, and two weeks after the adoption of this constitution, the Thingvalla Congregation joined the Evangelical Lutheran Synod of Icelanders in America, whose constitution, among other things, provided that "the Synod believes that the Holy Scriptures, that is, the canonical books of the Old and New Testaments, are the revealed Word of God and the only true and reliable rule of belief, doctrine, and life of men. . . . Every Lutheran congregation of Icelanders in America, which desires to join the synod, must accept its constitution."

It was admitted by counsel for appellants on the oral argument, and there is certainly much evidence in support of the proposition, that the appellants do not adhere to the doctrine of plenary inspiration. There is also much evidence in support of the proposition that both the constitutions of the synod and of the Thingvalla Congregation presupposed that belief. Dr. Samuel F. Halfyard, for instance, though one of the witnesses for the appellants, positively stated that "the phrase that says that the canonical books are *the Word of God would imply the plenary theory of inspiration* or the canonical theory of inspiration, but not necessarily the theory of inspiration known as free inspiration, or, as has been stated here this afternoon, partial inspiration. . . . *Speaking as a theologian, I would say that a man who makes the declaration first that the word of God as revealed in the canonical books is the supreme guide and rule, and then makes the declaration that he reserves the right to accept and reject in matters of Holy Scripture, is not asserting anything further than what is commonly known as the right of private judgment.*" It is true that he afterwards intimated that in his opinion Martin Luther was himself a believer in the doctrine of free inspiration and in the right of the individual to the exercise of his own private judgment, but, as we before stated, the question is not what Martin Luther believed, but the meaning of the terms which were used in the constitution of the Evangelical Lutheran Synod of Icelanders and of the Thingvalla Congregation.

This, as we before stated, is the testimony of one of the experts for the defendants and appellants; and as we understand the testimony of Dr. Robertson, it is in the main to the same effect, though, of course,

both Dr. Halfyard and Dr. Robertson make it clear that they and the church which they represent (the Methodist Episcopal) do not believe in the doctrine of plenary inspiration. When we come to the testimony of the witnesses for plaintiffs, we find more positive testimony. It would be absurd, indeed, to contend that there is not abundant testimony in support of the findings of the trial court. These witnesses are Rev. K. K. Olafson, a former pastor of the Thingvalla Congregation; Rev. N. S. Thorlakson and Rev. Jonsson, vice president and president respectively of the Evangelical Lutheran Synod of Icelanders, Professor Ness of Concordia College in Moorhead, Minnesota, and a member of the United Norwegian Church; Rev. Walper, a member of the Missouri Synod, and Rev. Fossmark, a member of the Norwegian Synod. Of these witnesses, the Rev. Olafson, the Rev. Walper, and the Rev. Thorlakson testify that the technical meaning of the Word "Scripture" is synonymous with "the whole Bible," and that the expression the "Word of God" is synonymous with "the Word of God as it is revealed in the canonical Books of Scripture," *and means the Bible in its entirety.* On the main question of the meaning of the constitutional provisions in issue, the testimony of Professor Ness is similar to that of the other witnesses mentioned, and is in part as follows:

Q. Would a congregation which holds that certain parts of the canonical books of Scripture are not inspired, but untrue and unreliable, be in conformity with the standards, of faith of Thingvalla Congregation as set forth in its constitution?

A. No.

Q. Would you call it a departure from the faith of the congregation?

A. Yes.

The testimony of Rev. Mr. Fossmark, Lutheran minister of Grand Forks, reads in part as follows:

Q. In your opinion would a congregation in adopting such a resolution be acting in conformity with § 1 of article 2 of the constitution of Thingvalla Congregation, which reads as follows: "The Word of God as it is revealed in the canonical books of Scripture is the true

fountain and perfect law of the congregation in matters of doctrine, faith and morals?"

A. It would not.

Q. Would you consider such an action a departure from the faith of the congregation having this constitution?

A. Most certainly.

Q. State whether or not in your opinion this article of the constitution means that the canonical books of Scripture in their entirety are the supreme law and inspired Word of God?

A. Why, it means, in my opinion, that they look upon the Bible as a whole as the inspired word of God in its entirety.

Q. Would a congregation which holds that certain parts of the canonical books of Scripture are not inspired, but untrue and unreliable, be in conformity with the standards of faith of this congregation as it is prescribed by this article in its constitution?

A. It would not.

Rev. Mr. Walper, a Lutheran minister of Grand Forks, also testified on this point:

In my opinion a congregation adopting such a resolution (meaning defendants' resolution of June 5th), could not be acting in conformity with § 1 of article 2 of the constitution of Thingvalla Congregation. I would consider such action a departure from the faith of such congregation. Said article in the constitution means that the canonical books of Scripture in their entirety are the inspired Word of God.

In the testimony of Rev. L. O. Walper we find the following:

Q. Does your church permit an individual member to hold a view that certain portions of the Bible are uninspired, and still remain within the church as a member in good standing?

A. It does not permit that. A member of the church who took that position would be considered to have departed from the faith of the church. . . .

Q. Without reading to any extent from this M. Michelet's Life of Luther, I will just call your attention to certain passages. I refer now to page 272, where he quotes Luther as follows: "I candidly avow my ignorance as to whether I rightly understand the Psalms in their legiti-

mate sense. I do not, however, doubt the verisimilitude of my version of them. Amongst those who have rendered them, one has been in error in one part, and another has mistaken the meaning in another part. I discover meanings that were overlooked by St. Augustine; others who come after me will, I am aware, perceive much that has escaped me. Who will venture to affirm that anyone has thoroughly understood a single psalm? Our life is a beginning and a progress, not a consummation. He is best who approaches nearest to the spirit. There are degrees in life and in action; why should there not be the same in mind? The apostle declares that we are transformed from one light to a greater one." Respecting the New Testament Luther remarked: "The gospel of St. John is the true and pure gospel—the chief of the gospels—inasmuch as it contains the greatest portion of our Savior's sayings. Thus also the epistles of St. Paul and of St. Peter are higher in authority than the gospels of St. Matthew, St. Mark, and St. Luke. In a word, St. John's gospel and his first epistle, the epistles of St. Paul, more especially those to the Romans, the Galatians, and the Ephesians, together with the first epistle of St. Peter, constitute that portion of the New Testament which most clearly show Christ, and which contain and teach all that is useful and necessary to know, even were you never to see any other books." He did not consider the epistle to the Hebrews nor that of St. John to be of apostolic origin. He thus delivered his sentiments respecting that of St. Jude: "It is quite undeniable that this epistle is either an extract from or a copy of the second epistle general of St. Peter. The expressions are nearly identical in both. Jude speaks therein of the apostles as having been their disciples, and as writing after their decease. He quotes texts and mentions circumstances which are nowhere else to be found in the Scriptures." Luther's opinion respecting the Apocalypse is remarkable: "Let each man judge of this book according to the light that is in him and by his own particular perceptions. I do not desire to impose my opinion respecting it upon anyone. I say simply that which I think of it myself. I look upon the Revelations of St. John to be neither apostolic nor prophetic." On another occasion he said: "Many of the Fathers of the Church rejected this book; consequently every man is at liberty to treat it according to the dictates of his own mind. For my part, one single reason has determined me in the judgment I have

come to respecting it, which is that Christ is neither adored in it, nor is he therein taught such as we know him." These being claimed to be by the author as quotations from Luther's works, do you dissent from all this that I have read?

A. You must consider here that Luther was originally not a Lutheran in our sense of the word, but that Luther was originally a Catholic and a monk, and that through study of the Bible—Holy Scripture—he became enlightened, and that he was raised by the Catholic Church, and that he, more and more through studies of Holy Scriptures, became what he was in his latest years.

Q. You don't deny that these quotations are correctly taken from Luther's works, do you?

A. I do not deny it. I make no distinction between verbal and plenary inspiration. It means that every word in the Bible is literally true. For instance, that Eve was made out of a rib out of the side of Adam; that the world was created in six days of twenty-four hours each; in short, that every expression in the Bible relating to geography, geology, and biology is literally true, and also that it is historically true, and that if there is any astronomy in the Bible it is also true. That the sun actually stood still, for instance, at the command of Joshua, and so did the moon if it is mentioned there. If the plaintiffs in this case are members in good standing of the Icelandic Synod, and believe in plenary inspiration of the Bible, then in my judgment they are necessarily in harmony with my views that I have just now expressed, and if they are not, then they are not good Lutherans. Any man who disbelieves any of those things thereby immediately puts himself outside the pale of Lutheran Christianity. There is no word in the canonical books which I regard in any other light than the light I have thrown upon this subject now by my testimony. The holy authors were inspired by the Holy Spirit, and the Holy Spirit selected the vehicle for each thought. That doctrine does not go to the extent of the punctuation marks in the original manuscripts. There were no punctuation marks nor any vowels in the Greek,—there were in the original. In the old manuscripts there were no vowels and no divisions of syllables or words. The marks that were supplied in the sixth century were only put there to make it easier for foreign students of this language to study it. For instance, as originally written, you would have the letters

B R N, we will say; that might be barn or bairn, or anything else you could make out of it by putting vowels in. They put in the vowels in the sixth century. The scholars who put them in, were not, in my judgment, inspired by the Holy Ghost. These marks which they put in, which represent the vowels, are not inspired. The state church of Germany has taken an extremely advanced ground on this doctrinal matter. We have in our confessions the Formula of Concord and all the confessions that are contained in the Book of Concord. So far as the results of philosophical and scientific inquiry of modern times are against the Bible in the sphere of geology, archæology, history, geography, and biology, and astronomy, I repudiate them. In my judgment any man who believes in the verbal or plenary inspiration doctrine of the Bible must repudiate them. . . . . I should say that our church believes that the Holy Spirit used the individuality of the author as he wrote the words of Holy Writ. I believe that the words were suggested to the author by the Holy Spirit.

As I construe the evidence also, the majority were not merely content with repudiating the doctrine of plenary inspiration as applied to the particular words of the accepted books of the Bible, but repudiated whole passages, and to a large extent whole books. Dr. Bergman, for instance, who can be taken as expressing in a large measure the faith of the majority, stigmatizes as absurd a large number of the historical statements of the Old Testament. He says: "Now just this is characteristic of the literature of Israel, the Old Testament, that which contains any history in the proper sense; the writers of Israel did not write the history of their nation in the manner that history is written. They wrote homilies on national events, true and imaginary, but not history. They are much more concerned about the teaching than the history,— shape it and mould it as they see fit to support their doctrine." He then goes on to state that the story that King David prepared for the house of the Lord "an hundred thousand talents of silver and of brass and iron without weight, for it is in abundance" (see 1 Chronicles 22, 14), was an absurdity, as such an amount of money would be more than all the present national debt of Great Britain. In the same way he stigmatizes as absurd the recitals in Numbers, 2, 32, as well as those in the 7th chapter of Numbers, in regard to the amount

and number of sacrifices made in the desert. "When," he says, "a Jew in the exile wrote a homily (midrash) on the basis of some historical event, he did not intend that it should be history, but a pious meditation or sermon on a historical basis." On this basis he also seems to repudiate the story of Aaron and the Golden Calf (Exodus, 32). He states that "it is not necessary to think long about this story to realize how utterly far from all truth it must be. . . . This is too much for a thinking man to believe when he considers the separate features; for instance, the punishment."

In addition to all this I am of the opinion that the whole matter of doctrine has been adjudicated and decided by the Icelandic Evangelical Lutheran Synod of America, and that this court should follow this decision. The decision of the synod was that "it therefore seems apparent that the majority of the Thingvalla Congregation (meaning the defendants herein) has been guilty of a direct violation of its own constitution and of the constitution of the synod, and therefore it is right to allow the petition which the minority of said congregation has presented to this convention for determination, to wit: That the minority be recognized as the rightful Thingvalla Congregation."

This adjudication may not be final as a matter of law, or constitute *res judicata* in the strict sense of the term, but it is and should be persuasive evidence of the highest kind. When the church joined the synod, it expressly agreed "that the synod at its annual convention has the supreme power of decision in all disputes in church matters which may arise between or within its congregations." Article 2, constitution of the synod.

It also agreed to article 13 of the constitution of the synod, which provided that "every Lutheran Congregation of Icelanders in America which desires to join the synod must accept its constitution." It further agreed to article 3 of the constitution of the synod, which provided that "the synod believes that the Holy Scriptures, that is, the canonical books of the Old and New Testaments, are the revealed Word of God, and the only true and reliable rule of belief, doctrine, and life of man."

By joining the synod it accepted the doctrine of the synod, for article 2 of its own constitution expressly provided that "the congregation shall be affiliated with the Lutheran Synod of Icelanders in this country, which accepts the same confession as the congregation." It is

true that the action of the synod was not taken until on or about the 21st day of June, 1910, and was in the form of an adoption of the report of a committee of five which was appointed to sit upon the matter. It is also true that the majority faction of the Thingvalla Congregation had no representative at this meeting, and no definite notice of the appointment of the committee or of the hearing of the report. It is also true that prior to such meeting, and on or about the 6th day of June, 1910, such majority faction of the Thingvalla Congregation had notified the synod of its withdrawal. It is equally true, however, that the dispute arose long before any such withdrawal, and was the cause thereof, and that on or about the 9th day of June, 1910, the president of the synod sent the following notice to the defendants and appellants:

Mr. Olafur Olafson,
Edinburgh, N. D.

Dear Sir:—I am in receipt of your letter of the 6th inst., together with a resolution of a meeting signed by Magnus Benjaminson, president, and Olafur Olafson, secretary. As a synodical convention will be held within a few days I am making no decision in the matter, but am referring it to the convention to be dealt with and disposed of. This I let you know in order that those who are concerned will have an opportunity to explain the matter to the convention if they so desire.

The evidence also shows that article 2 of the constitution of the synod provided that "the synod at its annual convention has the supreme power to decide all disputes in church matters which may arise between or within its congregations."

From all of this it is apparent that the proper tribunal to decide the doctrinal questions in controversy was the synod, and the fact that no member of the majority was present at the convention does not in any way weaken the evidentiary value of its decision. It is true that it was made a short time after the notice of withdrawal, but it was made while acting upon such notice and before the same had been accepted. The constitution of the synod expressly provided for the determination of such matters at such conventions, and, the withdrawal of the majority being based largely upon doctrinal differences, and the dispute having arisen while the church was a member of the synod, it seems hardly proper to hold that a body of people may enter

into a contract, provide for a tribunal which may determine questions arising thereunder, and then avoid the decision of that tribunal, after a breach of that contract, by withdrawing from its allegiance to that tribunal. We realize indeed that every tribunal must provide a hearing and a day in court, and that without such there is no due process of law. Due process of law, however, does not always involve a notification of the exact day or hour when a trial will be had; and when one knows that the matter will be considered in a meeting of a convention, and has an opportunity to send a delegate to that convention, the rules regarding due process of law would seem to be sufficiently complied with.

The matters of doctrine, indeed, which are before us, are such as should be determined by an ecclesiastical, and not by a civil, tribunal. The case before us is in the nature of an action of ejectment. Unless consent had been given that it should be tried by the court, it would have been submitted to a jury, and the absurdity and danger of submitting to an ordinary jury, or even to the ordinary judge, questions concerning theological differences, is too apparent to need amplification. We may accept the contention of counsel for appellants, "that the great weight of authority is to the effect that the jurisdiction of an ecclesiastical tribunal is subject to collateral attack," but even if this be the case, I find no fault with the exercise of that jurisdiction in the case at bar, and, provided that there was a day in court, which I think there was, I am ready to adopt and emphasize the well-known rules that "civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions and all matters which concern doctrine and disciplines;" "and where a civil right or the right of property depends on some ecclesiastical matter such as doctrine, discipline, or church government, the civil court, where the question may arise, will take the ecclesiastical decisions out of which the civil right has arisen as it finds them, accepting those decisions as matters adjudicated by another jurisdiction." See 34 Cyc. 1184. I certainly adopt the general understanding of what are and what are not ecclesiastical questions, and that is: "An ecclesiastical matter is one that concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the

power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church." 34 Cyc. 1185. As I have said before, I believe there was the opportunity to be heard and the due process of law. I do not in all cases say that the courts will not inquire into the jurisdiction of an ecclesiastical body. I do however, say, except in the case of a palpable abuse of power, that "whether a case is regularly or irregularly before the assembly is a question that the assembly has the right to determine for itself, and no civil court will reverse, modify, or impair its action in a matter of purely ecclesiastical concern." State ex rel. Watson v. Farris, 45 Mo. 183; Shannon v. Frost, 3 B. Mon. 253; Gibson v. Armstrong, 7 B. Mon. 481; Mack v. Kime, 129 Ga. 1, 24 L.R.A.(N.S.) 675, 58 S. E. 184; Trinity M. E. Church v. Harris, 73 Conn. 216, 50 L.R.A. 636, 47 Atl. 116; Robertson v. Bullions, 9 Barb. 65.

It is not necessary for me, however, to take this position. Even if the action of the synod was not *res judicata,* it constituted evidence of the most persuasive kind. "But suppose we treat the action of the association as purely advisory, and not judicatory," says the supreme court of Indiana, in Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363, "still its action must have a controlling influence on the civil courts." Again, the Supreme Court of the United States, in Bouldin v. Alexander, 15 Wall. 131, 21 L. ed. 69, a case in some of its aspects much like the one at bar, said: "They claim to be the Third Colored Baptist Church, and as such they were recognized by councils of Baptist churches duly called, and by the Philadelphia Baptist Association, an ecclesiastical body with which the church was associated. That body, it is true, was not a judicatory. Its action was not conclusive of any rights. But the fact that the complainants, and those acting with them, applied for recognition as the Third Colored Baptist Church, and that the association thus recognized them, is persuasive evidence that they were not seceders, and that their rights have not been forfeited."

The record, indeed, discloses that the question under consideration here was twice passed upon by the synod, and there can be and is no claim or pretense that on the first occasion at any rate the plaintiffs and the Thingvalla Congregation generally were not members of that synod. This was on the occasion of the passage of the so-called Frid-

riksson resolution, in June, 1909, which construed the constitution of the synod, and defined the position of the synod and of its membership or congregations upon the question here in controversy, the same provision being in the constitutions of both the synod and of the Thingvalla Congregation. It is true that after the passage of this resolution the delegates of the Thingvalla Congregation withdrew from the convention in a body, but they were present at the time of the introduction and passage of the same, and participated in the discussion and action thereon, and there is no pretense that the *congregation,* as a congregation, withdrew from the synod, or that even the delegates themselves withdrew from the synod as a synod, until long after the schism in the Thingvalla Congregation and the withdrawal of the plaintiffs, that is to say, until June 5th, 1910. The so-called Fridriksson resolution was as follows: "The convention declares that the views which the synod's organ, Sameinigin, has advocated during the past year, are the correct position of the synod, and protests against the attacks on those views which have appeared within the synod by Rev. F. J. Bergman in his periodical, Breidablik. And in consequence of these attacks, the convention makes the following resolution: 1. The convention denies that the confessions of the synod are merely advisory, and not binding, as has been contended by Rev. F. J. Bergman in Breidablik. Confessions are binding until they are repealed. 2. The convention denies that the clergymen of the synod have the right to teach whatever they please, even though they can say that they are teaching according to their best conscience and convictions. They do not have the right to teach within the synod anything which conflicts with what they have bound themselves to teach as pastors of the synod. 3. The convention *denies* that the religious consciousness of the *individual* has the *power of decision over Holy Scripture and may reject its statements at pleasure,* and the conclusion which follows from this, that the Bible is an unreliable book. On the other hand, the convention declares that it adheres to the confession of the synod that the entire Scriptures are the Word of God, reliable and inspired, and that everything in it ought to be judged according to the standard of the Bible itself."

Added to the evidence afforded by the resolution of the synod is the testimony of a number of prominent divines who testify in support of the findings of the trial court and of the contention of the respondents.

In addition to this is the testimony of Sigurbjorn Gudmundson, who testified that he was one of the organizers of the congregation and a member of the committee which drafted the constitution, and that the intention of the framers of the constitution, when they drafted § 1 of article 2 thereof, was "that the congregation must accept the Bible and the whole thereof as the supreme law and inspired Word of God, and that it could not reject any part or parts of Scripture as not inspired." This testimony, I believe, was competent. 34 Cyc. 1157; Robertson v. Bullions, 11 N. Y. 243.

I cannot, in the face of all this evidence, say that the findings and judgment of the trial court are not supported by competent and persuasive evidence, and, being unable to make such findings, I am of the opinion that the judgment of the trial court should be sustained. The whole matter, indeed, resolves itself around an interpretation of article 3 of the constitution of the synod, and ¶¶ 1 and 2 of article 2 of the Thingvalla Congregation, which at no time seem to have been amended; and which some witnesses at least construe to imply the doctrine of plenary inspiration. Much, it is true, is said by counsel of certain of the other provisions and amendments which recognize the confessional documents of the Icelandic and Lutheran churches, but in them is no reference to the question of the inspiration of the Scriptures, or the doctrines of plenary or free or partial inspiration, but merely to the cardinal questions of the Trinity and of the Godhead. The reference, in short, to these documents, in no way affects the scope and application of articles 2 and 3 of the respective constitutions.

I find no merit in appellants' contention that the amended complaint stated no cause of action as it failed to properly allege what the particular tenets were from which the defendants had departed, wherein that departure consisted, and that plaintiffs themselves had adhered to these tenets. If, indeed, the complaint was lacking in anything, it was in definiteness and particularity, and the objection should have been raised by a motion before the trial, rather than by a motion to exclude any and all evidence after the trial had begun. We have held in a number of cases that a complaint will be most liberally construed on a motion to exclude all evidence thereunder, and such a rule is not only in conformity with the spirit of the Code as I see it, but with the holdings of the authorities also. "We cannot," says Judge Cooley,

in the case of Bauman v. Bean, 57 Mich. 1, 23 N. W. 451, "sanction the practice of pleading to the merits, and then raising at the trial an objection in the nature of a demurrer. It is every way an inconvenient practice, and it tends to make litigation unnecessarily expensive. If a declaration fails altogether to set out a substantial cause of action, and is incapable of being made good by amendment, the objection may be taken in any stage of the proceedings; but even then, for very obvious reasons of convenience, the questions of sufficiency ought to be disposed of before parties are put to the expense of preparation for trial. But if the objections to the declaration are not necessarily fatal, the defendant has no claim to the indulgence of a hearing upon them at the trial."

There is no merit in appellants' contention that plaintiffs and respondents failed to specifically allege the incorporation of the defendants. The incorporation was specifically alleged in the answer, and admitted upon the trial by the defendants. This I believe cured any omission that there might have been in the complaint. Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677; 31 Cyc. 714; Rogers v. Penobscot, 28 S. D. 72, 132 N. W. 792, Ann. Cas. 1914A, 1184; Sheibley v. Huse, 75 Neb. 811, 106 N. W. 1028, 13 Ann. Cas. 376.

Nor is there any merit in appellants' ingenious argument that the majority of the congregation, by incorporating themselves after the secession, incorporated the minority, as the constitution provided for a rule by the majority. The controversy is over the church property, and the church property alone. It is admitted that the incorporation was not perfected until August 12, 1910, while it was on June 5th that the majority withdrew from the synod, and specifically declared their renunciation or dissent from the doctrine of plenary inspiration. All the acts of secession, therefore, if secession there was, had been committed before the incorporation, and if these acts amounted to a secession, which the trial court was, I believe, justified in holding, the property became vested in the plaintiffs under article 1 of the constitution, which provided that "if a division occurs in the congregation, the property shall belong to such portion as adheres to this constitution." This, indeed, would have been the rule, even if there had been no constitutional provision. It seems, indeed, to be well established that "the separation or secession of part of the members from a church

does not destroy the identity of the church, or lessen the right of those adhering to the organization, but members seceding from a church thereby forfeit all right to the church property, and the courts, when called upon, will award the property, and all rights pertaining thereto, to those who continue to adhere to the doctrine, tenets, and rules of the church as they existed before the division, or, in case it is a denominational church, to those recognized by the highest judicatory of the denomination as being the church or congregation." 34 Cyc. 1167; Venable v. Coffman, 2 W. Va. 310; Nance v. Busby, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; Krecker v. Shirey, 163 Pa. 534, 29 L.R.A. 476, 30 Atl. 440; Mt. Zion Baptist Church v. Whitmore, 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81.

I am not unmindful of the cases of Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; Holm v. Holm, 81 Wis. 374, 51 N. W. 579; West Koshkonong Congregation v. Ottesen, 80 Wis. 62, 49 N. W. 24; 24 Am. & Eng. Enc. Law, 361, 362 and cases cited; 34 Cyc. 1196, and cases cited in note 13; Gewin v. Mt. Pilgrim Baptist Church, 166 Ala. 345, 139 Am. St. Rep. 41, 51 So. 947; Happy v. Morton, 33 Ill. 398; State v. First Catholic Church, 88 Neb. 2, 128 N. W. 657; 34 Cyc. 1157, and cases cited in note 5 and page 1158, note entitled "Possession of Corporation Presumed." Dubs v. Egli, 167 Ill. 514, 47 N. E. 766 at page 768; Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. App. 347, 118 S. W. 1171; 24 Am. & Eng. Enc. Law, 329–330 and cases cited; Calkins v. Cheney, 92 Ill. 463; Horst v. Traudt, 43 Colo. 445, 96 Pac. 259; Wilson v. Livingstone, 99 Mich. 594, 58 N. W. 646. In none of these cases, however, was there a constitutional provision such as in the case at bar, nor was the incorporation had after the secession and without the consent or connivance of the regular or remaining congregation.

I am of the opinion that the judgment of the district court should be affirmed.

SPALDING, Ch. J. dissenting. While concurring fully in the opinion of Judge Bruce, I desire to add a word showing as succinctly as pos-

sible my conclusions reached after spending some weeks on the record and authorities.

Judges of the different civil courts are not elected with reference to their qualifications as theologians or theological experts. They are not presumed to be, and in fact are not recognized as, such. They are elected because of certain other real or imaginary qualifications. On the other hand, ministers of the gospel, who have spent years or their entire lives in the study of theological questions, the consideration of the doctrines of their own and other denominations, are particularly qualified to pass upon such questions. For this reason civil courts of a country in which church and state are separate uniformly decline to determine theological controversies within a church, when they have been passed upon by the supreme judicature of such church.

The question in this case, the answer to which ought to control this court, is, Has the supreme judicature of the denomination to which the Thingvalla Congregation voluntarily attached and subjected itself passed upon the doctrinal meaning of the Thingvalla constitution and the constitution of the Synod of the Icelandic Lutheran Church in America? If it has, its decision, whatever it was, is binding upon this court. It matters not whether any representative of the Thingvalla Congregation was before the judicature. If not, the least weight that could be attached to the decision of the synod would be, as found by the trial court, that it was entitled to great weight as evidence. If the Thingvalla Congregation was represented, or was a component part of the synod, the decision is conclusive. It is unquestioned that at the time of the adoption of the Fridriksson resolution the Thingvalla Congregation was a member of the synod, was represented in the synod, and participated in the consideration of the questions involved. The decision having been adverse to them, they should not now be heard to question its binding character.

Certain other points may be referred to. I think the basic fallacy of the opinion written by my brother Goss consists in his assumption that the synod must have jurisdiction over the person, so to speak, of the Thingvalla Congregation when it passes upon a theological question, in order to make it controlling in the case of such congregation. The synod had power under its constitution to determine doctrinal questions. That was the only jurisdiction necessary for it to possess,

and all coming within the supremacy or dominion of the synod were concluded by that decision until it should be overruled or reversed by the body which made it.

The right of private interpretation as a term is plainly misapplied. It does not mean the right to reject any or all of the Bible. It means the right to give to any portion, or the whole of the Scriptures, such meaning as appeals to the intelligence and conscience of the reader, all the time assuming it to be Scripture.

Neither is it necessary that the contention of the respondents in this case be proved by the evidence, or established by the record. The evidence is conflicting as to the fact as understood by different theologians, but there is ample evidence to sustain the findings of the trial court, even if such opinions were necessary in the face of the decision of the synod. The synod has construed and interpreted the language of the constitutions. It had authority to do so. It is not for this court to inquire into the mental processes employed, or the evidence on which the synod based its decision. It is sufficient that it came to a decision. We are required only to inquire what that decision was, and then give it such force and effect as may be necessary to determine the right to the ownership and possession of the church property. I apprehend that no member of this court, if expressing his own views, would concur with those of the minority of the Thingvalla Congregation, or of the majority of the synod, on the question of inspiration; I certainly should not; but be that as it may we are confronted with the duty of deciding this lawsuit on the record before us, and not on our personal beliefs.

Referring to the concurring opinion of my brother Fisk: In reply to his statement that no one contends that the constitution of the Thingvalla Congregation stipulates in favor of the doctrine of plenary inspiration, my understanding is that the testimony of several witnesses, experts, is to the effect that the language of the constitution implies plenary inspiration, though it does not use the word "inspiration" or the word "inspired." From their testimony I judge that the terms used have generally been construed by theologians to mean that the Scriptures were wholly inspired. Not only that, but in the employment of this language its authors proceeded on the assumption that it was conceded by all that Scriptures were plenarily inspired, and that there-

fore it was unnecessary to make specific mention of that fact. It was not assumed that it would ever be questioned, and in fact Judge Fisk concedes this when he says: "They merely took it for granted that all accepted the doctrine of inspiration of the Bible. In other words, it was presupposed that the Bible was inspired." But when he continues by saying that "in what specific manner it was inspired did not at that time concern them," he injects into the case an irrelevant and immaterial question. The controversy was far more vital than a quibble over the manner of inspiration. The question was whether all Scripture was inspired, and if it was, then the doctrine of the appellants, to the effect that whole books might be rejected if their contents did not find favor in the judgment and conscience of the reader, was in conflict with the constitutions. My understanding is that when one believes in either verbal or mechanical inspiration he believes in plenary inspiration, but that inspiration may be plenary without being either verbal or mechanical.

I, however, do not consider it very material whether any doctrine of inspiration was considered or thought of when the congregation adopted its constitution. When it joined the synod it agreed to abide by the interpretation placed upon the constitutions of both the synod and the congregation by agreeing to submit all doctrinal questions to it for decision, and even had it contemplated any specific kind of inspiration when the constitution was framed, language was used which left room for growth and expansion. It likewise left room for contraction and narrowing by interpretation. But however the conclusion of the synod may be regarded, it constituted its decision on a doctrinal question, and when it is said that it was taken for granted or presupposed that the Bible was the inspired word of God, the full contention of the respondents is sustained, because such is plenary inspiration. Surely the doctrine contained in the last paragraph of Judge Fisk's opinion is most novel, and would exclude all opinion evidence by experts.

JOHN W. POPE v. BAILEY-MARSH COMPANY.

(151 N. W. 18.)

Written agreement of settlement and release — avoidance of — fraud and misrepresentation — evidence — clear and convincing beyond reasonable controversy.

1. In order to warrant the avoidance of a formal written agreement of settlement and release upon the grounds of fraud and misrepresentation, the evidence of such fraud or misrepresentations must be clear and convincing and beyond reasonable controversy.

Proof — degree of — to impeach such settlement — contract — mental incapacity to make.

2. The same degree of proof is required in order to successfully impeach such settlement and release upon the ground of mental incapacity of plaintiff to enter into such contract.

Settlement and release — avoidance — evidence insufficient to warrant directed verdict — motion for — judgment notwithstanding the verdict — motion for.

3. Evidence examined and held insufficient to warrant the court or jury in avoiding such settlement and release, and it was accordingly error to deny defendant's motions for a directed verdict and for judgment notwithstanding the verdict.

Opinion filed December 14, 1914. Rehearing denied February 9, 1915.

Appeal from District Court, Pierce County, *A. G. Burr, J.*

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

Reversed, with directions to dismiss the complaint.

Polda, Aaker, & Greene (*Walson & Abernethy,* of counsel), for appellant.

The plaintiff assumed all the risks of the employment. Choctaw, O. & G. R. Co. v. Jones, 7 Ann. Cas. 439, note; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; Rev. Codes 1905, § 5544; 4 Thomp. Neg. § 4640, and cases cited.

The test is not whether plaintiff knew and comprehended the dan-

ger, but whether, under the circumstances, he had the means of knowledge and ought to have known and comprehended it. Klatt v. N. C. Foster Lumber Co. 92 Wis. 622, 66 N. W. 791; Hughes v. Winona & St. P. R. Co. 27 Minn. 137, 6 N. W. 553; Renne v. United States Leather Co. 107 Wis. 305, 83 N. W. 473; Ragon v. Toledo, A. A. & N. M. R. Co. 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612; Day v. Cleveland, C. C. & St. L. R. Co. 137 Ind. 210, 36 N. E. 854; Louisville & N. R. Co. v. Hall, 91 Ala. 112, 24 Am. St. Rep. 863, 8 So. 371; Pennsylvania Co. v. Ebaugh, 152 Ind. 531, 53 N. E. 763; Hill v. Meyer Bros.' Drug Co. 140 Mo. 433, 41 S. W. 909, 3 Am. Neg. Rep. 229; Taylor-Craig Corp. v. Hage, 16 C. C. A. 339, 32 U. S. App. 548, 69 Fed. 581; Union P. R. Co. v. Monden, 50 Kan. 539, 31 Pac. 1002; Haley v. Jump River Lumber Co. 81 Wis. 412, 51 N. W. 321, 956; Muldowney v. Illinois C. R. Co. 39 Iowa, 619, 14 Am. Neg. Cas. 612; Aldridge v. Midland Blast Furnace Co. 78 Mo. 559.

The negligence of the plaintiff was not only a proximate cause of his injury, but except for his own negligence he would not have been injured. Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Morrison v. Lee, 16 N. D. 377, 13 L.R.A.(N.S.) 650, 113 N. W. 1025; Beach, Contrib. Neg. § 7; Davis v. Western R. Co. 107 Ala. 626, 18 So. 173; Thoman v. Chicago & N. W. R. Co. 92 Iowa, 196, 60 N. W. 612; Miller v. Grieme, 53 App. Div. 276, 65 N. Y. Supp. 813; Knorpp v. Wagner, 195 Mo. 637, 93 S. W. 961; 4 Thomp. Neg. § 4629.

A full and complete, valid settlement, release and payment for all claims of plaintiff for damages was made prior to the commencement of this action. There was no legal evidence sufficient to show the incapacity of the plaintiff, nor to sustain the claim of fraud and misrepresentation in obtaining the release. A mere preponderance of the evidence is not sufficient to establish such fraud or mistake as will avoid a written release, as it can only be avoided by clear, convincing, and unequivocal proof,—proof beyond all reasonable question. 6 Thomp. Neg. § 7384; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Riley v. Riley, 9 N. D. 580, 84 N. W. 347; Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Anderson v. Anderson, 17 N. D. 275, 115 N. W. 836; Schweikert v. John R. Davis Lumber Co. 117 Wis. 242, 133 N. W. 136; Chicago & N. W. R. Co. v. Wilcox, 54 C. C. A. 147, 116 Fed. 913; Bessey v. Minneapolis, St. P. & S. Ste. M. R. Co.

154 Wis. 334, 141 N. W. 244; Oakes v. Chicago, B. & Q. R. Co. 157 Iowa, 15, 137 N. W. 1062.

In actions at law this rule is slightly modified. Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012.

Defendant's request that the court instruct the jury "that if plaintiff had the capacity and opportunity to read the release and failed to do so, he is estopped by his own negligence to claim that same was not binding on him," should have been granted and the jury so charged. Wallace v. Chicago, St. P. M. & O. R. Co. 67 Iowa, 547, 25 N. W. 772; Pederson v. Seattle Consol. Street R. Co. 6 Wash. 202, 33 Pac. 351, 34 Pac. 665, 7 Am. Neg. Cas. 77; Hartley v. Chicago & A. R. Co. 214 Ill. 78, 73 N. E. 398; Rutherford v. Rutherford, 55 W. Va. 56, 47 S. E. 240.

Plaintiff retained the benefits of the contract of release and settlement, with a full knowledge of all the facts, without offer to return them, either before suit or after, and such acts amount to a full ratification of the settlement. Laird v. Union Traction Co. 208 Pa. 574, 57 Atl. 897; Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798, 10 Mor. Min. Rep. 445; Crooks v. Nippolt, 44 Minn. 239, 46 N. W. 349; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; Northwestern Mut. Hail Ins. Co. v. Fleming, 12 S. D. 36, 80 N. W. 147; Fahey v. Detroit United R. Co. 160 Mich. 629, 125 N. W. 704; Gibson v. Western New York & P. R. Co. 164 Pa. 142, 44 Am. St. Rep. 594, 30 Atl. 308; Carroll v. United R. Co. 157 Mo. App. 247, 137 S. W. 303; Och v. Missouri, K. & T. R. Co. 130 Mo. 27, 36 L.R.A. 442, 31 S. W. 962; Johnson v. Merry Mt. Granite Co. 53 Fed. 569; Vandervelden v. Chicago & N. W. R. Co. 61 Fed. 54; Barker v. Northern P. R. Co. 65 Fed. 460; Brainard v. Van Dyke, 71 Vt. 359, 45 Atl. 758; Conrad v. Keller Brick Co. 79 Ohio St. 461, 87 N. E. 1134; Joslyn v. Empire State Degree of Honor, 145 App. Div. 14, 129 N. Y. Supp. 563.

E. R. Sinkler, for respondent (*Greenleaf, Bradford, & Nash,* of counsel).

The question whether the servant should have been informed as to his surroundings is for the jury, whenever there is evidence tending to show that it was a proper case for such instructions, and where definite conclusions may be reasonably drawn from the testimony. Richardson v. Swift & Co. 37 C. C. A. 557, 96 Fed. 699; New Orleans

Ice Co. v. O'Malley, 34 C. C. A. 233, 92 Fed. 108; Nyback v. Champagne Lumber Co. 33 C. C. A. 269, 63 U. S. App. 519, 90 Fed. 774.

An employee cannot be said as a matter of law to have assumed the risk incident to his employment unless such assumption is shown by undisputed evidence, or is so clearly proven that no reasonable inference can be drawn to the contrary. Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co. 20 N. D. 642, 127 N. W. 993; Revolinski v. Adams Coal Co. 118 Wis. 324, 95 N. W. 122, 14 Am. Neg. Rep. 244.

The question is not whether plaintiff was aware of the conditions which produced the danger, but whether he understood the danger itself. McDonald v. Chicago, St. P. M. & O. R. Co. 41 Minn. 439, 16 Am. St. Rep. 711, 43 N. W. 380.

When the servant is ordered by one in authority to perform an act, and the peculiar risk of the act is not obvious to the servant, and he has not been warned of the danger by the master or by the one in authority under him, the servant has the right to assume that he is not being sent into any unusual peril, and if, while in the exercise of due care, he is injured in the performance of such act, he did not assume the risk incident to the act. Daubert v. Western Meat Co. 135 Cal. 144, 67 Pac. 133; Merrifeld v. Maryland Gold Quartz Min. Co. 143 Cal. 65, 76 Pac. 710; Brazil Block Coal Co. v. Gaffney, 119 Ind. 455, 4 L.R.A. 850, 12 Am. St. Rep. 422, 21 N. E. 1102; Ferren v. Old Colony R. Co. 143 Mass. 197, 9 N. E. 608, 15 Am. Neg. Cas. 481; Brown v. Ann Arbor R. Co. 118 Mich. 205, 76 N. W. 407; Cook v. St. Paul, M. & M. R. Co. 34 Minn. 45, 24 N. W. 311, 16 Am. Neg. Cas. 247; Linderberg v. Crescent Min. Co. 9 Utah, 163, 33 Pac. 692.

Knowledge of a defect, imperfection, or unfitness will not defeat the employee; he must have knowledge of the risk or danger. Thompson v. Chicago, R. I. & P. R. Co. 86 Mo. App. 141; Eichholz v. Niagara Falls Hydraulic Power & Mfg. Co. 68 App. Div. 441, 73 N. Y. Supp. 842; affirmed in 174 N. Y. 519, 66 N. E. 1107; Southwestern Teleph. Co. v. Woughter, 56 Ark. 206, 19 S. W. 575, 13 Am. Neg. Cas. 286; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; 1 Labatt, Mast. & S. 279a; Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; Davis v. St. Louis, I. M. & S. R. Co. 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; Myhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L.R.A. 172, 17 Am. St.

Rep. 436, 6 So. 799; Stiller v. Bohn Mfg. Co. 80 Minn. 1, 82 N. W. 981; Schall v. Cole, 107 Pa. 1; Huddleston v. Lowell Machine Shop, 106 Mass. 282.

Where the master selects a coservant in his employment to instruct and qualify the servant for the new and more dangerous service, the master must select a competent instructor, and be and is liable for his incompetency or negligence while on such duty. In such case, where the servant is injured, the master is liable. Brennan v. Gordon, 118 N. Y. 489, 8 L.R.A. 818, 16 Am. St. Rep. 775, 23 N. E. 810, 24 N. E. 1105; Pullman's Palace Car Co. v. Harkins, 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932; Verdelli v. Gray's Harbor Commercial Co. 115 Cal. 517, 47 Pac. 364, 1 Am. Neg. Rep. 6; Coffeyville Vitrified Brick & Tile Co. v. Shanks, 69 Kan. 306, 76 Pac. 856; Baumann v. C. Reiss Coal Co. 118 Wis. 330, 95 N. W. 139; Carlson v. Northwestern Teleph. Exch. Co. 63 Minn. 428, 65 N. W. 914.

Where the risk incurred by the employment is latent or not usual to such employment, the burden of proof is upon the employer to show that the injured employee knew or ought to have known of the danger. National Steel Co. v. Hore, 83 C. C. A. 578, 155 Fed. 62; Madden v. Saylor Coal Co. 133 Iowa, 699, 111 N. W. 57; Swoboda v. Ward, 40 Mich. 420, 16 Am. Neg. Cas. 1; Thompson v. Great Northern R. Co. 70 Minn. 219, 72 N. W. 962; Stephens v. Elliott, 36 Mont. 92, 92 Pac. 45; Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; Nadau v. White River Lumber Co. 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135; 34 Century Dig. § 907.

Where the evidence concerning a servant's knowledge of defects or risks is conflicting, it is for the jury to determine the facts. Hollinshead v. Minneapolis, St. P. & S. Ste M. R. Co. 20 N. D. 642, 127 N. W. 993; Balhoff v. Michigan C. R. Co. 106 Mich. 606, 65 N. W. 592.

Where the complaint raises no issue of assumed risk, the burden is upon the employer to allege and prove the same. Galveston, H. & S. A. R. Co. v. Parish, — Tex. Civ. App. —, 93 S. W. 682.

Also, the burden is on the employer to prove knowledge of servant of danger or risk. Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co. supra.; Kueckel v. O'Connor, 73 App. Div. 594, 76 N. Y. Supp. 829.

In such cases, *i. e.*, negligence and contributory negligence, if it can

be said that different minds may honestly differ as to the inference and conclusion to be drawn from the testimony, it is properly a case for the jury. Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co. supra; Haugo v. Great Northern R. Co. 27 N. D. 268, 145 N. W. 1053; Webb v. Dinnie Bros. 22 N. D. 377, 134 N. W. 41.

The release or settlement was obtained by the fraudulent representation that it was a written statement of the manner in which the injury to plaintiff occurred. The small money consideration was a mere gratuity and an added inducement for the perpetration of the fraud. Bessey v. Minneapolis, St. P. & S. Ste. M. R. Co. 154 Wis. 334, 141 N. W. 244.

The instructions of the court were a clear and concise statement to the jury of the law applicable to the case, and more especially to that feature which deals with the release and settlement. The court told the jury that plaintiff's proof must show fraud by clear and convincing evidence before they could find for plaintiff. Such words, used in the court's charge, have been construed to mean, "beyond a reasonable doubt." Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872.

At least, they mean more than a mere preponderance of proof. Hall v. Wolff, 61 Iowa, 559, 16 N. W. 710; Winston v. Burnell, 44 Kan. 367, 21 Am. St. Rep. 291, 24 Pac. 477.

The charge of the court placed all of that burden upon the plaintiff which the law would permit; it told the jury what the jury must find to have been proved by plaintiff, and also of the manner and how strong such proof should be. The charge of the court must be read and considered as a whole. Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; McBride v. Wallace, 17 N. D. 495, 117 N. W. 857.

It was not necessary for plaintiff to return the money upon repudiation and before bringing suit. This is a case of fraud in the factum. The plaintiff did not know he was signing a release. It is also a case of fraud in the treaty itself, because plaintiff believed he was merely signing a statement of facts as to his injury. Malkmus v. St. Louis Portland Cement Co. 150 Mo. App. 446, 131 S. W. 148; Herman v. P. H. Fitzgibbons Boiler Co. 136 App. Div. 289, 120 N. Y. Supp. 1074; Bearden v. St. Louis, I. M. & S. R. Co. 103 Ark. 341, 146 S. W. 861;

St. Louis, I. M. & S. R. Co. v. Hambright, 87 Ark. 614, 113 S. W. 803; Illinois C. R. Co. v. Edmonds, 33 Ky. L. Rep. 933, 111 S. W. 331; Illinois C. R. Co. v. Vaughn, 33 Ky. L. Rep. 906, 111 S. W. 707; St. Louis & S. F. R. Co. v. Ault, 101 Miss. 341, 58 So. 102; Roberts v. Colorado Springs & I. R. Co. 45 Colo. 194, 101 Pac. 59; Simeoli v. Derby Rubber Co. 81 Conn. 423, 71 Atl. 546; Mullen v. Old Colony R. Co. 127 Mass. 86, 34 Am. Rep. 349; Parsons v. Lee, 24 N. D. 639, 140 N. W. 712.

FISK, J. On February 23, 1912, plaintiff met with a serious personal injury while in defendant's employ, and he seeks by this action to recover damages therefor, basing his claim thereto upon the alleged negligence of the defendant in failing to provide him with a reasonably safe place to work. The answer puts in issue the alleged acts of negligence set forth in the complaint, and alleges that the plaintiff's injury was the direct and proximate result of plaintiff's own negligence. Also that plaintiff knowingly assumed the risks incident to such employment. As a further defense it is alleged that a full settlement was had between the parties of the alleged claim for damages, and that the plaintiff, for value, executed and delivered to defendant a release in full of all claims for damages occasioned by such injury. By way of reply plaintiff alleged in substance that on the date such purported release was executed he was lying in a hospital in Minot, suffering excruciating pain as the result of his injuries and was unfit to transact any business, and, on account of such pain he was at times unconscious and did not realize what was going on around him. That on such day two men came into his room at the hospital and represented that they desired to obtain from him a statement as to the manner of receiving his injuries, and after asking plaintiff certain questions they requested him to sign a statement which he signed, believing the same to be a statement merely relating to his injuries, but which document he believes was the release aforesaid, and that he was thereby falsely and fraudulently deceived and misled by defendant's agents. He further alleges that he did not, on the 29th day of February, 1912, nor at any time, agree with the defendant to release and discharge it from any or all liability which had or might thereafter accrue by

reason of such injuries, and that he never at any time agreed with defendant to settle said matter for $100 or for any sum whatsoever.

These issues were tried to a jury, resulting in a verdict and judgment in plaintiff's favor. A motion for judgment *non obstante* or for a new trial was made and denied and judgment entered, to reverse which judgment and order this appeal is prosecuted.

Appellant's specifications challenge, in several particulars, the sufficiency of the evidence to justify the verdict, and they also call in question the correctness of numerous rulings and instructions, as well as refusals to instruct. As we view the record it will be necessary to notice only the specification challenging the sufficiency of the evidence to show that the release aforesaid was obtained through fraud or misrepresentation on defendant's part, or that plaintiff was not, at the time of executing such release, capable of understanding the legal effect thereof.

Such release was executed on February 29, 1912, being six days after the plaintiff's injuries and about six months prior to the bringing of this suit, and is in the following words:

Whereas, the undersigned was injured on or about the 23d day of February, 1912, under circumstances claimed to render Bailey-Marsch Company, a corporation, liable in damages; and whereas the said Bailey-Marsch Company denies liability therefor, and whereas both parties desire to compromise and have agreed to adjust and settle the matter for the sum of One Hundred Dollars ($100), and the further payment of the bill at St. Joseph's Hospital and the bill of Dr. Pence for services.

Now, therefore, in consideration of said sum, the receipt of which is hereby acknowledged, and the further payment of said hospital and doctor bills, I, John W. Pope, do for myself, my heirs, executors, and administrators, hereby compromise said claim and release and forever discharge said Bailey-Marsch Company, a corporation, its successors and assigns, from any and all liability which has accrued or may hereafter accrue to myself, my heirs, executors, and administrators by reason of said injuries or damages occurring therefrom. And it is fully understood and agreed that there is no agreement on the part of

the said Bailey- Marsch Company to do or omit to do any act or thing not herein mentioned.

Witness my hand and seal at Minot, North Dakota, this 29th day of February, 1912.

John W. Pope. (Seal)

Witness:
A. R. Earl,
Charles A. Edblom.

State of North Dakota, }
County of Ward, } ss:

On this 29th day of February, in the year 1912, before me personally came John W. Pope, to me known, and known by me to be the individual described in, and who executed the foregoing instrument, and he acknowledged that he executed the same.

Charles A. Edblom,
Notary Public, Ward County, North Dakota.

The facts surrounding the settlement which culminated in the giving of such release are detailed by the various witnesses and in substance are as follows:

Plaintiff admits the payment to him of $100 on February 29th, and the undisputed evidence shows that defendant in the following June or July paid plaintiff's hospital bill, amounting to $261, and his doctor's bill, amounting to $325. The witness, Edblom, the notary public who took plaintiff's acknowledgment on such release, testified to his calling upon the plaintiff at the hospital in company with one Thompson, and testified to the fact that plaintiff signed and acknowledged such instrument in his presence, and that he, the witness, asked plaintiff if he had read and understood the contents of the document and if it was made and executed of his free will, to which plaintiff nodded, yes, whereupon the witness affixed his signature and seal to the certificate of acknowledgment. This witness also testified that when he called at the hospital to take such acknowledgment he observed plaintiff's apparent physical condition and heard him talk, and in the conversation between them the plaintiff responded promptly to questions asked him, and "from what I saw of the man in that transaction

he seemed to be able to understand what was going on around him, and, in my judgment, he was in full possession of his mental faculty."

Plaintiff in rebuttal testified:

I heard Mr. Edblom's testimony; I do not remember that I signed any papers.

Q. Did they ask you to sign a written statement?

A. He did. I do not remember who was present there; I was, at that time, in lots of misery and pain and agony; as near as I can remember they came up to me and says "We have a statement here we want to make to you," and started to tell me about this statement; they asked me to sign a statement; I do not remember that I read any papers, I do not know the contents of any papers I signed; they told me it was a deposition of my accident here; they did not tell me it was a release; as near as I can remember it was a statement of what happened in the basement, acts surrounding the accident; that is what I thought I was signing; he said "We are going to pay your doctor's bill here, and then we will give you time for two months, of $96," and he says "We will put it up to $100 and that will keep you up until such time as you can get around, and the doctor says you will be out inside of two months, and that will hold you up until you get out of the hospital." I received $100 from them; it was for things I had demanded or something similar to that.

Q. For the time you had lost?

A. For the time I had lost.

Q. Or would lose?

A. Or would lose from that time up to the time I could go to work. I did not intend to sign any instrument and would not have signed any instrument at that time for a settlement if I had known what the instrument was; I first learned that I had signed Exhibit "D" when you (Sinkler) got a letter from the company; you sent for me to come to your office, and there you handed me that paper; that is the first I learned or knew that they claimed I had settled this matter.

On cross-examination he testified:

I do not remember seeing Thompson and Earl in the hospital at about the time this statement was talked about. I do not remember the occasion when they called. I do not remember seeing them; I remem-

ber these two men, but I do not remember who they were; I remember two men being beside the bed; I didn't remember at the time who they were. I knew Earl when I was down there at work; I did not recognize him for sometime afterwards; I do not remember him being there when this statement was made; I do not remember that they told me what was in it; I do remember they told it was a deposition of what occurred at the time of the accident; it was a statement I was to make to them of my recollection of what happened at the time of the accident; that is what I thought they wanted. I do not remember how long I had been in the hospital when these two men came to see me, it seemed a short time. I do not remember that I recognized the doctor at first, after I went to the hospital; sometimes I recognized people and other times I didn't. I began to recognize the doctor about the latter part of the first week. When these two men called I was in the first ward down stairs; I was in there maybe a little over two weeks; I left there some two weeks or more before the skin-grafting operation was performed; I had fully regained consciousness at that time; during all those early weeks I was not unconscious all the time; there were times when I didn't realize what I was doing.

Q. How do you know you didn't realize them?

A. I could tell it; my mind.

Q. You are testifying now about a statement that was obtained from you when you say you didn't have any mind, or realization, is that it? is that not so?

A. At that time.

Q. Is that one of the particularly bright spots in your memory, during those weeks, when they called for a statement?

A. I don't know whether you call it bright or not.

Q. You remember it?

A. I remember it. . . . I do not remember anything else in particular that occurred there during those two weeks.

Q. Do you recall getting $100 about that time?

A. Oh, that statement, yes. I gave the $100 to the girl shortly after they went away, some two or three minutes; I told her to put it away for me; I had her bring it back to me several times while I was in the hospital. I remember Miss Mulzof, the head nurse in my ward. I do not remember her being in the room when the statement was asked

for, nor when these men stated to her that the company would pay the hospital and doctor's bills, and that there had been a settlement made and that was part of it; I do not remember it. I do not remember a conversation with Sister Lucy of the hospital some weeks afterwards when I complained of my not recovering as fast as I ought; I did not tell her that I had settled with the company; I do not remember saying anything about it to her; if it occurred six weeks after I went to the hospital I would be in sound mental condition then.

Q. If she should testify that you did so say, would you say it was false?

A. I do not say it is false, but I do not remember it; if I did say it, it was true.

Q. You do not remember Mr. Edblom having asked you if you had read it and knew the contents of the instrument you signed at that time, when these two men were there?

A. No, sir.

Q. You do not remember seeing Edblom there?

A. At what time?

Q. Any time at all?

A. I believe I remember seeing him there once after that.

Q. After what?

A. Along in the middle—or something like four or five weeks, maybe something like that.

Q. Was he there to see you?

A. I think so; some man was there; suppose it is the same man.

Q. That was four or five weeks after this occurrence of the statement?

A. Yes, sir.

Q. And this man Edblom came to see you?

A. Well, I do not know whether that was his name or not.

Q. Well, the man that was on the witness stand here, testifying to your acknowledgment to this agreement, is he the man you are talking about?

A. No, sir.

Q. Then you say you do not remember ever having seen Edblom at all?

A. I do not know, never heard of his name at all before until he was

up here—I remember signing a paper; if I read it I do not remember of it; I won't say I didn't read it; I do not remember reading it; if I read it I would not know what was in it.

Q. Why not?

A. I do not remember reading it.

Q. I ask you if you read it, wouldn't you remember reading it?

A. I think so, if I read it over—If I read it I do not remember what was in it now; I can't tell how I account for that; I suppose it was being in the condition I was; I had pain, I didn't care for anything at that time, I didn't care whether I lived or died; it didn't make any difference to me; I can remember I was in agony from start to finish. I didn't pay any attention to anything that was going on at all. At times I knew when they took the bandages off my leg; after the first day I remember when they took them off and put them on. I recognized the doctor and the nurses, and the inmates of the ward, and used to talk with them quite frequently. I do remember distinctly the details of this money payment, what it was for.

Q. How do you account for being so clear and distinct in your memory in regard to the details of that transaction?

A. Well, he just told me what it was for and I signed it.

Q. But you say that the thing you signed didn't have anything to do with money?

A. I never remember any money being in it.

Q. But what did you talk about signing it for if there wasn't anything about that there?

A. It was on a statement, the statement of how I got hurt, that is what I remember.

Q. Was there any money in the statement?

A. I do not know. The statement gave me money.

Q. I am asking you how you can remember so distinctly all that was said about the payment of money and what it was paid for, if you were in the condition you have described; how do you account for it now? You said they told you they would pay you $96 per month, was it?

A. That was it.

Q. For what, for wages?

A. $96 for wages.

Q. For how long?

A. For two months.

Q. And what other money were they to pay you?

A. $4 to make it $100. The paper I signed was the statement I have testified about, concerning the injury. I do not remember giving them any statement; I do not remember that they asked me questions; they may have, but I do not remember telling them anything about it. They asked me questions and I suppose I answered them; what questions they asked I do not remember; I have no recollection of what they asked me or what I told them; it was on the same day that they gave me the money; I do remember distinctly that they gave me $96 for two months' time and put in $4 to make it $100; that is clear and distinct in my mind; it all happened on the same day, and during the same visit of these two men. I remember sending for the girl to put the money away, but I do not remember whether it was the clerk in the hospital or not. The reason that I am not able to remember these things is because of the intense suffering and agony I was undergoing from my injuries; I was not able to understand much that was going on about me by reason of that fact. These men that were there requested me to sign the statement before I got the $100. I think they wanted me to sign before they gave me the money; I do not remember whether I signed it first or last.

Q. Why do you remember whether they requested you to sign it before you got the money?

A. Well, I said I did, but I don't. Referring to the occasion when these men were at the hospital, I remember the statement being handed me to sign, I remember the fact of signing it; I was lying on my back, but I don't remember how I signed it. I do not know who it was that gave me the money; I do not believe the doctor was there; I knew him before, but I didn't know those other men.

Q. Didn't you know whether they were men you had seen before or not?

A. Yes, sir.

Q. You knew you had seen them before didn't you?

A. I do not remember.

Q. But you remember you made the bargain you testified to here, about the $100, do you?

A. Yes, sir.

Q. That you can remember distinctly, that is right?

A. Yes, sir,—I am more positive about the $100 proposition than I am about the statement.

We have quoted the plaintiff's testimony in full bearing upon the alleged incapacity to execute the release and the alleged fraud and deceit practised upon him by the defendant, for it is all the evidence on this subject produced by him at the trial.

To rebut plaintiff's testimony the defendant offered as witnesses Dr. Pence, the physician in charge of plaintiff at the hospital, R. M. Thompson, who represented defendant in effecting the settlement, C. A. Edblom, the notary whose testimony we have heretofore referred to, A. L. Campbell, a patient in the same ward of the hospital where plaintiff was when the release was given, Julia Noakes, clerk in the hospital, Rosa Mulzof, nurse in charge of plaintiff's ward at the hospital, and Sister Lucy, one of the Sisters in charge of such hospital.

Dr. Pence testified:

I heard the testimony of the plaintiff when he was last on the stand. After he was taken to the hospital I was in attendance on the plaintiff for a period extending, with the exception of ten days, from February 23d to about the 10th of June; from March 9th to 20th I left him in charge of Dr. Ringo, a resident physician of Minot. During the first week of plaintiff's confinement in the hospital I called on him three times a day for the first three or four days and twice a day thereafter; during that period I examined his condition and record very closely; noted his temperature and pulse among other things; I changed the bandages once a day myself, and conversed with him every time I called; during that ten-day period I conversed with him about other things than his case. From my observation of his condition, his record in the hospital, my conversation with him about his case and other matters he was, after the first day or two, in my opinion, possessed of his full mental faculties at all times that I saw him. When I first saw him at the hospital on February 23d, he was unconscious; that condition did not last to exceed one hour after he arrived at the hospital; I saw him three times a day for three or four days, and twice a day thereafter; during that period his condition as to consciousness was practically normal; I found him in no unconscious condition during that period

other than when he was asleep; there was no indication of delirium during any of those visits; on those visits during the first week or ten days, I would spend on an average from thirty minutes to an hour with him at each visit.

Q. Do you wish to be understood that during all those five or six days that this man was not under the influence of morphine, he was suffering intense pain as you observed him, all the time?

A. He was not. There were seasons when he was not making manifestations of pain; at such time he conversed intelligently. In the proper treatment of this case while the patient was at the hospital there was no occasion for administering morphine in such quantities as to produce deadening of the mind, or delirium. I was with Mr. Thompson and Mr. Earl on one occasion when they went to the hospital; I think they went with me several days after the injury; I was in the room with them when Pope was and remember that he conversed with them, and also with me; I was there to note his condition; there was nothing in his condition at that time to indicate any abnormal condition of his mind; I was there on the following day and noticed no such abnormal condition, nor did I at any time after that.

The witness R. M. Thompson, who represented defendant in effecting the settlement, thus detailed the conversation which he had with plaintiff at and prior to obtaining the release:

I asked Pope about the matters leading up to the accident and he told me on the morning of that day he called to see Cockrum in regard to work, he said he had not been working for several days, and he stopped to see Cockrum and asked him if there was any work there, and Cockrum was talking with one of the other men, and he asked him if he could take care of the salamanders, and he told him he could do it if anyone could, and Cockrum told him about the work and said Dawson would show him how to do it, and told him not to go down in the hole, let all the smoke out, be careful not to stay down too long; he said Dawson then went down in the basement with him, showed him the location of the salamanders, told him to fill them, told him where to get the coal, told him not to stay down too long, but come up after filling each salamander. He stated he had filled all but the last salamander and was filling that, and the next thing he knew he was in intense pain

in the hospital. He stated he didn't know how the accident happened; didn't know anyone was to blame for it; thought it was entirely accidental. We then had some talk as to the probable time he would be laid up, and when I was there the day before the doctor had talked with him about the extent of his injuries, and he told him he expected to have him up and around in from eight to ten weeks, but he couldn't tell how long it would be before he would be able to get to work; that he was unable to state. I then asked Pope as to who was going to pay the expenses, but he said he didn't know, he said he wasn't able to, and I then took up the question as to whether he expected Bailey-Marsh Company to pay it. Well, he said, it was an accident, and I asked him what he expected them to do for him; he said he didn't know, that was up to them. I then asked him if he was willing to make a settlement if we paid him $100 and the hospital bill, and we had some discussion as to how long he would be in the hospital, what the doctor's bill would be, and we had some little talk as to what his services were, and he told me he was receiving $2 a day, and that $100 wouldn't pay his time for two months. We took the matter up with Earl and with Pope, and it was shown that the men hadn't been working regularly, and that even where the work was regular they had not averaged five days a week; he said $10 a week would pay him for about ten weeks; I said, I am not paying you for the time; I am willing to give you $100 for the lump sum; and I will take my chances on the extent of the hospital bill and the doctor's bill. We then had some further talk about the time, and as to what he had been doing; then he asked me as to whether or not he could go back to work when he was well, and I told him that I could not make any promise as to that; that Bailey-Marsh Company employed men, and that because he had been hurt there would be no prejudice against him for that, but I could not make an agreement to employ him, and under such circumstances men sometimes seem to think they might have jobs without work; I told him that I would make a settlement, pay him $100 in cash, and he would have to take his chances, and the company take their chances on the doctor's bill and the hospital bill. We then talked about several other matters; I asked him—we talked about where he come from, about his people, asked him how he was getting along, and we then went back and talked over the matter further; and it was finally agreed he would make a settle-

ment on the basis of $100 in cash, and the further payment of the bill of the hospital, St. Joseph's Hospital, and the bill of the doctor, Dr. Pence. I was at the hospital about an hour, I think. I then went down town to the bank and got $100; got Cockrum; I then went to the office of the Consumer's Power Company, where Mr. A. E. Stevens was then the manager; he was an acquaintance I had formed; known in Minneapolis; a man I had not seen for some six or seven years, and ran across him in the Leland, and he had taken me to the office and showed me the plant, and told me about the work he had been doing; I went to the office for the purpose of getting a typewriter for the purpose of drawing my release; I drew the release and asked Mr. Stevens if he knew of a notary public I could get to go to the hospital, and he introduced me to Mr. Edblom; he said he had to go there for the purpose of collecting from a meter, making a reading from a meter. We went to the hospital together. He went into the office, and I went back into the ward where Pope was, and I had made a copy of this release; it was typewritten and I gave him a copy, and I took a copy myself, and I read the release to him; I cannot say he read it; he appeared to, because he interrupted me a couple of times to ask about certain points; then after it was all brought up, he said, now, about this $100, do I get anything more? I told him no, that was—I would pay him $100 in cash, and there was no further promise except to pay the bill at the hospital and Dr. Pence, and he wanted to know how he was to know we would pay that bill, and I said I could call in a nurse and tell her, and he said all right. I then went out and got Mr. Edblom, who was working at the telephone; I think he was working at the telephone; fixing up something; and he came in with me, and Pope signed the release and Earl signed it as a witness, and Mr. Edblom then acknowledged it as a witness; I then asked Mr. Edblom, as he started to take the acknowledgment, to ask Pope if he understood what he was signing, and if it was of his own free will, and Mr. Edblom did that; Pope said yes, sir, it was a release, and it was his free act, and then Edblom signed as a notary and put his seal on, and his stamp as to when his commission expired. I then sent for the head nurse, Miss Mulzof, and she came in and I told her that I had made a settlement with Mr. Pope, and had gotten his release.

Q. Was that in the ward?

A. That was in the ward in the presence of Pope and Earl, and there were two, or possibly three, other patients in the ward at the time, and I told her that we had made this settlement, and gotten this release, gotten his release, and that the Bailey-Marsch Company was to pay the hospital bill for as long a time as it was deemed necessary for him to stay, and we were to pay Dr. Pence, and he said, yes, that is right, and she talked with us a few moments and went out. I then turned over $100 in bills to Mr. Pope; as I turned that over, right as soon as he signed it, and I went up—Mr. Earl took some oranges up and Pope pealed one and ate it and talked with us—and when I got back I noticed the peeling of another orange, whether he ate it or not I do not know.

Q. At the various times you were at the hospital and talked with Pope did you observe any manifestations of his suffering from pains at times, or all of the time?

A. At times I noticed it; the first afternoon I was there when Dr. Pence dressed his leg, and he took his finger and touched different places, and asked him, does that hurt, and certain times he would wince, and almost scream, and other times say, no, I don't feel that, that don't hurt; and when they took the bandages off he winced a little, and the following morning when I called to see him I asked him how he rested, he said he had a pretty fair night, was feeling better excepting when he moved. He seemed to be normal; he didn't seem to be under any great stress; if he was he didn't say so.

Q. How was he located physically in the bed where he was, was he lying down flat?

A. He was propped up with a couple of pillows.

Q. And where did he sign the paper?

A. There was a little table at the head of the bed he was on, that had the bag of oranges, the bag of oranges lay there, and that was moved over next to the bed, and he kind of reached over this way (indicating) and signed it.

The testimony of the witness Earl is quite lengthy and we shall not attempt to quote the same. Suffice it to say that in the main it corroborates the testimony of the last witness, but as to some details his testimony differs from that of the witness Thompson.

The witness Campbell testified by deposition in substance as follows: "I am fifty years old; have lived in Minot twenty-five years. I have been confined to my bed in the hospital for a little over a year. I remember Mr. Pope, who was burned at the new Soo depot in February, 1912; he was in the same ward with me. I remember a man named Thompson came here to see him; he was a claim agent of the Soo, I believe, he represented either the Soo or the contractor. I heard the talk between Thompson and Pope about a settlement; they was figuring on the grounds of what he would have been able to earn if he had been up; Pope said he did not want to be unreasonable and said he would accept $100. I saw them counting out the money, but I don't know how much it was. This man Thompson also agreed to pay the hospital and the doctor's bills. I remember seeing Pope sign the papers; Thompson read them over to him. Pope did not seem to be suffering anything out of the ordinary; he talked just the same as he had been talking—seemed to be all right; I thought he seemed to understand what he was talking about. I heard him and some of the patients talking about the settlement afterwards; someone told him he should not have settled; Pope thought he had done all right, and said he had done as well as he could expect to do at the time; at that time he acknowledged that he had settled; this was after the papers were signed, after they had left; they used to be talking about it in the room. I understood it was a settlement for the damages he had sustained, in the fire; it was not for time lost; but they figured it up in that way, what time he had lost and the doctor's bill and the hospital bill; it was not a settlement for time lost merely; they agreed to pay doctor's and hospital bills and treatment, aside from actual damages he sustained in the injury. I know that Pope was not settling merely for time lost from the fact that Thompson told him in plain English that he would pay the doctor's bill and hospital bill and all bills, and asked him if he would be satisfied with $100. My bed was about 5 or 6 feet from Pope's. The paper that was read to Pope, from the sound of it, was a settlement with him for damages; Pope had it in his hands; I don't know that he read it, any more than that he was looking at it when Thompson read it to him. In talking about it afterward Pope said he thought it was a fair settlement, that he thought Mr. Thompson had

treated him very fairly, and that he was entirely satisfied with the settlement."

The witness Julia Noakes, a bookkeeper and office girl in the hospital during the time plaintiff was there, testified in substance: "I was bookkeeper and office girl in St. Joseph's Hospital while Mr. Pope was there in February, 1912. I remember Mr. Thompson coming there to see him; I did not hear any of the conversation; after Mr. Thompson had gone Mr. Pope sent for me, and I went to the ward where he was and he asked me to take some money and keep it for him in the office safe; I think there was $100 and a small check; I received the money; Mr. Pope would send for the money afterwards, quite often to draw from it."

The witness Rosa Mulzof testified: "In February and March, 1912, I was employed as head nurse on the first floor in St. Joseph's Hospital in Minot. I recollect Mr. Pope being brought here during the month of February. I remember two gentlemen calling to see him; I did not hear the conversation any more than that I was called in to witness to the fact that Mr. Pope was satisfied with the settlement of $100, and that the firm would pay the hospital and doctor's bills; I heard that statement made to Mr. Pope, and he said that he was satisfied with it. The last narcotic that was given to Mr. Pope prior to February 29th was on February 26th. After the time when I heard the settlement talked of between Mr. Thompson and Mr. Pope, I heard Mr. Pope talk about it a number of times, but I do not recall on what date it was; he commented on the fact that he had settled."

The witness, Sister Lucy, also testified in substance as follows: "I am known as Sister Lucy of St. Joseph's Hospital. I am one of the Sisters in charge of the hospital and was so when Mr. Pope was here in February and March, 1912. I recall an instance when some gentlemen called at the hospital and it was understood that a settlement had been made by Mr. Pope; I do not know the date. Some time in March, after the skin-grafting operation had been done, I was in the ward one day and he said his limb wasn't getting along quite as well as he would like for it to, or as he thought it would, but that he had settled with the company, so there is nothing more to be done."

Thereupon the plaintiff was recalled in rebuttal and testified as follows:

Q. You heard the statement in the depositions, you had talked with various persons about settlement?

A. I did.

Q. Did you have a talk with Sister Lucy in regard to settlement?

A. I did.

Q. And have you talked with other persons about settlement?

A. I did.

Q. With respect to these depositions, Sister Lucy's particularly, what did you mean when you talked about settlement?

A. I never did mean anything in particular only I never said anything to her, I do not think, about any deposition, or any release. I just spoke of having settled, and if I said that, why that was all.

Q. What did you mean when you said settlement, settled for what? What were you talking about?

A. She asked me then if I had settled with the company, and I said no, I haven't, in one way I have settled with them, on the release, and they said they would see me through, and help me through, and all this, and then on the other hand, and furthermore, I never did see any of them that claimed it is not a deposition.

In connection with the foregoing testimony we here call attention to a letter written and mailed by plaintiff to Bailey & Marsh on September 9, 1912, as follows:

Surrey, Nor. Dak. Spt. 9, 1912.

Kind Sir:—

This I have been intending to write for several days. I am the man that got burnt in the new depot at Minot, so I come out here in the country where I could get better treatment. They are not as good to a person in the hospital as they might be, so I thought I might as well get out of it. I am getting along fine so far and hope to be on my feet soon. I have spent what little change I had and I am in debt quite a bit, you know a person can't eat without mon. so now if you can help a cripple out, I would like to get it. You know I have been as easy on

you fellows as a man could be, now I will ask you to help me a little for I kneed it very badly.

And oblige,

John William Pope

Address
Surrey, N. Dak.

We have, perhaps, quoted from the testimony to a needless extent, but we do so because of the importance of the case and the fact that our decision is placed upon the sole ground that plaintiff settled and released his cause of action.

After considering the entire testimony bearing upon such settlement and release, we have no hesitancy in deciding, as we do, that the evidence is wholly insufficient to authorize a finding, either of fraud or misrepresentation upon the part of defendant's agent, Thompson, in procuring such release, or that plaintiff was mentally incapable of transacting business at the time such settlement was effected. The testimony to the contrary is overwhelming, and we are forced to the conclusion that plaintiff, who concededly had the burden of proof of showing facts relieving him of the legal effect of such formal release by clear and convincing proof, has failed in meeting such burden. Plaintiff's evidence as to his mental incapacity to transact business at the time of the settlement is, in many respects, somewhat irreconcilable and by no means clear and convincing, especially when viewed in the light of the testimony of numerous disinterested witnesses to the contrary. Moreover, his testimony is highly unreasonable. He contends, in effect, that the settlement was merely for time lost, or which he would necessarily lose by reason of the injury. Is it reasonable or probable that defendant would make a settlement merely of a portion of the damages which plaintiff might claim against it, and leave plaintiff a cause of action for other damages which he might be able to establish? Both reason and experience furnish a negative answer. It is inconceivable that Mr. Pence, Sister Lucy, Julia Noales, and Rosa Mulzof, employees in the hospital, as well as Edblom, the notary who took plaintiff's acknowledgment to the release, and the witness Campbell, all of whom, so far as the record discloses, were fair and unbiased witnesses, would intentionally and corruptly perjure themselves in order to defeat plain-

tiff's recovery as against this foreign corporation. Furthermore, the letter written by plaintiff to the defendant long after he left the hospital furnishes quite cogent proof against him. If plaintiff was not aware at that time of the settlement which he had effected, the tone of the letter would have been more in the nature of a demand than a mere screeve or appeal for financial aid as it clearly discloses that it was.

It was clearly the duty of the trial court to have granted defendant's motion at the close of the case, and also its subsequent motion for judgment *non obstante veredicto.*

The authorities in support of our conclusion are very numerous. We cite merely the following: Bessey v. Minneapolis, St. P. & S. Ste. M. R. Co. 154 Wis. 334, 141 N. W. 244, and cases cited; Laird v. Union Traction Co. 208 Pa. 574, 57 Atl. 987; Schweikert v. John R. Davis Lumber Co. 147 Wis. 242, 133 N. W. 136; Chicago & N. W. R. Co. v. Wilcox, 54 C. C. A. 147, 116 Fed. 913, and cases cited; Oakes v. Chicago, B. & Q. R. Co. 157 Iowa, 15, 137 N. W. 1062, and cases cited.

This court in numerous instances has recognized and enforced the general rule that solemn written instruments cannot be impeached for fraud or other cause except upon proof that is clear, satisfactory, and convincing, and of such a character as to leave in the mind of chancellor no hesitation or substantial doubt. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714; Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Anderson v. Anderson, 17 N. D. 275, 115 N. W. 836.

The judgment and order appealed from are reversed and the cause remanded to the District Court with instructions to dismiss the complaint.

BARBARA TRUBEL v. ANDREW SANDBERG and Caroline Sandberg, His Wife.

(150 N. W. 928.)

Defendant paid the amount due upon a mortgage note, to an investment company, which assumed to act as agent of the assignee of the mortgagee, but who did not have possession of the note, and who embezzled the funds.

Evidence examined and held insufficient to show that the investment company was agent for plaintiff in making such collection.

Opinion filed January 9, 1915. Rehearing denied February 1, 1915.

Appeal from the District Court of Grand Forks, *Cooley*, J.

Affirmed.

Barnett & Richardson, John A. Nordin, for appellants.

An agency of express authority to receive payment of security may be shown by other proof than the possession of the securities, and when such authority is shown, the payment is binding on the holder, although the security paid was not in the custody of the agent. Campbell v. Gowans, 35 Utah, 268, 23 L.R.A.(N.S.) 414, 100 Pac. 397, 19 Ann. Cas. 660, and cases.

Mrs. Trubel's reliance upon Faber was complete, and he had charge of the entire transaction, as shown by the entire evidence. General Convention of Cong. Ministers & Churches v. Torkelson, 73 Minn. 401, 76 N. W. 215; Dexter v. Berge, 76 Minn. 216, 78 N. W. 1111; First Nat. Bank v. Mutual Ben. L. Ins. Co. 145 Mo. 127, 46 S. W. 615.

A direction to an agent by the owner of paper, that it must be paid when due, is express authority to the agent who negotiated the deal, to receive payment. Hare v. Bailey, 73 Minn. 409, 76 N. W. 213; Ried v. Kellogg, 8 S. D. 596, 67 N. W. 687; Noble v. Nugent, 89 Ill. 522; Phœnix Ins. Co. v. Walter, 51 Neb. 182, 70 N. W. 938; Dunn v. Hornbeck, 72 N. Y. 80; Harrison v. Legore, 109 Iowa, 618, 80 N. W. 670; Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055; Bronson v. Chappell (Townsend v. Chappell), 12 Wall. 681, 20 L. ed. 436.

The fact that the mortgage company did not have the papers in their possession at the time of the payment by Sandberg is not at all conclusive. It is simply an evidentiary fact. Campbell v. Gowans, 23 L.R.A. (N.S.) 415, note.

There is not sufficient evidence in the case to warrant the court in finding that Faber was the agent of the mortgage company. Hare v. Bailey, 73 Minn. 409, 76 N. W. 213; General Convention of Cong. Ministers & Churches v. Torkelson, 73 Minn. 401, 76 N. W. 215; First Nat. Bank v. Mutual Ben. L. Ins. Co. 145 Mo. 127, 46 S. W. 615; Ried v. Kellogg, 8 S. D. 596, 67 N. W. 687; Harrison v. Legore, 109 Iowa, 618, 80 N. W. 670; Thomson v. Shelton, 49 Neb. 644, 68 N.

W. 1055; Phœnix Ins. Co. v. Walter, 51 Neb. 182, 70 N. W. 938; Meserve v. Hansford, 59 Kan. 777, 53 Pac. 835; Wilson v. LaTour, 108 Mich. 547, 66 N. W. 475; Shane v. Palmer, 43 Kan. 481, 23 Pac. 594; May v. Jarvis-Conklin Mortg. Trust Co. 138 Mo. 275, 39 S. W. 782; Bissell v. Dowling, 117 Mich. 646, 76 N. W. 100; Central Trust Co. v. Folsom, 167 N. Y. 285, 60 N. E. 599; Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138, 16 Pac. 762.

Henry Moen (*W. A. McDonnell,* of counsel), for respondent.

The respondent cannot be bound by any apparent authority assumed by the mortgage company unless she herself gave such authority, or her conduct estops her from showing the contrary. Civil Code, § 5784; Humphrey v. Havens, 12 Minn. 298, Gil. 196; Church Asso. v. Walton, 114 Mich. 677, 72 N. W. 998.

"If a negotiable note be made payable at a given place, such provision is so an agreement on the part of the holder to have the note at the specified place of payment; that if the maker be there with the money to make payment, and makes a proper deposit, he is relieved from further obligation to seek the holder; if the holder places the note in any other place, then the person in charge becomes the agent of the holder to rceive the money and deliver the note; but if the note be not so deposited for collection and delivery, then such person has no authority to receive the money." Hollinshead v. John Stuart & Co. 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89; Budd v. Broen, 75 Minn. 316, 77 N. W. 979; Thomas v. Swanke, 75 Minn. 326, 77 N. W. 981; White v. Madigan, 78 Minn. 286, 80 N. W. 1125; Brown v. Blydenburgh, 7 N. Y. 141, 57 Am. Dec. 506; 20 Am. & Eng. Enc. Law, 2d ed. 1045.

The company was not advised to go ahead and collect the money; but respondent wanted the mortgage paid when due. Trowbridge v. Ross, 105 Mich. 598, 63 N. W. 534.

Agency will never be presumed, but where it is denied the burden of proof is upon him who affirms its existence. Corey v. Hunter, 10 N. D. 12, 84 N. W. 570; Busch v. Wilcox, 82 Mich. 336, 21 Am. St. Rep. 563, 47 N. W. 328; Farrington v. South Boston R. Co. 150 Mass. 406, 5 L.R.A. 849, 15 Am. St. Rep. 222, 23 N. E. 109; Moore v. Skyles, 33 Mont. 135, 3 L.R.A.(N.S.) 136, 114 Am. St. Rep. 801, 82 Pac. 799.

Apparent authority is that which an agent appears to have from that which he actually has, and not from what he pretends to have, or from

his acts and conduct on occasions unknown to and not ratified by the principal. Oborne v. Burke, 30 Neb. 581, 46 N. W. 838; Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827; Wierman v. Bay City-Michigan Sugar Co. 142 Mich. 422, 106 N. W. 75; Anderson v. Patten, 157 Iowa, 23, 137 N. W. 1050; Burchard v. Hull, 71 Minn. 430, 74 N. W. 164; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570.

The mere fact that one negotiates a loan does not imply authority to receive payment. Western Security Co. v. Douglass, 14 Wash. 215, 44 Pac. 259; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Schenk v. Dexter, 77 Minn. 15, 79 N. W. 526; Trull v. Hammond, 71 Minn. 172, 73 N. W. 644; Hollinshead v. John Stewart & Co. 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285; Dwight v. Lenz, 75 Minn. 78, 77 N. W. 546; Trowbridge v. Ross, 105 Mich. 598, 63 N. W. 534; Walsh v. Peterson, 59 Neb. 645, 81 N. W. 853; Trull v. Hammond, 71 Minn. 172, 73 N. W. 642; Chandler v. Pyott, 53 Neb. 786, 74 N. W. 263; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570.

Or where one has formerly collected interest, unless he has in his possession for collection and delivery the notes or papers in the present transaction. Burchard v. Hull, 71 Minn. 430, 74 N. W. 163; Bull v. Mitchell, 47 Neb. 647, 66 N. W. 632; Western Security Co. v. Douglass, 14 Wash. 215, 44 Pac. 257; Trull v. Hammond 71 Minn. 172, 73 N. W. 642; Porter v. Ourada, 51 Neb. 510, 71 N. W. 52; Joy v. Vance, 104 Mich. 97, 62 N. W. 140; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285.

The doctrine of apparent or ostensible authority cannot be invoked in aid of those who have had no knowledge of past transactions; for there can be no reliance upon such dealings in the absence of knowledge. Burchard v. Hull, 71 Minn. 430, 74 N. W. 165; Harris v. San Diego Flume Co. 87 Cal. 526, 25 Pac. 758; Anderson v. Patten, 157 Iowa, 23, 137 N. W. 1050; Dispatch Printing Co. v. National Bank, 115 Minn. 157, 132 N. W. 2; Weidenaar v. New York L. Ins. Co. 36 Mont. 592, 94 Pac. 1; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 59 L.R.A. 657, 93 Am. St. Rep. 113, 65 N. E. 136.

BURKE, J. The defendant Sandberg was the owner of a farm upon which there was a mortgage of $1,400, given by a prior owner of the

farm to the American Mortgage & Investment Company of St. Paul, Minnesota, who, in turn, had sold it to the plaintiff, Mrs. Trubel. The Investment Company, however, continued to collect the interest from defendant and remit the same. When the principal sum became due, the Investment Company notified defendant that he should pay the same to them, and he, personally, went to their office in St. Paul and paid the full amount due upon the mortgage. The Investment Company embezzled said funds and shortly thereafter failed. Plaintiff started foreclosure proceedings, which were met by a claim that payment had been made to the Investment Company, as the agent of plaintiff. The trial court held that the Investment Company had no authority to receive the money, as agent of the plaintiff, and defendant appeals to this court and asks a trial *de novo*. There is not a great deal of dispute as to the law, it being, we think, conceded that the burden of proof is upon the defendant to show that the Investment Company had either actual or ostensible authority to make the collection upon behalf of the plaintiff. It is, we think, admitted that each case must be judged by its own facts, and the decisive question is whether or not, under the facts and circumstances of this case, such authority has been shown.

(1) It is physically impossible to set out all of the evidence in this case and we must content ourselves with merely a few quotations. The Investment Company was in the business of selling mortgages upon real estate. Their profit was usually evidenced by a second mortgage for a part of the interest. In the case at bar, the principal note bore interest at the rate of 6 per cent, and this mortgage was sold to Mrs. Trubel as an investment. She lived in Illinois in the same town where one Mr. Faber was cashier of a bank, and he received a cash commission from the Investment Company for negotiating the sale of such mortgage to her. When she had purchased such loan, she placed the note and mortgage in a tin box to which she retained the key, and left the same in Faber's bank. As the interest coupons became due she clipped the same, handed them to Faber, with the request that he collect the money for her. Faber, upon his part, forwarded the coupons to the Investment Company with a similar request. The Investment Company wrote to the defendant to come in and pay the same, which he did. There does not appear to have been any direct correspondence between

Mrs. Trubel and either the Investment Company or defendant. Faber had negotiated the sale of several other mortgages for the Investment Company and wrote frequently relative to the entire business. Incidentally, reference is often made to this loan. The principal sum became due February 13, 1912. On February 4th of that year, Faber wrote to the president of the Investment Company, saying in part: " . . . If you know the addresses of the owners of the Hoidal (the land in question) and Standy lands, I wish you would write them and tell them that these loans must be paid when due. Better do it now than after the loans have matured. . . ." Upon receipt of this letter, the Investment Company wrote to the defendant, demanding payment of the principal sum and that year's interest, and also wrote to Faber, stating that the mortgagor had made arrangement to pay, and requesting that the note and the satisfaction of the mortgage be sent either to the Investment Company or to the Scandinavian-American Bank of St. Paul, Minnesota. Faber caused a satisfaction of the mortgage to be executed, and sent it and the notes to the Scandinavian bank, and not to the Investment Company. This was done on the 14th or 15th of February, 1912, after defendant had paid the money to the Investment Company, payment having been made on the 8th of the month. As already stated, the money was embezzled by the Investment Company. It is defendant's contention that Mrs. Trubel had constituted Faber her agent for the entire transaction, and that she is bound by his actions as fully as though she had herself written the letters to the Investment Company, and that Faber, in his turn, acting for Mrs. Trubel, had constituted the Investment Company her agent to make the collection. In support of this contention, they have introduced in evidence letters passing between Faber and the Investment Company, many of which relate to other matters entirely, and point to the testimony of Mrs. Trubel wherein she testified that she had no dealings with the Investment Company, but had all her dealings with Faber, and that she had delivered over her money to Faber, relying upon his integrity to look after the matter for her, and they quote from her testimony in their brief as follows: "Knowing Mr. Faber as I did, and his connection with the bank, I was perfectly satisfied with anything he did in the way of looking after this mortgage investment." However, this testimony when considered in connection with the undisputed fact that she kept

the mortgage and notes in a tin box under lock and key, does not, we think, bear out appellant's contention. On February 14, 1912, after the embezzlement and just before the Investment Company had asked for the satisfaction of the mortgage, Faber wrote them as follows: ". . . Something must be done about this loan and the Hoidal, Standy, and Clara Arndt loans, or I will have all kinds of trouble on my hands. It seems as if you people ought to ascertain several months before a note matures whether it will be paid promptly, and if not a new note should be arranged for at once." And on March 6, 1912, he wrote: "What seems to be the trouble with the Hoidal matter that it is not paid?" From the whole of the evidence, we have reached the conclusion that defendant has failed to establish any authority, actual or ostensible, upon the part of the Investment Company to act as agent for the plaintiff in receiving the money from the defendant. The law upon the subject is admirably stated in a note in 23 L.R.A.(N.S.) 414; Campbell v. Gowans, said note gives a *résumé* of all of the cases bearing upon this interesting subject, and extracts from some of the more important decisions. Quoting from Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423, the note says: "The rule just referred to is in line with that policy. It is so simple, and once understood, furnishes so easy and sure a means for both debtor and owner to protect themselves against unauthorized acts of others, that it ought not to be weakened or confused. The holder can always be safe by retaining the instrument in his possession; the debtor, by refusing payment, without actual presentation." Or, as stated in Hollinshead v. Stuart & Co. 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89: "If a negotiable note be made payable at a particular place, such provision is so far an agreement on the part of the holder to have the note at the specified place at maturity, that, if the maker be there with the money to make the payment, and make a proper deposit, he is relieved from all further obligation to seek the holder. . . . If the holder has seen proper to place the note in the designated place, then the person in charge becomes the agent of the holder to receive the money and deliver the note to the maker. But if the note be not so deposited, then no authority exists in the person in charge to receive the money. . . . He had in his own hands the means of absolute protection. He had only to see to it that he received his note when he paid his money. If he neglected this simple re-

quirement, demanded not more by the law than by common prudence, he paid at his peril; and, if loss occurs, he must bear it. One party or the other must suffer, and he, being the party in fault, must bear the burden."

See also Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570. It follows that the plaintiff was well within her rights, and that the loss was occasioned by the carelessness of the defendant in paying to an unauthorized person without a production of the note itself or evidence of agency from the owner thereof. The order of the trial court is affirmed.

A. Y. MORE v. THE COURIER-NEWS, a Corporation, and E. D. Guild.

(151 N. W. 2.)

Corporations — stock of — issued and paid up — assessment upon — unless declared nonassessable by by-laws.

1. Under §§ 4570–4572, Comp. Laws 1913, an assessment may be made upon capital stock of a corporation issued and paid for, unless the by-laws of the corporation make the same nonassessable.

Assessment — limited — capital stock — articles.

2. Such assessment is limited to 10 per cent of the capital stock named in the articles of incorporation which, in the case at bar, is $50,000, and authorizes an assessment of $5,000.

Opinion filed January 15, 1915. Rehearing denied February 10, 1915.

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

Affirmed.

A. W. Fowler and *Pollock & Pollock*, for appellant.

Fully paid stock is not assessable under the laws of this state. Cali-

Note.—In the absence of statutory authority or special power conferred upon the directors of a corporation by the articles of incorporation, the corporation has no power to make calls or assessments on fully paid-up stock, or stock which is issued as fully paid up. This is clearly shown by the authorities on the subject reviewed in notes in 45 L.R.A. 648 and 22 L.R.A.(N S.) 1013.

fornia Trona Co. v. Wilkinson, 20 Cal. App. 694, 130 Pac. 190; Goodnow v. American Writing Paper Co. 72 N. J. Eq. 645, 66 Atl. 607; Wells v. Green Bay & M. Canal Co. 90 Wis. 442, 64 N. W. 69; Wall v. Basin Min. Co. 16 Idaho, 313, 22 L.R.A.(N.S.) 1013, 101 Pac. 733; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311; Elyton Land Co. v. Birmingham Warehouse & Elevator Co. 92 Ala. 407, 12 L.R.A. 307, 25 Am. St. Rep. 65, 9 So. 129; First Nat. Bank v. Gustin Minerva Consol. Min. Co. 42 Minn. 327, 6 L.R.A. 676, 18 Am. St. Rep. 510, 44 N. W. 198; O'Dea v. Hollywood Cemetery Asso. 154 Cal. 53, 97 Pac. 1; Southern Trust & D. Co. v. Yeatman, 67 C. C. A. 456, 134 Fed. 811; Shaw v. Straight, 107 Minn. 152, 20 L.R.A.(N.S.) 1077, 119 N. W. 951; Callanan v. Windsor, 78 Iowa, 193, 42 N. W. 652; Easton Nat. Bank v. American Brick & Tile Co. 69 N. J. Eq. 326, 60 Atl. 54; Ersfeld v. Exner, 128 App. Div. 135, 112 N. Y. Supp. 561; Parmelee v. Price, 208 Ill. 544, 70 N. E. 725; Randall Printing Co. v. Sanitas Mineral Water Co. 120 Minn. 268, 43 L.R.A.(N.S.) 706, 139 N. W. 606; Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

The same was the rule at common law. Enterprise Ditch Co. v. Moffitt, 58 Neb. 642, 45 L.R.A. 647, 76 Am. St. Rep. 122, 79 N. W. 560; Lowry v. Inman, 46 N. Y. 119; Duluth Club v. MacDonald, 74 Minn. 254, 73 Am. St. Rep. 344, 76 N. W. 1128; Cook, Corp. 6th ed. § 241.

One of the benefits resulting from incorporation is the fact that liability is made definite and certain. Smith v. Huckabee, 53 Ala. 191; Spense v. Iowa Valley Constr. Co. 36 Iowa, 407; Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Rev. Codes 1913, §§ 4570–4572.

The statute authorizing an assessment on stock means that the subscribed stock, and not the authorized stock, may be assessed. Gary v. York Min. Co. 9 Utah, 464, 35 Pac. 494.

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

Fully paid-up capital stock of a corporation is assessable under the laws of this state. Comp. Laws 1913, §§ 4570–4588; Sullivan v. Triunfo Gold & S. Min. Co. 39 Cal. 465; Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Sayre v. Citizens' Gaslight & Heat

Co. 69 Cal. 207, 10 Pac. 408; Bottle Min. & Mill. Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994; Lum v. American Wheel & Vehicle Co. 165 Cal. 657, 133 Pac. 303, Ann. Cas. 1915A, 816; Browne v. San Gabriel River Rock Co. 22 Cal. App. 682, 136 Pac. 542; Younglove v. Steinman, 80 Cal. 375, 22 Pac. 189; San Bernardino Invest. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487; Ventura & O. Valley R. Co. v. Hartman, 116 Cal. 260, 48 Pac. 65; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Von Horst v. American Hop & Barley Co. 177 Fed. 979.

Where a state takes and adopts a statute from another state, the construction theretofore placed upon such statute by the courts of the state from which it is taken is also taken and adopted. State v. Stevens, 19 N. D. 249, 123 N. W. 888; Beddow v. Flage, 20 N. D. 66, 126 N. W. 97.

The right of a corporation to make an assignment on stock and to sell the same in case of delinquency is well settled. Bottle Min. & Mill. Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994; People's Home Sav. Bank v. Stadtmuller, 150 Cal. 110, 88 Pac. 280; Lum v. American Wheel & Vehicle Co. 165 Cal. 657, 133 Pac. 303, Ann. Cas. 1915A, 816.

The statute becomes a part of the contract between the stockholder and the corporation just as much as though its provisions were embodied in the contract, subject only to the rule that the statutory mode must be strictly followed. Bottle Min. & Mill. Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994; Los Angeles Athletic Club v. Spires, 166 Cal. 173, 135 Pac. 298; Weber v. Della Mountain Min. Co. 14 Idaho, 404, 94 Pac. 441; Lum v. American Wheel & Vehicle Co. 165 Cal. 657, 133 Pac. 305, Ann. Cas. 1915A, 816; Callahan v. Chilcott Ditch Co. 37 Colo. 331, 86 Pac. 123; Gary v. York Min. Co. 9 Utah, 464, 35 Pac. 494; Wall v. Basin Min. Co. 16 Idaho, 313, 22 L.R.A.(N.S.) 1013, 101 Pac. 733; Nelson v. Keith-O'Brien Co. 32 Utah, 396, 91 Pac. 30; 26 Am. & Eng. Enc. Law, 923.

It is conceded that, in the absence of statutory authority, or power conferred by the articles, or some other promise to pay, fully paid-up capital stock cannot be assessed. Bottle Min. & Mill. Co. v. Kern, 9 Cal. App. 527, 99 Pac. 994; Los Angeles Athletic Club v. Spires, 166 Cal. 173, 135 Pac. 298; Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441; Callahan v. Chilcott Ditch Co. 37 Colo. 331, 86 Pac. 123; Mirage Irrig. Co. v. Sturgeon, 77 Neb. 175, 108 N. W. 977; Blue

Mountain Forest Asso. v. Borrowe, 71 N. H. 69, 51 Atl. 670; Smith v. Iron Mountain Tunnel Co. 46 Mont. 13, 125 Pac. 649, Ann. Cas. 1914B, 551; Price's Appeal, 106 Pa. 421; Redkey Citizens' Natural Gas Co. v. Orr, 27 Ind. App. 1, 60 N. E. 716; Gardner v. Hope Ins. Co. 9 R. I. 194, 11 Am. Rep. 238; Carter R. & Co. v. Samuel Hano Co. 73 N. H. 588, 64 Atl. 201; Western Improv. Co. v. Des Moines Nat. Bank, 103 Iowa, 455, 72 N. W. 657; Dewey v. St. Albans Trust Co. 57 Vt. 332.

The stockholder can make his contract as he sees fit. All the courts can do is to enforce it. Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661; Garey v. St. Joe Min. Co. 32 Utah, 497, 12 L.R.A.(N.S.) 554, 91 Pac. 369; Wall v. Basin Min. Co. 16 Idaho, 313, 22 L.R.A. (N.S.) 1013, 101 Pac. 733.

Where stock is issued and has printed thereon the word "nonassessable," such word becomes a part of the contract between the stockholder and the corporation, and may be enforced by the stockholder. Lum v. American Wheel & Vehicle Co. 165 Cal. 657, 133 Pac. 303; Browne v. San Gabriel River Rock Co. 22 Cal. App. 682, 136 Pac. 542; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Handley v. Stutz, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311; Elyton Land Co. v. Birmingham Warehouse & Elevator Co. 92 Ala. 407, 12 L.R.A. 307, 25 Am. St. Rep. 65, 9 So. 129.

The courts have nothing to do with the question of the necessity or wisdom of an assessment, nor with the motive which prompted the levy. Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186; Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311; Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. 189 U. S. 230, 47 L. ed. 786, 23 Sup. Ct. Rep. 517; Weber v. Della Mountain Min. Co. 14 Idaho, 404, 94 Pac. 441.

The majority stockholders have the right to vote as they please and elect such directors as they wish, regardless of the wishes of the minority stockholders. Weber v. Della Mountain Min. Co. 14 Idaho, 404, 94 Pac. 441; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24, 3 Mor. Min. Rep. 551; Von Horst v. American Hop & Barley Co. 177 Fed. 979; Beitman v. Steiner Bros. 98 Ala. 241, 13 So. 87.

The appellant had and has a plain, speedy, and adequate remedy at

law, and the court did not abuse its discretion in refusing to grant the temporary injunction. High, Inj. §§ 34, 35; 27 Century Dig. "Injunction," § 8, and cases cited; Burton v. Walker, 13 N. D. 149, 100 N. W. 257; Dewing v. Perdicaries, 96 U. S. 193, 24 L. ed. 654; Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143; Pratt v. Taunton Copper Mfg. Co. 123 Mass. 110, 25 Am. Rep. 37, 13 Mor. Min. Rep. 590; Pollock v. National Bank, 7 N. Y. 274, 57 Am. Dec. 525; Cushman v. Thayer Mfg. Jewelry Co. 76 N. Y. 369, 32 Am. Rep. 315; Continental Hose Co. v. Mitchell, 15 N. D. 144, 105 N. W. 1108; Chicago & N. W. R. Co. v. Rolfson, 23 S. D. 405, 122 N. W. 343; Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Asso. 150 Fed. 413; 22 Cyc. 753, Injunction; Dickson v. Dows, 11 N. D. 404, 92 N. W. 797; Donovan v. Allert, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441.

BURKE, J. The defendant is a domestic corporation of $50,000 common stock, par value $100 each. Of this common stock, $36,000 has, and $14,000 has not, been subscribed and issued. Plaintiff is the holder of 100, and the defendants Guild are the owners of 260, shares. Plaintiff's stock was marked "fully paid" upon its face at the time it was issued. The defendants Guild are in control of the board of directors and of the management of the corporation. In August, 1914, such board of directors attempted to levy an assessment against the issued stock for the gross sum of $4,996.80, or $13.88 upon each share actually issued. Plaintiff applied to the district court of Cass county for a permanent injunction against said assessment, claiming (a) that his stock was not subject to any assessment whatever under the laws of this state, and (b) that in case any assessments were proper, the assessment exceeded the 10 per cent limitation subscribed by § 4571, Comp. Laws 1913. The trial court denied such relief and this appeal followed. It is conceded that unless authorized by statute, no assessment can be made upon paid-up stock, and that if there is any authority for the position in question, it must be in the following sections of the Compiled Laws of 1913, of which §§ 4570–4572 read as follows:

Assessment of stock.

§ 4570. When levied.—The directors of any corporation formed or existing under the laws of this state, after one fourth of its capital stock has been subscribed, may, for the purposes of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof in the manner and form and to the extent provided herein.

§ 4571. Limitation of.—No assessment must exceed 10 per cent of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows:

1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities, or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or, if a less amount is sufficient, then it may be for such a percentage as will raise that amount.

2. The directors of railway corporations may assess the capital stock in instalments of not more than 10 per cent per month, unless in the articles of incorporation it is otherwise provided.

3. The directors of fire or marine insurance corporations may assess such a percentage of the capital stock as they deem proper.

§ 4572. When new assessment can be levied.—No assessment must be levied while any portion of a previous one remains unpaid, unless:

1. The power of the corporation has been exercised in accordance with the provisions of this article for the purpose of collecting such previous assessment.

2. The collection of the previous assessment has been enjoined; or,

3. The assessment falls within the provisions of either the first, second or third subdivisions of § 4571.

Referring to those sections, the appellant in his brief says: "Is there any room for doubt that the *'subscribed capital stock'* referred to in § 4570, upon which only assessments may be levied and collected, is the same subscribed capital stock referred to in the other sections? Clearly the same thing is referred to. That being so, it plainly follows that the subscribed capital stock referred to in said § 4570 does not include fully paid *capital stock.*" In other words, it is their con-

tention that because their stock is marked "fully paid" it can under no circumstances be assessed.

As nearly as we can learn, this class of legislation was first enacted in California about the year 1853, but contained a positive declaration that no assessment could be made upon fully paid-up stock. Later, and in 1864, the legislature of that state changed the law and made provision for such assessment. Minor changes were made in 1866 and the whole was incorporated in the California Code of 1872. The California courts passed upon the statute of 1864 in Sullivan v. Triunfo Gold & S. Min. Co. 39 Cal. 465, and after further amendment the statute was again construed in Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802. In this later case, which was decided in 1884, the identical question arose which confronts us in the case at bar. The California court says, after reviewing the history of the legislation: "The conclusion is, to our minds, irresistible, that, in enacting the sections of the Code in question, it [the legislature] not only did, but clearly intended to, authorize, for the purposes and subject to the limitations prescribed, assessments upon stock fully paid for, as well as assessments for the amount unpaid thereon." It is true, this opinion was concurred in by four justices and dissented to by three, but many sessions of the California legislature intervened from that time to this, and no effort has been made to change the statute as construed, while the courts of that state have repeatedly recognized the correctness of such holding. See: Sayre v. Citizens' Gaslight & Heat Co. 69 Cal. 207, 10 Pac. 408; Bottle Min. & Mill. Co. v. Kern, 154 Cal. 96, 97 Pac. 25, 9 Cal. App. 527, 99 Pac. 994; Lum v. American Wheel & Vehicle Co. 165 Cal. 657, 133 Pac. 303, Ann. Cas. 1915A, 816; Younglove v. Steinman, 80 Cal. 375, 22 Pac. 189; San Bernardino Invest. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487; Ventura & O. V. R. Co. v. Hartman, 116 Cal. 260, 48 Pac. 65; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

During said time, the United States circuit court for the district of California, in Von Horst v. American Hop & Barley Co. 177 Fed. 979, not only followed the California ruling, but approved the same, saying: "My own views as to the proper interpretation of the provisions of the Code are in full accord with those expressed by Judge Ross (the Santa Cruz Case)." And in the meantime the statute had

been adopted in other states, and had been construed in Idaho in Weber v. Della Mountain Min. Co. 14 Idaho, 410, 94 Pac. 441, and Wall v. Basin Min. Co. 16 Idaho, 313, 22 L.R.A.(N.S.) 1013, 101 Pac. 733, and by the supreme court of Utah in Gary v. York Min. Co. 9 Utah, 464, 35 Pac. 494, and in Nelson v. Keith-O'Brien Co. 32 Utah, 396, 91 Pac. 30. In each of the above-named cases, California's ruling was followed. No decision has been called to our attention to the contrary.

The statute was adopted in Dakota territory in 1877 after the Sullivan v. Triunfo Gold & S. Min. Co. decision and before the Spreckles decision. While not absolutely bound by the construction given by the California courts, yet, under the circumstances, those decisions should be given great weight in this state.

It is desirable to have all of the states in accord in construing the same statute, and we might rest our decision in this case upon that ground alone; but, on the other hand, we would not hesitate to announce a contrary decision if we believe the California case wrong in principle, and for this reason we have investigated carefully the arguments advanced by both parties to this appeal, and have reached the conclusion that the respondent is supported by the better reasoning. We will notice only a few of the more persuasive arguments advanced by the respondent. First, it is customary where the stockholders wish to avoid such further assessment, to have incorporated in the by-laws of the corporation a positive provision that the stock shall be nonassessable, and this is thereupon printed upon the face of the certificates. If appellant's construction of the statute is correct, this would be an idle act. And again, all through article 10, which contains the section above enumerated, the expression "subscribed capital stock" is used in referring to the entire stock of the corporation, and not, as contended by appellant, to only those subscribers who are in arrears upon their initial payment. For instance, § 4534 provides that the assent of all stockholders representing a majority of all the "subscribed capital stock" is necessary to adopt by-laws. It cannot be meant that only those members who are in arrears in paying for the capital stock can vote upon this important question; and in § 4537 it is provided that the by-laws may be amended or repealed in a like manner. Section 4547 provides that "at all elections or votes had for any purpose there must

be a majority of the subscribed capital stock . . . represented either in person or by proxy." Can it be that this term applies only to members who have not paid in full for their stock? And in § 4563 provision is made for changing the corporate name upon the written assent of the holders of three fourths of the "subscribed capital stock." As is said in respondent's brief, in order to sustain appellant's contention, it would be necessary to write into the statute the words: "Subscribed capital stock *upon which subscriptions have not been paid in full.*" No hardship can come from this construction. No person is obliged to buy stock in a corporation, and if he wishes to limit his liability and to protect himself from assessment he can have that provision inserted in his contract with the corporation, which is the by-laws. If the by-laws provide that the stock is nonassessable, he cannot be assessed. If they do not so provide, under the authority of § 4570, Comp. Laws 1913, they may, provided the assessment is in all other particulars legal. We do not understand that the assessment is challenged in any other particular in this litigation.

(2) This brings us to the second proposition of the appellant; namely, that even if an assessment is authorized by our statutes, it is limited to 10 per cent of the par value of the stock owned. We have already set forth § 4571, under which this limitation is claimed, and it is apparent that no assessment must exceed 10 per cent of the amount of the capital stock *named in the articles of incorporation,* except in cases otherwise provided. Upon this proposition we are cited by appellant to but one case, Gary v. York Min. Co. 9 Utah, 464, 35 Pac. 494, which, upon a casual reading, seems to support their contention, but upon a closer examination is found to turn upon another point, and not discuss such question. Respondent states no authorities upon this proposition. We have, therefore, to place the construction upon the statutes without the aid of any prior adjudication. The words: "No assessment must exceed 10 per cent of the *amount of the capital stock named in the articles of incorporation*" seem to be susceptible to but one meaning. The amount of the capital stock named in the articles of incorporation of the Courier-News Company is $50,000. The assessment in question does not exceed that. While the legislature might have provided that the assessment should not exceed 10 per cent of the *paid-in capital stock,* it has not done so.

There being no valid objection presented to the assessment aforesaid, the trial court did not abuse its discretion in refusing them a temporary injunction.

BOVEY-SHUTE LUMBER COMPANY, a Corporation, v. C. E. LIND.

(151 N. W. 16.)

Evidence — agent — scope of authority — contract — sale of goods.

1. Evidence examined, and, *held* that the agent of the plaintiff company made an agreement within the scope of his authority, whereby defendant was to have a 25 per cent discount from list prices upon the goods brought by him from plaintiff.

Agreement — ratification — evidence of.

2. The evidence further shows a ratification of such agreement by the officers of the company.

Opinion filed January 18, 1915. Rehearing denied February 10, 1915.

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

R. A. Stewart (*Miller & Zuger,* of counsel) for appellant.

There was no consideration shown for the alleged agreement for 25 per cent discount after defendant had taken the materials and charged same to himself at the going prices, as it was due and owing to the plaintiff already by defendant's own acts of acknowledgment. Whiffen v. Hollister, 12 S. D. 68, 80 N. W. 156; Fletcher Bros. v. Nelson, 6 N. D. 94, 69 N. W. 53; Gaar, S. & Co. v. Green, 6 N. D. 48, 68 N. W. 318; McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125; Chilson v. Bank of Fairmount, 9 N. D. 96, 81 N. W. 33; Roberts v. First Nat. Bank, 8 N. D. 474, 79 N. W. 993; Barrington v. Ryder, 119 Iowa, 121, 93 N. W. 56; McNerny v. Hubbard, 3 Neb. (Unof.) 108, 93 N. W. 1125; Martinson v. Marzolf, 15 N. D. 474, 108 N. W. 801; Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544; Runkle v. Kettering, 127 Iowa, 6, 102 N. W. 142; Trombley v. Klersy, 141 Mich. 73, 104 N. W. 419; First Nat. Bank

v. Lehnhoff, 77 Neb. 303, 109 N. W. 164, 112 N. W. 563; Ryan v. Dockery, 134 Wis. 431, 15 L.R.A.(N.S.) 491, 126 Am. St. Rep. 1025, 114 N. W. 820; Rev. Codes 1905, §§ 5316–5326.

R. Goer, for respondent.

When the belief of the authority of an agent arises only from his previous actions as an agent, the person treating with him must, on his own responsibility, ascertain the nature and extent of his previous employment. Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Nichols & S. Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089.

A finding of the trial court in a law action, supported by evidence, must be given the weight of a verdict of the jury. Wolf v. Ranck, 161 Iowa, 1, 141 N. W. 442; Plewa v. St. Josaphat's Congregation, 153 Wis. 276, 141 N. W. 267; Independent Pub. Co. v. Stanley County, 31 S. D. 483, 141 N. W. 366; Kroeger v. Warren, 31 S. D. 480, 141 N. W. 395; State ex rel. Rice v. Chicago, M. & P. S. R. Co. 31 S. D. 547, 141 N. W. 473; Evans v. Evans, 159 Iowa, 338, 140 N. W. 801; Reed v. Boland, 31 S. D. 309, 140 N. W. 691.

Burke, J. Plaintiff is a corporation in the general lumber business, having a line of yards in this state, one of which is at Warwick, and was managed by the defendant Lind during the times hereinafter mentioned. Between July and November, 1911, defendant built a house in the village, taking the lumber from his yard and charging himself therewith at list prices. Every day, or at least twice a week, statements of the business done at the yards were forwarded to the company. It seems to have been understood that agents of the plaintiff company should receive a discount, at least for cash purchases made by themselves. Plaintiff's traveling auditor, Jackson, went to Warwick during that month and had a conversation with defendant relative thereto. This conversation was in the presence of Mrs. Lind, and the three persons interested have given their recollection of this conversation. Jackson says: "I was going over the books at Warwick, when I saw this account which I had not seen before, and I asked Lind what it was, and how he happened to have charged so much material to himself. He replied that he had taken it out to build a house. I asked him if he had obtained the consent of anyone in authority to sell this material to himself, and he replied that he had not done so, but that he was intending to do so, and he said that he was

also intending to find out if an arrangement could be made for allowing him a reasonable discount on the bill for cash. . . . I told him I could make no arrangement for allowing him a discount on the bill, and I did not know whether the company would under the circumstances; that if he wanted to find out further about discounts, he should take the matter up with Mr. Bovey direct by letter, which he said he would do. . . . I asked him by whose authority he had taken material and how he intended to pay for it. He said that he expected to pay for it out of the proceeds of his crop that fall, and he further stated that he would put a mortgage on his farm if the crop was not sufficient to pay for it."

Mr. Lind, upon his part, testifies:

Q. Prior to getting this stuff, you did not write to the company and ask them whether you could have it or not?

A. I spoke to the superintendent.

Q. Mr. Taylor?

A. Mr. Taylor. It was quite a time before Mr. Bovey—

Q. He is a traveling auditor of the company?

A. Mr. Bovey was there himself quite a while before I built and Mr. Taylor says—

Q. I just asked you a question and you have not answered it, you see.

A. All right.

Q. And you made the entries on your yard sheet, as you bought the material, didn't you?

A. Yes, sir.

Q. And had you forwarded any of those to the company prior to the time Mr. Jackson came out?

A. Yes, sir, a report going in every day—every week anyway—twice a week.

. . .

Q. Now was it their custom to allow discounts when they carried a man on an account—open account—that way?

A. Yes, sir.

Q. All persons?

A. All? No, not all persons, but—

. . .

Q. And you say that Mr. Jackson told you in that conversation that you should have a discount of 25 per cent?

A. Yes, sir.

Q. And that was the words he used?

A. Yes, sir.

Mrs. Lind testifies:

Q. You may state, Mrs. Lind, if you were in the office of the Bovey-Shute Lumber Company at Warwick on or about September 20, 1911?

A. Yes, I was in the back there.

Q. You lived in the office at that time, didn't you?

A. Yes, we lived there.

. . .

Q. You may state now, Mrs. Lind, whether or not at that time and in that conversation you heard Mr. Jackson tell your husband that he would allow him a discount of 25—any amount—on certain material that your husband had purchased from the plaintiff?

A. Yes, I did.

Q. You may go on now and state the circumstances of the conversation as you remember it.

. . .

A. Now they were going through the ledger, and Mr. Jackson asked Mr. Lind—as they were going through the accounts Mr. Jackson said, "I suppose you want to be carried," and Mr. Lind said, 'Yes,' he thought he would have to be on account of the failure of the crop, and so it went further and Mr. Lind wanted to know about the discount, and Mr. Jackson told him that it wouldn't be more than right for him to have it at cost, but that it cost some to run the yard; and then he asked him if 25 per cent discount would be all right, and Mr. Lind said 'Yes,' and they agreed on it.

There were also introduced in evidence certain letters from which we quote. The first is dated February 1, 1912, written by Lind to the company. ". . . Yours of the 20th at hand, regarding my lumber bill. Would you be satisfied with real estate security and allow me my discount until December 1, 1912. . . ." And, in answer from the company, dated February 6, 1912: "Answering yours

of February 1st with regard to your account, will say that it is really out of the question for us to carry this until next fall. . . . We saw that you were taking out this material, and inasmuch as you said nothing about any arrangements for time, we took it for granted that it was a cash deal. . . . We will allow you a proper discount for cash, but we must have cash settlement at once. . . ." Other correspondence followed, a summary of which is given in a letter written by Mr. Bovey, the president of the plaintiff corporation, in January 2, 1913, which we reproduce in full later. In the meantime, plaintiff had raised $300 upon a mortgage upon one of his farms and had assigned portions of his salary to the company, so that if he were allowed the discount before mentioned, his account would be fully paid in October, 1912. Upon writing to the company to this effect, he received the following letter, January 2, 1913, written as aforesaid by the president of the company.

Mr. C. E. Lind,
Bovey–Shute Lumber Co., Warwick, N. D.
Dear Sir:—

I have yours of December 29th, and note all you say about your account. Now, in this connection would call your attention to the following quotations from letters which we have written you repeatedly regarding this account. I have looked up all this correspondence and want to call your attention to what the General Office has told you regarding your account.

Under date of January 30, 1912, which would be about eleven months ago, we wrote you as follows:

"We cannot agree to carry this account much longer, but if you will settle within the next thirty days, we will give you a reasonable discount for cash." You replied to this on February 1st, offering a real estate mortgage if we would carry it until the next fall. To this we replied that it would be out of the question for us to carry this until fall. In this letter we also state that we will give you a proper discount for cash, but must have the cash settlement at once. This letter is dated February 6th, 1912. On February 12th you wrote in that you would be able to pay us by March 1st and on February 23d we wrote you, reminding you that there was only a week left before

March 1st, and asking if you were going to be able to pay. We also stated that we could not carry the account any longer than March 1st. We again wrote you on March 5th, stating that if you expected to get a discount on your bill you would have to settle pretty soon, and we also said that the time would soon be up during which we could afford to allow any discount on last year's business.

On the 6th of April we wrote you offering to take out a mortgage on your farm and furnish you the money so that you could settle our account. Nothing was ever done about this, so far as we know.

On April 29th you stated in a letter that you were going to get $600 and would give us $300 out of it. This $300 you did pay down on your account. It was many months after your time for discount had expired.

Now, Shorty, the fact is this: that no one could let an account run as long as yours has and put us to so much trouble and expense and still expect to get his discount. You know as well as we do that discounts are allowed on certain terms, either where an agent needs a house and comes to us frankly and tells us so, and making arrangements whereby he is to pay so much out of his salary each month after having made a substantial cash payment in advance. On a deal of this kind, we allow a discount, or we will allow discount for cash to any customer and a larger cash discount to our own agents; but your account has run along so long that we can't possibly allow a discount.

This is a trial *de novo* in this court, the only dispute being as to whether or not the defendant is entitled to a 25 per cent discount, it being agreed that if such discount is allowed, defendant owes nothing to the plaintiff, and that if it is not allowed, his indebtedness will be the sum of $140, for which a lien was later filed.

(1) We have not set out all of the testimony, but think we have given sufficient extracts to justify the conclusion which we have reached, to wit: That Mr. Jackson made an agreement with the defendant, whereby he was to have the discount, and that the agreement was ratified by the company. Appellant states that he relies for a reversal upon two propositions. First, that Jackson did not agree to the 25 per cent discount; and, second, that if he did, he was without authority to make such an agreement. To the first question, we have

to say, as above, that we think the preponderance of the evidence is in favor of the version given by the defendant, and we are particularly impressed with the probability of the testimony given by Mrs. Lind.

(2) As to the second proposition, it is sufficient to say that the letters of the president of the company show either a ratification of the conversation had by Mr. Jackson, or else of an understanding from some source that a discount should be allowed. As late as March 5th, some six months after the purchase of the lumber, the president of the company wrote that if defendant expected to get a discount on his bill, he would have to settle pretty soon. Some six weeks later $300 was paid, and under the assignment of salary arrangement, the entire bill was paid within five months more. In our opinion, this was such a ratification of the conversation which we have already held occurred between Jackson and defendant as would support the same as a contract. Therefore, we adopt the findings and conclusions of the trial court in this matter to the effect that the debt was fully paid and that the lien should be discharged of record.

Judgment affirmed.

J. P. SCHROEDER and Nic Schroeder, a Copartnership, Doing Business under the Firm Name and Style of McClusky Implement Company, v. A. N. DAVENPORT and George Kelly.

(150 N. W. 926.)

Justice court — garnishment proceedings.

1. Section 6981, Rev. Codes, 1905, construed and held not applicable to a garnishee proceeding commenced in a justice court, following Burcell v. Goldstein, 23 N. D. 257.

Garnishment proceedings — justice court — defense in — by defendant for garnishee — time of — waiver.

2. Section 8405, Rev. Codes, 1905, as amended by chapter 131, Laws 1909, construed and held to require a defendant who desires to interpose a defense in behalf of a garnishee in justice court, to do so at the time fixed for the garnishee's appearance in that court, and that he waives such privilege if not exercised at that time.

Opinion filed January 18, 1915.

Appeal from District Court, Sheridan County, *W. L. Nuessle,* J.

From a judgment in plaintiff's favor dismissing defendant's appeal to the District Court from a judgment against the garnishee, defendant appeals.

Affirmed.

Peter A. Winter, for appellant.

In order to maintain garnishment proceedings, there must be at the time a claim,—a subsisting right of action in favor of the defendant and against the garnishee. 20 Cyc. 983; Hallowell v. Leafgreen, 3 Colo. App. 22, 32 Pac. 79; Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 359; Pabst Brewing Co. v. Liston, 80 Minn. 473, 81 Am. St. Rep. 275, 83 N. W. 448; Edney v. Willis, 23 Neb. 56, 36 N. W. 300.

The defendant is given the express privilege of defending the proceedings against the garnishee. Mallory v. Russell, 71 Iowa, 63, 60 Am. Rep. 776, 32 N. W. 103; Fleming v. Pye, 43 Tex. Civ. App. 176, 95 S. W. 594.

Frank I. Temple, for respondent.

Defendant appeals from a judgment rendered against Kelly, his garnishee, and by answer filed sets up no defense for himself or the garnishee, but one which might exist in favor of a third person,—a stranger to this action. Section 6891, Revised Codes 1905, is intended to relate solely to garnishment proceedings originally begun in district court. Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243; Rev. Codes 1905, § 8405.

The word "May" in a statute must always be construed to mean "must" or "shall" wherever it appears that a duty is imposed, and not merely a privilege granted. Downing v. Oskaloosa, 86 Iowa, 352, 53 N. W. 256; Keely v. Morse, 3 Neb. 224; Mason v. Fearson, 9 How. 248, 13 L. ed. 125; Ex parte Cincinnati, S. & M. R. Co. 78 Ala. 259; Birdsong v. Brooks, 7 Ga. 89; Waterloo Gasoline Engine Co. v. O'Neill, 19 N. D. 784, 124 N. W. 951; Re Brown, 2 Okla. 590, 39 Pac. 469; Richardson v. Augustine, 5 Okla. 667, 49 Pac. 932; Kansas P. R. Co. v. Reynolds, 8 Kan. 623.

If the element of costs is to affect the rule that appellate courts will not decide questions which have become moot questions merely, then in every case such questions must be decided. Costs have nothing to

do with the merits of a case. Re Kaeppler, 7 N. D. 307, 75 N. W. 253; Russell v. Campbell, 112 N. C. 404, 17 S. E. 149; Pritchard v. Baxter, 108 N. C. 129, 12 S. E. 906; Edgerton v. State, 50 Neb. 72, 69 N. W. 302; State ex rel. McNulty v. Porter, 58 Iowa, 19, 11 N. W. 715; Cutcomp v. Utt, 60 Iowa, 156, 14 N. W. 214; Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; State ex rel. Coiner v. Wickersham, 16 Wash. 161, 47 Pac. 421; Hice v. Orr, 16 Wash. 163, 47 Pac. 424; Foster v. Smith, 115 Cal. 611, 47 Pac. 591.

Fisk, C. J. This litigation originated in justice court and is an action to recover on a promissory note. When called for trial in justice court both the defendant, Davenport, and the garnishee, Kelly, appeared in person, and the defendant, for answer to the complaint, admitted each and every allegation therein contained, and made no further appearance in the case. The garnishee, Kelly, was sworn as a witness for the plaintiff, and from his disclosure the court found that the property in his hands was the property of the defendant, and judgment was entered against both the defendant and the garnishee for the sum of $102.62, damages and costs. On December 21, 1912, the defendant appealed from such judgment as rendered against the garnishee, and in March following the cause was reached for trial in the district court, and on motion of counsel for plaintiffs, the appeal was dismissed and judgment entered accordingly, from which judgment this appeal is prosecuted. The ground of the motion for such dismissal was that the defendant, Davenport, was not adversely interested in the judgment against the garnishee, Kelly, and therefore was not the proper party to appeal.

There is but one assignment of error in this court, and that challenges the correctness of the action of the trial court in dismissing such appeal. We shall not stop to inquire whether, technically speaking, the motion to dismiss the appeal was the proper method to pursue in the district court, for it is apparent that had such motion not been made, but instead the cause had been submitted to that court on the merits, the same result would, of necessity, have followed. In other words, the judgment of the justice court would have been affirmed for the obvious rea-

son that there were no disputed issues for trial. Both the defendant, Davenport, and the garnishee, Kelly, admitted liability. But counsel for appellant contends that it was error to dismiss the appeal because he insists that under § 6981, Rev. Codes 1905, defendant had the right to defend in behalf of the garnishee. That section reads: "The defendant may in all cases, by answer duly verified, to be served within thirty days from the service of the garnishee summons on him, defend the proceeding against any garnishee upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment; or, upon any ground upon which a garnishee might defend the same; and may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. And the garnishee may, at his option, defend the principal action for the defendant, if the latter does not, but shall be under no obligations so to do."

As we view it there are two answers to such contention; first, this statute has no application to an action originating in justice court; and, second, even if it had any application there was no issue for trial between the plaintiff and the garnishee, for, as before stated, the garnishee expressly admitted liability to the defendant.

Upon the first proposition see Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243. At page 263 of the opinion it is stated: "It is perfectly clear to us, indeed, that § 6981 of the Codes of 1905, was intended to relate solely to garnishment actions which are commenced originally in the district court, and not to those which have had their origin before a justice of the peace." As we understand appellant's position he claims the right to defend the garnishee upon the ground that the indebtedness owing by such garnishee is not due and owing to him, but to one W. J. Hunt, who is not a party to the record. Conceding, for the purpose of argument, that he had such right if he had properly exercised it, we are clear that he has failed to avail himself thereof. If the money in the hands of the garnishee was due to Hunt instead of to the defendant, Davenport, Hunt should have been interpleaded as a party, but no request for such interpleader appears to have been made before the justice. Appellant's counsel relies upon § 8405 as amended by chapter 131, Laws of 1909, as conferring the right upon

him to urge such defense in behalf of the garnishee at any time, but we do not thus construe the statute. It reads: " . . . If a defendant desire to defend the garnishment proceedings upon the ground that the indebtedness or property involved is exempt from execution, or any other ground contemplated in § 6981, such defense *may* be interposed at the time fixed for the garnishee's appearance; provided, that if said defense is on the ground that such property or indebtedness is exempt from execution, said defendant shall within three days after the service of the garnishment summons upon him, have filed in the justice court in which said action is pending, a schedule of his personal property made and sworn to as provided in § 7119," etc. We think it clear that the defendant is required, under this section, to interpose any defense which he has to the garnishee proceedings at the time fixed for the garnishee's appearance in the justice court, and that if he fails to do so at such time his rights are waived. The 1909 amendment was not designed to change this feature of the statute, although the word "may" was inserted in lieu of the word "must." We think the only change intended by such amendment was the insertion of the proviso included in the above quoted portion of the amended statute. A comparison of the original act with the amended statute serves to make this reasonably plain. The case of Burcell v. Goldstein, supra, lends support to this view. It construed the statute as amended, and we there held, with reference to pleading exemptions in garnishment proceedings originally brought in justice court, that one must, within three days after service of the garnishment summons upon him, file a schedule of his personal property as provided in § 7119, using this language: "This much certainly must be done, as the statute is clear and unequivocal on the subject."

We conclude that the appellant was in no way aggrieved by the judgment appealed from, and the same is accordingly affirmed.

J. L. McCAULL, R. A. Dinsmore, S. J. McCaull, and A. M. Dinsmore, Copartners as the Hawkeye Elevator Company, v. JAKE NICHOLS and Frank Kaiser, Partners as Nichols & Kaiser, and the Flasher State Bank.

(150 N. W. 932.)

Agent — authority — mechanic's lien — withholding from record — mortgage — evidence.

1. Evidence examined, and *held*, that plaintiff's agent had the authority to withhold from record the mechanic's lien until the ninety-day period had expired, thus allowing the mortgage to become a first lien. The evidence discloses that this is what was done.

Estoppel — agent — acts of — benefits received — bank intervening — restoring to former position.

2. Under the evidence, it is held that the plaintiffs are estopped to take advantage of the conduct of their agent whereby they received material benefit and the intervening bank was materially injured by such conduct, unless plaintiffs are in a position to restore the bank to as favorable a position as it occupied at the beginning of the transaction.

Opinion filed January 18, 1915.

Appeal from the District Court of Morton County, *Nuchols*, J. Affirmed.

Niles & Koffel, for appellants.

Defendant bank's mortgage, made within the ninety-day period, did not take priority over plaintiff's mechanic's lien for materials furnished before the expiration of the ninety days. Rev. Codes 1905, §§ 6240, 6242; Bastien v. Barras, 10 N. D. 29, 84 N. W. 559; Turner v. St. John, 8 N. D. 245, 78 N. W. 340; Haxton Steam Heater Co. v. Gordon, 2 N. D. 246, 33 Am. St. Rep. 776, 50 N. W. 708; Bender-Moss on Mechanic's Lien, p. 458, and notes; Bohn Mfg. Co. v. Kountze, 12 L.R.A. 33, note.

The withholding from record of plaintiff's claim for lien, by inducements offered plaintiff's local agent by the cashier of the defendant bank, and by the acts of such cashier in delaying filing plaintiff's lien, constituted fraud on the plaintiff. The filing of its mortgage prior to

plaintiff's lien was also a fraud on plaintiff, or at least gross negligence on the part of the cashier, who had assumed to have the lien filed. Therefore the bank is estopped to deny priority of plaintiff's lien. Peabody v. Lloyds Bankers, 6 N. D. 27, and note page 35, 68 N. W. 92; Stevens v. Ludlom, 24 Am. St. Rep. 210, and note, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771; 7 Am. & Eng. Enc. Law, 17–20; Markham v. O'Connor, 52 Ga. 183, 21 Am. Rep. 249; Hennessy v. Griggs, 1 N. D. 53, 44 N. W. 1010; O'Hara v. Park River, 1 N. D. 279, 47 N. W. 380; Brown v. First Nat. Bank, 137 Ind. 655, 24 L.R.A. 206, 37 N. E. 158; Kray v. Muggli, 77 Minn. 231, 45 L.R.A. 219, 79 N. W. 964, 1026, 1064; Continental Nat. Bank v. National Bank, 50 N. Y. 575; McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281; Gjerstadengen v. Hartzell, 9 N. D. 276, 81 Am. St. Rep. 575, 83 N. W. 230; Rev. Codes, § 5772, and authorities cited; Union Mut. L. Ins. Co. v. Slee, 110 Ill. 35; 31 Cyc. 1379, and cases cited; 1 Am. & Eng. Enc. Law, 2d ed. 1003, and cases cited.

The defendant bank knew or could have known, and it was its duty to know, the extent of the authority of plaintiff's agent. 1 Am. & Eng. Enc. Law, 2d ed. 996, 998, and cases cited; 1 Am. & Eng. Enc. Law, 350, and notes 2, 354, and cases cited; 31 Cyc. 1322, 1323, 1326, 1330, and cases cited.

When an agent is authorized to sell and collect, he must receive payment in cash. No other mode is permitted. 1 Am. & Eng. Enc. Law, 356, 357, and note 1; 31 Cyc. 1379, 1390, 1391, and cases cited; 1 Am. & Eng. Enc. Law, 2d ed. 108, 1002, 1003, 1014–1018, 1027, and cases cited; Van Vechten v. Smith, 59 Iowa, 173, 13 N. W. 94; Kountz v. Gates, 78 Wis. 415, 47 N. W. 729; Ludwig v. Gorsuch, 154 Pa. 413, 26 Atl. 434; Foster v. Paine, 56 Iowa, 622, 10 N. W. 214.

Neither can he bind his principal by a composition or release of the claim. 1 Am. & Eng. Enc. Law, 2d ed. 1028, and cases cited; Melvin v. Lamar Ins. Co. 80 Ill. 446, 22 Am. Rep. 199; 31 Cyc. 1393, and note 44.

Authority to do acts beyond the needs of the principal's business is not inferred from the use of general terms of the broadest import. 31 Cyc. 1386; Thiel Detective Service Co. v. McClure, 4 L.R.A.(N.S.) 843, and case note, 74 C. C. A. 122, 142 Fed. 952; Wheeler v. McGuire, 2 L.R.A. 808, and case note, 86 Ala. 398, 5 So. 190; Fifth Nat.

Bank v. Ashworth, 2 L.R.A. 491, and case note, 123 Pa. 212, 16 Atl. 596; Wm. Deering & Co. v. Russell, 5 N. D. 319, 65 N. W. 691; Reeves v. Corrigan, 3 N. D. 415, 57 N. W. 80.

Hauley & Sullivan, for respondents.

The findings of the lower court will be presumed to be correct in the absence of a showing to the contrary. There is no such showing in this case. Brady v. Kreuger, 8 S. D. 464, 59 Am. St. Rep. 771, 66 N. W. 1083; Gress v. Evans, 1 Dak. 387, 46 N. W. 1132; Myers v. Mitchell, 1 S. D. 249, 46 N. W. 245; Merrill v. Luce, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43; Searles v. Knapp, 5 S. D. 325, 49 Am. St. Rep. 873, 58 N. W. 807; Garr, S. & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867; Gould v. Duluth & D. Elevator Co. 3 N. D. 104, 54 N. W. 316; Crouch v. Dakota, W. & M. R. Co. 18 S. D. 540, 101 N. W. 722.

The plaintiff did an act with the intention of influencing the conduct of defendant, and under reason to believe that the statements made would influence the defendant; and since defendant was influenced by and acted upon such statements, a perfect example of estoppel exists. Parliman v. Young, 2 Dak. 175, 4 N. W. 139, 711; Eickelberg v. Soper, 1 S. D. 568, 47 N. W. 953.

The fact of agency and the extent of authority cannot be proved by the agent's declarations. Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

Again, by accepting the benefits of the argument made by McCall, the plaintiff ratified the act of its agent. Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717; Russell v. Waterloo Threshing Mach. Co. 17 N. D. 248, 116 N. W. 611; Anderson v. First Nat. Bank, 4 N. D. 182, 59 N. W. 1029; Rev. Codes 1905, §§ 5763–5766.

Burke, J. This is a trial *de novo.* While there are disputes in this case, we have no hesitancy in stating that the facts are clear to us. Not having the space to set out the evidence in full, we will content ourselves with stating that in our opinion the following narration is supported by the evidence and appeals to us as the most reasonable construction to be placed upon all of the evidence.

During the fall of 1909 the defendant Kaiser, together with one Nichols, bought a lot in the village of Flasher upon contract from the

W. H. Brown Land Company and began the erection of a building thereon, procuring lumber upon credit from the plaintiff, copartnership, which we shall hereafter refer to as the Hawkeye Elevator Company, the last purchase of lumber being on November 11, 1909.

Thereafter, and on or about the 24th of January, 1910, Kaiser purchased the interest of Nichols in the contract for the lot, and upon paying the balance of the purchase price, obtained the deed to the same. At or about the same time, he negotiated for a loan with the Flasher State Bank, through one Grace, its cashier. During all of these times, one McCall was the local agent of the plaintiff and Hawkeye Elevator Company, and as such had sold the lumber to the defendant and Nichols. Shortly before the 24th of January, 1910, Kaiser and McCall approached Grace with the purpose of having the bank take a mortgage upon the building and lot in a sum sufficient to pay the balance due upon the lumber bill, which was the sum of $800.

In this connection, Mr. Grace testified:

I can't remember whether they came together or whether they came separately, but Kaiser and he were both in and solicited the loan before it was made.

Q. Is that all you remember about it?

A. Furthermore, we were to have the first lien on the property. We were to have the mortgage, and our mortgage was to be the first lien.

. . .

Q. And were to loan them $800—and what was to be done with the $800?

A. To pay the Hawkeye Elevator Company.

. . .

Q. You were not to get clear title to the property until they were paid off?

A. If they did not turn over the property, that was not our business. That is what we loaned it to them for.

. . .

Q. Did you obligate yourself in any way to attend to the distribution of the money?

A. I did not.

. . .

Q. Did he offer you any inducements, as cashier of the bank, to induce you to make this loan to Frank Kaiser?

A. We were to have the first lien on the property.

Q. Was that his offer to you?

A. Yes.

. . .

Q. Then it was the statement made by the Hawkeye Elevator Company through their agent, Frank McCall, that induced you to make this loan to Frank Kaiser?

A. Yes.

Q. Did you rely upon the representations that were made to you by Mr. McCall?

A. I did.

Upon this same question, McCall testifies in part:

Q. That was the arrangement and understanding on the day the papers were made out?

A. Yes, sir, we were to get our $800 and they were to get the first lien.

Q. That was on the 24th day of January. The arrangement between you and Mr. Kaiser and the bank was this,—that the bank should make the loan of $800 to Mr. Kaiser,—that if they would make the loan of $800 to Mr. Kaiser, their mortgage would be the first lien, and you were to have the $800 that Mr. Kaiser was to get?

A. Yes.

And again he testifies:

Q. You wanted Mr. Grace to make the loan so your company would get its money?

A. Yes, sir, we did.

Q. You were anxious to get the matter straightened up?

A. Yes.

. . .

Q. You were willing to have Mr. Grace make this loan for $800, and you told him that if he would make the loan for $800, that you would let his mortgage be the first lien when you got your money, and, of course, it would be?

A. Yes, it would be because we would have nothing against the property.

Q. That was the arrangement and understanding on the day the papers were made out?

A. Yes, we were to get our $800 and they were to get the first lien.

Without setting forth more of the testimony, we will say that we are satisfied that at that time the arrangement was that Kaiser was to pay to McCall the proceeds of the loan; everybody had confidence in Kaiser and did not attend to the business as promptly as they otherwise might have done, and owing to the fact that Flasher is not a county seat, none of the papers were then filed. We also find that on the same day, the 24th of January, 1910, the bank paid to Kaiser the full amount of his loan by crediting it to him upon the books of the bank, and that McCall knew of this transaction and assumed the burden of collecting the money from Kaiser, for either upon the same afternoon or upon the following forenoon, McCall had further conversation with Kaiser outside of the bank, and without the knowledge of the bank, whereby he extended further accommodations to Kaiser, the exact nature of which is not clear to us, owing to the fact that Kaiser was not a witness. However, it appears that Kaiser wished to go to Iowa to be married, and, needing some money for that purpose, induced McCall to accept a check for $450 upon the bank, and a note for the balance, $350, due in one year, running to the Hawkeye Elevator Company. Regarding this transaction, McCall testifies that Kaiser promised to pay the same after he returned from his wedding trip, which is, of course, inconsistent with the fact that the note ran for one year.

McCall testifies upon cross-examination:

Q. Mr. Grace never told you that he had to hold the money until the papers were accepted?

A. No, it was just an assumption I had.

. . .

Q. Now, it was the same afternoon or the next day that he gave you this check?

A. I think it was the next morning. Some time the day after or the next day.

Q. And he gave you then a check for how much?
A. $450.
Q. On this account in the bank?
A. Yes, to apply to our account.
Q. He gave you a check of this $800 he got from the bank?
A. Yes.
Q. And he gave you a check for $450 of it?
A. Yes.
Q. And you arranged with him at that time that the balance of the $350 you would take a note for?
A. Yes.

. . .

Q. And your arrangement with him was—he was at that time going away to get married, and when he got back he would give you a check for the balance?
A. Yes.
Q. In the meantime you accepted his note as satisfactory?
A. I accepted his note as satisfactory at that time, and told him that in case he did not pay it, I would have to file a lien for the balance.

It does not appear that the bank had any knowledge of the extension of this further credit to Mr. Kaiser.

The ninety days, within which the lien might be filed, expired about the 9th of February, 1910, and at that time no lien had been filed. The bank recorded their mortgage on the 18th of February, 1910. Later, on the same day, the lien was filed with the clerk of court. Thus, the mortgage, under our recording act, would be prior to the mechanic's lien, if it were not for the circumstance claimed by appellant to control; to wit, that the $800 was paid to Kaiser about two weeks before the time for the filing of a mechanic's lien had expired. We do not need to rest our decision upon this proposition, however, as we are satisfied that the priority of the mortgage rests upon at least two other grounds upon which the law is absolutely clear.

(1) One of those is that McCall was the ostensible agent of the plaintiff as defined by §§ 6338–6340, Comp. Laws 1913. It is immaterial whether he had authority to satisfy a lien or to waive a lien, but he certainly had authority to withhold the lien from the files until

after the ninety-day period had expired, thus allowing the mortgage by agreement to become a first lien. That he did this in pursuance of an agreement with the bank is a conclusion that is irresistibly forced upon us by all the circumstances of this case.

(2) The second ground is that the plaintiffs are estopped to take advantage of the conduct of their agent even if unauthorized, which resulted in the payment by the bank of $800 to Kaiser upon the representations of their agent that the money would be used to pay the lien, thus making the mortgage the first encumbrance. Having received the benefits of the conduct of their agent, it would be inequitable to allow them to repudiate the deal, unless they were prepared to place the bank in as favorable a position as it was at the beginning. Eickelberg v. Soper, 1 S. D. 563, 47 N. W. 953.

For those reasons, we affirm the findings of the trial court in all particulars and adopt his conclusions of law to the effect that the mortgage was a prior encumbrance upon the premises.

THE STATE OF NORTH DAKOTA v. J. C. HOFF.

(150 N. W. 929.)

Embezzlement — information — sufficiency.

1. Information examined and held sufficient to charge embezzlement by defendant as a bailee.

Instruction — intent — errors — cured by specific instructions.

2. Though a portion of the instructions concerning intent are inaccurate, and, under certain circumstances, might be prejudicial, the specific instructions as to intent cure the error complained of and render the same nonprejudicial.

Opinion filed January 18, 1915.

Defendant, convicted of embezzlement, appeals from the judgment of the District Court of Mountrail County, *F. E. Fisk*, J.

Affirmed.

E. R. Sinkler for appellant.

The information is insufficient for the reason that the charging

clause or part is in recital form. No bailment is alleged. No demand for the return of the property is alleged. No conversion alleged. No fiduciary capacity is pleaded, and no trust relation shown. The information is bad for duplicity. State v. Messenger, 58 N. H. 348; State v. Palmer, 32 La. Ann. 565; 7 Enc. Pl. & Pr. 418; People v. Tryon, 4 Mich. 665; State v. Farrington, 59 Minn. 147, 28 L.R.A. 395, 60 N. W. 1088.

The capacity or character in which money or other property alleged to have been embezzled was received or held by the accused, and the fact that it came into his possession by reason of such fiduciary relation, should be alleged in the information. 15 Cyc. 519; Com. v. Barney, 115 Ky. 475, 74 S. W. 181; Terry v. State, 1 Wash. 277, 24 Pac. 447; People v. Cohen, 8 Cal. 42; Sanders v. State, 86 Ga. 717, 12 S. E. 1058; Kibs v. People, 81 Ill. 599, 2 Am. Crim. Rep. 414; Gaddy v. State, 8 Tex. App. 127; State v. Longworth, 41 Tex. 162; Com. v. Simpson, 9 Met. 138; State v. Johnson, 21 Tex. 775; Griffin v. State, 4 Tex. App. 390; Wise v. State, 41 Tex. 139.

A deposit for safe-keeping is one where the depositary is bound to return the identical thing deposited. Rev. Codes 1905, § 5451.

In such case, before embezzlement can be claimed it must be shown that the thing or property has been converted to the depositary's own use. A mere appropriation to one's use is not sufficient. People v. Cohen, 8 Cal. 42; People v. Peterson, 9 Cal. 313; People v. Poggi, 19 Cal. 600; 3 Chitty, Crim. Law, 967; Com. v. Merrifield, 4 Met. 468; People v. Johnson, 71 Cal. 384, 12 Pac. 261; State v. Griffith, 45 Kan. 142, 25 Pac. 616.

The information, under our statute, should not merely state the bailment or trust, but should aver the facts and circumstances which make the case embezzlement, and it is also necessary to state the purpose for which defendant was intrusted with the property. Com. v. Smart, 6 Gray, 15; State v. Grisham, 90 Mo. 163, 2 S. W. 223; Gaddy v. State, 8 Tex. App. 127; State v. Mims, 26 Minn. 191, 2 N. W. 492; Wilbur v. Territory, 3 Wyo. 268, 21 Pac. 698.

Information should allege that defendant agreed to safely keep the property. Calkins v. State, 34 Tex. Crim. Rep. 251, 29 S. W. 1081; State v. Nelson, 79 Minn. 388, 82 N. W. 650; People v. Dunlap, 113 Cal. 72, 45 Pac. 183; Wabash, St. L. & P. R. Co. v. People, 12 Ill.

App. 448; State v. Collins, 62 Vt. 195, 19 Atl. 368; State v. Walworth, 58 Vt. 502, 3 Atl. 543.

A wholly unjustified attack by counsel upon a party to a cause on trial before a jury is calculated to prejudice their minds and prevent them from impartially weighing the evidence, and is ground for a new trial. Parker v. Providence Carriage Co. 20 R. I. 378, 78 Am. St. Rep. 878, 39 Atl. 242; People v. Dane, 59 Mich. 550, 26 N. W. 781; Sasse v. State, 68 Wis. 530, 32 N. W. 849; Kearney v. State, 101 Ga. 803, 65 Am. St. Rep. 348, 29 S. E. 127.

The intent to defraud must be established by the state beyond a reasonable doubt from all the evidence, and not from one act. State v. O'Malley, 14 N. D. 200, 103 N. W. 421; State v. Pilling, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230; Thomas v. State, 57 Tex. Crim. Rep. 452, 125 S. W. 35; State v. Schaefer, 35 Mont. 217, 88 Pac. 792; Goldsberry v. State, 66 Neb. 312, 92 N. W. 906; Madden v. State, 1 Kan. 356; Farris v. Com. 14 Bush, 367; Thomas v. State, 16 Tex. App. 539; Black v. State, 18 Tex. App. 124; Luera v. State, 12 Tex. App. 259; Ogletree v. State, 28 Ala. 697.

F. F. Wyckoff, State's Attorney, for respondent.

"That the act or omission charged as the offense is clearly set forth, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Rev. Codes 1905, § 9856.

Certain positive and specific facts are alleged which clearly create the trust relation existing between defendant and the complaining witness. Rev. Codes 1905, §§ 5703, 5704; Wilbur v. Territory, 3 Wyo. 268, 21 Pac. 698; People v. Johnson, 71 Cal. 384, 12 Pac. 261.

In such cases, it is not necessary to allege a demand and refusal to return the property, because such are not elements of the offense; only evidence of the wrongful conversion is necessarily in such respect. Com. v. Kelley, 125 Ky. 245, 101 S. W. 315, 15 Ann. Cas. 573; State v. Porter, 26 Mo. 208; People v. Piggott, 126 Cal. 509, 59 Pac. 31; People v. Carpenter, 136 Cal. 391, 68 Pac. 1027; People v. Ennis, 137 Cal. 263, 70 Pac. 84.

Proper objection and exception to improper remarks of the state's attorney during the trial must be made at the time they occur, in order

to present the question for review. Territory v. Collins, 6 Dak. 234, 50 N. W. 122.

The intent may be inferred and presumed from the doing of a wrongful and fraudulent act. A person intends the ordinary consequences of his voluntary act, and that an unlawful act was done with an unlawful intent. State v. O'Malley, 14 N. D. 200, 103 N. W. 421; State v. Pilling, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230; State v. Schaefer, 35 Mont. 217, 88 Pac. 792.

Goss, J. Defendant, convicted of embezzlement, appeals. The first error assigned is based on objection to all testimony on the ground that the information is insufficient to charge embezzlement. The information was not assailed by demurrer. It will be assumed that the question of sufficiency of the information to charge embezzlement is raised under § 10,745, Comp. Laws 1913. The information recites that defendant "did commit the crime of embezzlement, committed as follows, to wit: that at said time and place the said J. C. Hoff then and there having in his possession and under his control property of Carl Anderson, to wit: $120 intrusted to said J. C. Hoff by said Carl Anderson for safekeeping, for the use and benefit of said Carl Anderson, did wilfully, fraudulently, and feloniously appropriate the same to his own use, a purpose not in the due and lawful execution of his trust, without the consent of said Carl Anderson." The information is drawn to charge embezzlement by a fraudulent conversion by a bailee, under § 9934, Comp. Laws 1913. That statute, omitting unnecessary words, reads: "If any person being intrusted with any property as bailee. . . . fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, he is guilty of embezzlement." Appellant asserts that the information is insufficient "for the reason that the charging part is in the form of a recital." This arises from the use of the word "having," the participle. No citation of authority is needed, as no modern authority supports the objection taken. Bishop's New Criminal Procedure, vol. 2, §§ 504, 556–588, that "the participle or even the adverb will suffice when so employed to satisfy the demand for directness," and "the law which is even indifferent to false grammar and verbal in-

accuracies does not require for the direct averment any particular part of speech, provided that to the common understanding it is direct."

Counsel then avers that the information is drawn under both §§ 9933 and 9934, relating to different appropriations by persons in different fiduciary capacities, and therefore, that the information is duplicitous. This ground cannot be urged on an objection taken to evidence. It can only be taken by demurrer. No demurrer having been interposed, the defect is waived. State v. Climie, 12 N. D. 33, 94 N. W. 574, 13 Am. Crim. Rep. 211. But the information was not drawn under or to cover any embezzlement except the one charged under § 9934, heretofore quoted.

The next assignment is that "no demand for the return of the property alleged to have been embezzled is set forth." Drawn under this section the information did not need any allegation as to demand, as the statute does not make demand an element of the offense. 15 Cyc. 522 and authorities under note 27 and 7 Enc. Pl. & Pr. 440. "It is necessary to allege a demand made upon the defendant to pay the money or return the property, and his refusal to do so, only when the statute makes such demand and refusal elements of the crime." See also Keys v. State, 81 Am. St. Rep. 63, and note (112 Ga. 392, 37 S. E. 762), and State v. Blackley, 138 N. C. 620, 50 S. E. 310, that "where a statute defining embezzlement does not make a demand necessary to support a conviction, proof of a demand is unnecessary." Arizona v. Monroe, 10 Ariz. 53, 85 Pac. 651.

Defendant then alleges that "there is no allegation set forth of conversion by the defendant." This is predicated upon the use of the words "fraudulently appropriate" in the information, instead of the statutory terms "fraudulently convert" in the averment that said defendant "did wilfully, fraudulently, and feloniously appropriate the same to his own use . . . without the consent of said Carl Anderson." The objection is unsound. Section 9929 defines embezzlement to be "the fraudulent appropriation of property by a person to whom it has been intrusted," and § 9934 declares that under the circumstances there stated whoever "fraudulently converts the same . . . to his own use is guilty of embezzlement," the very definition of which is the fraudulent appropriation of property by a person to whom it has been intrusted. In other words, the term "convert" means no more than

is signified by the term "appropriation" as used in defining this particular crime. See also § 9936, construed in State v. Bickford, 28 N. D. 36, 147 N. W. 407 at page 418. And the information charges the commission of the crime of embezzlement by felonious appropriation of property. The terms are words of art as used in the information for this particular crime, and therefore have a certain and definite meaning. Teston v. State, 50 Fla. 137, 39 So. 787. Counsel in this connection draws the inference that because the statute uses the word "converts," a demand must be alleged before a conversion to constitute embezzlement is charged. The cases heretofore cited establish the law to be the contrary. See also People v. Ward, 134 Cal. 301, 66 Pac. 372, from which we quote: "A demand is not 'an indispensable requirement of law in all cases,' as contended by appellant, nor can it be true that 'without such demand, no offense [embezzlement] exists.' A demand, followed by a refusal, if the other essential facts exist, is evidence of embezzlement, and sometimes indispensable evidence of it; but it is the fraudulent and felonious conversion of the money or other property that constitutes the offense, and that may often be proved without a demand," citing authority. This is true, of course, only where a demand is not a part of the definition of the embezzlement charged.

It is urged that the information does not sufficiently charge the existence of a fiduciary relationship between defendant and Anderson, or define the same, or allege that the money was held by defendant in a fiduciary capacity and appropriated to a purpose not in the lawful execution of the trust under which it was held. The information charges the money to have been in the possession and under the control of defendant, and to have been the property of Anderson, intrusted to the defendant by him for safe-keeping, for the use and benefit of Anderson, and Anderson's money, so held by defendant for such purposes, was by defendant fraudulently appropriated to his own use,—a purpose not in the due and lawful execution of his trust, and this without Anderson's consent. The words "for safe-keeping" define the character for the holding by defendant of Anderson's money so intrusted and in Hoff's possession and control, and that the same is alleged to be for the benefit of Anderson. The facts stated make the defendant a bailee of the money under the only conclusion of law to be

drawn therefrom. This sufficiently meets the requirement that the fiduciary relationship and character of the holding and possession of the money shall appear. It may be true that without the phrase "for safe-keeping" the information would be fatally defective. Such has the support of the cases found in appellant's brief, upon which question there is no necessity for passing. Assuming that the character of the bailment must appear, "the nature of this trust is we think, for all practical purposes, sufficiently indicated by the averment to the effect that it was created for the use and benefit of the particular person named," quoting from Keys v. State, 112 Ga. 392, at page 395, 81 Am. St. Rep. 63, at page 66, 37 S. E. 762; 15 Cyc. 519; 7 Enc. Pl. & Pr. 420–423. It is true that some early holdings may be found to the contrary, but the tendency of the law in embezzlement, under statutes, found in most of the states, similar to §§ 10,693, 10,694, and kindred provisions, announcing rules of pleading and form of the information, is toward a more liberal construction of criminal informations. As illustrative of this, some of the very authority cited, People v. Cohen, 8 Cal. 42, was overruled in People v. Poggi, 19 Cal. 600, in turn again later at least modified by the holding of People v. Johnson, 71 Cal. 384, 12 Pac. 261, also an embezzlement case, wherein the same claim was made as here. "It is insisted that the information is fatally defective in that it does not charge in express terms that the defendant was a 'bailee.' The decisions of the courts of the several states as to the sufficiency of the charging parts of indictments depend very largely on the various statutes. . . . We think it does not render the information subject to general demurrer that the defendant is not named therein as 'bailee' . . . if the terms of the contract between the defendant and the person alleged to have been specially injured are specifically set forth and the contract clearly shows that the defendant was thereby constituted a bailee and received the property in that capacity. . . . None of the cases seem to sustain the proposition that where the facts showing a party charged as a 'bailee' are fully stated, and all the other facts necessary to constitute the offense are averred, and indictment is fatally defective, because he is not in terms alleged to be a 'bailee.' On principle, we can see no reason why it should be so held." And many of the very cases cited by appellant are discussed in People v. Poggi, 19 Cal. 600, and held inapplicable.

The information there was very similar to the one here. It sufficiently charges both the fact of and the character of the bailment.

Error is assigned on a remark of the state's attorney, made during defendants' cross-examination. No exceptions was taken thereto, either at the time or later, during the progress of the trial, and there is therefore nothing upon which to predicate error.

Several exceptions are taken to the written charge given, all of which have been carefully examined. Only one is apparently meritorious. But taking the instruction as a whole, and in the light of the proof, no prejudice could have resulted from such error. In its general instructions the court said: "To constitute the crime of embezzlement the intent of the defendant is a material allegation to be proved by the state." A correct instruction, but which was followed by the erroneous one that "the rule of law in regard to intent is that intent to defraud is to be inferred from wilfully and knowingly doing that which is illegal and which in its necessary consequences and results must injure another. The intent may be presumed from the doing of a wrongful and fraudulent or illegal act." While this is an instruction in the abstract, it is not a correct one. The statement that "intent to defraud is to be inferred" may be easily misunderstood. What was meant was that intent to defraud may be inferred. Then again, intent to defraud is not necessarily an inference to be drawn from "knowingly doing that which is illegal, and which in its consequences and results must injure another." People v. Jackson, 138 Cal. 462, 71 Pac. 556, 557. This instruction, also given in a prosecution for embezzlement, is there criticized as follows: "We think appellant's objection to that part of the instruction which reads as follows, 'A fraudulent and felonious intent is presumed from the deliberate commission of an unlawful act for the purpose of injurying another' is not altogether without foundation. It does not necessarily follow that a party intends fraud because he deliberately commits an unlawful act for the purpose of injuring another. The 'unlawful act' may be an act of personal violence, intended simply to injure the person, or it may be intended only to injure the character, and in no way directed at the property or property rights of the person. In any of these instances it would be very difficult to deduce a fraudulent purpose from the act." But the court concludes with the following, applicable to the instant case, under the evidence:

"But in this case there were no acts of defendant before the jury from which to infer any criminal intent, except the acts which went to make up the very crime with which she was charged, and which were pertinent to establish that crime. The jury of necessity, therefore, must have applied the instruction to those facts alone; and thus applied, it could do the defendant no harm. Again, the portion of the instruction objected to should be read and construed with all the instructions given; and reading it thus, it is still more clearly made to appear that the defendant suffered no injury by it." The instruction given was taken literally from 2 Brickwood's Sackett, Instructions, § 2925 (d), and one which was approved in Agnew v. United States, 165 U. S. 36–48, 41 L. ed. 624–629, 17 Sup. Ct. Rep, 235, where the identical instructions here given are found as a part of a lengthy instruction on intent in embezzlement. But, of course, instructions sometimes proper in federal courts are erroneous in state jurisdictions, where, as here, the court must not instruct upon facts. State v. Barry, 11 N. D. 428, 92 N. W. 809, adhering to the rule early announced in Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003. The instruction is inaccurate and should not be given. But the jury were also instructed that it could not find defendant guilty without he entertained at the time of the appropriation of the money a specific intent to "fraudulently appropriate or convert the same to his own use." The erroneous general instruction must have been nonprejudicial under the facts and under the specific instruction on intent later given.

All the testimony has been carefully read and overwhelmingly supports the verdict. The judgment and order appealed from is affirmed.

ARTHUR LYNN v. IVER SEBY.

(L.R.A. 1915 —, 151 N. W. 31.)

Thresher — action by to recover balance — counterclaim by defendant — unfinished threshing — contract — damages — depreciation in price — remote.

1. Plaintiff, a thresher, agreed to thresh all the grain of defendant. He

Note.—The question of the effect of remoteness on the recovery of damages for breach of contract is considered in a note in 53 L.R.A. 37. This note also contains

threshed the wheat and oats and refused to thresh the flax. Defendant paid a portion of the thresh bill for the grain threshed. On suit by plaintiff for the balance defendant counterclaims for damage to the unthreshed flax by the elements after plaintiff's refusal to thresh the same and before defendant could procure it to be threshed; also, for $25, the amount of the difference between what defendant would have been charged under the agreement and the amount he was obliged to pay for flax threshing; also, for the depreciation in market price between the time when it should have been threshed and the time it was threshed; and that if the damage by the elements is too remote to be recovered, that plaintiff, because of his breach of contract, should not be allowed a recovery, and the court should leave the parties as it finds them and dismiss the action. *Held*, that under the rule announced in Hayes v. Cooley, 13 N. D. 204, damage to said grain by the elements is too remote for allowance, and as that case established a rule in this state, it will be followed and not overruled.

Excess thresh bill necessarily paid — counterclaim for.

2. Defendant may counterclaim, as was allowed by the trial court, and recover for any excess in thresh bill paid for threshing the flax over what he would have paid had plaintiff performed the contract and threshed the flax.

Market price — depreciation — counterclaim for — speculative.

3. Defendant's counterclaim for depreciation in the market price of flax between the time of plaintiff's refusal to thresh and the time when the flax was threshed is wholly speculative and conjectural and cannot be allowed.

Damages — measure of — difference in cost of threshing.

4. Plaintiff may recover for the balance of the thresh bill remaining over and above the counterclaim for difference in threshing. Where the work and labor performed before the breach of contract by the party afterwards breaching it is beneficial to the other party, the latter will be required to pay therefor under promise implied in law to pay its reasonable value.

Complaint — theory — express contract — judgment — *quantum meruit* — issues tried and submitted — supreme court will not consider change.

5. Judgment was awarded on the theory that the complaint constituted a basis for the recovery. Defendant now seeks to urge on appeal that as the complaint is upon an express contract, judgment as upon *quantum meruit* should not have been ordered. *Held*, that on the record this constitutes an attempt to change the theory of trial, and the appellate court will pass upon the same issues only as those presented to the trial court, and will not permit defendant to urge the additional issue that the complaint is insufficient to support the judgment.

Opinion filed January 30, 1915.

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a division devoted to the question of the measure of damages for breach of contracts for services.

From the judgment of the District Court of Eddy County, *Bultz*, J., defendant appeals.

Affirmed.

N. J. Bothne, for appellant.

The court erred in sustaining the plaintiff's demurrer to that part of defendant's counterclaim relating to damages for loss in difference in price of grain, caused by respondent's failure to timely perform his contract. Rev. Codes 1905, § 6563.

Where a contract is entire and one party, not in default, is willing to complete its performance, the other party, who abandons the contract or refuses to perform it, cannot recover on *quantum meruit* the value of the labor he has expended in its partial performance. The fixing of the price per bushel for threshing does not make the contract severable. Johnson v. Fehsefeldt, 106 Minn. 202, 20 L.R.A.(N.S.) 1069, 118 N. W. 797.

An entire contract for services cannot be apportioned so as to permit a recovery for part performance by one who is guilty of a breach of contract. Timberlake v. Thayer, 71 Miss. 279, 24 L.R.A. 231, 14 So. 446; Ptacek v. Pisa, 231 Ill. 522, 14 L.R.A.(N.S.) 537, 83 N. E. 221; McMillan v. Vanderlip, 12 Johns. 165, 7 Am. Dec. 299; Munsey v. Tadella Pen Co. 2 N. Y. Anno. Cas. 371, 38 N. Y. Supp. 159; Stewart v. Weaver, 12 Ala. 538; Olmstead v. Beale, 19 Pick. 528; Hansell v. Erickson, 28 Ill. 257; Koplitz v. Powell, 56 Wis. 671, 14 N. W. 831; Lantry v. Parks, 8 Cow. 63; Badgley v. Heald, 9 Ill. 64; Prautsch v. Rasmussen, 133 Wis. 181, 113 N. W. 416; Widman v. Gay, 104 Wis. 277, 80 N. W. 450; Parsons, Contr. 519, 658, 659.

This action is upon an express contract, and not one by which *quantum meruit* damages can be recovered.

The complaint is upon an express contract, and there is no allegation as to the reasonable value of the services rendered, or any intimation of intention to recover upon such ground or cause. 3 Words & Phrases, 2606; Tharp v. Blew, 23 N. D. 3, 135 N. W. 659; Lowe v. Jensen, 22 N. D. 148, 132 N. W. 661; Bentley v. Edwards, 125 Minn. 179, 51 L.R.A.(N.S.) 254, 146 N. W. 347; 9 Cyc. 749; Morrow v. Board of Education, 7 S. D. 553, 64 N. W. 1126.

The answer states a valid, substantial defense and it was error to

order judgment on the pleadings. Nollman v. Evenson, 5 N. D. 344, 65 N. W. 686; Anderson v. Todd, 8 N. D. 158, 77 N. W. 599; Braseth v. State Bank, 12 N. D. 486, 98 N. W. 79; Marchand v. Perrin, 19 N. D. 794, 124 N. W. 1112; Von Rosenberg v. McDonald, 24 Misc. 771, 53 N. Y. Supp. 551.

Maddux & Rinker, for respondent.

Where a thresher fails to do the threshing, and loss to the grain is occasioned by the elements, the damages resulting are too remote to admit of recovery. Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250.

This is also true as to defendant's claim for damages resulting to him, in the difference or change in price of the grain, on same ground, and on the further ground that same is speculative. Ibid.

The contract is conceded to be entire in its nature. But plaintiff may recover for the value of his services, less any provable damages sustained by defendant, by reason of plaintiff's failure to strictly or substantially perform his entire contract. Fenton v. Clark, 11 Vt. 560; Hillyard v. Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Pixler v. Nichols, 8 Iowa, 106, 74 Am. Dec. 298; McClay v. Hedge, 18 Iowa, 66; Duncan v. Baker, 21 Kan. 99; Parcell v. McComber, 11 Neb. 209, 38 Am. Rep. 366, 7 N. W. 529; Bedow v. Tonkin, 5 S. D. 432, 59 N. W. 222.

But the amount of recovery cannot exceed the amount of the contract. Bedow v. Tonkin, 5 S. D. 432, 59 N. W. 222; Parcell v. McComber, 11 Neb. 209, 38 Am. Rep. 366, 7 N. W. 529.

In this case there is no question or dispute as to the value of the services actually performed by plaintiff, as was the condition in the South Dakota case cited by counsel. Morrow v. Board of Education, 7 S. D. 553, 64 N. W. 1126.

Goss, J. Plaintiff has recovered judgment against defendant for a small amount as a balance of a thresh bill. Judgment was granted upon the pleadings. In brief, plaintiff agreed to thresh all of defendant's grain. He threshed the wheat and oats, but refused to thresh the flax. Defendant was unable to procure threshing of his flax that fall, and defends and counterclaims for the amount of the resulting damage from the flax remaining unthreshed through the winter. The contract for threshing was the usual one, with no special provision whereby

plaintiff agreed to be responsible in damages for more than ordinary liability. Therefore his counterclaim did not plead a cause of action for damages, under the holding in Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250, for the reason that the loss of grain through resulting exposure to the elements is a remote, and not a proximate, consequence of the breach of the contract, and will not sustain a recovery, the measure of which is defined by § 7146, Comp. Laws 1913, merely declaratory of the common law. It cannot be said that such damages are those "which in the ordinary course of events would be likely to result" from the breach of the contract by plaintiff. Defendant concedes this to be the declared law of this state, but avers that the same should be either overruled or there should be engrafted thereon the further condition that if defendant cannot recover such damages plaintiff should not be allowed to breach his contract and also recover for the part performance by him. Or, in other words, that the parties should be left as they are found, and if plaintiff sees fit to breach his contract, that he should go without pay for the portion performed, and for which he would have received payment had he fully performed.

The question is an important one, and no doubt much can be said towards and much authority cited sustaining the contention of the defendant. The rule at common law was against plaintiff's recovery until the case of Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713, was decided in 1834, in disregard of precedent. But the reasoning of that case is so cogent that it seems to have at least divided, if not changed, the current of authority. It first recognized the fact of the benefits of the part performance to the party who would keep such benefits, incapable of being returned, and still avoid paying anything for the benefits accrued where the contract is not fully performed. It may be remarked that besides affecting parties similarly situated to those before us, this decision must also be precedent upon the right of recovery of those in analogous positions; as, for instance, the farm laborer who hires for the summer and at the end of six months' labor performed quits his employment, and similar cases, where the contract is indivisible. An equitable rule has gradually developed permitting a recovery for the value of the services rendered, irrespective of the breach, giving to the other party to the contract a corresponding right of action in damages separately or in mitigation of the plaintiff's recovery, so

that the rights of both may be equitably adjusted at law, notwithstanding the breach and nonperformance of the contract. Bedow v. Tonkin, 5 S. D. 432, 59 N. W. 222; Ball v. Dolan, 21 S. D. 619, 15 L.R.A. (N.S.) 272, 114 N. W. 998; Stolle v. Stuart, 21 S. D. 643, 114 N. W. 1007; Williams v. Crane, 153 Mich. 89, 116 N. W. 554; Allen v. McKibbin, 5 Mich. 449; Bush v. Brooks, 70 Mich. 446, 38 N. W. 562; Buckwalter v. Bradley, 31 Ky. L. Rep. 1177, 104 S. W. 970; Byerlee v. Mendel, 39 Iowa, 382; Pixler v. Nichols, 8 Iowa, 106, 74 Am. Dec. 298; Hillyard v. Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Burkholder v. Burkholder, 25 Neb. 270, 41 N. W. 145; Duncan v. Baker, 21 Kan. 99; Pitts v. Pitts, 21 Ind. 309. This is true only where that which has been received by the employer under the partial performance has been beneficial to him. "The implication of a promise in all such cases is derived from the fact that the performance has been beneficial to him." 9 Cyc. 689 and 685. In this case it must be admitted that the threshing done was of substantial benefit to defendant and a partial performance of his contract. While there is a division of authority, and the weight of authority from the number of holdings alone, 26 Cyc. 1042, would deny a right of recovery, yet we prefer to follow the other line of authority. Either rule must, under certain circumstances, work injustice. Otherwise there would be no division in authorities. We elect to follow that which we believe to be the trend of authority. It may be noted that cases of default under sales contracts, similar to Pfeiffer v. Norman, 22 N. D. 168, 38 L.R.A. (N.S.) 891, 133 N. W. 97, must not be taken as analogous to contracts for work and labor as involved in the instant case. The implications arising from the reception of benefits of part performance of employment contracts where that which is so received cannot be returned, has no analogy to sale transactions where a portion of the price is paid and the party to pay the balance sees fit to default and attempts to recover back what he has paid in partial performance and before his default. Likewise a different equitable rule has developed under building contracts, the rule of substantial compliance and performance, and such authorities are not strictly applicable.

But defendant asserts that conceding plaintiff might have recovered upon the *quantum meruit,* he has pleaded an express contract with partial performance only, and that it was error for the court to grant

him judgment as a recovery of the reasonable value of the services. The record of proceedings on trial is here. The sufficiency of the complaint was not challenged; the issues were formulated, argued, and disposed of upon the sufficiency of the defense and counterclaim, and on the theory that plaintiff would be entitled to recover except for the defense and counterclaims asserted, and which, under the motion attacking them, were held insufficient for either purpose. Defendant's attorney is quoted in the record as follows: "The defendant objects to judgment on the pleadings on the ground that the defendant has stated a good and valid defense to plaintiff's cause of action,—has alleged the nonperformance of the contract,—and on that I think the motion should be denied." It was then admitted "that the correct number of bushels of each of those kinds of grain threshed by the plaintiff for the defendant under this contract are as set up in the complaint." The court thereupon granted "the motion for judgment on the pleadings, of course considering the record and the stipulations that are in the record." It is elementary that a party cannot adopt one position in the trial court and thereafter urge a different one here for reversal. This court must rule upon the same issues as did the trial court, and not upon new ones. Defendant is therefore bound by the theory of trial pursued by him, and will not be heard to allege that plaintiff cannot recover because he has not sued on the *quantum meruit* instead of upon an express contract. The judgment is affirmed.

AMADA FRENCH v. STATE FARMERS' MUTUAL HAIL INSURANCE COMPANY.

(L.R.A. 1915—, 151 N. W. 7.)

Amendments — allowance of — discretion of court.

1. The allowance of amendments rests largely within the sound discretion of the trial court.

Note.—In harmony with the decision in this case, it seems to be well settled that, on principle as well as from considerations of public policy, agents of insurance companies authorized to procure applications for insurance must be deemed the agents of the insurers, and not of the assured ,in all that they do in

Complaint — amendment to conform to facts proved — mistake — surprise — prejudice — allowance for.

2. Where it clearly appears that the defendant was not misled, surprised, or in any way prejudiced from maintaining his defense upon the merits, an amendment of the complaint to conform to the facts proved should be allowed.

Misjoinder of causes — equitable — legal — appeal — objection first made on.

3. The objection that there is a misjoinder of causes of action, or that a cause is of equitable, and not of legal, cognizance, cannot be raised for the first time on appeal.

Insurance contract — reformation — recovery on — same action.

4. An insurance contract may be reformed and a recovery thereon enforced in the same action.

Agents for insurance company — applications for insurance — authority to take — agents or insurers — mistakes in application — chargeable to insurer.

5. Agents for an insurance company, authorized to procure applications for insurance, and to forward them to the company for acceptance, are deemed the agents of the insurers in all that they do in preparing the application. Hence, when such agent makes out an application incorrectly, notwithstanding the facts are truthfully stated to him by the applicant, such error is chargeable to the insurer, and not to the insured.

Hail insurance — misdescription of land in application — loss — recovery — reformation of application contract — same action — facts to be pleaded.

6. A misdescription of the land on which crops, insured against hail, are growing, will not of itself prevent a recovery in case of loss. And where such misdescription is due solely to the error of the agent of the insurance company

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preparing the application. In cases where the agent has filled in the application for the assured and the company has sought to relieve itself from liability upon the ground that in so doing he acted for the assured, and not for the company, the courts have held that if the applicant fully stated the facts to the agent and the latter filled in the application wrongfully, the agent is to be considered the agent of the company. The cases on the question, when insurance agent is the agent of the assured, are reviewed in a note in 20 L.R.A. 277.

And as shown by the authorities reviewed in notes in 4 L.R.A.(N.S.) 607, and L.R.A. 1915A, 273, on the effect of agent's insertion in the application of false answers to questions correctly answered by insured, the great weight of authority is to the effect that if an agent authorized to solicit insurance either fraudulently or negligently inserts in the application false answers to questions correctly answered by the applicant, his wrong would be imputed to the company, and it will be estopped to defend an action upon the policy upon the ground of the falsity of such answers, if the insured was unaware that his answers were incorrectly recorded.

in preparing the application for such insurance, it is not necessary to bring an action in equity to reform the policy, but the insured may, by setting forth the facts relating to the mistake in his complaint, bring an action at law thereon in the first instance.

Opinion filed February 2, 1915.

From a judgment of the District Court of Walsh County, *Kneeshaw*, J., defendant appeals.

Affirmed.

H. R. Turner, for appellant.

There were mistakes made in the contract of insurance. As to whether an action can be maintained at law on the policy without first having had a reformation, the practice differs in different jurisdictions. Some courts hold there must be a reformation before there can be an action at law. 19 Cyc. 654; Taylor v. Glens Falls Ins. Co. 44 Fla. 273, 32 So. 887; Collins v. St Paul F. & M. Ins. Co. 44 Minn. 440, 46 N. W. 906; Sun Ins. Co. v. Greenville Bldg. & L. Asso. 58 N. J. L. 367, 33 Atl. 962; Landers v. Cooper, 115 N. Y. 279, 5 L.R.A. 638, 12 Am. St. Rep. 801, 22 N. E. 212.

Extrinsic evidence which goes beyond the purpose of aiding in the interpretation of the written contract, and which tends to show that the subject thereof was different from that described in the written contract, while it might tend to establish a case for the reformation of the contract, would be inadmissible to sustain an action to enforce the contract as written, as though it applied to the property intended to be covered, but not described in the policy. Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799; Landers v. Cooper, 115 N. Y. 279, 5 L.R.A. 638, 12 Am. St. Rep. 801, 22 N. E. 213.

If there is any remedy against the company for the mistake or carelessness of the agent, it is not available in an action to enforce a contract relating to one subject, as if it were a contract relating to another subject. Landers v. Cooper, supra; Collins v. St. Paul F. & M. Ins. Co. 44 Minn. 440, 46 N. W. 906.

It is clearly established under the law that no action at law can be founded upon such a policy of insurance. Sun Ins. Co. v. Greenville Bldg. & L. Asso. 58 N. J. L. 367, 33 Atl. 962; Connecticut F. Ins. Co. v. Kinne, 77 Mich. 231, 18 Am. St. Rep. 398, 43 N. W. 872;

Taylor v. Glens Falls Ins. Co. 44 Fla. 273, 32 So. 887; Wood, Ins. § 95; Holmes v. Charlestown Mut. F. Ins. Co. 10 Met. 211, 43 Am. Dec. 528; Ewer v. Washington Ins. Co. 16 Pick. 502, 28 Am. Dec. 258.

It was the plaintiff's duty to have taken steps at once upon receiving the policy to have the same corrected or rescinded. He was and is chargeable with full knowledge of its contents. Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 182, 45 N. W. 799.

The court in its discretion has the extraordinary power, even after judgment, to allow a pleading to be amended by inserting new allegations material to the case; *but this power should be sparingly exercised.* 1 Sutherland, Code Pl. § 796.

One will not be allowed to amend his pleading to conform to proof, where objection was made to the evidence to cover which the amendment is desired. Wheaton v. Voorhies, 53 How. Pr. 319; Mendenhall v. Harrisburg Water Power Co. 27 Or. 38, 39 Pac. 399; Eikenberry v. Edwards, 67 Iowa, 14, 24 N. W. 570; Maxwell v. Day, 45 Ind. 509; Carpenter v. Huffsteller, 87 N. C. 273; Allen v. Brooks, 88 Wis. 265, 60 N. W. 253; Sanford v. American Dist. Teleg. Co. 13 Misc. 88, 34 N. Y. Supp. 144.

Where the proposed amendment materially changes the cause as originally pleaded and on which issue was joined, it cannot be allowed. Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; Woodward v. Northern P. R. Co. 16 N. D. 39, 111 N. W. 627; Taugher v. Northern P. R. Co. 21 N. D. 111, 129 N. W. 750; Cooke v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 306.

A new and distinct cause of action cannot be thrust into a complaint by amendment. Cooke v. Northern P. R. Co. supra.

Where both equitable and legal relief is sought, the equity action must be first and separately tried. 34 Cyc. 992; Cotton v. Butterfield, 14 N. D. 465, 105 N. W. 237; Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; Estrada v. Murphy, 19 Cal. 272; Lombard v. Cowham, 34 Wis. 486; DuPont v. Davis, 35 Wis. 631; Laffy v. Gordon, 15 N. D. 282, 107 N. W. 970.

H. C. DePuy, for respondent.

A person who takes and writes out an application for insurance and same is signed by the insured, and such application is accepted by the company and the policy issued pursuant thereto, is the *agent of the*

company, and not of the insured. 19 Cyc. 826–829; 28 Century Dig. Col. 3015; Kausal v. Minnesota Farmers' Mut. F. Ins. Asso. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430; Norman v. Kelso Farmers' Mut. F. Ins. Co. 114 Minn. 49, 130 N. W. 13; Smith v. Continental Ins. Co. 6 Dak. 433, 43 N. W. 811; Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 840; Whitney v. National Masonic Acci. Asso. 57 Minn. 472, 59 N. W. 943; Pudritzky v. Supreme Lodge, K. H. 76 Mich. 428, 43 N. W. 373; Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799; Erickson v. Ladies of Maccabees, 25 S. D. 183, 126 N. W. 262; Parno v. Iowa Merchants' Mut. Ins. Co. 114 Iowa, 132, 86 N. W. 211; Key v. Des Moines Ins. Co. 77 Iowa, 174, 41 N. W. 614; Stone v. Hawkeye Ins. Co. 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47; Siltz v. Hawkeye Ins. Co. 71 Iowa, 710, 29 N. W. 605; Kansas Farmers' F. Ins. Co. v. Saindon, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15.

The rule is the same with regard to mutual as well as stock companies. Kausal v. Minnesota Farmers' Mut. F. Ins. Asso. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430; Leisen v. St. Paul F. & M. Ins. Co. 6 Dak. 433, 43 N. W. 811; Norman v. Kelso Farmers' Mut. F. Ins. Co. 114 Minn. 49, 130 N. W. 13; Whitney v. National Masonic Acci. Asso. 57 Minn. 472, 59 N. W. 943.

The mistake made in the contract of insurance did not go to the question of *consideration for the note.* It did not affect the maker's liability on the note. Phenix Ins. Co. v. Gebhart, 32 Neb. 144, 49 N. W. 333; Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799.

Whether insured was guilty of laches for not discovering a mistake in the policy, and in not seeking to have it corrected before loss and suit brought thereon, is a question for the jury. Delaware Ins. Co. v. Hill, — Tex. Civ. App. —, 127 S. W. 283; Norman v. Kelso Farmers' Mut. F. Ins. Co. 114 Minn. 49, 130 N. W. 13.

For a court to entertain an action to reform a contract, the errors and mistakes of which complaint might be made, must be mutual. Such element is lacking in this case. State Ins. Co. v. Schreck, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 341; Kansas Farmers' F. Ins. Co. v. Saindon, 52 Kan. 486, 39 Am. St. Rep.

356, 35 Pac. 15; Hearsh v. German Ins. Co. 130 Mo. App. 457, 110 S. W. 23; Maher v. Hibernia Ins. Co. 67 N. Y. 283; Phenix Ins. Co. v. Geehart, 32 Neb. 144, 49 N. W. 333; Smith v. Commonwealth Ins. Co. 49 Wis. 322, 5 N. W. 807; Germania L. Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1082; Eggleston v. Council Bluffs Ins. Co. 65 Iowa, 308, 21 N. W. 652; Deitz v. Providence Washington Ins. Co. 31 W. Va. 851, 13 Am. St. Rep. 909, 8 S. E. 616; Lumberman's Mut. Ins. Co. v. Bell, 166 Ill. 400, 57 Am. St. Rep. 140, 45 N. E. 130; Hobkirk v. Phœnix Ins. Co. 102 Wis. 13, 78 N. W. 160; Carey v. Home Ins. Co. 97 Iowa, 619, 66 N. W. 921; Walrath v. Royal Ins. Co. 16 Ohio C. C. 413, 9 Ohio C. D. 233; Ætna Ins. Co. v. Brannon, 99 Tex. 391, 2 L.R.A.(N.S.) 548, 89 S. W. 1057, 13 Ann. Cas. 1020; 19 Cyc. 654, note 4; 28 Century Dig. Col. 818; 11 Decen. Dig. 189.

The contract may be enforced in an action at law, where the facts as to the mistake are fully pleaded. The plaintiff is not first driven to a court of equity. May, Ins. 872, 566; American Cent. Ins. Co. v. McLanathan, 11 Kan. 533; 1 Greenl. Ev. 300, 302; Loomis v. Jackson, 19 Johns. 449; 2 Hilliard, Real Prop. 358, 368; Boardman v. Reed, 6 Pet. 340, 8 L. ed. 420; Manhattan Ins. Co. v. Webster, 59 Pa. 227, 98 Am. Dec. 332; Mumper v. Kelley, 43 Kan. 256, 23 Pac. 558; State Ins. Co. v. Sihreck, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 344; Phenix Ins. Co. v. Gebhart, 32 Neb. 144, 49 N. W. 333.

Where, as in this state, the court exercises the functions of law and equity, it may, where there is an answer, grant any relief consistent with the facts alleged, and the prayer for relief may be amended accordingly at any time. 31 Cyc. 110 and cases cited on page 111; Rev. Codes, 1905, 7073; Maher v. Hibernia Ins. Co. 67 N. Y. 283; Getty v. Hudson River R. Co. 6 How. Pr. 269; Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673; Esch Bros. v. Home Ins. Co. 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229; Holmes v. Campbell, 12 Minn. 221, Gil. 141; 31 Cyc. 438, 439, 731; 39 Century Dig. Col. 2776, 2780; Fraley v. Bentley, 1 Dak. 25, 46 N. W. 506.

Where both equitable and legal relief is sought in the same action, the parties may waive a jury, and by express or implied consent try the issues as if they were all of the same nature, and they will not

be heard on appeal to urge objection to such procedure. Laffy v. Gordon, 15 N. D. 282, 107 N. W. 969.

CHRISTIANSON, J. There is no dispute about the facts in this case. The testimony consists solely of certain documentary evidence and the oral testimony of the plaintiff and of one Colette, an agent for the defendant. The plaintiff is a farmer residing on section 17, in township 157, range 51, in Walsh county, in this state. This township is named Acton township. It is conceded that Colette was the duly authorized and licensed agent of the defendant company, authorized not only to write insurance for the defendant, but also authorized to appoint subagents. On June 27, 1912, said Colette obtained from the plaintiff an application for hail insurance with the defendant upon crops on the lands owned and occupied by plaintiff in section 17, and in the adjoining section 8 in said township. The application was prepared by Colette, who asked questions of the plaintiff, and wrote down the answers in the application, and secured the signature of the plaintiff, French, thereto. The plaintiff did not read the application before signing the same. The first part of the application is as follows: "I, Amada French, of Oakwood, P. O., *township of Acton,* county of Walsh, and state of North Dakota, hereby apply," etc. While the application was being prepared, Colette inquired of the plaintiff as to the legal description of the township, and the plaintiff in reply stated that he did not know, whereupon Colette stated that he would look up the description for himself and insert it. Colette, in inserting such description, made an error, in this, that he wrote the number of the township "158" and the number of the range "52," when he should have written the number of the township "157" and the number of the range "51." The testimony of Colette in regard to the transaction is substantially as follows: "The application was taken right at Mr. French's home in section 17 in Acton township. It was township 157. I knew he lived in Acton township; I also knew the land he was working. The application was made on June 27, 1912. I saw Mr. French that day in the yard. He decided to take out some insurance right away, and I wrote the application in the yard. When I first took the application I started to write it (the description of the township) in, then I said, 'I suppose that this is township 157, Acton

township,' and he said he was not positive of that, and I said I would look it up myself and be sure, but I put it down 158 and it should have been 157. I did not look it up afterwards to see if it was 158. I was supposed to go to my brother-in-laws' and get it in a plat book, but I was sure it was 158. I did not read the application over to him; I simply asked him questions, and I put down the answers. I told him where to sign it, and he signed it. I intended to describe in the application the land that I knew he was working, that is, the crops upon sections 17 and 8 in Acton township. The mistake in regard to the number of the range was made under the same circumstances as the mistake with reference to the township. I undertook to fill in the description. I have since looked it up and discovered it was a mistake. I intended to take an application upon land situated in sections 17 and 8, in township 157, range 51. I understook to fill in the description of the township in the application, and have since looked it up and discovered it was a mistake." It is conceded that the plaintiff owned no lands or crops in township 158, range 52, but the only lands and crops which he owned were those located in Acton township, and there is no dispute but that these are the lands that were intended to be covered by the insurance. The testimony of the plaintiff, French, is substantially the same as the testimony of Colette. The plaintiff afterwards on July 7, 1912, received his policy and on July 8, 1912, suffered a loss by hail. Proof of loss was duly forwarded to the defendant company, and a duly authorized adjuster for the defendant company, on July 31, 1912, adjusted the loss, and agreed with the plaintiff in writing that the loss sustained amounted to $771.25. The mistake in the policy was not discovered until sometime subsequent, when the defendant company refused to pay the loss as adjusted, but offered, however, to compromise by the payment of $400, which the plaintiff refused and afterwards brought suit against the defendant for the amount of the loss as adjusted.

The original complaint sets forth by proper allegations all the matters above recited relative to the mistake in the description as contained in the application and policy, how the same occurred, the issue of the policy, the loss thereunder, the adjustment of such loss, and the defendant's refusal to pay the same, and prays judgment for $771.25, the amount of the loss as adjusted. The original answer is

not before us, hence we are unable to ascertain what defense was offered thereby. The case was tried to the court without a jury, a jury being expressly waived.

At the very commencement of the trial, the following proceedings were had:

By Mr. Turner: The defendant asks leave to file an amended answer. I have the same prepared, but it is not verified. I will ask to verify it later.

By Mr. DePuy: The plaintiff has no objection, but we would like to have the amendment allowed upon condition that the plaintiff shall have the right to interpose a reply if the plaintiff deems it desirable setting up a waiver or estoppel in accordance with the proof, and also amend his complaint to conform with the proof that may be introduced at any time before judgment.

By the Court: All right.

The plaintiff's amended complaint sets forth almost identically the same facts as those contained in the original answer, with the single exception that another allegation is added, stating the value of plaintiff's interest in the crops; and the prayer for judgment was amended by asking that the policy be reformed by substituting the proper description of township and range in lieu of the incorrect description. The amended answer admitted that Colette was a duly authorized agent of the defendant company, that the policy was issued and delivered, but denied any mutual mistake in the issuance of the policy, and further denied that the defendant issued any policy of insurance for injuries to the crops destroyed. The trial court made findings of fact, and ordered judgment in favor of the plaintiff, that the policy be reformed by correcting the mistakes made therein with reference to the number of the township and range, and further awarded plaintiff judgment against the defendant for the sum of $771.25 and interest and costs. The appeal is taken from the judgment so entered.

The appellant relies for a reversal on three propositions,—(1) that the court erred in allowing the amendment of the complaint; (2) that the insurance policy must be reformed by an action in equity before a judgment at law can be obtained; (3) that where both equitable and legal relief is sought, the equity action must be first and separately tried.

Appellant's first contention, that the trial court erred in allowing an amendment of the complaint, is clearly without merit. It will be observed that at the commencement of the trial, defendant's counsel obtained leave to amend the answer; that such leave was granted upon the condition that the plaintiff be permitted to amend the complaint. No objection was made by defendant's counsel to such arrangement, and the record indicates that the trial court believed that this arrangement was entirely satisfactory to defendant's counsel. The amendment could in no manner prejudice the defendant, and we are satisfied that the trial court did not abuse its discretion in permitting the complaint to be so amended. The amended complaint sets forth substantially the same facts as the original complaint, and the only change of which defendant's counsel complains is the amendment of the prayer for judgment. It is not contended that any substantial change was made in the body of the complaint, and no showing or claim of surprise was made by the defendant. It is, therefore, self-evident that plaintiff was not prejudiced by the amendment, as the plaintiff was entitled to recover upon the facts alleged and proved farther than the relief demanded in the prayer for judgment. "Disregarding the prayer or demand of judgment, the court will rely upon the facts alleged and proved as the basis of its remedial action." Pom. Code Remedies, *83. "If the facts entitling a party to a remedy, legal or equitable, are averred and proved, he shall obtain that remedy, notwithstanding his omission to ask for it in his demand of judgment; and, if the facts were not averred, he shall not obtain the remedy, although he demanded it in the most formal manner." Pom. Code Remedies, *84.

"The prayer for relief forms no part of the statement of the cause of action; and it is unimportant unless there is ambiguity in such statement. A bad prayer for relief or a prayer for improper relief will not vitiate a pleading which is otherwise sufficient. *The facts alleged, and not the relief demanded, are of chief importance, and they determine the relief to be granted.*" 31 Cyc. 110, and cases cited. Under the provisions of § 7482, Comp. Laws 1913, the court has the right in a proper case to grant an amendment of the pleadings even after judgment. The propriety of the granting of such amendments rests within the sound discretion of the trial court, and will not be re-

viewed by this court, except in a case where such discretion has been abused.

California has certain statutory provisions, identical in language with §§ 7478 and 7482, Comp. Laws 1913, and in the case of Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957, the supreme court of California held that "to allow amendments after the trial has commenced is in the discretion of the trial court, and error cannot be predicated on the allowance of such an amendment, *whereby issues were raised which were not raised by the original pleadings, unless the adverse party asked to have the case reopened for the purpose of trying the new issue.*" And in the case of Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 47, in considering the same question, the California court said: "It is also contended that the court erred in allowing the plaintiff, after the evidence had been taken and the cause submitted, to file an amended complaint. This contention is based upon the theory that the amended complaint changed the cause of action. What has been said disposes of this proposition. The action still remains upon the contract made by the former board, and, as there has been no change in the actual existence of the corporation which made the contract and was responsible for it, there has been no such change in the cause of action as would constitute a departure. The additional facts and circumstances alleged in the amended complaint do not involve any change in the nature of the cause of action. It still remained an action upon the contract, and it was within the discretion of the court to allow the amendment." The decisions of the California court are also in harmony with the views expressed by Chief Justice Morgan in the case of Barker v. More Bros. 18 N. D. 82, 85, 118 N. W. 823, and are sustained by the great weight of authority. Firebaugh v. Burbank, 121 Cal. 186, 53 Pac. 560; Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 47; Hedstrom v. Union Trust Co. 7 Cal. App. 278, 94 Pac. 387; Thomas v. Brooklyn, 58 Iowa, 438, 10 N. W. 849; Tiffany v. Henderson, 57 Iowa, 490, 10 N. W. 885; Adams v. Castle, 64 Minn. 505, 67 N. W. 638; Kaufman v. Barbour, 103 Minn. 173, 114 N. W. 739; O'Brien v. Northwestern Consol. Mill. Co. 119 Minn. 4, 137 N. W. 399; Hibernia Sav. & L. Soc. v. Jones, 89 Cal. 507, 26 Pac. 1089; Coubrough v. Adams, 70 Cal. 374, 11 Pac. 634; Wabash & W. R. Co. v. Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85;

Metropolitan L. Ins. Co. v. Smith, 22 Ky. L. Rep. 868, 53 L.R.A. 817, 59 S. W. 24; Garver v. Garver, 145 Mo. App. 353, 130 S. W. 369; Rothschild v. Harris, 125 N. Y. Supp. 41; Howland v. Caille, 153 Mich. 349, 116 N. W. 1079; Higgins v. People, 2 Colo. App. 567, 31 Pac. 951; Hansen v. Allen, 117 Wis. 61, 93 N. W. 805; Frey v. Owens, 27 Neb. 862, 44 N. W. 42; Briggs v. Rutherford, 94 Minn. 23, 101 N. W. 954.

Appellant's next contention is stated in its brief as follows: "It is the contention of the appellant and defendant that there were here two separate controversies, one equitable and the other legal; that before any judgment could be entered or any amount found to be due, an action for a reformation of the contract must be brought and it be determined as a matter in equity that such reformation be had so that a decree in such equity action would set out the real contract of the parties, and then upon that contract the plaintiff might sue for the amount claimed to be due."

We are unable to agree with appellant in his contentions, for three reasons: First, the questions now sought to be raised were not raised in the court below; second, the policy could be reformed and recovery enforced thereon in the same action; third, a reformation of the policy was not essential to entitle the plaintiff to recover.

The objections now raised by appellant were in no manner urged in the court below. No demurrer was interposed to the complaint, and no demand for a separate trial of legal and equitable issues was made, and no objection in any manner interposed to the submission of all the issues to the court. In fact, the defendant expressly stipulated that a trial by jury be waived and all the issues tried to the court. It is therefore obvious that the plaintiff cannot assert at this time that he was prejudiced by a mode of procedure to which it acquiesced in the district court; nor can it be permitted to object for the first time on appeal that a cause is of equitable, and not of legal, cognizance, or *vice versa;* that there is a misjoinder of causes of action, or that certain issues should have been submitted to a jury. 2 Cyc. 683, 690, 701.

We are also satisfied that appellant is clearly in error when it contends that two actions are necessary where it is essential to reform an insurance contract,—first, one in equity to reform the policy, and then an action at law for the amount due thereon as reformed; but we are

entirely satisfied that the policy may be reformed and a recovery enforced thereon in the same action. "There was nothing in the objection that the court should have stopped with reforming the policy, and turned the plaintiffs over to a new action to recover their damages. The rule of courts of equity was, when they had acquired jurisdiction, and had the whole merits before them, to proceed and do complete justice between the parties." Bidwell v. Astor Mut. Ins. Co. 16 N. Y. 267. In this state the forms of civil actions have been abolished, and it is provided that the provisions of, and all proceedings under, the Code in this state, "are to be liberally construed with a view to effect its objects and to promote justice." Comp. Laws, § 7321. "When the plaintiff is clothed with primary rights, both legal and equitable, growing out of the same cause of action or the same transaction, and is entitled to an equitable remedy, and also to a further legal remedy, based upon the supposition that the equitable relief is granted, and he sets forth in his complaint or petition the facts which support each class of rights, and which show that he is entitled to each kind of remedy, and demands a judgment awarding both species of relief, the action will be sustained to its full extent in the form thus adopted." Pom. Code Remedies, *78. "In one civil action the plaintiff may not only unite and obtain both the remedy of reformation and the equitable remedy of specific performance, *but also the remedy of reformation and the legal remedy of a pecuniary judgment for debt or damages for the breach of the contract as corrected,* or the legal remedy of a recovery of specific property." Pom. Eq. Jur. 3d ed. § 862.

Was it necessary for plaintiff to seek relief in equity, and bring an equitable action for a reformation of the policy, or could he, by alleging all the facts in his complaint, maintain an action at law thereon in the first instance? It is conceded that Colette, and not the plaintiff, committed the blunder. Colette, in preparing the application, was the agent of the insurance company, and not of the applicant. In so doing, he was acting within the scope of his authority. Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837; Kausal v. Minnesota Farmers' Mut. F. Ins. Asso. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430; Whitney v. National Masonic Acci. Asso. 57 Minn. 472, 59 N. W. 943; Norman v. Kelso Farmers' Mut. F. Ins. Co. 114 Minn. 49, 130 N. W. 13. Colette's error, therefore,

was the error of the defendant, and it will not be permitted to say that the plaintiff was to blame or negligent in trusting the accuracy of its agent in preparing the application. The only reason for the questions propounded to the plaintiff was to ascertain the truth with reference to the crops to be insured. It is conceded that the plaintiff gave truthful answers to all questions asked. The erroneous answer with reference to the description of the premises was not the answer of the plaintiff, but of Colette. Plaintiff applied for insurance upon his crops in Acton township in Walsh county. French and Colette both say that the intention was to insure these crops,—the crops growing on the very land where the application was prepared and signed. The plaintiff was in no manner to blame for the mistake in the application and policy. This was solely the fault of the defendant as, of course, the defendant is bound by the acts of its agent in this case. The contract was to insure the very crops of the plaintiff in Acton township which were destroyed by hail. "The agreement in a policy is to insure certain property of a party,—such as the house in which he and his family reside, a barn on his farm, or a warehouse for the storage of produce, or, as in this case, certain personal property. A misdescription of the land on which any of these is situated will not defeat a recovery in case of loss by fire, because the court looks at the real contract of the parties, which was to insure certain property of the policy holder. The fact that such property was on a particular section—as § 16, instead of 17—cannot, of itself, affect the risk, and would not render the policy void." Phenix Ins. Co. v. Gebhart, 32 Neb. 144, 49 N. W. 333, 334. In May Ins. p. 1330, § 566, it is said: "In most of the states, however, courts of law will apply the doctrines of waiver and estoppel, *or allow proof of mistake,* so as to enable the plaintiff to maintain his action for indemnity, and not drive him to a court of equity." This question was before the supreme court of Kansas in American Cent. Ins. Co. v. McLanathan, 11 Kan. 533; and in that case the court says: "In such a case the contract is not void for uncertainty, nor is there any need of applying for a reformation of the contract, provided it appear, either from the face of the instrument or extrinsic facts, which is the true and which the false description." These principles are sustained by the following authorities: Phenix Ins. Co. v. Gebhart, supra; American Cent. Ins. Co. v. McLanathan, supra; Eggleston v. Council

Bluffs Ins. Co. 65 Iowa, 308, 21 N. W. 652; Germania L. Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1082; Deitz v. Providence Washington Ins. Co. 31 W. Va. 851, 13 Am. St. Rep. 909, 8 S. E. 616; Kansas Farmers' F. Ins. Co. v. Saindon, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15; Smith v. Commonwealth Ins. Co. 49 Wis. 322, 5 N. W. 804; State Ins. Co. v. Schreck, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 340, 344; Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400, 57 Am. St. Rep. 140, 45 N. E. 130; Hobkirk v. Phœnix Ins. Co. 102 Wis. 13, 78 N. W. 160; Carey v. Home Ins. Co. 97 Iowa, 619, 66 N. W. 920; Ætna Ins. Co. v. Brannon, 99 Tex. 391, 2 L.R.A.(N.S.) 548, 89 S. W. 1057, 13 Ann. Cas. 1020; Maher v. Hibernia Ins. Co. 67 N. Y. 283; Phenix Ins. Co. v. Allen, 109 Ind. 273, 10 N. E. 85. See also Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 317, 30 L.R.A.(N.S.) 539, 127 N. W. 837; and Gorder v. Hilliboe, 17 N. D. 281, 283, 115 N. W. 843, and Beach, Ins. § 1319. A number of the authorities cited above are based upon the theory that the insurance company is estopped to deny the error of its agent, and that for that reason the plaintiff may sue upon the contract as issued, and, without any allegations in the complaint relative to the mistake, introduce testimony showing the knowledge of, and mistake made by, the agent of the insurance company in misdescribing the property. As we view the matter, however, the principle of estoppel should not be applied in a case where there is a misdescription of the property intended to be covered by the policy, but it is rather a case coming within the rule that parol evidence may be admitted for the purpose of showing that, by reason of a mistake, a written instrument does not truly express the intention of the parties. While there are cases holding that such evidence is only admissible in a court of equity, "yet this rule is by no means universal, and, in fact, the weight of authority supports the doctrine that evidence of this character is also admissible in an action at law." 9 Enc. Ev. 344. This rule is supported by the weight of modern authority. 17 Cyc. 702; Wigmore, Ev. §§ 2413–2415. See also Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Gorder v. Hilliboe, supra. But, "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." 17 Cyc. 703.

It is established by the undisputed evidence in this case that the crops intended to be covered by the policy were destroyed; that the loss was adjusted by the adjuster of the defendant at the amount for which the trial court rendered judgment, and it is conceded that the plaintiff suffered a loss for at least the amount of the adjustment. It is inconceivable how plaintiff was in any manner injured by the mistake in the application and policy. It is not contended that there was any extra hazard in township 157, range 51, which did not exist in township 158, range 52. We are entirely satisfied that the judgment of the trial Court, under the undisputed facts in this case, is entirely just and proper and should be affirmed. It is so ordered.

MRS. DELLA VAN WOERT, Surviving Widow, and Legal Heir of Jiles J. Van Woert, and William Van Woert, Guardian of Ella Van Woert, Joseph Earl Van Woert, Ralph Leighton Van Woert, and Fairy Van Woert, Minor Heirs of Said Deceased, v. MODERN WOODMEN OF AMERICA, a Foreign Corporation.

(151 N. W. 224.)

Directed verdict — motion for — both parties — deemed to have consented to discharge of jury — consent to trial by court.

1. When both plaintiff and defendant move for a directed verdict at the close of the testimony, they will be deemed to have consented to a discharge of the jury and a trial by the court.

Legislative policy — wisdom of — not a question for the court.

2. The question of the wisdom of a legislative policy is a matter for the legislature, and not for the court.

Insurance — contract for — false warranty — fact material to risk.

3. Section 6501, Compiled Laws 1913, does not change the effect of a false warranty in a contract of insurance as to a fact material to the risk assumed. Satterlee v. Modern Brotherhood, 15 N. D. 92, followed.

Application for insurance — untrue statements in — physician — had not consulted — is a material representation — policy vitiated by — intention to deceive immaterial.

4. An untrue statement by the insured in his application that he had not, within the seven years last preceding the date of such application been treated

by or consulted any physician or physicians in regard to personal ailment, which statement was made as a warranty, is under the undisputed facts in this case, a material representation, which vitiated the policy, even though such misrepresentation was not made with intent to deceive.

False statements — application for life insurance — provision in policy — policy void if made — acceptance of last assessment — not a waiver of such provision.

5. Acceptance of the last assessment and proofs of death of the insured is not a waiver of a provision in the policy that it should be void if statements in the application, constituting warranties, were false, where the falsity was not known at the time the assessment was paid and the proofs of death approved.

Opinion filed February 6, 1915.

From a judgment of the District Court of Renville County, *Leighton,* J., plaintiffs appeal.

Judgment affirmed.

Grace & Bryans, for appellant.

The defendant, being engaged in the insurance business in this state as an insurance company, is subject to the general insurance laws of the state, and is not exempt. Rev. Codes 1905, §§ 5893, 5934; Comp. Laws, 1913, 6501.

Under such statute it has been held that, if the application contains untrue statements, the burden of proof is upon the defendant to show that they were made in bad faith, fraudulently, and with the intention to deceive the insurance company. Soules v. Brotherhood of American Yeoman, 19 N. D. 23, 120 N. W. 760; Jacobs v. Omaha Life Asso. 146 Mo. 523, 48 S. W. 462.

The benefit certificate issued by such fraternal organization doing a life insurance business stands in the place of the *policy* issued by regular insurance companies, and the distinction sought to be made is without a difference. Both are *insurance contracts.* 29 Cyc. 8; Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413; Fogg v. Supreme Lodge, U. O. G. L. 156 Mass. 431; Supreme Counsel, A. L. H. v. Larmour, 81 Tex. 71, 16 S. W. 633; Bolton v. Bolton, 73 Me. 299; Brown v. Balfour, 46 Minn. 68, 12 L.R.A. 373, 48 N. W. 604; Rockhold

v. Canton Masonic Mut. Ben. Soc. 129 Ill. 440, 21 N. E. 794; Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657.

The fraternal character of the organization is merely incidental thereto. It is a *life insurance company* just the same. State v. Bankers' & M. Mut. Ben. Asso. 23 Kan. 499; Folmer's Appeal, 87 Pa. 133; Illinois Masons' Benev. Soc. v. Winthrop, 85 Ill. 537; Illinois Masons' Benev. Soc. v. Baldwin, 86 Ill. 479; State ex rel. Beach v. Citizens' Ben. Asso. 6 Mo. App. 163; Bolton v. Bolton, 73 Me. 299; Bacon, Ben. Soc. chap. 51.

Under modern decisions, it is the tendency of the courts to hold that the untrue statements are but the opinion of the insured, and that they do not constitute *warranties,* unless made in both faith and with intent to deceive; that the burden is upon the company to prove such bad faith and wrong intention. Lakka v. Modern Brotherhood, — Iowa, —, 49 L.R.A.(N.S.) 902, 143 N. W. 513; Supreme Ruling, F. M. C. v. Crawford, 32 Tex. Civ. App. 603, 75 S. W. 844.

A clause in a policy that insured agrees to warrant the truthfulness of his answers to questions amounts to no more than to warrant that such answers were bona fide. Hough v. City F. Ins. Co. 29 Conn. 10, 76 Am. Dec. 581; Illinois Masons' Ben. Soc. v. Winthrop, 85 Ill. 537; Conver v. Phœnix Mut. L. Ins. Co. 3 Dill. 226, Fed. Cas. No. 3,143; Goucher v. Northwestern Traveling Men's Asso. 20 Fed. 598; Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500; Moulor v. American L. Ins. Co. 111 U. S. 341, 28 L. ed. 449, 4 Sup. Ct. Rep. 466; Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; Fidelity Mut. Life 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; Rupert v. Supreme Ct. U. O. F. 94 Minn. 293, 102 N. W. 715; Ranta v. Supreme Tent, K. M. 97 Minn. 454, 107 N. W. 156; Royal Neighbors v. Wallace, 73 Neb. 409, 102 N. W. 1020; Modern Woodmen v. Wilson, 76 Neb. 344, 107 N. W. 568.

The plaintiff's proposed amendment to the complaint should have been allowed. Zimmer v. Pauley, 51 Wis. 282, 8 N. W. 220; Johnson v. Tucker, 136 Wis. 505, 128 Am. St. Rep. 1097, 117 N. W. 1003;

J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82.

The court erred in not allowing the plaintiff to prove that the answers in the application of which complaint is made, were *not* made by the *insured,* but were written in by the person who took the application, —the defendant's agent. Session Laws 1907, chap. 146, p. 228; 25 Cyc. 929, and cases cited under note 84; Lyon v. United Moderns, 148 Cal. 470, 4 L.R.A.(N.S.) 247, 113 Am. St. Rep. 291, 83 Pac. 804, 7 Ann. Cas. 672; Fell v. John Hancock Mut. L. Ins. Co. 76 Conn. 494, 57 Atl. 175; 25 Cyc. 937 sub-div. (V) text and cases cited under note 5 under enpoint 29 Cyc. 242, and cases cited under note 26; Moore v. Union Fraternal Acci. Asso. 103 Iowa, 424, 72 N. W. 645.

Defendant alleges and attempts to prove that the insured died from the tumor; that he had such tumor long before he took out the insurance. The court erred in not allowing plaintiff to prove that insured died from *hemorrhage,* and not from tumor. 25 Cyc. 243, 921, 941; 29 Cyc. 242, 928; Fell v. John Hancock Mut. L. Ins. Co. 76 Conn. 494, 57 Atl. 175 Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760.

Greenleaf, Bradford, & Nash (*Benj. D. Smith,* of counsel), for respondent.

A representation is deemed *false* when the facts fail to correspond with its assertions or stipulations. Rev. Codes 1905, § 5931.

The false representations in this case had been made express warranties by the contract of the parties. This question is settled in this jurisdiction. Satterlee v. Modern Brotherhood, 15 N. D. 92, 106 N. W. 561; Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799.

By uniting in the motion for a directed verdict, both plaintiff and defendant waived a submission of the case to the jury. By such motions both parties said to the court that there was no question or issue of fact to be submitted to the jury, and neither party will be permitted to urge that the issues should have been submitted to the jury. Bank of Park River v. Norton, 12 N. D. 497, 97 N. W. 860; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; American Case & Register Co. v. Boyd, 22 N. D. 166, 133 N. W. 65; 29 Cyc. 242, 928; Fell v. John Hancock Mut. L. Ins. Co. 76 Conn. 494, 57 Atl. 175; Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760.

The respondent is a fraternal benefit society, and as such is not governed by the general insurance laws of the state. Peterson v. Manhattan L. Ins. Co. 244 Ill. 337, 91 N. E. 466, 18 Ann. Cas. 96; 29 Cyc. 7–11.

That § 5934, Rev. Codes 1905, being § 6501, Compiled Laws 1913, does *not* apply to fraternal benefit societies should be too clear for argument. This question has been passed upon and settled in several jurisdictions. Smith v. Supreme Lodge, K. & L. G. P. 123 Iowa, 676, 99 N. W. 553; Knapp v. Brotherhood of American Yeoman, 128 Iowa, 566, 105 N. W. 63; Knudson v. Grand Council, N. L. H. 7 S. D. 214, 63 N. W. 911; Hudnall v. Modern Woodmen, 103 Mo. App. 356, 77 S. W. 84; Newland v. Modern Woodmen, 168 Mo. App. 311, 153 S. W. 1097; Valeeroy v. Knights of Columbus, 135 Mo. App. 574, 116 S. W. 1130; Fawcett v. Supreme Sitting, O. I. H. 64 Conn. 170, 24 L.R.A. 815, 29 Atl. 614; State ex rel. Atty. Gen. v. Mutual Protection Asso. 26 Ohio St. 19; State v. Whitmore, 75 Wis. 332, 43 N. W. 1133; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213; Extended note in Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 1.

The false representations and answers contained in the policy or contract were expressly made *warranties* on the part of the insured, and are subject to the general rules of construction of like contracts. They made the contract void from its inception.

That they were innocently made, or made in good faith and without intent to deceive or defraud, is wholly immaterial. The fact that the answers or statements were *false* is the test, and proof only to such extent is required. Beard v. Royal Neighbors, 53 Or. 102, 19 L.R.A. (N.S.) 798, 99 Pac. 83, 17 Ann. Cas. 1199; Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595; Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766; Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230; Modern Woodmen v. Von Wald, 6 Kan. App. 238, 49 Pac. 782; McDermott v. Modern Woodmen, 97 Mo. App. 636, 71 S. W. 833; 3 Cooley, Ins. 1954; 3 Joyce, Ins. § 1964; May, Ins. § 156; Bacon, Ben. Soc. § 197; Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 171, 45 N. W. 799.

Where the section of our Code to which reference has been made applicable, nevertheless the policy or contract would be void, because

the matters misrepresented tended to increase the risk of loss, and therefore, such statements being express warranties, it is wholly immaterial in this case whether or not the same were made with intent to deceive. Satterlee v. Modern Brotherhood, 15 N. D. 92, 106 N. W. 561.

Where the society is ignorant of the facts giving it the right to avoid the contract or to declare a forfeiture, any action or inaction upon its part cannot operate against it, by estoppel or waiver. Finch v. Modern Woodmen, 113 Mich. 646, 71 N. W. 1104; Stuart v. Mutual Reserve Fund Life Asso. 78 Hun, 191, 28 N. Y. Supp. 944; Modern Woodmen v. Wieland, 109 Ill. App. 340; Marcoux v. St. John Baptist Beneficence Soc. 91 Me. 250, 39 Atl. 1027; Callies v. Modern Woodmen, 98 Mo. App. 521, 72 S. W. 713; Dunn v. Merrimack County O. F. Mut. Relief Asso. 68 N. H. 365, 44 Atl. 484; Preuster v. Supreme Council, O. C. F. 135 N. Y. 417, 32 N. E. 135.

The plaintiff's proposed amendment to the complaint would have amounted to a reformation of the contract sued upon; it would have been a different contract and a different cause of action. In jurisdictions like ours, it is the rule that if a party relies upon estoppel or waiver, he must plead it. 3 Cooley, Ins. p. 2768; Parliman v. Young, 2 Dak. 175, 4 N. W. 139, 711; Gill v. Rice, 13 Wis. 549; Clarke v. Huber, 25 Cal. 594; Burlington & M. River R. Co. v. Harris, 8 Neb. 140; Waddle v. Morrill, 26 Wis. 611; Gaylord v. Van Loan, 15 Wend. 308; People ex rel. M'Kinch v. Bristol & R. Turnp. Road Co. 23 Wend. 122.

The question of legislative policy is not for the courts. If the people of a state wish to change the public policy thereof in insurance matters by limiting the general rule of agency, it is for the legislature, and not the courts, to act. Iverson v. Metropolitan L. Ins. Co. 151 Cal. 746, 13 L.R.A.(N.S.) 866, 91 Pac. 609; Dimick v. Metropolitan L. Ins. Co. 69 N. J. L. 384, 62 L.R.A. 779, 55 Atl. 291; Ward v. Metropolitan L. Ins. Co. 66 Conn. 227, 50 Am. St. Rep. 80, 33 Atl. 902; Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799; Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297.

The plaintiff's offer of proof was wholly improper for other reasons. It referred to other applications made by other persons, and to the mere fact that certain other applications had been changed or amended

and certain questions had not been asked of or answered by other applicants. All such testimony would have been inadmissible. First Nat. Bank v. North, 2 S. D. 480, 51 N. W. 96; Thomp. Trials, § 678; Wigmore, Ev. § 17 b. (2); Herndon v. Black, 97 Ga. 327, 22 S. E. 924; Over v. Schiffling, 102 Ind. 191, 26 N. E. 91; Farleigh v. Kelley, 28 Mont. 421, 63 L.R.A. 319, 72 Pac. 756.

CHRISTIANSON, J. This is an action upon a benefit certificate or policy of fraternal life insurance in the sum of $3,000, issued to the plaintiff's husband, Jiles J. Van Woert, for the plaintiff's benefit. The application for such insurance was made on May 8, 1909, and the benefit certificate or policy issued on May 31, 1909, and delivered to the insured on June 12, 1909. The insurance contract consists of the beneficiary certificate together with the application therefor. The application for insurance contains thirty-five questions, together with the answers of the insured thereto. The insured, Jiles J. Van Woert, died on August 30, 1911. The cause of his death being what is commonly known as tumor of the brain.

The application is expressly made a part of the beneficiary certificate, and a copy thereof attached to and made a part of such insurance contract. The application consists of thirty-five questions and answers, and at the top of each page of the application it is provided that the application must be completed in the presence of and with the aid of the camp physician. After all the questions and answers in the application and above the signature of the applicant, the following is found: "Applicant will please note this clause." "I have verified each of the foregoing answers and statements from 1 to 35, both inclusive, adopt them as my own, whether written by me or not, and declare and *warrant* that they are full, complete, and literally true, and I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any benefit certificate that may be issued on this application, and shall be deemed and taken as a part of

such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; that inasmuch as only the head officers of the society have authority to determine whether or not a benefit certificate shall issue on any application, and as they act upon the written, statements, answers, warranties, and agreements herein made, no statements, promises, knowledge, or information had, made, or given by or to the person soliciting, taking, or writing this application, or by or to any person, shall be binding on the society or in any manner affect its rights, unless such statements, promises, knowledge, or information be reduced to writing and presented to the head officers of the society at or before the time any benefit certificate shall be issued hereon; and I further agree that if any answer or statement in this application is not literally true, that my benefit certificate shall be void. . . .” Among the questions propounded to applicant in the application are the following two questions (to both of which he answered, “No.”): (a) “Have you, within the last seven years, been treated by or consulted any person, physician, or physicans in regard to personal ailment?” (b) “If so, give dates, ailments, duration of attacks, and name and address of each and all persons or physicians consulted or by whom treated.” “Have you ever had any of the following named diseases or symptoms, to wit, . . . tumors?” The application containing the answers and warranties of the applicant was signed by the applicant. In the body of the benefit certificate it is expressly agreed: “This benefit certificate is issued and accepted only upon the following *express warranties,* conditions, and agreements: . . . (1) That the Modern Woodmen of America is a fraternal beneficiary society. . . . That the application for beneficial membership in this society made by the said member, a copy of which is hereto attached, and made a part hereof, together with the report of the medical examiner, which is on file in the office of the head clerk, and is hereby referred to and made a part of this contract, is true in all respects, and that the literal truth of such application, and each and every part thereof, shall be held to be a *strict warranty,* and to form the only basis of the liability of this society to such member and to his beneficiary or beneficiaries, the same as if fully set forth in this certificate. (2) That if said application sha[ll not be

literally true in each and every part thereof, then this benefit certificate shall, as to said member, his beneficiary or beneficiaries, be absolutely null and void. (5) . . . If his said application for membership or any part of it shall be found in any respect untrue, then this certificate shall be null and void and of no effect, . . . and all rights and benefits which may have accrued on account of this certificate shall be absolutely forfeited and this certificate shall become null and void."

On the first page of the benefit certificate, printed in large red type (in fact this is the only part of the certificate in red type), is found the following: "A copy of your application for membership is attached to this certificate—READ IT—if any answer or statement therein is not correct, notify the head clerk at once."

The principal defense is that the policy is void because the answers made by the insured in the application, to the effect that he never had a tumor and that he had not within the last seven years been treated by or consulted any person, physician, or physicians in regard to his personal ailments, were untrue, and that his untrue answer to such questions were breaches of the warranties contained in the application and beneficiary certificate. The case came on for trial before a jury, and the undisputed testimony showed that in the year 1907 Jiles J. Van Woert's left eye became inflamed, presumably from flax chaff. On bandaging his left eye, he discovered that he could not see well with his right eye. His condition growing no better, in the spring of 1908 he consulted Dr. A. Carr, of Minot, North Dakota, relative to his eyes. At that time he gave Dr. Carr a history of the trouble, and the doctor made an examination for the purpose of diagnosis and treatment, and found that there existed a partial atrophy of the optic nerve, slight as to the left eye, and more pronounced as to the right eye. The field of vision was contracted, and this contraction was more pronounced in the right eye than in the left. Dr. Carr then advised Mr. Van Woert that this affliction was not a primary one, and that he was unable to diagnose the primary trouble, but further advised Van Woert to consult specialists in Minneapolis and St. Paul relative thereto. That thereafter, and in January, 1909, Van Woert returned to Dr. Carr for further consultation and treatment, and at that time told Dr. Carr that he had visited specialists in St. Paul and that they had directed him to return to Dr. Carr for further treatment, and Dr. Carr did so

treat him for some time, and he did not recover. Aside from the condition of his eyes and the apparent atrophy of the optic nerve, the deceased was a robust and apparently strong, healthy man. During all the time subsequent to the deceased's first treatment by Dr. Carr, there had been a gradual loss of vision on the part of the deceased, and in the spring of 1910 he went, by the advice of his physician at Mohall, N. D., to Dr. C. E. Riggs of St. Paul, Minnesota, for diagnosis. Dr. Riggs is a specialist in the line of neuro diagnosis. On consultation Mr. Van Woert disclosed the facts, heretofore recited, to Dr. Riggs relative to his physical condition, and further disclosed that in the fall of 1909 he was taken with projectile vomiting followed by vertigo. He commenced to have severe headaches, began to take on flesh rapidly, was troubled with loss of memory, and was unable to distinguish certain well-defined odors, and could not tell sweet from bitter. After an examination of the case, Dr. Riggs diagnosed the same as tumor of the brain, and advised Van Woert to go to Dr. Harvey Cushing, then of Johns-Hopkins Hospital, at Baltimore, Maryland, for operation. This he did and was operated upon in the early summer of 1910 for tumor of the brain, or more properly speaking tumor of the pituitary body, one of the ductless glands located at the base of the brain about 1½ or 2 inches back of the eye.

The atrophy of the optic nerve heretofore referred to was caused by a pressure upon the optic nerve,—this pressure being induced by the enlargement or tumor of the pituitary body. At the time of the operation Van Woert had become totally blind in his right eye and vision in his left eye was every greatly impaired. A portion of the pituitary body was removed, and Van Woert returned to Dakota hopeful of recovery. He disclosed to Dr. Cushing, aside from the facts heretofore recited, that long prior to any apparent illness upon his part he had been kicked in the head by a horse.

Van Woert died about August 31, 1911, and the direct cause of his death was the tumor of the brain or pituitary body above referred to.

Dr. Cushing is in charge of the department of neural surgery of Harvard Medical College, and formerly was in charge of the same department in Johns-Hopkins University. He has written a book upon disorders of the pituitary body, and is one of the recognized authorities in the United States upon the subject. He testified that in

his opinion Van Woert had been suffering from the disorder, to wit, tumor of the pituitary body for many years, and that the same was in existence as early as 1907.

Dr. Riggs is a diagnostician of long years' experience and is one of the recognized authorities on neuro diagnosis. He testified that in his opinion the tumor referred to was in existence as early as 1907.

Dr. Carr testified that a tumor of the pituitary body was an extremely dangerous affliction, and the percentage of deaths resultant therefrom under the recorded cases was very high; that atrophy of the optic nerve was not a primary disorder, and danger to a patient's life therefrom depended to some extent upon the nature of the primary disorder. All the medical experts agreed that the impaired vision of Van Woert, and his eye trouble in 1908 and thereafter, doubtless was due to the tumor in question, and no other cause. The above recited testimony was uncontradicted.

At the close of the testimony, both sides moved for a directed verdict. The court thereupon discharged the jury, and subsequently made findings of fact, and ordered judgment in favor of the defendant for a dismissal of the action. The appeal is taken from the judgment so entered.

The first error complained of by appellant is the failure to submit the case to the jury. The record in this case shows that at the close of the testimony and after both parties had rested, both plaintiff and defendant made motions for a directed verdict, whereupon the court said: "Both of these motions, coming at the close of the testimony, leaves the matter for the court, and not for the jury." So, so far as this action is concerned, gentlemen of the jury, you may be excused from any further attendance in this case." No request was made by either side to have any issue of fact submitted to the jury. It is the settled law in this state that under these circumstances, the jury was properly discharged and all questions of law and fact determined by the court. "By making these motions for the direction of a verdict, the attitude of each party was that there was no issue of fact to be submitted to the jury, and that the court should dispose of the case as a matter of law. By such motions they are deemed to have impliedly consented to a disposition of the case without the aid of a jury, by the submission of all questions to the court; and if, in disposing of the

case, it should become necessary for the court to determine issues of fact, such parties will not thereafter be permitted to urge that such issues should have been submitted to the jury." American Case & Register Co. v. Boyd, 22 N. D. 166, 167, 133 N. W. 65. See also Erickson v. Citizens' Nat. Bank, 9 N. D. 81, 81 N. W. 46; Bank of Park River v. Norton, 12 N. D. 497, 97 N. W. 860; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390.

Appellant's next contention is that applicant had no actual intent to deceive the defendant by the erroneous answers, and that under the provisions of § 6501 of the Comp. Laws of 1913, and the construction placed thereon by this court in the case of Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760, the statements contained in the application must be treated as representations rather than warranties. Respondent, on the other hand, contends that under the provisions of § 5043, Comp. Laws 1913, the defendant is not subject to the general insurance laws of the state, and that for that reason § 6501 of the Comp. Laws has no application. The greater portion of appellant's argument is devoted to an attack upon the defendant and its methods of doing business, and it is contended that the defendant is not in fact a fraternal beneficiary society, but is merely an insurance company, and for that reason is not entitled to be exempted from the general insurance laws even though such associations are exempted from the provisions of such laws. Appellant's counsel also severely criticizes the wisdom and policy of such laws. The fact that the defendant in this case is a fraternal beneficiary association is not open to controversy, as this fact is expressly pleaded in plaintiff's complaint and admitted in the answer. Whether it is a wise legislative policy to exempt fraternal beneficiary societies from the operation of general insurance laws, either in whole or in part, as provided by §§ 5043 and 5061A, Comp. Laws 1913, is not a question for this court to determine. This court is itself created by law, and is not superior to, but bound by all valid enactments of, the legislature. Its function is to interpret, not to make, laws. Whether or not valid legislative enactments are wise or unwise, desirable or undesirable, is not for us to say, but is purely a question for the legislature, and the responsibility for the continuation or abolishing of such legislative policy rests solely upon the legislature, and not upon the courts.

It is unnecessary for us, in this case, to decide whether or not § 6501, Comp. Laws 1913, is applicable or inapplicable to the contract involved in this case. And for the purpose of deciding this case we will assume, without deciding, that this section applies. The section in question is as follows: "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, *or unless the matter misrepresented increased the risk of loss.*" The statement by the applicant that he had not been treated by or consulted any physician in regard to any personal ailment within the seven years last preceding the date of the application was contained in the application, signed by him and referred to in the policy and is expressly declared to be a warranty by the parties to the contract and must be given such effect by this court. §§ 6519–6528, Comp. Laws 1913; Satterlee v. Modern Brotherhood, 15 N. D. 92, 98, 106 N. W. 561.

In Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760, this court held that § 6501 of the Compiled Laws applied to statements contained in the application denominated warranties as well as to so-called representations, and that "there is no more reason why a warranty not material to the risk should vitiate a policy, than there is that misrepresentations as to a nonmaterial fact should do so." We have no intention of disapproving the doctrine laid down in that case, but on the contrary entirely approve thereof. It will be observed, however, that under the express language of § 6501, Comp. Laws, as well as the decision of this court in Soules v. Brotherhood of American Yeomen, supra, it is held that if the matter so misrepresented or falsely warranted increased the risk that then it would avoid the policy. The question is therefore, Did the matters misrepresented and falsely warranted by the applicant in this case increase the risk? It cannot be said that the question whether applicant had consulted a physician within the last seven years asked for an expression of opinion. It asked for certain information which applicant could give more readily and accurately than any other person. The latter part of the same question asks for particulars, including the names and addresses of the physicians consulted. Even though applicant believed

that the trouble with his eyes was only local, still the defendant had a right to a complete, truthful answer in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant withheld from the defendant the very information the question submitted was expected to furnish.

The applicant warranted that he had not consulted a physician within the last seven years, and that he was not suffering with a tumor. The undisputed evidence in this case shows that both of these warranties were untrue. They were both material facts which increased the risk. The truth of the conditions warranted is a condition precedent to recovery. Whether the applicant acted in good faith is immaterial. Satterlee v. Modern Brotherhood, supra, Bacon, Ben. Soc. § 197. McDermott v. Modern Woodmen, 97 Mo. App. 636, 71 S. W. 833. As was said by this court in the case of Satterlee v. Modern Brotherhood, supra: "If the matter misrepresented increased the risk of loss, it is still wholly immaterial whether the matter was intentionally or innocently misrepresented. The applicant in this case warranted that she was not pregnant. That this warranty was untrue cannot be seriously questioned. That a state of pregnancy materially increased the risk of loss is obvious. It was a material fact which increased the risk of loss; and the warranty with respect to it was untrue, however innocent the applicant may have been of any intentional misrepresentation. The warranty being false, the contract was vitiated." The decision of this court in the case of Soules v. Brotherhood of American Yoemen, supra, in no manner questioned the soundness of the doctrine laid down by this court in the case of Satterlee v. Modern Brotherhood, but merely held that a warranty not material to the risk would not vitiate the policy any more than a misrepresentation as to a nonmaterial fact would do. We are clearly satisfied that the risk in this case was greatly increased by reason of the misstatements made by the applicant, as it is established by the undisputed evidence in this case that the very ailments for which he had been seeking medical treatment were the recognized symptoms of the disease from which he eventually died. In view of the false warranties the policy never attached, but was void *ab initio.* "A breach of warranty without fraud merely exonerates an insurer from the time that it occurs, *or when it is broken in its inception, prevents the policy from attaching*

to the risk." Comp. Laws, 1913, § 6528. McDermott v. Modern Woodmen, supra; Beard v. Royal Neighbors, 53 Or. 102, 19 L.R.A. (N. S.) 798, 99 Pac. 83, 17 Ann. Cas. 1199; Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595; Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230.

Complaint is also made of the court's ruling in sustaining an objection to an offer of proof made by the defendant, and the refusal to permit an amendment of the complaint at the close of plaintiff's case. The evidence offered was so clearly inadmissible and the court's rulings in excluding the same so entirely proper, under the most elementary and fundamental rules of evidence, that no good purpose would be served by entering into a lengthy discussion of this feature of the case.

The proposed amendment to the complaint was to the effect that the defendant had received the last assessment and proof of death of the insured, and that the board of directors had taken action thereon, and that for that reason defendant was estopped to deny liability. This constituted matter in avoidance of the affirmative defense set forth in the answer, and might have been proper by way of reply, but had no place in the complaint. And under the provisions of §§ 7467–7477, Comp. Laws 1913, plaintiff could have offered the evidence in question without a reply. Plaintiff, however, offered no evidence whatever in support of this proposition. But plaintiff would not be entitled to recover even though such evidence had been introduced. It is not contended that defendant or its officers had any knowledge of the false warranties at the time of the receipt of the assessment or the proofs of death. On the contrary, it is conceded that they had no such knowledge or notice until sometime subsequent thereto, and that when such knowledge and notice was received, payment under the benefit certificate was promptly refused. In the absence of such knowledge or notice there can be no estoppel or waiver on the part of the defendant. 25 Cyc. 859; Bacon, Ben. Soc. § 436; Finch v. Modern Woodmen, 113 Mich. 646, 71 N. W. 1104; Modern Woodmen v. Wieland, 109 Ill. App. 340; Marcoux v. St. John Baptist Beneficence Soc. 91 Me. 250, 39 Atl. 1027; Callies v. Modern Woodmen, 98 Mo. App. 521, 72 S. W. 713; Dunn v. Merrimack, County O. F. Mut. Relief Asso. 68 N. H. 365, 44 Atl. 44; Preuster v. Supreme Council O. C. F.

135 N. Y. 417, 32 N. E. 135; Stuart v. Mut. Reserve Fund L. Ins. Co. 78 Hun, 191, 28 N. Y. Supp. 944.

We find no error in the record which would justify a reversal of the judgment; the findings of the trial court are sustained by the undisputed evidence in the case, and the conclusions of law of the trial court are clearly correct. The judgment appealed from is therefore affirmed.

GEORGE H. TRUMAN v. DAKOTA TRUST COMPANY, a Corporation, and Lottie A. Becker, Both Individually and as Executrix of the Will of Carrie L. Truman, Deceased, Intervener.

(151 N. W. 219.)

Estates — property scheduled — husband's property listed as property of estate of deceased wife — action in replevin to recover — appeal from adverse judgment — claim to exemptions — made pending such appeal — appeal not repudiated — dismissal.

1. The fact that pending an appeal from an adverse judgment in an action by a surviving husband to replevin property which has been scheduled with the assets of the estate of his deceased wife and which he claims to own, such husband files a claim for exemptions in such estate as the husband of the deceased, which if allowed in full would require the conveyance to him of all of the property in dispute, does not amount to a repudiation of his prior claim of ownership or justify a dismissal of such appeal.

Estate — claim and delivery — lies to recover individual property listed — original form of property — immediate right of possession — equitable title — where necessary to first prove — will not lie.

2. An action of replevin or of claim and delivery will lie against an estate for the recovery of personal property which has been converted by the deceased or wrongfully taken by such estate, and which remains in its original form and in which the plaintiff has the right of immediate possession. It will not lie, however, where the existence of an equitable title is necessary to be proved before the right to the possession by the complainant can be established.

Certificates of deposits — issued during life of deceased — in her name — with consent of husband — claim and delivery against estate to recover — will not lie.

3. An action of replevin or of claim and delivery will not lie against the estate of a deceased wife to recover from such estate certificates of deposit

which were taken out during the lifetime of the deceased in her own name with the consent of her husband, even though such husband claims that they were held in trust for him and that the money they represent was his money.

Action against estate — to recover property listed — evidence — conversations with third persons and deceased — in absence of deceased's surviving husband or wife — not allowed.

4. Chapter 109 of the Laws of 1909, which provides that "in any action or proceeding by or against any surviving husband or wife touching any business or property of either or in which the survivor or his or her family are in any way interested, such husband or wife will be permitted if they shall so desire to testify under the general rules of evidence as to any and all transactions and conversations had with the deceased husband or wife during their lifetime touching such business or property," does not authorize the introduction of testimony by the executrix or administratrix of such deceased person's estate in a suit against such executrix for the recovery of property claimed to be unlawfully held by such executrix as a part of the property of such estate, of conversations held with the deceased by third persons outside of the presence of the surviving husband or wife.

Estates — recover of property from — probate court claims — filing of.

5. One who claims as his own property which has been converted by the executrix of the estate of a deceased person is not precluded from pursuing such property in an appropriate action in the district court by the fact that he has not filed a claim therefor in the probate court.

Opinion filed February 8, 1915. Rehearing denied February 25, 1915.

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

Action in claim and delivery to recover the possession of a diamond ring and certain certificates of deposit. Judgment for defendant and intervener. Plaintiff appeals.

Reversed.

Statement of facts by BRUCE, J.

This is an action in claim and delivery which was commenced in November, 1912. Plaintiff seeks to recover from the defendant Dakota Trust Company two certificates of deposit of the face value of $2,131.74 and one diamond ring of the stipulated value of $400. A complaint in intervention is filed by one Lottie A. Becker, in which she claims to be the owner and entitled to the possession of the property in question individually and as executrix of the estate of Carrie L. Truman, the deceased wife of the plaintiff. The case was tried to a jury, and at

the close of the entire case a verdict was directed in favor of the intervener as such executrix and of such trust company. The motion for such directed verdict was based upon the four grounds: First, that the possession of the property could not be recovered in an action in claim and delivery under the proof in the case; second, that there was no testimony tending to show that the plaintiff was the owner; third, that as the certificates had been issued in the name of the deceased and of the intervener for a long time prior to the death of the deceased, the plaintiff was guilty of laches, and was estopped to claim the property in this action; fourth, that the plaintiff having failed to file his claim against the estate, his right of action was barred. The appeal before us is from the judgment entered upon the verdict so directed.

It also appears from the record that after the trial of the action in the district court, the appellant, George H. Truman, filed in the county court of Cass county and in the proceedings for the distribution of the estate of the deceased a claim in which he asked to be allowed $1,500 exemptions as the surviving husband of the said Carrie L. Truman, deceased, and that thereafter and in due course this claim was brought on for hearing, but was disallowed by the court, and that later and on the 20th day of September, 1913, an order was entered in the district court dismissing an appeal from such order and ordering that the action of the county court refusing to allow petitioner's claim for exemptions be in all things approved and sustained. The record also shows that outside of the certificates of deposit and the ring mentioned there was about $575 worth of property in the estate, while the expenses and indebtedness incurred by the administratrix amounted to more than $650.

The plaintiff also testifies that he and Carrie L. Truman were married in 1882; that Carrie L. Truman died in December, 1911; that she had no property of her own, and that though she engaged at different times in business enterprises, no profit was made therein except, perhaps, when she was working in the millinery business in the early eighties, and perhaps when she was working for a short time on a salary, though the amount of the salary is not disclosed. Defendants seek to rebut this testimony by proof of earnings much of which evidence, however, was incompetent. The plaintiff, George H. Truman,

appears to have turned over a portion of his earnings to his wife at different times, and she told him that she had put the money in the First National Bank of Fargo, but he never went with her when she made the deposits. She seems to have taken out certificates of deposit in her own name, and this appears to have been known to the plaintiff. It is also shown that later she had these certificates made out jointly to her and her daughter, Mrs. Lottie A. Becker, the intervener, and this fact was known to the plaintiff in the spring of 1910, but he did not go to the bank to find out. In May or June, 1910, the plaintiff and his wife separated. They lived apart thereafter until her death in December, 1911. After the separation, Truman paid his wife a monthly allowance. There is also evidence that shortly before her death Mrs. Truman turned the certificates over to Mrs. Becker, together with some rings, $260 in cash, and the $400 diamond ring, concerning which the plaintiff testifies that several times he bought diamond rings for investment, and later he exchanged these rings for the one now in dispute, paying the balance. He testified that the purpose was purely that of an investment, but that he allowed his wife to wear this and the other rings. He appears to have had no bank account of his own.

The intervener, Mrs. Lottie A. Becker, testified that shortly before her death the deceased gave the property in controversy to her, and that after the death of Mrs. Truman she took possession of the certificates and the ring, and later, upon her appointment as executrix of Mrs. Truman's estate, brought the certificates and ring back to Fargo, listed them in the inventory of the estate, and then deposited them with the Dakota Trust Company, the original defendant herein, as security for the bond issued to her as executrix. It is also shown that prior to her death, Mrs. Truman made a will in which she bequeathed the certificates and ring in question to Mrs. Becker. Later, and in the probate proceedings, the plaintiff filed an answer claiming the property in question as his own, but merely as a reason why Mrs. Becker should not be appointed as executrix of the estate. He at no time, however, seems to have filed any specific claim for the property or for the proceeds thereof in the probate court. Later, also ,he filed a claim for exemptions in said estate as the husband of the said deceased and to the amount of $1,500. This claim, however, was disallowed.

Barnett & Richardson, for appellant.

Plaintiff was not guilty of laches in bringing this action. The action was brought just as soon as plaintiff learned that the intervener claimed the property in question. Before gaining such knowledge, no action was necessary. Further than this there is no evidence or claim or prejudice to anyone, nor has either of the other parties changed his position or rights by reason of delay. Such change is *necessary* to establish laches. The same reason applies to the contention that plaintiff was estopped to claim the property in question. Turpin v. Dennis, 139 Ill. 274, 28 N. E. 1065; Tynan v. Warren, 53 N. J. Eq. 313, 31 Atl. 596; Coleman v. Whitney, 62 Vt. 123, 9 L.R.A. 517, 20 Atl. 322; Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Luke v. Koenen, 120 Iowa, 103, 94 N. W. 278.

Under the directed verdict, it must be conceded that the certificates and ring in question were purchased with plaintiff's money, only *with the consent of appellant* as a means of keeping such money, and as an investment.

No *title* passed to the wife at any time, for the reason that there is no testimony showing any intention or desire or purpose to change the title from the husband to the wife. Title to personal property may only be changed as follows: (1) By original acquisition; (2) by transfer by act of the law; (3) by transfer by act of the parties. 22 Am. & Eng. Enc. Law, 752, § 4.

The fact that the trust company was keeping the property for intervener is immaterial. Flatner v. Good, 35 Minn. 395, 29 N. W. 56.

Nor is the fact that appellant never had possession of the certificates material. Miller v. Warden, 111 Pa. 300, 2 Atl. 90.

Testimony as to conversations of deceased with *third persons* is wholly inadmissible, and especially is this true when such conversations were had in the absence of plaintiff, deceased's husband, plaintiff offered testimony as to conversations had between him and the deceased wife. He had the statutory right to do so. But this did not open the door to defendant, nor did it give the right to defendant to offer testimony of third persons as to conversations had with plaintiff's deceased wife, in his absence. Neither is such testimony rebuttal, because it relates to other and different matters than those embraced within plaintiff's testimony as to plaintiff it is mere hearsay. Frank v. Thompson, 105 Ala. 211, 16 So. 634; 40 Cyc. 2347, note 8.

Watson & E. T. Conmy, for respondents.

The plaintiff is precluded and estopped from appealing from the judgment herein, because he has taken and retained benefits under said judgment, acquiesced in same, and has proceeded in a legal way to enforce a claimed right which could only be created through such judgment. The trial court holds that the property sued for here was the property of the estate of Carrie L. Truman. The plaintiff acquiesces in and accepts benefits under such judgment, when he asks for exemptions out of this specific property. Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468; Williams v. Williams, 6 N. D. 269, 69 N. W. 47; Tuttle v. Tuttle, 19 N. D. 748, 124 N. W. 429; Bennett v. Van Syckel, 18 N. Y. 481; Liebuck v. Stahle, 66 Iowa, 749, 24 N. W. 562; Priestly v. Shaughnessy, 10 La. Ann. 455; McGrew v. Grayston, 144 Ind. 165, 41 N. E. 1027; Garner v. Garner, 38 Ind. 139; Manlove v. State, 153 Ind. 80, 53 N. E. 385; Ault v. Gill, 14 Ky. L. Rep. 525.

The plaintiff, by his conduct and actions inconsistent with his claims in this action, waived his right of appeal herein and waived any error of the trial court, and is estopped to prosecute this appeal, and same should be dismissed. Murphy v. Spaulding, 46 N. Y. 556; Gordon v. Ellison, 9 Iowa, 317, 74 Am. Dec. 353; Joseph Goldberger Iron & Steel Co. v. Cincinnati Iron & Steel Co. 153 Ky. 20, 154 S. W. 374; Bennett v. Van Syckel, 18 N. Y. 481; Knapp v. Brown, 45 N. Y. 207; Marvin v. Marvin, 11 Abb. Pr. N. S. 97; Carll v. Oakley, 97 N. Y. 633; Baylies, New Trials & Appeals, pp. 18, 19; Samuel v. Samuel, 59 Kan. 335, 52 Pac. 889.

Third persons can testify to conversations had with the deceased wife of plaintiff, and to her statements, contrary to the testimony of plaintiff. Braithwait v. Aiken, 2 N. D. 57, 49 N. W. 420; Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 731; Regan v. Jones, 14 N. D. 591, 105 N. W. 613; First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1087, 17 Ann. Cas. 213; 40 Cyc. 2348.

Under the contract between plaintiff and wife as to the deposit of the money, if after her death there was anything owing to plaintiff thereunder, his remedy was to file a claim against her estate and proceed to collect it. Rev. Codes 1905, § 8099; Cottonwood County Bank v. Case, 25 S. D. 77, 125 N. W. 298.

An action in claim and delivery will not lie against the estate. In order to maintain such action, plaintiff must show title, and an *immediate* right of possession. Replevin will not lie to recover money or scrip unless it is so marked as to be capable of identification. But this action is to recover certificates of deposit—the legal title to which is in Carrie L. Truman and Lottie A. Becker. Wheeler v. Allen, 51 N. Y. 42; Spalding v. Spalding, 3 How. Pr. 297; Seymour v. Van Curen, 18 How. Pr. 94; Sager v. Blain, 44 N. Y. 449; Pilkington v. Trigg, 28 Mo. 96; Leete v. State Bank, 141 Mo. 584, 42 S. W. 927; Turner v. Langdon, 85 Mo. 44, and cases cited; Stonebraker v. Ford, 81 Mo. 532; 34 Cyc. 1359; Graves v. Dudley, 20 N. Y. 76; Bowker Fertilizer Co. v. Cox, 106 N. Y. 555, 13 N. E. 943; Dowdy v. Calvi, 14 Ariz. 148, 125 Pac. 876.

An equitable assignee of a chose in action cannot maintain replevin to recover possession of it against the legal owner and holder. Clapp v. Shepard, 2 Met. 127; 34 Cyc. 1354; Wadsworth v. Owens, 21 N. D. 255, 130 N. W. 935; Cobbey, Replevin, § 2; 7 Lawson, Rights & Rem. § 3642; Flannigan v. Goggins, 71 Wis. 28, 36 N. W. 846; Hooker v. Latham, 118 N. C. 186, 23 S. E. 1004; Pasterfield v. Sawyer, 132 N. C. 258, 43 S. E. 799; s. c. 133 N. C. 44, 45 S. E. 524; Bridgers v. Ormond, 148 N. C. 375, 62 S. E. 423.

The plaintiff has been guilty of such laches in bringing this action as to preclude and estop him to maintain it now. State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 143; Jones v. Subera, 25 S. D. 223, 126 N. W. 253; Kenny v. McKenzie, 25 S. D. 485, 49 L.R.A.(N.S.) 775, 127 N. W. 597; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; "Estoppel or Waiver," 39 Cyc. 519; Jones, Ev. § 74, p. 74; "Estoppel," 16 Cyc. 813.

BRUCE, J. (after stating the facts as above). It is claimed that the action of plaintiff in claiming the ownership of the property in dispute in the present action of claim and delivery in the district court is totally inconsistent with his claim for exemptions as the husband of the deceased which was later filed in the county court, and that the filing of such claim was an acceptance of the judgment of the district court in the replevin action, and a motion is made to dismiss the appeal for this reason. We think, however, that there is no merit in this

motion. The record shows that in addition to the certificates of deposit and the diamond ring in controversy there was property in the estate to the value of $575, and though an allowance seems to have been claimed by the executrix of said estate to the amount of $650 for expenses incurred, no decree of final distribution seems to have been entered. Nor do we believe that the mere fact that the claim for exemptions was filed for more than the condition of the estate would warrant, and that such exemption, if allowed, would necessarily involve some, if not all, of the property sought to be replevined, would make the claim so inconsistent with the prior assertion of the ownership of the certificates of deposit and of the diamond ring in question as to amount to an election of remedies, and justify a dismissal of the appeal. Plaintiff, indeed, does not take to inconsistent positions. He merely says that he is entitled to the property because he owns it, and that, even if the court holds that he does not own it, he is still entitled to it as his exemption as the husband of his deceased wife.

The point next to be considered is the contention of defendants that the action of replevin will in no event lie under the facts of the case, but rather one in equity, and that since the plaintiff has filed no claim in the probate court, his right of action is barred.

We agree with the defendants in their first proposition in so far as the certificates of deposit are concerned, but not in regard to the diamond ring. We, indeed, concede the general proposition that merely equitable titles may not be litigated or accountings obtained in an action of replevin or claim and delivery; that only he who has the right of immediate possession may bring the action; that in such cases the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant. Leete v. State Bank, 141 Mo. 584, 42 S. W. 927.

This rule, however, though applicable to the certificates of deposit, is not applicable to the diamond ring, and the verdict as directed by the learned trial court was therefore improper. It is to be remembered, indeed, that the case comes before us on a motion to direct a verdict for the defendant, and in such cases we must give to the plaintiff's evidence the most favorable construction which is reasonably possible. If we do so, the action in so far as the ring is concerned is not one for an accounting or to establish an equitable title in prop-

erty in the hands of an innocent third party, but to recover from a bailee personal property which she or he has wrongfully converted and detailed.

It is quite clear to us that the petitioner, Lottie A. Becker, had no right as an individual to intervene in the case, as she had individually no interest in the property and no right to the immediate possession thereof. It is true that she testified that prior to the death of Mrs. Truman, Mrs. Truman gave the property to her. She, however, subsequently scheduled the property as an asset of the estate, and elected to take it under the will, and based her whole claim upon such will. She thus relinquished any claim she may have had under the gift. In fact, in her petition she says nothing of the gift whatever. The court, however, merely directed a verdict in her favor as administratrix, and therefore no error was committed in so far as she was individually concerned. When we come to the trust company, the position is the same. The property at the most was the property of the estate, and did not belong—at least until the final decree of distribution—to the intervener, Lottie A. Becker. It goes without saying that an administratrix or an executrix of an estate cannot pledge the property of that estate as security for her own bond which is given to protect the estate, the creditors thereof, and the very property which she seeks to pledge. The position of the trust company was therefore merely that of a custodian, or as a servant or agent, of the executrix for safe-keeping.

The question remains whether as executrix of such estate, the intervener, Lottie A. Becker, was entitled to the possession of such property as against the plaintiff, George H. Truman, or, conversely, whether George H. Truman was entitled to the possession of such property and could maintain a replevin action against Lottie A. Becker as such executrix.

We are clearly of the opinion that as far as the diamond ring was concerned the action of replevin or of claim and delivery would lie, and that there was enough evidence introduced by the plaintiff, which, if taken alone, would justify a submission to the jury, the rule being well established that on a motion to direct a verdict in favor of the defendant, the evidence of the plaintiff must be taken in its most favorable light.

The evidence of the plaintiff in regard to the ring was as follows:

"I bought three or four rings,—three anyway. I bought one in the first place. The ring was about a carat and a half and then I bought another two-stone ring. I don't remember the weight. Then this other ring there was traded. There was some exchanges made around on it and differences paid, but of course that was exchanged in with the other ring to get a little larger one. I went down there and looked the rings over before they were bought, and they were paid for in payments. Mrs. Truman went and paid the payments, I gave her the money. I never made any payments myself that I remember. She did almost all that business herself, paying bills, etc. . . . . I don't know what the amount of the difference was, when my wife deposited a ring with Hagen and got this ring exhibit C. I think the payments were made at different times. This was the information I got from Mrs. Truman. I didn't go there when the money was paid. I took her word for it. I know she was anxious about it. I objected in the first place, but finally consented to her making the change." And again: "In regard to the rings, there are three or four of those rings. I bought those rings and paid for them; bought them from Martin Hagen down here. Mrs. Becker had a ring and wanted to trade it with her mother. Her mother came to me and asked me several times for my consent to allow her to trade. I had bought these rings and paid for them. Finally I consented. Then she went to work and made another exchange and got this larger diamond. The second exchange was made at Martin Hagen's. The trade was made, she paid part, and I furnished the money to pay the difference in the bargain. Mrs. Truman figured diamonds was the same as money. She could have the use of them and they were increasing in value, and it would be the same as laying up money, and I consented to that and let her have the diamonds so that she could have them to use."

If we construe this testimony in its most favorable light, and this we must do, the executrix and the trust company are in the same position as the finder of lost goods who, having paid no consideration therefor, refuses to deliver them to the true owner. In such a case it is elementary law that claim and delivery will lie. Cobbey, Replevin, § 3554. As far as this ring is concerned, indeed, we have a case where a ring belonging to a husband, held by his wife as a gratuitous bailee and for the benefit of the bailor, is given by such bailee to her

daughter, which in itself is a conversion, and the daughter then schedules the property with the assets of the deceased wife's estate, and thereafter deposits such property as security for her own personal bond as an executrix. This, in itself, is another conversion. The action, in short, is not one to assert an equitable title, but to follow and recover one's own specific property. The court therefore erred in taking the case from the jury in so far as the diamond ring was concerned. Farrow v. Farrow, 72 N. J. Eq. 421, 11 L.R.A.(N.S.) 389, 129 Am. St. Rep. 714, 65 Atl. 1009, 16 Ann. Cas. 507.

When we come to the certificates of deposit, however, we are of the opinion that even if the facts were as claimed by the plaintiff, the action of replevin or of claim and delivery would not lie. The reason for our holding is that the legal title to the certificates of deposit seems at no time to have been in the plaintiff, but an equitable title merely, and that the right of the plaintiff, if any, was to follow a trust fund, rather than to seek to recover specific property of which he had at no time the right of immediate possession. An action of replevin will not lie where the existence of an equitable trust is necessary to be proved before the right to the possession by the complaint can be established. We cannot, in fact, do better than to quote from the language of the supreme court of New York which was used in a somewhat similar case. "This action," the court said, "cannot be maintained. The scrip was held by the defendant, on the books of the Great Western Insurance Company, in his own name. The legal title was in him. As the scrip stood in that way for several years, it is a legal inference that it was by the consent or permission of the plaintiff. A demand and refusal to *transfer* did not give the plaintiff the title to the scrip. Possession of the scrip, without a transfer, would be of no avail to the plaintiff. All that the plaintiff could recover (assuming that he could maintain replevin), would be the possession of that which would not avail him, *viz.*, scrip standing in the name of Allen. Such a recovery would be nugatory. But the plaintiff cannot, in my opinion, recover scrip of which the legal title is in the defendant by his permission, in an action of replevin; or of claim and delivery, which is an action of the same legal nature. If the plaintiff desires the identical scrip, his remedy is in equity. If he desires damages only, he can, perhaps, maintain an action on the case." Leonard, J., in Wheeler v. Allen.

49 Barb. 460, affirmed in 51 N. Y. 37. See also Leete v. State Bank, 141 Mo. 584, 42 S. W. 927; Bridgers v. Ormond, 148 N. C. 375, 62 S. E. 423.

Even though replevin would not lie for the certificates of deposit, however, it would, as we before stated, lie for the recovery of the ring, providing the proper proof was adduced. Enough evidence was introduced to justify a submission of the case to the jury on the question of the ring, and the trial court committed error when it directed a verdict in favor of the defendants for the possession of both the ring and the certificates of deposit, and the verdict as a whole was improper. A new trial, therefore, must be had.

A new trial being necessary, and a decision of the question being necessary for the proper conduct thereof, we further add that it is clear to us that the testimony of the intervener, Lottie A. Becker, and of all other witnesses, save the plaintiff husband, as to the conversations alleged to have been held by them with the deceased, Carrie L. Truman, was inadmissible. The original statute on the subject was ¶ 2, of § 5653, Rev. Codes 1899, being ¶ 1 of chapter 17 of the Laws of 1879, amended. This section provided that "in civil actions or proceedings by or against executors, administrators, heirs at law or next of kin in which judgment may be rendered or ordered entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party. But if the testimony of a party to the action or proceeding has been taken and he shall afterwards die and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law or next of kin, then the other party shall be a competent witness as to any and all matters to which the testimony so taken relates."

Chapter 109 of the Laws of 1909 amended this section by adding the following proviso: "Provided, further, that in any action or proceeding by or against any surviving husband or wife touching any business or property of either, or in which the survivor or his or her family are in any way interested, such husband or wife will be permitted, if they shall so desire, to testify under the general rules of evidence as to any or all transactions and conversations had with the

deceased husband or wife during their lifetime touching such business or property." It will be noticed that this provision or amendment merely relates to conversations held between the surviving husband or wife and the deceased husband or wife, and relates to no other person whatever. There is nothing in the statute or in the rules of evidence which would justify the admission in evidence of conversations held between the deceased and a third person, and not in the presence of the surviving husband or wife. Such evidence would have been clearly hearsay if introduced during the lifetime of the deceased, and we find nothing in the statute which changes the general rule as to hearsay evidence.

The failure of the appellant to file a claim in the probate court did not preclude him from maintaining this action.

The judgment of the District Court is reversed and the cause is remanded for further proceedings according to law.

On Petition for Rehearing (Filed February 25, 1915).

BRUCE, J. Counsel for appellant appears to have misconstrued our original opinion, and no doubt some explanation is necessary. We did not hold that, if the evidence had shown that the interest of the plaintiff in the diamond ring was merely that of a joint owner, an action of replevin or of claim and delivery would have lain. We merely held that as we construed the evidence of the plaintiff, the sole ownership and right of possession was shown in him, and that therefore the action would lie.

Nor did we wish to be understood as holding that the testimony as to conversations between third persons who are not parties to the suit, and a deceased husband or wife, would be inadmissible in all cases. In relation to such testimony we have no specific statutes, and the ordinary and general rules of evidence obtain.

All that chapter 109 of the Laws of 1909 did was to free the surviving husband or wife, when a litigant, from the disqualifications and personal inability to testify as to conversations with the deceased spouse in "an action or proceeding by or against the executor, administrator, heirs at law, or next of kin," of such persons which was imposed upon him by ¶ 2 of § 6563, Rev. Codes 1899, being ¶ 1 of chapter 17 of the

Laws of 1879. Witnesses who are not parties to the suit are not disqualified by such statute, and may still testify as to conversations held with the deceased which are otherwise admissible, but subject, of course, to the general rules as to hearsay evidence.

The petition for a rehearing is denied.

PETER WALLIN v. GREAT NORTHERN RAILWAY COMPANY.

(151 N. W. 291.)

Personal injury — ignition of lighting gas — employee — volunteer — not engaged in employment — dismissal of case — motion for.

Plaintiff was injured by ignition of lighting gas while the tank containing it was being cleaned and recharged. Plaintiff recovered on the theory that the gas was ignited by the lantern of an incompetent and inexperienced employee, a boy seventeen years old, who, plaintiff asserts, was negligently directed to assist in such work. All the evidence is examined, and it is held that there is no evidence to support the finding that said employee, who had other duties elsewhere to perform, was assigned to this work or directed to do it. Instead the evidence without contradiction is all to the effect that the boy whose lantern plaintiff asserts caused the explosion, was a mere volunteer, and was at the place of the accident out of his mere curiosity, and for which the defendant and its officials in charge were in no wise responsible. The motion to dismiss made at the close of plaintiff's case and again at the close of the trial should have been granted, and dismissal is directed.

Opinion filed February 9, 1915.

Appeal from the District Court of Richland County, *Allen,* J.

Reversed and ordered dismissed.

Purcell & Divet and *Murphy & Toner,* for appellant.

No common-law liability exists in this case, and if defendant is liable at all, it is because of some law extending its liability in relation to fellow servants, beyond the common law. Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; Hoxie v. New York N. H. & H. R. Co. 82 Conn. 352, 73

Atl. 754, 17 Ann. Cas. 324, 21 Am. Neg. Rep. 42; Sullivan v. Mississippi & M. R. Co. 11 Iowa, 421.

The plaintiff complains on but one ground of negligence, and he is confined to that negligence alleged. Jenning v. Great Northern R. Co. 96 Minn. 302, 1 L.R.A.(N.S.) 696, 104 N. W. 1079; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619.

The accident involved in this case happened in Minnesota, and the laws of that state govern. Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132, 44 L.R.A. 410, 52 N. E. 951, 5 Am. Neg. Rep. 549; Voshefskey v. Hillside Coal & I. Co. 21 App. Div. 168, 47 N. Y. Supp. 386; Louisville & N. R. Co. v. Graham, 98 Ky. 688, 34 S. W. 229; Western & A. R. Co. v. Strong, 52 Ga. 461; East Tennessee, V. & G. R. Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905.

Their law on the subject of fellow servants has been construed by their courts the same as our law of 1903. Blomquist v. Great Northern R. Co. 65 Minn. 69, 67 N. W. 804; Leier v. Minnesota Belt-Line R. & Transfer Co. 63 Minn. 203, 65 N. W. 269; Lavallee v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974; Weisel v. Eastern R. Co. 79 Minn. 245, 82 N. W. 576, 7 Am. Neg. Rep. 635; Schus v. Powers-Simpson Co. 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68.

Where the work of the employee has nothing to do with the *movement* and *operation* of cars or trains, and the particular injury complained of was not caused by the movement or operation of cars or trains, then the work is *not* railroad hazard. Jenning v. Great Northern R. Co. 96 Minn. 302, 1 L.R.A.(N.S.) 696, 104 N. W. 1079; Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; Smith v. Burlington, C. R. & N. R. Co. 59 Iowa, 73, 12 N. W. 763; Luce v. Chicago, St. P. M. & O. R. Co. 67 Iowa, 75, 24 N. W. 600; Pearson v. Chicago, M. & St. P. R. Co. 47 Minn. 9, 49 N. W. 302; Foley v. Chicago, R. I. & P. R. Co. 64 Iowa, 644, 21 N. W. 124, 14 Am. Neg. Cas. 630; Reddington v. Chicago, M. & St. P. R. Co. 108 Iowa, 96, 78 N. W. 800, 6 Am. Neg. Rep. 60.

Plaintiff admitted that he *knew* this gas was explosive and that to

bring a lighted lantern near it was dangerous. A person exposing himself to a *known* danger assumes *all ordinary risks,* and is guilty of contributory negligence. Anniston Pipe Works v. Dickey, 93 Ala. 418, 9 So. 720; Noyes v. Southern P. R. Co. 3 Cal. Unrep. 293, 24 Pac. 927; Pittsburgh, Ft. W. & C. R. Co. v. Collins, 87 Pa. 405, 30 Am. Rep. 371; Goldstein v. Chicago, M. & St. P. R. Co. 46 Wis. 404, 1 N. W. 37; Baltimore & O. R. Co. v. Depew, 40 Ohio St. 127; Corlett v. Leavenworth, 27 Kan. 673; Mehan v. Syracuse, B. & N. Y. R. Co. 73 N. Y. 585; Erie v. Magill, 101 Pa. 616, 47 Am. Rep. 739; Thunborg v. Pueblo, 45 Colo. 337, 101 Pac. 399, 21 Am. Neg. Rep. 36; Smith v. Peninsular Car Works, 60 Mich. 501, 1 Am. St. Rep. 542, 27 N. W. 662, 16 Am. Neg. Cas. 42; Mitchell v. Stewart, 187 Pa. 217, 40 Atl. 799, 4 Am. Neg. Rep. 578; Truntle v. North Star Woolen-Mill Co. 57 Minn. 521, 58 N. W. 832; 1 Labatt, Mast. & S. p. 816; Sweeney v. Minneapolis & St. L. R. Co. 33 Minn. 153, 22 N. W. 289, 16 Am. Neg. Cas. 302; Mantel v. Chicago, M. & St. P. R. Co. 33 Minn. 62, 21 N. W. 853.

A servant is also under a duty to pay attention to his surroundings. If he does not, he is negligent. Sours v. Great Northern R. Co. 84 Minn. 230, 87 N. W. 766.

One of the *ordinary* risks in handling any lighting gas, in the very nature of things, is that it may explode. Plaintiff knew this gas was explosive; that it was dangerous to bring a light near it; he had done the work a number of times before. Therefore he assumed the risks and cannot recover. Toohey v. Equitable Gas Co. 179 Pa. 437, 36 Atl. 314, 1 Am. Neg. Rep. 185; Brown v. West Riverside Coal Co. 143 Iowa, 662, 28 L.R.A.(N.S.) 1260, 120 N. W. 732, 21 Am. Neg. Rep. 646; Perkins v. Oxford Paper Co. 104 Me. 109, 71 Atl. 476, 21 Am. Neg. Rep. 116; Young v. Randall, 104 Me. 135, 71 Atl. 647, 21 Am. Neg. Rep. 127; Anniston Pipe Works v. Dickey, 93 Ala. 418, 9 So. 720; Noyes v. Southern P. R. Co. 3 Cal. Unrep. 293, 24 Pac. 927; Goldstein v. Chicago, M. & St. P. R. Co. 46 Wis. 404, 1 N. W. 37; Baltimore & O. R. Co. v. Depew, 40 Ohio St. 127; The Serapis, 49 Fed. 395; Stafford v. Chicago, B. & Q. R. Co. 114 Ill. 244, 2 N. E. 185; Texas & P. R. Co. v. Bradford, 66 Tex. 732, 59 Am. Rep. 639, 2 S. W. 595; Northern Ohio R. Co. v. Rigby, 69 Ohio St. 184, 68 N. E. 1046, 15 Am. Neg. Rep. 411.

There being no common-law liability, unless plaintiff has brought himself within one or more of the exceptions to that rule, the court erred as a matter of law, in denying defendant's motion for a directed verdict. 2 Labatt, Mast. & S. p. 1329; Gulf, C. & S. F. R. Co. v. Blohn, 73 Tex. 637, 4 L.R.A. 764, 11 S. W. 867; Weisser v. Southern P. R. Co. 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636, 19 Am. Neg. Rep. 88; Duff v. Willamette Steel Works, 45 Or. 479, 78 Pac. 363, 668, 17 Am. Neg. Rep. 120; O'Reilly v. Bowker Fertilizer Co. 174 Mass. 202, 54 N. E. 534, 6 Am. Neg. Rep. 555.

George W. Freerks and *Geo. E. Wallace,* for respondent.

It is the duty of the master to employ only reasonably competent and careful servants. Perpich v. Leetonia Min. Co. 118 Minn. 508, 137 N. W. 12.

A master is liable for injuries to servants that spring from such negligent acts of fellow servants as are due to their incompetency. Hilts v. Chicago & G. T. R. Co. 55 Mich. 437, 21 N. W. 878; Lee v. Michigan C. R. Co. 87 Mich. 574, 49 N. W. 909; Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Matthews v. Bull, 5 Cal. Unrep. 592, 47 Pac. 773; McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094.

A servant is entitled to assume that the master has exercised due care and diligence in the selection and retention of reasonably competent and careful fellow servants. Giordano v. Brandywine Granite Co. 3 Penn. (Del.) 423, 52 Atl. 332; Chicago & A. R. Co. v. Sullivan, 63 Ill. 293; Illinois C. R. Co. v. Jewell, 46 Ill. 99, 92 Am. Dec. 240; Hall v. Bedford Quarries Co. 156 Ind. 460, 60 N. E. 149; Nordyke & M. Co. v. Van Sant, 99 Ind. 188; Ohio & M. R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134; Scott v. Iowa Teleph. Co. 126 Iowa, 524, 102 N. W. 432; Cayzer v. Taylor, 10 Gray, 274, 69 Am. Dec. 317, 15 Am. Neg. Cas. 500; Brown v. Maxwell, 6 Hill, 592, 41 Am. Dec. 771; Gilman v. Eastern R. Co. 10 Allen, 238, 87 Am. Dec. 635; Blumenthal v. Union Electric Co. 129 Iowa, 322, 105 N. W. 588, 19 Am. Neg. Rep. 235; Carlson v. Wilkeson Coal & Coke Co. 19 Wash. 473, 53 Pac. 725; Curran v. A. H. Stange Co. 98 Wis. 598, 74 N. W. 377; Northern P. R. Co. v. Mares, 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; 25 Cyc. 1080.

The servant *never* assumes the risk of the ***master's negligence.***

Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Northern P. R. Co. v. Mares, 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; Giordano v. Brandywine Granite Co. 3 Penn. (Del.) 423, 52 Atl. 332; Metropolitan West Side Elev. R. Co. v. Fortin, 203 Ill. 454, 67 N. E. 977, 14 Am. Neg. Rep. 283.

It is also the duty of the master to warn and instruct his servant concerning the dangers incident to his employment. This duty is most imperative where the danger is of a latent or obscure character, and where the master knows the servant to be inexperienced, or of immature age, as in this case. Wilder v. Great Western Cereal Co. 130 Iowa, 263, 104 N. W. 434; 20 Am. & Eng. Enc. Law, 2d ed. 97; Kerker v. Bettendorf Metal Wheel Co. 140 Iowa, 209, 118 N. W. 306; Johnson v. Desmond Chemical Co. 156 Mich. 669, 121 N. W. 269; Hamm v. Bettendorf Axle Co. 147 Iowa, 681, 125 N. W. 186; Bell v. Northern P. R. Co. 112 Minn. 488, 128 N. W. 829; Bjbjian v. Woonsocket Rubber Co. 164 Mass. 214, 41 N. E. 265; Pullman's Palace Car Co. v. Harkins, 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932; George Matthews Co. v. Bouchard, Rap. Jud. Quebec 8 B. R. 550.

Goss, J. Plaintiff has recovered for personal injuries suffered through the ignition of carbyde lighting gas in the yards of the defendant company at Breckendridge, Minnesota. The plaintiff was on top of a passenger coach and engaged in recharging the gas tank. In so doing it became necessary for him to loosen the top of the tank, which top extends some inches above the roof of the coach. The tank itself extends from the top to the bottom of the coach. The refuse from the former charging had just been taken out at the bottom by the plaintiff and another employee, Frank Warnecke. It then became necessary to discharge any gas remaining in the tank, and for this purpose the plaintiff climbed upon the roof of the coach. It was about 8:30 in the evening and was getting dark. A seventeen-year old boy, Joe Bronecke, had just assisted plaintiff to bring over some carbyde and was watching plaintiff and the other employee clean out the bottom of the tank. The boy did something toward helping in this operation. His lantern, with the lanterns of the other two men, was burning while

they were at work on the ground. There is some conflict in the testimony as to whether any lanterns other than the boy's were taken to the roof of the coach, but as this must be resolved in favor of the plaintiff we should assume that the two other employees did not take their lanterns to the roof. Plaintiff, on completion of the work on the ground, mounted a ladder to the top of the coach, and knelt or sat down while releasing the cover of the carbyde tank. He says he did not see the boy mounting the ladder or on top of the coach, but the fact was the boy followed plaintiff to the top of the coach, carrying his lighted lantern, and immediately behind him was the employee, Frank. Very soon afterwards the gas released from the tank ignited and exploded, and injured all three men, the boy least of all. The plaintiff has recovered upon the theory that the boy was an incompetent and inexperienced employee of the defendant company, and was not cautioned against or informed of the dangers incident to the line of duty then being performed, that is, doing what was necessary in order to clean and recharge the carbyde tank. Defendant denies the employment, and asserts contributory negligence by plaintiff. A verdict for $575 damages was recovered, and upon the judgment rendered thereon defendant appeals.

Defendant contends that "cleaning the gas tank was no part of the boy's work, and he had no duties near the top of the gas tank and was there as a mere volunteer." And the court instructed the jury that "if you believe from the evidence that the boy was not employed by the railroad company to do the work that Wallin and Warnecke were doing, the repairing of cars and recharging of gas tanks, and was not ordered by his foreman to assist them at this work, but was hired to do other work, and that he voluntarily assisted these men at the time of the accident at his own curiosity or at their request, then I charge you that the defendant company is not liable in this action." This instruction is not challenged and becomes the law of the case. Determination of the merit of the assignment as to the boy being a mere volunteer in doing what he did becomes a question of fact. The record will now be quoted to present the proof as to whether there is evidence that the boy was at that time engaged as an employee of the defendant company in the performance of the duties of his employment. The testimony will be set out by question and answer so far as it bears upon this matter

of fact. Plaintiff testified that he, Joe, Frank, and Martin Bronecke, the boy's father, were present, and to the preliminary facts heretofore recited, and also that the boy had come to the top of the coach before the explosion, which occurred immediately afterwards.

He testified as follows:

Q. What work or business did the boy have up there on top of the car?

A. He had orders to help us fill them.

By the Court: How do you know he had orders to help you?

A. They was the only two there, and Carl Stander gave the orders to fill the coaches.

Q. How do you know Carl Stander ordered him to help you?

A. He told me he had two down there filling the coaches.

Q. He told you he had two men down there?

A. They was going to fill, and he told me to go down and help them.

Q. And was Martin Bronecke there before that?

A. Yes.

Q. And Frank?

A. Frank was not there; he came later. Frank had orders by the foreman; he was home and he got orders to work extra over there and help fill up these coaches.

Q. You say you know he (Joe) had orders to fill and to help because somebody told you; you didn't hear these orders.

A. No, I didn't hear.

Q. He (Joe) didn't report to you?

A. No.

Q. He was not working for you or anything?

A. No.

Q. Was he doing anything particular to help, or was he just standing around?

A. Well, he was trying to do what he could.

Q. Did he do anything?

A. No, not much.

Q. By the Court: What did he do, if anything, if you can remember?

A. He helped to try to pound up the bottom cover with the bar; it

was awful tight, and we have to take a bar and push it open. [This refers to what was done on the ground, and by the term "he" the boy Joe is meant. Plaintiff, testifying as to his going up the ladder, says: "I just started and he was on the ladder after me."]

By the Court: How do you know that?

A. We were staying there talking what we were going to do, and he think he would like to help, and I take my hammer and went up. [Witness has reference to talking with Joe while they were on the ground just before going on top of the coach.]

He was then asked:

Q. Who was it that was doing that work? Was it you or Joe or this man Warnecke?

To which he answered: We was supposed to help.

Joe the boy was called in plaintiff's behalf and testified to his age, that he had been in the employ of the defendant company for twenty-two nights, that he was hired to clean the coaches inside and out on trains 197 and 198, that is the train running from Breckendridge to Larimore and back, and that that was the only work he was hired to do. He then testified:

Q. Was there anything in your duties that you were hired to perform that had anything to do with the acetyline gas tanks?

A. Not exactly.

Q. Were you ever instructed, directed, or hired to clean or take part in cleaning gas tanks?

A. No.

Q. Was it any part of your duties in the employ of the company in which you were engaged at that time to participate or help in the cleaning of gas tanks?

A. No.

Q. Your work consisted entirely of cleaning coaches itself?

A. Cleaning coaches, yes.

Q. This is the work you were doing nights.

A. Yes.

Q. Were there any particular coaches that it was your duty to clean?

A. Yes.

Q. What were they?

A. Three coaches running on 197, again when they came back on 198; left at 5:25 in the morning and came back at 9:30 in the evening. [It appears that this train had not yet arrived, and was not in the yard at the time of the accident in question, but arrived around an hour later.] Witness was asked why he went over there, to which he answered: "I went over to help them out is all."

Q. Anyone send for you?

A. No.

Q. You went on your regular duties?

A. Yes.

On cross-examination he was immediately asked:

Q. Did you go over there on your regular duties to help clean out the gas tank?

A. Oh, no, no, that was not my duties.

Q. You were there in the yards waiting for your train?

A. Yes.

Q. To attend to your duties when the train came in?

A. Yes.

Q. There was nothing in the line of your duties that required or authorized you to be around this particular gas tank?

A. No.

Upon this testimony as to employment plaintiff's case was rested, and the usual motion to direct a verdict of dismissal was overruled. Afterwards in defendant's case Joe was recalled and testified substantially as before, stating that he had been over at this particular car since 7 o'clock, or about an hour and a half, and had helped carry a 2-bushel basket of carbyde to the car, at which time but he and plaintiff were there; that subsequently his father and Frank came; and that he was not assigned or directed to do this work by anyone, but did it in addition to his duties, which were to be over there in time to get his ice, oil, and waste ready for the coaches when train No. 198 arrived, for cleaning them. Concerning what was done on the ground toward cleaning this carbyde tank, witness says:

"Well Pete [plaintiff] started to drive it off and it got tighter, and then Frank come along and said we was putting it on, and he tapped it on the other side and it loosened up, and father took a bar and

knocked on it, and Frank took a stick and loosened up all the waste carbyde, and in the meantime after he had this poked out then Pete went up on the car. I was watching Frank a few seconds, and then Frank picked up his lantern to go up, and I followed him up the ladder and went up on the car.

Q. What were you doing there?
A. I was watching to see how it was done.
Q. Who told you to?
A. Nobody.
Q. Were you helping in any way?
A. I was in one way.
Q. Anybody suggest you going up there?
A. No, sir, nobody did.

He then describes the explosion, which he says was caused by one of the other lanterns. The car foreman, Ames, then testified that all of these employees, including Joe, were working under his supervision, and that he had hired Joe to work as a coach cleaner only; that at no time had he directly or indirectly ordered Joe to do the work of repairing or cleaning carbyde gas tanks, that it was not Joe's work; that he had told Frank to return after supper and take care of "the particular car and gas tank and the filling of it" and to clean the carbyde gas tank; that "he had done it before, but I instructed him to be careful of the light and his pipe, because he had not been in the habit of filling tanks late in the evening at night." Carl Stander, concerning whom plaintiff has given some hearsay testimony, was called and testified that he was a car inspector in the yards, and that he sent Wallin down "to fill the tank with carbyde. I told him to go down and fill this tank, and asked him if he had ever filled one before. I says, 'Do you know how to fill them?' and he says, 'I have filled them before;' and I says, 'Look out for the light;' and he went away, went down; that was the last I seen of him until after the accident." On this testimony this question was presented to the jury. Under the court's instructions it must have found that if this work was within the scope of Joe Broncecke, either he was actually employed to do work of which that was a part, which is contrary to all the testimony, or that he was assigned by Stander to assist in doing this work. Concerning this plaintiff

heard no such orders given, and the only evidence in the entire record supporting this consists of the conclusions of the plaintiff that "he (Stander) told me he had two down there filling the coaches," given in response to the question, "How do you know Stander ordered him to help you?" and "they was going to fill and they told me to go down and help them." It is undisputed that both the plaintiff and Frank were assigned to this particular work on this night, one by Stander and the other by Ames, and further that Joe was not employed to do this work, but had his regular duties elsewhere at about this time. In fact, immediately after the explosion he entered upon them by getting oil, ice, and waste ready for the incoming train from Larimore, to which under his employment he was assigned as cleaner. He had worked in the yards only twenty-two days, and necessarily was an inexperienced employee, a mere boy; besides it is undisputed that the two men assigned to this work were both railroad men of considerable experience, and were both cautioned against having lights around while doing this work. Not only are all the probabilities against such an employment of the boy, as plaintiff must establish to be the fact, but at no place in the record is there any evidence that the boy was there other than as a volunteer or out of mere curiosity to see, as he says, "how it was done," and while he was waiting for the time to arrive to begin his regular duties. Plaintiff's conclusion that Stander ordered Joe to fill the coaches, based entirely on the fact that Stander had told him that "he had two down there filling the coaches" and to go down and help them, amounts to nothing more than a mere inference at the most that Joe was one of the men doing that work, while it is equally probable that Joe's father, Martin, and Frank Warnecke, or some employee other than Joe, was meant. Besides plaintiff has offered the testimony of the boy as a part of his main case, and thereby vouched for his credibility, and such witness has repeatedly and positively denied that anybody sent him there, or that what he was doing there was a part of his regular duties; and later on, in response to the question, "What were you doing there?" says, "I was watching to see how it was done,"—a most natural thing for a boy to do who was just starting at the business of railroading, and who found himself with time on his hands and near some railroad men who were working at something he probably had not seen done before. The judgment appealed from is ordered

reversed and the verdict upon which it is based set aside. There seems to be no reasonable likelihood that plaintiff can establish that Joe Bronecke was acting within the scope of any employment at the time of the accident. In fact the testimony conclusively negatives such a probability. The action is therefore ordered dismissed under authority of § 7643, Comp. Laws 1913, construed in Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 819, and subsequent holdings of this court. It is so ordered.

FREDERICK W. STONE v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, John Kurth, and A. Gaskill.

(151 N. W. 36.)

Contributory negligence — question for jury — damages — train — speed of — estimate — foundation laid for testimony.

1. Appeal from a judgment of $5,268, damages and costs, a recovery for personal injuries to plaintiff arising out of a collision of an automobile driven by plaintiff and a passenger train of the defendant company operated by codefendants' employees. Defendants contend that plaintiff was guilty of contributory negligence precluding his recovery, in failing to observe the oncoming train and avoid collision, under the proof that he had opportunity to observe the train while he was yet from 23 to 27 feet from the track and approaching it. The jury may have found from the evidence that freight cars on two of the four tracks at the crossing on Third street in Bismarck at the time obstructed plaintiff's view of the main line track in the direction from which the train was approaching; a 20-mile per hour wind was blowing, carrying the roar of the train away from plaintiff; the day and the crossing were dusty; the train was running at a speed of 30 miles per hour to within 60 or 90 feet of the crossing, when the emergency brakes were applied. *Held:* Under all the circumstances the question of contributory negligence was for the jury, and plaintiff is not guilty of contributory negligence as a matter of law.

Speed ordinance of city — place of accident — foundation for admission in evidence.

2. Sufficient foundation was laid in the testimony of witness Davies to permit of his estimate of the speed of the train at the time of the collision.

3. It was not error to admit in evidence a speed ordinance of the city of Bismarck, as sufficient foundation had been laid.

Photographs of portion of the crossing — offered in evidence — refused to receive not error.

4. It was not error to deny admission in evidence of a photograph of a portion only of the crossing, taken from some distance to the side of the main line track, and perhaps a misleading view of the situation.

Opinion filed January 29, 1915. Rehearing denied February 10, 1915.

From a judgment of the District Court of Burleigh County, *Nuessle,* J., defendants appeal.

Affirmed.

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

The estimate as to the speed of a train by a witness who had a mere glimpse of it from the side for a few seconds, is not sufficient to carry to the jury the question of the negligence of the railroad company with respect to its speed. Davis v. Chicago, R. I. & P. R. Co. 16 L.R.A. (N.S.) 424, 88 C. C. A. 488, 159 Fed. 10; Hoppe v. Chicago, M. & St. P. R. Co. 61 Wis. 357, 21 N. W. 227; Mott v. Detroit, G. H. & M. R. Co. 120 Mich. 127, 79 N. W. 3; Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

In offering a city ordinance in evidence, it is necessary to prove its passage and to show that it is still in effect. Without such proof its admission was prejudicial to defendants. Picton v. Fargo, 10 N. D. 469, 88 N. W. 90; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Larkin v. Burlington, C. R. & N. R. Co. 85 Iowa, 492, 52 N. W. 480, 11 Am. Neg. Cas. 514.

The photograph offered in evidence showed that part of the crossing where the accident occurred, and it was very material to show the view of the crossing which the approaching engineer had; it went to the question of negligence, and it was error to exclude it. Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. 24 N. D. 40, 138 N. W. 976; Jones, Ev. 2d ed. § 411.

The undisputed evidence shows that plaintiff was guilty of contributory negligence in that, at a point some 25 feet from the track, he had a clear view of the approaching train. At a place and a time of safety he could have clearly seen the approaching train, and could have stopped and avoided the injury. 1 Moore, Facts, p. 293; West v. Northern

P. R. Co. 13 N. D. 221, 100 N. W. 254; Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. 24 N. D. 40, 138 N. W. 976; 3 Elliott, Railroads, § 1165; New York C. & H. R. R. Co. v. Maidment, 21 L.R.A.(N.S.) 794, 93 C. C. A. 413, 168 Fed. 22; Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577.

Plaintiff's failure to use his sight and hearing, and to use due care to prevent the accident, precludes a recovery. Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; 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; Schmidt v. Great Northern R. Co. 83 Minn. 105, 85 N. W. 936; Burns v. Louisville & N. R. Co. 136 Ala. 522, 33 So. 891; Omaha & R. Valley R. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599; Guthrie v. Missouri P. R. Co. 51 Neb. 746, 71 N. W. 722; Chicago, I. & L. R. Co. v. Reed, 29 Ind. App. 94, 63 N. E. 878; Bush v. Union P. R. Co. 62 Kan. 709, 64 Pac. 624; Miller v. Louisville, N. A. & C. R. Co. 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339; Aurelius v. Lake Erie & W. R. Co. 19 Ind. App. 584, 49 N. E. 857; Mann v. Belt R. & Stock Yard Co. 128 Ind. 138, 26 N. E. 819, 11 Am. Neg. Cas. 466; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; Hajsek v. Chicago, B. & Q. R. Co. 5 Neb. (Unof.) 67, 97 N. W. 329.

Plaintiff was also guilty of such negligence as to prevent a recovery, because of the careless manner in which he approached the crossing and the speed at which he was running his automobile. West v. Northern P. R. Co. 13 N. D. 221, 100 N. W. 254; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 535; Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; 3 Elliott, Railroads, § 1167; Chicago, M. & St. P. R. Co. v. Bennett, 104 C. C. A. 309, 181 Fed. 799; 1 Moore, Facts, p. 258; Davis v. Chicago, R. I. & P. R. Co. 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 Fed. 10.

Where a person of good eyesight, in attempting to cross a railway, was struck by an approaching train which was plainly visible from the point where it became his duty to stop, look, and listen for trains, it is presumed that he failed to do so, and this constitutes contributory negligence. Kelsay v. Missouri P. R. Co. 129 Mo. 362, 30 S. W. 339; 1 Moore, Facts, p. 254.

Courts cannot interfere with verdicts based on conflicting evidence, where there is substantial evidence in the record to support the finding of the jury. But where the verdict is clearly against the truth and the undoubted weight of the evidence submitted, they should not hesitate to set aside such a verdict. Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359.

"It will be presumed that deceased actually saw and heard what he could have seen and heard if he had looked and listened before attempting to cross the track." Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308; Garlech v. Northern P. R. Co. 67 C. C. A. 237, 131 Fed. 837; Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149, 59 Am. Rep. 159, 7 Atl. 105; Shufelt v. Flint & P. M. R. Co. 96 Mich. 327, 55 N. W. 1013; Stepp v. Chicago, R. I. & P. R. Co. 85 Mo. 235; Chicago, B. & Q. R. Co. v. Munger, 94 C. C. A. 176, 168 Fed. 692; Davis v. Chicago, R. I. & P. R. Co. 16 L.R.A.(N.S.) 428, 88 C. C. A. 488, 159 Fed. 10; 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; Knopf v. Philadelphia, W. & B. R. Co. 2 Penn. (Del.) 392, 46 Atl. 747; Cincinnati, I. St. L. & C. R. Co. v. Grames, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; Keyley v. Central R. Co. 64 N. J. L. 355, 45 Atl. 811, 7 Am. Neg. Rep. 452; Carter v. Central Vermont R. Co. 72 Vt. 190, 47 Atl. 797.

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

A well informed, intelligent person may testify as to the speed of a train, or may estimate or give his opinion on such question, where the facts are fully stated. Union P. R. Co. v. Ruzicka, 65 Neb. 621, 91 N. W. 543; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512; Pennsylvania Co. v. Conlan, 101 Ill. 93; Worthen v. Grand Trunk R. Co. 125 Mass. 99; Chicago, B. & Q. R. Co. v. Clark, 26 Neb. 645, 42 N. W. 703.

The city ordinance offered in evidence was issued in pamphlet or book form as the "Charter and Ordinances of the City of Bismarck." The book bore evidence that it was "ordered printed by the city council." It was produced and identified by the city auditor of Bismarck, the keeper of such books and city records. It was properly received in

evidence. Compiled Laws 1913, § 3596; 17 Cyc. 298, and authorities cited; Whaley v. Vidal, 27 S. D. 627, 132 N. W. 247.

It is well settled that a motion by defendant to direct a verdict is a demurrer to the plaintiff's evidence, and the court, in considering such motion, is substituted for the jury as the judge of the facts, and everything which the jury might reasonably infer from the evidence is considered as admitted. Bank of United States v. Smith, 11 Wheat. 171, 6 L. ed. 443; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Pendroy v. Great Northern R. Co. 17 N. D. 443, 117 N. W. 531; Haugo v. Great Northern R. Co. 27 N. D. 268, 145 N. W. 1053.

A failure to stop, look, and listen for an approaching train will not be held as negligence, when the circumstances were such that an observance of these precautions would have been unavailing as a guard against injury. Pendroy v. Great Northern R. Co. 17 N. D. 443, 117 N. W. 531; New York S. & W. R. Co. v. Moore, 45 C. C. A. 21, 105 Fed. 725; Union P. R. Co. v. Ruzicka, 65 Neb. 621, 91 N. W. 543; Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co. 20 N. D. 642, 127 N. W. 993; Dusold v. Chicago G. W. R. Co. 162 Iowa, 441, 142 N. W. 213; Dougherty v. Chicago, M. & St. P. R. Co. 20 S. D. 46, 104 N. W. 673; Ernst v. Hudson River R. Co. 35 N. Y. 9, 90 Am. Dec. 761.

Where a person about to cross a railway is suddenly confronted with danger from an approaching train, he has very little time to collect his thoughts and decide what is the best course to pursue. Beanstrom v. Northern P. R. Co. 46 Minn. 193, 48 N. W. 778; Hendrickson v. Great Northern R. Co. 49 Minn. 245, 16 L.R.A. 261, 32 Am. St. Rep. 540, 51 N. W. 1044.

A person, in driving an automobile, is not required to stop before crossing a railway, where such act would be futile to prevent injury. Walters v. Chicago, M. & P. S. R. Co. 47 Mont. 501, 46 L.R.A.(N.S.) 702, 133 Pac. 357.

Goss, J. From a judgment of $5,268 damages and costs, as a recovery for personal injuries to plaintiff through their negligence, defendants appeal. The usual averments of negligence are made with answer by denials and charges of contributory negligence. The alleged

negligence pleaded in the complaint covers all negligence disclosed by the proof. Certain errors are also assigned on reception of testimony, over objection. But the principal question, as stated in appellant's brief, is that of contributory negligence is whether the uncontroverted and admitted facts established plaintiff's negligence *per se,* contributing to his injury.

The injury was received on May 4, 1911, in a crossing accident, where the railway tracks cross Third street within the city of Bismarck, and as plaintiff crossed tracks in an automobile. The train demolished the auto and hurled plaintiff a considerable distance, rendering him unconscious, fracturing his skull, and seriously injuring him. The verdict is not challenged as excessive. Instead the question is only that of liability.

Plaintiff had resided near Bismarck for eleven years. He was engaged in dairying. He was familiar with the crossing and the situation thereabouts as to obstructions to view and any possible danger likely to be encountered. He had owned his International automobile about a month, and understood its operation. About 2:30 o'clock that afternoon he crossed the railway tracks on Fifth street south to Front street, the first street running each and west south of the tracks, where he turned westward, and after going about a block stopped to allow a passenger to alight, after which he immediately continued on about a block further to the intersection of Third street with Front street. Here he turned on Third street going north and up a gradual incline, running in low gear. It is 170 feet from where he turned onto Third street to where the first of the four tracks of the defendant company was crossed, and after crossing which he continued on 40 feet further, when he was struck by the engine of a special passenger train running at right angles to Third street and the direction he was traveling. The accident occurred about 2:37 P. M. A strong 29 mile per hour wind was blowing from the southeast, carrying any sound that might have been made by the train away instead of toward plaintiff. Approximately a dozen bystanders saw the occurrence and have testified. Defendant's depot is situated a block and a half east of Third street crossing, the scene of the accident. The train was coming from the west. Estimates of its speed at Third street vary from 12 to 30 miles per hour. The Government Weather Bureau buildings, immediately ad-

joining and on the north of defendant company's main track, consist of a barn 400 feet west of Third street and a house 680 feet west of the same point. Estimates are that the train was making 30 miles per hour or more in passing these buildings. At the time in question a regular passenger train was about due or a little overdue, and plaintiff had knowledge that a passenger train was scheduled to be due from the west. He had no knowledge concerning the particular train of some eight or ten coaches which was not running on any regular schedule time, but on telegraphic order. It was not intended that the train would stop at Bismarck, unless on signal for orders.

The train was on the main line and on the north one of four tracks at Third street crossing. These tracks were 14 feet apart from center to center. According to the testimony offered by plaintiff, upon the two southermost tracks were freight cars extending into and upon the highway, and to within about 6 feet from the roadway where teams travel over the crossing. These freight cars were of sufficient heighth and width to entirely block off the view to the west and northwest, and to plaintiff's left as he came up the grade and until he crossed the second track, or approximately to that point, and within 24 feet of the south rail of the main track, upon which the collision happened. Immediately to the south of the tracks was situated the Marshall Oil warehouse, extending out approximately to the street line. West of this warehouse were two oil tanks 25 or 30 feet high, 50 feet from the railway tracks, and to the west of these tanks was another building. In the neighborhood of the tanks was also a loading platform 3 or 4 feet high. While testimony for the defendants, with a photograph in evidence, offered by them, is to the effect that only the second track from the south was occupied by cars and with the cars to the west of the street line of the crossing, yet there is testimony tending to establish that within fifteen or twenty minutes of the time of the accident, and before the picture was taken, a switch engine had removed the freight cars from where they had been immediately previous to the accident; and the presence of the switch engine in the immediate vicinity, and that it had moved over at least tracks number one and two at the crossing before the photograph was taken, is admitted. There is a conflict in the evidence on whether the position of the cars was changed before the photograph was taken. What is said hereafter will be upon the assump-

tion that such a change was made, as the jury must be assumed to have found in their finding for the plaintiff. Hence, immediately prior to this accident there were cars upon both tracks three and four, the two southermost tracks, and which were extending well out to within 6 feet of the road over which the automobile traveled, and which, together with the warehouse, loading platform, oil tanks, and raise of ground all taken together, wholly obstructed plaintiff's view to the northwest, and rendered it impossible for him to see any portion of the main line track number one, upon which the accident occurred, during that period of time within which he was traveling a distance of 75 feet on Front street before turning upon Third, and also while he was traveling uphill on Third street over 175 feet, until he crossed the track number three, occupied by freight cars, and 24 feet from the main line track. When he reached this point, 24 feet from the main track, had plaintiff immediately looked to the west, he could have seen the train, but he could not have seen it until then. It was approaching the crossing upon a slightly down grade, and, according to the train crew, steam had been cut off some little time before, and it was rolling without power applied. A strong wind was blowing from plaintiff toward the train, and the reasonable probabilities are that he could not have heard it coming. It was a dusty day and dusty at the crossing. As plaintiff ascended the hill, immediately upon reaching the top he was upon the southernmost track and then about 45 feet from the main line track. He looked eastward toward the depot when passing upon the track, and says he looked westward. Concerning this plaintiff testifies that he was running upon low speed, and about 5 miles per hour, with the auto operating well and under his full control, he having nothing to do but to steer it and keep a lookout.

The following questions were asked him:

Q. Now, as you passed on the track, did you look east and west?

A. Yes, sir; I did.

Q. See any train coming from the east?

A. No.

Q. Were you listening at that time for the approach of trains from either way?

A. Certainly was; yes.

Q. Did you hear the sounds of bells or whistle or roar of a train upon the track?

A. No.

Q. You heard nothing whatever?

A. Nothing at all until the last thing.

Q. As you passed the crossing upon the second track from the south and your auto pushed on toward the third track, did you see or hear a train?

A. Not until it was just about ready to hit me.

Q. And then did you see it?

A. Just an instant; yes.

Q. Was it approaching quickly at that time?

A. Came onto me just so quick (indicating),—all at once.

Q. Did you have time to stop or reverse the automobile?

A. No, sir; I should say not.

Q. After you pushed by these cars on the second track from the south, as they were then, what, if anything, do you remember?

A. Nothing more than seeing the train right onto me all to once; just a flash and that is all I can remember.

He testifies that he could have stopped his car, running on low speed at 5 miles an hour, in a foot and a half quite easily, and with the ordinary foot brake and without using the emergency brake, and that his machine was in first class condition in every respect at that time; that when running uphill he looked to the east, but could not see to the west; that he has traveled over this crossing probably once a month for years and knew it was a bad crossing; and that his automobile was making considerable noise in low speed with the cutout open. The proof shows that unquestionably during the instant preceding the collision the engineer gave an alarm whistle, at the same time throwing on the emergency air brakes, which did not operate instantaneously, but when in perfect order take an instant to apply the braking power.

The engineer testifies:

Q. When was it that you first noticed any automobile crossing that crossing on that day?

A. Why, just as I was approaching Third street crossing. Just

before I was approaching Third street crossing an automobile bobbed out from behind the cars, these ferry cars standing there, and bobbed right in front of me. Blowed the whistle and reached for the air at the same time to stop. Was looking straight ahead and that appeared to be bobbing right in front of me, probably in the neighborhood of 60 or 90 feet. Was running 12 miles an hour or such a matter. Ran three car lengths over the crossing before the train came to a complete stop.

The testimony offered by plaintiff was that the train was running at a much higher rate of speed and that the alarm whistle blew when it was within two or three hundred feet west of the crossing. Several eyewitnesses were watching the impending accident, expecting it, and one of them, witness Davies, an attorney, estimates the train's speed at 30 miles an hour at the time it whistled, the instant before the collision. He places the length of the train at ten or twelve coaches, and says the train had gone about by, "possibly a coach or two left." "It was a very long train. I should think there was ten or twelve coaches at least. Most of them went by" the crossing. Plaintiff was hurled 40 or 50 feet, and witness was one of the first to his assistance. This witness had observed the train approaching for half a mile, and as the probability arose that there would be a collision was in position to carefully observe all the attendant circumstances from about a block distant north and in plain view of the crossing. He drives a motorcycle, and to the usual extent is familiar with the speed of vehicles. Witness timed the occurrence as 2:37 P. M. Just before hitting the automobile the engine whistled two long and one short, "the Morse letter d." Witness "used to work in a railroad station as an operator helper." Another eyewitness, Evans, saw the occurrence; saw Stone approach the crossing from the south from the time that he was coming up the grade at the side of the track at about 5 miles an hour, and saw the train approaching from the west; that plaintiff "seemed to be looking right straight ahead and watching his machine while it was running. He was looking just like anybody would in driving a car, and looking where he was going; had his head straight up and looking forwards. The engineer didn't blow the whistle until it was very close to him." "Saw the engine strike the auto." Another eyewitness, Attorney

Dullam, sworn in defendants' behalf, saw the auto and train approach the point of collision, "saw the train come around the curve (800 feet west of the point of collision), and saw the automobile coming at the same time." "Could not tell where plaintiff was looking. It was over a block away; didn't see how he appeared. Just saw the man driving in the machine and turned up to the crossing." "As he came up the grade onto the track, his machine very nearly stopped just as he got on the level, then picked right up and increased speed until he was hit." Witness couldn't state as to whether plaintiff looked for the approaching train or not; "saw the train coming and saw him coming, and wondered if there would not be a collision, and watched them, but was straight in front of the train and couldn't tell how far the train was from the crossing." Another eyewitness, Clough, testifying in behalf of defendant, gave practically the same testimony, both placing the speed of the auto at 5 or 6 miles an hour. The ordinances of the city of Bismarck are in evidence, showing that the speed of the train, according to even defendants' witnesses, greatly exceeded the speed limit permitted at crossings.

There is much more similar and cumulative testimony. There was ample evidence from which it could have been found that the train was running at a high and dangerous rate of speed, 30 miles per hour, over the crossing. That the permitting of the freight cars to block off vision of the track and shorten about one half the usual distance within which, under ordinary conditions without the cars being where they were, plaintiff would have had to protect himself, constitutes, all taken together, an indisputable basis from which to conclude that the defendant company might have been found in the first instance guilty of negligence contributing to plaintiff's injury. The question then arises whether the plaintiff was guilty of contributory negligence resulting in his injury, and if so, of course, he cannot recover. As motions for directed verdict were made at the close of plaintiff's testimony and again at the close of the trial, and denied, and reviewed on motion for a new trial, the question is presented whether as a matter of law it should be said that plaintiff was guilty of such contributory negligence. Defendants contend that the same is established *per se*. The particular circumstances urged as sufficient to establish such negligence *per se* on plaintiff's part are that between 23 and 27 feet were traveled

by the auto beyond the point where the train was within his range of vision on his emerging from behind the box car on track number three in his progress toward the main line track number one, and Stone's testimony that at 6 miles an hour he could have stopped the automobile, under ordinary circumstances, within a foot and a half. Defendants assert that if plaintiff did not see the train and stop, it was his own fault, and that the law will not hear him say that he was not negligent, or entertain a contrary finding of a jury. When the time thus elapsing within which defendants would require plaintiff to so act is measured in seconds instead of distance traveled, the case assumes a closer aspect as to contributory negligence *per se*. At 6 miles per hour as the rate of speed of the automobile, and in accord with the weight of the testimony, plaintiff would be traveling $8\frac{8}{10}$ feet per second, and therefore within three seconds elapsed time, he would traverse the distance and be upon the railroad track, even taking defendants' own figures for the distance. And had he looked to his right and toward the depot at his point of emergence from behind the box car, and for which he could not be criticized, as he would be under obligation to look both ways, with his automobile traveling at this rate of speed, the distance between it and the track would be greatly reduced, and he might thus, though cautious and alert, be in such dangerous proximity before, after looking westward, he fully sensed his position, as to make the course of his probable conduct under such exacting circumstances, in the face of his great peril, problematical, instead of so clear and certain as to compel an inference that the results could undoubtedly have been avoided, equivalent to convicting plaintiff of contributory negligence *per se*. Add to this the high, dangerous rate of speed at which the train was negligently bearing down upon him, for him to comprehend which an instant must expire, and during which he may have hastily concluded that the exercise of due care and his extrication from danger demanded that he cross ahead of the oncoming train, calculating it as running much slower than it was, and the question becomes still more complicated and uncertain as to the question decisive of plaintiff's right of recovery, defendant's negligence being assumed. An added circumstance is the wind blowing at 29 miles per hour from plaintiff directly northwest, and the dust it probably would carry toward the train to obscure vision. Add to this the circumstances that the train was

running not under steam, and perhaps with but little smoke, with no bell ringing, or if ringing, unheard because of the violent wind blowing in the opposite direction, and with no whistle blown or heard until the instant before the accident, and the situation is complete as one that could have been found by the jury to have existed at the moment of and immediately prior to the occurrence. It is impossible to conclude that reasonable minds must agree that under these circumstances plaintiff must have been negligent in failing to avoid a collision. The situation is too close to the border line, and is too speculative as to what the reasonably prudent man would have done in plaintiff's situation, for the law to conclusively presume negligence on his part. Examination has been had of all the negligence cases ever decided by this court, and no parallel is found. The nearest is that of Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531, under which, and in line with the weight of authority, plaintiff was not called upon to stop his automobile before going on the track, or be guilty of negligence *per se,* the circumstances here being similar to those there. Of course, a situation may arise in which an auto must be stopped or negligence be presumed, but it is not before us under these facts. Had the box cars not been where they were, or any greater distance been necessary to travel with the train within plaintiff's possible vision, the conclusion might be different. Nor can contributory negligence necessarily be measured by the distance to be so traveled. Cases may arise in which it may be negligence *per se* for an autoist to fail to stop within 20 feet of a crossing. The facts make the instant case a close one in law, when viewed in the light of the adjudicated cases. Defendants' contention is overruled.

Error is assigned in the reception of testimony of witness Davies wherein he estimated the speed of the train at 30 miles per hour at the time of the collision, over objection that he was not shown to have been qualified to so testify, and that his estimate is inadmissible as not based upon sufficient facts observed. In addition to what has already been stated in the recital of facts, it appears that this witness was observing the train while it was traveling at least half a mile, though part of the time his vision was obscured by obstructions, but the smoke of the train could be seen and the engine itself was in his plain view for three or four car lengths immediately before the collision. Of

course, the witness was watching both the train and the automobile. He was mentally calculating the probability of a collision and along with it the probable speed of the train, from when it first came into view until it struck the auto. To exclude the estimate of this eyewitness would likely announce a rule that would prevent the usual eyewitness from giving any estimate of speed. The foundation for this estimate was sufficient.

Error is assigned on the admission in evidence of a section of the revised ordinances of Bismarck, on the ground that no sufficient foundation was laid, in that the record does not show the existence or passage of the ordinance, and that there is no competent evidence showing that it is still in force. From the cases cited, it appears that counsel would contend that it was necessary to show the passage of the ordinance by yea and nay vote taken and recorded. The validity of the ordinance is not in issue, and the statute, § 3596, providing that "such book (of ordinances) or a certified copy of the ordinances so recorded shall be received as evidence in all courts and places without further proof," authorizes reception in evidence of particular ordinances so recorded. It appears that the city auditor, custodian of the city ordinances, was sworn, produced the book of ordinances, one of which was the particular ordinance in question, and testified that the same had not been repealed or amended since its passage. Thereupon the particular section was received in evidence over the objection that no foundation was laid. The objection is without merit. Whaley v. Vidal, 27 S. D. 627, 132 N. W. 242–247; 17 Cyc. 298.

The court excluded a photograph of the crossing upon defendants' offer. It was taken to show a view looking "in the direction that the engineer would look coming towards the east," but it was taken from a position 10 feet north of the main line, and but 25 or 30 feet west of the crossing, and from but a man's height above the ground. But in the offer counsel states that "it is not offered especially to prove or tending to prove what the engineer riding on the train could see." It was excluded, on objection, and when reoffered as showing the engineer's view of the situation, it was again excluded. Admittedly the exhibit was so taken as not to include the cars on side track, and to give but a partial, and perhaps misleading, view of the situation, and it could not have illustrated the engineer's view, it not

including the cars on the side tracks and having been taken from a point 10 feet north of the track and at a different angle and heighth from any view that could have been had by the engineer. While the ruling was more or less discretionary, it is apparent that it was offered with some motive other than that disclosed by the contradictory offers made. While caution should be exercised in excluding views of situations in controversy, no error was committed in its exclusion. After a careful review of all the evidence under the assignments urged, the judgment is affirmed.

On Petition for Rehearing.

Goss, J. Defendants petition for rehearing and state that we have overlooked an assignment of error taken in their brief in the following language: "The undisputed testimony shows that plaintiff was guilty of contributory negligence in that knowing the crossing he travelled up to it at a speed of five miles an hour or more and for a distance of from two hundred seventy-five to five hundred feet with both his sense of sight and sound obstructed and interfered with." This was thought to have been sufficiently discussed wherein the whole general situation was treated. As this necessarily included the approach to the danger area, which began at the point of emergence from behind the box cars obstructing vision to the northwest and twenty-three to twenty-seven feet from the main line track, it was inferentially covered in the main opinion. As counsel is insistent, however, it may be stated that it is difficult to conceive how as a matter of law plaintiff could be held to be guilty of contributory negligence at this point of entrance into the danger zone when he was then traveling but five or six miles per hour and in control of his machine and able to stop within a foot and a half from where the brakes might be applied. This is the testimony and the jury had a right to believe it. On this assumption plaintiff could have stopped as quickly as a pedestrian if emerging from behind the box car. It is evidence that whatever basis there is upon which to charge plaintiff with contributory negligence that charge must be placed upon the failure of plaintiff to observe the oncoming train or hear it during his entire approach and particularly from where the scope of his vision would have permitted and not in his advance merely to the edge of what has been termed the danger zone.

Defendants declare this case to be controlled by Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 128, L.R.A.1915A, 761, 147 N. W. 791, and Gast v. Northern P. R. Co. 28 N. D. 118, 147 N. W. 793. The facts in these cases discriminates them from this. In Hope v. Great Northern R. Co. the statement of facts is quoted as follows: "The main railroad track is the most northerly of three parallel tracks. South of it and about ten feet distant is a passing track and south of this passing track and about twenty-two feet distant from it is the elevator or side track. . . . Both the passing track and the side track were well filled with freight cars on both sides of the crossing." Thus the opening between the cars through which the highway ran, opened immediately upon the main track. The passing track which was covered with cars on both sides obscuring vision, was but ten feet from the main track. The situation was such that plaintiff's team was upon the main track at the instant when the driver's range of vision would open to enable him to see the oncoming train or for any distance to either side of him. He exercised no care whatever under this situation demanding it but on the contrary he recklessly drove his team on a trot or gallop over the crossing where the accident occurred. That situation was worse than this one in the instant case would have been had the passing track in addition to the third and fourth tracks also been covered with freight cars, which would have left but about fourteen feet to travel to reach the main line and within which distance only plaintiff could have seen the approach of the train. Counsel could then have more strongly contended that to approach such crossing at even six miles an hour would have been contributory negligence *per se*.

Perusal of Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. shows an entirely different situation to this one. That crossing was an extremely dangerous one, almost a veritable man trap, and known to be such, and necessarily so by the contour of the surrounding country. Likewise, in Gast v. Northern P. R. Co. the facts disclose that the driver of a four horse team, one team ahead of the other, drove over a crossing between cars obscuring his vision on either side, under circumstances in which the lead team must have been very close to or almost upon the main line track at the instant when plaintiff, the

driver, emerged from between or behind the box cars and was enabled for the first time to see any approaching train. No such situation is here disclosed.

It may well be said, as intimated in the main opinion, that the facts in this case present a close issue of law on whether plaintiff should be charged with contributory negligence as a matter of law. Doubt must be resolved in favor of the plaintiff and in favor of the findings of the jury by their verdict. It may be added that this case marks about the limit at which negligence should not be imputed to a plaintiff under circumstances. Another assignment on admission of testimony as to train's speed not particularly ruled upon and re-urged on petition for rehearing, we held not well taken. The petition is denied.

C. E. MERRITT v. ADAMS COUNTY LAND & INVESTMENT COMPANY, a Corporation.

(151 N. W. 11.)

Specific performance — contract to convey land — action for — innocent purchaser — supplemental complaint — jury to assess damages for breach — subsidiary to main action — still equitable action — verdict advisory merely.

1. Where an action is brought in equity to compel the specific performance of a contract to convey land, and it transpires upon the trial that the land has been subsequently sold by the vendor to an innocent purchaser, and a specific performance of the contract is therefore impossible, and a supplemental complaint is filed and a jury is summoned to assess damages for the breach of contract, and such jury trial is subsidiary to the main action, the suit still retains its equitable nature, and the verdict of the jury is advisory merely.

Note.—The decision in this case, that a contract for the sale of land is not required by the statute of frauds to be signed by both parties, is sustained by the great weight of authority, as shown by a review of the cases in notes in 28 L.R.A. (N.S.) 680, and 43 L.R.A. (N.S.) 410.

The holding, that the measure of damages on breach by a vendor of his contract to convey real estate is the difference between the price agreed to be paid and the value of the real estate at the time of the breach, is also in harmony with the general rule, although a number of cases have made an exception where the vendor

Contract for conveyance of land — party to be charged — executed by — agent of vendee — authority of — not in writing — may be enforced.

2. A contract for the conveyance of land is sufficient and enforceable if properly executed by the party sought to be charged, and the mere fact that the authority of the agent of the vendee, who signed such contract, was not given in writing, does not deter such party from suing upon the contract.

Contract of sale of land — signed only by seller — accepted by buyer — mutual.

3. A contract of sale, if accepted by the buyer, is not wanting in mutuality because it is signed only by the seller.

Corporation — vice president — acting for corporation — corporation affairs — authorized by by-laws to sell lands — third party has right to rely on such authority.

4. Where a corporation chooses to incorporate under the laws of North Dakota, a third party has the right to believe that the vice president of the company, when acting in the town, and, if not in the principal place of business, in the office of the attorney of the company, and in relation to a sale of the land of the company, for the purpose of buying and selling which the company alone was incorporated, is authorized by the by-laws to make such contract of sale, and when such officer tells such third party, upon express inquiry, that he has such authority, and the third party relies upon such statement, and not only pays down an earnest price, but obligates himself on a contract with still another party on the reliance therewith, and of which fact he informs the vice president, such purchaser has the right to believe in the statement of the vice president, and to pay the money on the strength of such belief, and when the vice president receives the money, he receives it for and on behalf of the company he represents, and such ostensible authority is not weakened by the fact that the attorney who draws the papers suggests to the plaintiff that it would be well to send them to another state where the other officers of the company reside for approval, it being shown by the evidence that, on and after such statement, the said vice president positively assured the plaintiff of his authority and of the validity of the agreement. In such a case also the knowledge of the vice president of the receipt of and payment of the earnest price will be pre-

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acted in good faith and the breach was not intentional or wilful. An exhaustive review of the authorities on this question is found in a note in 16 L.R.A.(N.S.) 768.

The question as to the right of a vendee to recover for profits lost through breach of contract by his vendor seems to depend, according to the authorities reviewed in a note in 52 L.R.A. 240, upon whether or not, in refusing to convey, the vendor acted in good faith.

The general question of the authority of the president or vice president of a corporation to execute contracts for the transfer of property is considered in a note in 14 L.R.A. 358.

sumed to be the knowledge of the company, and its retention will amount to a ratification of the contract.

Contract of sale of land — breach of — damages for — must be clearly ascertainable.

5. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.

Damages — awarding — two methods — the one most certain to be followed.

6. Where two methods of awarding damages are possible, the one being certain and the other being uncertain, that which is certain will be adopted by the courts.

Action for damages — failure to convey land — measure of damages.

7. Where an action is brought for damages for the failure to convey land, the general rule as to the measure of damages, and the measure which is prescribed by § 7151, Compiled Laws of 1913, is "the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, and the expenses properly incurred in examining the title, with interest thereon, and in preparing to enter upon the land, and the amount paid on the purchase price, if any, with interest thereon from the time of the breach."

Damages for loss of profits — subsequent sale — value of lands being exchanged — not known — cannot be recovered.

8. Damages for the loss of profits under a subsequent contract of sale which is entered into in reliance upon a former one which is sued upon, and where the fact of such sale is known to the seller, cannot be recovered when such subsequent sale involves the trading in of lands, the value of such lands being traded for not being known to the original vendor at the time he made his contract. Whether such damages could be recovered if the value had been known is not here passed upon.

Contract for sale of land — breach of — action for — allegations of complaint — general damages — sufficient.

9. A complaint alleging a contract for the sale of real estate, a breach of the contract, and that the plaintiff has sustained damages to a specified amount thereby, is sufficient to justify the assessment of general damages under § 7151, Compiled Laws of 1913, although special damages which are not provided or recoverable are also alleged therein.

On Petition for Rehearing.

10. In an equity case where the district court calls in a jury for advisory purposes, the trial is not governed by the provisions of § 7846, Compiled Laws of 1913, nor does the supreme court try such cases anew upon appeal. That statute applies only to such cases as are tried in the district court without a jury.

11. Where a court in an equity case calls in a jury for advisory purposes, such court is vested with discretion to vacate such verdict in full or in part, but this does not alter the fact that such verdicts are entitled to receive grave consideration at the hands of trial courts. Where, however, even though improper evidence is admitted, the verdict of the jury is clearly in accordance with the evidence properly admitted, and in accordance with the equities of the case, a new trial will not be granted by the supreme court after the affirmance of such verdict by the trial judge, merely because such improper evidence has been admitted.

Opinion filed January 21, 1915. Rehearing denied February 10, 1915.

Action for specific performance of a contract to convey land, with subsequent supplemental complaint for damages. Appeal from the District Court of Adams County, *Crawford,* J. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This action was commenced on the 27th day of April, 1911, to compel the defendant to specifically perform a contract for the conveyance of land in Adams county, North Dakota. The defendant was a corporation organized under the laws of North Dakota for the purpose of buying and selling land. It had its principal office at Hettinger, Adams county, North Dakota. Nothing in the record shows that any particular building or place was set apart for that purpose, but the company had a representative at Hettinger, who lived on a nearby farm of the defendant company, and who was vice president of the company. This person, A. A. Jackson by name, also styled himself general manager, and was known by such appellation, at any rate by the bank with which his company dealt. The company seems to have had no other representative in North Dakota, its other officers and stockholders living in Indianapolis, Indiana. The plaintiff, seeking to buy land from the company, carried on, through his agent Bigham, negotiations with the said Jackson at Hettinger, and made a contract with him for the purchase of a section of land belonging to the company, and which contract was signed: "Adams County Land & Investment Company, by A. A. Jackson, V. P. Vice President and General Manager. C. E. Merritt, by Chas. Bigham, his agent." At the time of the making of such contract, and

as a part thereof, the plaintiff's agent delivered to the said A. A. Jackson a check for $500, which was made payable to the Adams County Land & Investment Company. This check was afterwards indorsed by the said Jackson: "Adams County Land & Investment County, by A. A. Jackson, V. P. and Gen. Mngr.," and was deposited by him in a local bank to his own account, and the proceeds thereof were afterwards checked out by him. The record shows that the Adams County Land & Investment Company had no open account at the time with the bank, but from time to time sent money to Jackson which he deposited in his own name and paid small bills of the company therefrom, together with those of his own.

It transpired upon the trial that before the alleged contract was entered into the defendant had sold the land to another party, and was therefore unable to carry out its part of the agreement with the plaintiff. After hearing all the evidence in the case, except on the question of damages, the court made findings of fact and conclusions of law in favor of the plaintiff, but ordered that the action should be retained in equity for further proceedings to allow such plaintiff to establish his claim for damages. This so-called interlocutory judgment was filed on the 20th day of September, 1912. Later the plaintiff filed a supplemental complaint, and the case was tried on the question of damages before the court and a jury, at the January, 1912, term of the court, and a verdict was rendered in favor of the plaintiff for the sum of $1,850. The trial court then entered judgment on this verdict and the defendant has appealed.

P. D. Norton, John Carmody, Karl L. Hjort, for appellant.

The measure of damages, if any, is the difference between what plaintiff paid or agreed to pay for the land, and the market value, if such value was more than the price plaintiff was to pay, and not what some third party may have agreed to pay. Rev. Codes 1905, § 6563; Beck v. Staats, 16 L.R.A.(N.S.) 768, and cases cited in notes found on pages 768, 772.

The damages in such cases must be clearly ascertainable, not speculative. Hudson v. Archer, 9 S. D. 240, 68 N. W. 541.

E. C. Wilson and *Amos N. Goodman,* for respondent.

The trial court at no time treated this suit as two separate actions,—one for specific performance and one for damages for breach of contract.

The question of damages was not thought of until plaintiff offered proof that he had resold the land. Then all parties agreed to call in a jury for the sole purpose of fixing the amount of the damages. The verdict was merely advisory thereon; the action still retained its equity form in the hands of the court. This procedure is a well-recognized rule in such cases, and for the limited purpose stated, and was here adopted without objection. Van Dusen v. Bigelow, 13 N. D. 277, 67 L.R.A. 288, 100 N. W. 723; Mitchell v. Knudtson Land Co. 19 N. D. 738, 124 N. W. 946; 1 Pom. Eq. Jur. § 237, p. 342; Rev. Codes 1905, § 6663.

Evidence of facts which admit the act charged, but which avoid its force or effect, is inadmissible. Bliss, Code Pl. 240, 327, 341, 352; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692, as quoted under § 329 of Bliss, Code Pl.

Even if our contract were not signed by the company, still it is liable, for respondent performed it. The recitals of a contract as to payments received are conclusive. McPherson v. Fargo, 10 S. D. 611, 66 Am. St. Rep. 723, 74 N. W. 1057.

A party who has signed a written contract may be compelled to perform it, though the other party has not signed it, if the latter has performed or offered to perform it on his part, and the case is a proper one for specific performance. Gira v. Harris, 14 S. D. 537, 86 N. W. 624; McPherson v. Fargo, 10 S. D. 611, 66 Am. St. Rep. 723, 74 N. W. 1057; Rev. Codes 1905, § 6660.

If the company in fact has the by-law which it claims to have, it can recover full compensation from Jackson for any damages it is compelled to pay plaintiff. The plaintiff cannot recover from Jackson, for he had no dealings with him. Imhoff v. House, 36 Neb. 28, 53 N. W. 1032; Coles v. Iowa State Mut. Ins. Co. 18 Iowa, 425; Palmyra v. Morton, 25 Mo. 593; Buffalo v. Webster, 10 Wend. 99.

A third party had agreed to buy the land for a fixed price. His testimony on this point was competent on the question of general damages to plaintiff. Northwestern Fuel Co. v. Mahler, 36 Minn. 166, 30 N. W. 756.

"He who takes the benefit must bear the burden." Rev. Codes 1905, § 6668.

The company should have affirmed or disaffirmed the whole con-

tract; there was no middle road for it. It cannot disaffirm as to the part that is onerous, and affirm and retain so much of it as is beneficial. It cannot keep the advantage gained, and repudiate the burden. It cannot keep the consideration in whole or in part, and disaffirm. Rev. Codes 1905, § 5310; Foulke v. San Diego & G. S. P. R. Co. 51 Cal. 365; Merchants' Union Barb Wire Co. v. Rice, 70 Iowa, 14, 29 N. W. 784; Alexander v. Culbertson, Irrig. & Water Power Co. 61 Neb. 333, 85 N. W. 283; Moody & M. Co. v. Methodist Episcopal Church, 99 Wis. 49, 74 N. W. 572; Kneeland v. Gilman, 24 Wis. 39; Gano v. Chicago & N. W. R. Co. 60 Wis. 12, 17 N. W. 15; Kickland v. Menasha Wooden Ware Co. 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471; Dedrick v. Ormsby Land & Mortg. Co. 12 S. D. 59, 80 N. W. 153; Hunt v. Northwestern Mortg. Trust Co. 16 S. D. 241, 92 N. W. 23; Moore v. Atlantic Mut. Ins. Co. 56 Mo. 343.

The contract was executed by the vice president, and is binding on the corporation. Smith v. Smith, 62 Ill. 493; Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433; Neosho Valley Invest. Co. v. Hannum, 10 Kan. App. 499, 63 Pac. 92; Home Sav. & State Bank v. Wheeler, 74 Ill. App. 261; Leroy & C. Valley Air Line R. Co. v. Sidell, 13 C. C. A. 308, 26 U. S. App. 656, 66 Fed. 27; Minor v. Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; American Exch. Nat. Bank v. Ward, 55 L.R.A. 356, 49 C. C. A. 611, 111 Fed. 782; Wait v. Nashua Armory Asso. 66 N. H. 581, 14 L.R.A. 360, 49 Am. St. Rep. 630, 23 Atl. 77.

His signing as general manager alone also binds the corporation. Western Homestead & Irrig. Co. v. First Nat. Bank, 9 N. M. 1, 47 Pac. 721; Hurst v. American Asso. 105 Ky. 793, 49 S. W. 800; Auburn Bank v. Putnam, 1 Abb. App. Dec. 80; Jones v. Williams, 139 Mo. 1, 37 L.R.A. 688, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; Sparks v. Despatch Transfer Co. 104 Mo. 531, 12 L.R.A. 714, 24 Am. St. Rep. 351, 15 S. W. 417; Conely v. Collins, 119 Mich. 519, 44 L.R.A. 844, 78 N. W. 555; Goodwin v. Union Screw Co. 34 N. H. 378; Hamm v. Drew, 83 Tex. 77, 18 S. W. 434.

The by-laws of the corporation limiting the powers of its officers are only private rules, and have no effect on strangers. California Ins. Co. v. Gracey, 15 Colo. 70, 22 Am. St. Rep. 376, 24 Pac. 577; Hallenbeck v. Powers & W. Casket Co. 117 Mich. 680, 76 N. W. 119;

Flint v. Pierce, 99 Mass. 68, 96 Am. Dec. 691; Mechanics' & F. Bank v. Smith, 19 Johns, 115; Samuel v. Holladay, Woolw. 400, Fed. Cas. No. 12,288.

Even if the vice president had no power to bind the corporation, still it is estopped to deny that he had, because of its acceptance of benefits. Seeley v. San Jose Independent Mill & Lumber Co. 59 Cal. 22; Grice v. Woodworth, 10 Idaho, 459, 69 L.R.A. 584, 109 Am. St. Rep. 214, 80 Pac. 912; Gilbert v. American Surety Co. 61 L.R.A. 253, 57 C. C. A. 619, 121 Fed. 499; Reed v. Morton, 24 Neb. 760, 1 L.R.A. 736, 8 Am. St. Rep. 247, 40 N. W. 282; Barrell v. Lake View Land Co. 122 Cal. 129, 54 Pac. 594; Heinze v. South Green Bay Land & Dock Co. 109 Wis. 99, 85 N. W. 145; Bank of United States v. Danderidge, 12 Wheat. 64, 6 L. ed. 552; Zabriskie v. Cleveland, C. & C. R. Co. 23 How. 381, 16 L. ed. 488; Fayles v. National Ins. Co. 49 Mo. 380; Credit Co. v. Howe Mach. Co. 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; Farmers' & M. Bank v. Butchers' & D. Bank, 16 N. Y. 125, 69 Am. Dec. 678; Rev. Codes 1905, §§ 6664, 6690.

BRUCE, J. (after stating the facts as above). Although the trial before the jury was held some time after the hearing before the court, and the proceedings were treated in many respects as two independent actions, there can be no question that the hearing before the jury was held under the order of the court in the preliminary equity case, and that the verdict of the jury was nothing more or less than an advisory verdict of a jury which is rendered in a suit in equity.

The first point raised by appellant is that the contract of sale which is the foundation of the cause of action does not conform to the requirements of the statute of frauds, being § 5407, Rev. Codes 1905, § 5963, Compiled Laws of 1913, in that it is signed, as far as the plaintiff is concerned: "C. E. Merritt, by Chas. Bigham, his agent," and that there is no proof of any authority in writing to the said Bigham, and that such is required by § 5407, Rev. Codes 1905, § 5963, Compiled Laws of 1913, which provides that *"no agreement for the sale of real property,* or of an interest therein, is valid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party *to be charged,* or his agent thereunto authorized in writing; but this does not abridge the power of any court to compel the specific

performance of any agreement for the sale of real property in case of part performance thereof."

It is to be noticed that the statute merely speaks of an agreement *to sell,* and the agreement to sell which is sought to be enforced in this case was all that seems to have been required by the statute to have been authorized in writing. It is well settled, indeed, that not only is a contract sufficient and enforceable if executed by the party sought to be charged (see Morin v. Martz, 13 Minn. 191–193, Gil. 180, 182), but it has also been held that a contract of sale, if accepted by the buyer, is not wanting in mutuality because it is signed only by the seller. Ward v. Spelts, 39 Neb. 809, 58 N. W. 426; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576, reversing 2 Robt. 333, 30 How. Pr. 425; Tilt v. La Salle Silk Mfg. Co. 5 Daly, 19; 9 Cyc. 300.

The only question to be determined, then, is whether the contract was signed by the company itself, or was partly performed so as to be taken out of the statute of frauds and to render an action for damages or for specific performance maintainable. On this point there is no question that the plaintiff's agent gave to the vice president of the company a check for $500 at the time of the making of the contract; that that check was made payable to the Adams County Land & Investment Company, and that later it was indorsed "Adams County Land & Investment Company, by A. A. Jackson, V. P. and Gen. Mngr." and that, though the defendant company claims that it never received the proceeds thereof, it was paid to its representative and vice president. There is no claim that the money has ever been returned or offered to be returned, the extent of the offer being that the company would get A. A. Jackson to return the money. It, on the other hand, seems to be clear that A. A. Jackson was given no specific authority, either by the charter or by-laws, to sell land, and that the usual practice seems to have been (which practice, however, does not seem to have been generally known in North Dakota nor by the plaintiff) for land to be sold on a resolution of the board of directors.

The only question, therefore, to be determined, is whether A. A. Jackson had such ostensible authority that the plaintiff was justified in dealing with him and in purchasing land from him and making the payment to him in question. It really resolves itself around the question as to whether he had the ostensible authority to receive the money,

even though not to execute any specific contract of sale, as no effort seems to have been made to return the money. The case at bar seems in many respects to be analogous with that of Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, 150 N. W. 736, and we are quite satisfied, both under the holding in that case and of the authorities generally, that the plaintiff should be allowed to recover in the case at bar. Section 5770, Rev. Codes 1905, § 6324, Compiled Laws of 1913, defines ostensible authority to be "such as the principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." There is no question that if the by-laws or charter had so provided, the witness A. A. Jackson would have been the proper party to have made the contract, and to have received the money. Whether general manager or not, according to the understanding of the directors of the defendant corporation, he styled himself as general manager in North Dakota, and was known by the bank with which he dealt and with which the company dealt, as general manager. He was the only officer or agent of the company in North Dakota, and he was certainly vice president of the company. There is much conflict in the authorities, it is true, as to the duties of a vice president. Generally speaking, such an officer acts in the absence of the president. The president, in the general acceptation, is the general executive officer. It is no abuse of power or of a sound public policy to hold that when a corporation chooses to incorporate under the laws of North Dakota in order that it may deal in lands in North Dakota, and obtain the protection of the courts and of the laws of the state, both as to its contracts and to its property, and where the laws of North Dakota, loose and liberal though they may be, require that the principal place of business of the corporation shall be located in the state, that a third party has the right to believe that the vice president of the company when acting in the town, if not in the building, of the principal office, and in the office of the attorney of the company, and in relation to a sale of the land of the company, for the purpose of buying and selling which the company alone was incorporated, is authorized by the by-laws to make such contract of sale, and that when such officer tells such third party upon express inquiry that he has such authority, and the third party relies upon such statement and not only pays $500, but obligates himself on a contract with still another party on the reliance

therewith, and of which fact he informs the vice president, such purchaser has the right to believe in the statement of the vice president, and to pay the money on the strength of such belief, and, when the vice president receives the money he receives it for and on behalf of the company he represents. Nor do we think that this ostensible authority is weakened by the fact that the attorney who drew the papers suggested to the plaintiff's agent that it would be well to send them to Indianapolis for approval, it being shown by the evidence that on and after such statement, Jackson, the vice president, positively assured the plaintiff of his authority and of the validity of the agreement. Grant County State Bank v. Northwestern Land Co. supra.

It is unnecessary for us to examine the numerous objections to the admission of testimony in this case, including the testimony as to the subagreement by the plaintiff to sell the land in question to Gottlob Hoffman, and the loss of profits which he suffered on account of the failure of the defendant to convey the land to him and thus to make a reconveyance by him possible. A nice question of law is presented by these objections, both as to whether the damages provided for by § 6568, Rev. Codes 1905, § 7151, Compiled Laws of 1913, are exclusive of all others or whether the damages provided for the breach of a contract in § 6563, Rev. Codes 1905, § 7146, Compiled Laws of 1913, may in special instances and in the case of special damages which have or should have been foreseen at the time of the making of the contract of sale, also be relied upon (see Needham v. Halverson, 22 N. D. 594, 135 N. W. 203); also whether, such being the case, the rule of damages which is announced in the leading case of Hadley v. Baxendale, 9 Exch. 341, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; which has been generally followed by the American courts, and which is emphasized in North Dakota by § 6563, Rev. Codes 1905, § 7146, Compiled Laws of 1913 (see Needham v. Halverson, supra), would apply in a case such as that before us (see Guetzkow Bros. Co. v. A. H. Andrews & Co. 92 Wis. 214, 53 Am. St. Rep. 909, 66 N. W. 119, 52 L.R.A. 209, and valuable note thereto in 52 L.R.A.

The question is not briefed or discussed with any thoroughness, and we believe it would be unwise to pass upon it in its entirety here. It is sufficient, however, to say that in the case at bar this measure of

damages can have no footing, and the later part of § 6563, Rev. Codes 1905, § 7146, Compiled Laws of 1913, is conclusive. This paragraph provides that "no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." It merely restates the common law. It must be taken and construed in connection with the general rule that the law abhors uncertainty and speculation, and that where there are two methods of proving damages, one of which is certain and the other of which is uncertain, the former will be adopted. In the case at bar it is shown that, though a contract for resale had been made by the plaintiff Merritt with one Gottlob Hoffman before the making of the agreement with the Adams County Land & Investment Company, and that the making of this agreement was known to the vice president of the Adams County Land & Investment Company at the time of the making of the later contract, and that said vice president knew that the land was sought to be purchased for the purpose of meeting the terms of this agreement, that this subagreement embodied a trade of lands, and that the real value of those lands is neither clearly proved in the case at bar, nor was their value known to the said vice president. The proof, in short, of the damages which were occasioned by the loss of the subsequent sale are not merely indefinite, but it also can hardly be said that the vice president in question had or should be presumed to have had sufficient knowledge of the attempted transaction, that is to say, of the trade of the lands as opposed to a mere sale for cash, as would, under the construction of § 6563, Rev. Codes 1905, § 7146 Compiled Laws of 1913, and of the case of Hadley v. Baxendale, supra, make it fair to presume that he anticipated or could have anticipated the value thereof.

The rule of damages, therefore, in the case at bar, must in any event be that which is laid down by § 6568, Rev. Codes 1905, § 7151, Compiled Laws of 1913, and which is: "The difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, and the expenses properly incurred in examining the title, with interest thereon, and in preparing to enter upon the land, and the amount paid on the purchase price, if any, with interest thereon from the time of the breach." This conclusion, however, does not necessitate a new trial or a reversal of the judgment, even though we concede that some of the evidence that was intro-

duced was inadmissible. The action before us is a suit in equity and comes before us for a trial *de novo*. The verdict of the jury was merely advisory, and the errors in the admission of evidence, if any, do not necessarily interfere with us here, and we are quite sure that they did not interfere either with the correct judgment of the jury or of the trial court. The learned trial judge positively and correctly instructed the jury that their estimate of damages should be solely based upon the difference between the market value of the land contracted for by the plaintiff, and the price which he had agreed to pay therefor, added to which must be, if they found for the plaintiff, the original $500 payment, for which no consideration was received. The judgment of the trial court, and the verdict of the jury on which it was based, were for the sum of $1,850, and this allowed, after deducting the $500 and interest thereon, some $1,300 for the difference between such contract and market price. The price which was agreed to be paid for the land was about $16.25 per acre. The testimony as to the actual value of the land runs all the way from $14 to $25 per acre. The verdict of the jury allows a value of about $18.35 per acre. This is satisfactory to us, and we see no reason for overruling the judgment of either the trial court or the trial jury in relation to the matter. Even though the allegation and proof of special damages may have been improper and insufficient, proof of the general damages allowed by § 7151, Compiled Laws of 1913, was permissible under the general allegation of damages which is to be found in the complaint, and not only was the jury instructed on this basis, but the trial was largely had upon this theory. See 19 Enc. Pl. & Pr. 80; Partridge v. Blanchard, 23 Minn. 69.

We may close by adding that it is idle to say that the company did not know of the payment of the $500. The knowledge of a vice president of a North Dakota corporation, who is the only officer in the state, and who is transacting the business of such company, which is the buying and selling of land, and which is acquired in such a transaction, is the knowledge of the company itself. Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, 150 N. W. 736.

The judgment of the District Court is affirmed.

CHRISTIANSON, J., did not participate in the foregoing opinion.

On Petition for Rehearing.

BRUCE, J. A petition for rehearing has been filed, which, among other matters, calls attention to the fact that the writer of the opinion erred in saying that "the case before this court is a suit in equity on a trial *de novo* under § 7846, Compiled Laws of 1913," and in assuming therefrom that the errors in the admission of evidence before the jury, if any, were immaterial.

Counsel is correct in his criticism that the writer of the opinion did err. He, in fact, overlooked the prior opinion of this court in Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759, in which we held that "in an equity case where the district court calls in a jury for advisory purposes, the trial is not governed by the provisions of § 5630, Rev. Codes 1895, as amended by chapter 5 of the Laws of 1897 (being § 7846 of the Compiled Laws of 1913); nor does this court try such cases anew. That statute applies only to such cases as are tried in the district court without a jury." We have therefore stricken the clause from the original opinion so that one reading that opinion and failing to read the words just written will not be confused thereby. The fact, however, in no way changes the opinion or conclusion of this court in the case at bar. The court in Peckham v. Van Bergen, supra, expressly stated that, though in such cases the verdict of the jury is entitled to receive grave consideration at the hands of the trial courts, and such juries are not called as a mere formality, their verdicts can be set aside if clearly wrong. It would follow that, if their verdicts are clearly right, and, even though incompetent evidence may have been admitted, it is quite clear that the jury was not misled thereby, or at any rate that their advisory verdict is in accordance with the law, the mere fact of the introduction of such incompetent evidence will not justify the ordering of a new trial. Such, we believe, is the case in the action before us.

Counsel also criticizes the statement of facts made by this court, and in which it said that the vice president told the plaintiff "upon express inquiry that he had the authority to make the contract," and calls our attention to the fact that at the moment the contract was executed all that the vice president did was, "with a waive of the hand, to say that it was all right as it was." He, however, ignores the fact that the plain-

tiff positively testified that "at the time the contract was drawn I walked out with Mr. Jackson and had a conversation with him; I told him then after you (the attorney, Mr. Norton) spoke to me about there was some question in your mind as to this authority, you intimated something along that line. I talked with Mr. Jackson and I told him that we had drawn a contract for the sale of this land with a party, and we made a provision allowing ten days in case we couldn't deliver the land; that it was not binding upon us, and I told him at that time that I wanted to be sure and certain about his getting this land to us by the 1st of March. There was some encumbrance on the land, and I asked if he would see to having that paid up and having his abstract of title brought down to date, so that the deal could be closed on the date payment became due, and he assured me that everything would be all right; that he was vice president and general manager, and had authority to accept money and to make out contracts, and he had previously stated those things to me, and the fact that he had charge of the outfit out there,—I had been out to call on him a couple of times before the contract was made."

The petition for a rehearing is denied.

D. S. B. JOHNSTON LAND COMPANY v. F. H. MITCHELL, Louise M. Mitchell, Charles M. Scoville, and Olivia Scoville.

(151 N. W. 23.)

Adverse claims — statutory action to determine — title and possession — complaint in — use and occupation — money judgment for — counterclaim — statute of limitations — motgages barred by — findings and conclusions — questions of fact — new trial.

1. In the statutory action to determine adverse claims to real property, the plaintiff alleges that it has an interest in such property and that defendants claim certain estates or interests in or liens upon the same, adverse to plaintiff. The usual prayer for judgment quieting the title is made, and plaintiff also prays for the recovery of the possession of the property from defendants

Note.—For a discussion of the general rule that plaintiff in an action to recover real estate must recover, if at all, on the strength of his own title, see note in 18 L.R.A. 781.

with a money judgment for the use and occupation thereof. By their answer defendants put in issue plaintiff's alleged interest in such property, but admit that it has certain equities therein. They also by way of counterclaim allege title in fee and pray that such title be quieted in them as against all claims asserted by plaintiff.

The trial court found in defendants' favor as to the ownership of the land, but denied them any affirmative relief under their counterclaim except upon condition that they first do equity by satisfying or tendering the amount of all claims held by plaintiff against such real property, consisting of two old mortgages long since barred by the statute of limitations and numerous taxes paid by them, aggregating, with interest to November 1, 1912, the sum of $2,543.27.

On a trial *de novo* in the supreme court the findings and conclusions of the trial court are in all things affirmed, except as to one question of fact mentioned in the opinion, regarding which counsel inadvertently failed to furnish any competent proof. A new trial is granted for the purpose of permitting proper proof thereof to be supplied.

Adverse claims — statutory action — plaintiff must depend on own title — weakness of defendant's title — cannot recover upon.

2. In the statutory action to determine adverse claims to real property the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of his adversary's title.

Title to real estate — mortgage owned by copartners — corporation — succeeding copartnership — title to property — equitable.

3. Plaintiff's only source of title is through an alleged foreclosure in 1887 of a commission mortgage on the premises upon which there was only a small sum due. Such mortgage was given in 1884 and ran to a copartnership under the firm name of D. S. B. Johnston, Son, & Hance. In 1885 a corporation was organized under the name of D. S. B. Johnston Land Mortgage Company, which purchased and took over the assets of such copartnership, including such mortgage. At the date of such attempted foreclosure proceedings there was nothing of record to show ownership of this mortgage in such corporation. *Held*, following Hebden v. Bina, 17 N. D. 235, that the exercise of the power of sale in said mortgage by such corporation was not authorized under the provisions of § 5412, Comp. Laws of 1887, and consequently the foreclosure was void, and the purchaser at the sale, the D. S. B. Johnston Land Mortgage Company, acquired no title thereunder, but merely became an equitable assignee of such mortgage.

Mortgagee in possession — purchaser at void foreclosure sale does not become unless in possession with consent of mortgagor — unoccupied prairie land — fee owner deemed in possession.

4. A purchaser at a void foreclosure sale does not become a mortgagee in possession, unless he acquires the actual possession of the premises through the

express or implied consent of the mortgagor or owner of the land. The premises being at the time unoccupied wild prairie land, the fee owner will be deemed to be in the possession thereof.

Foreclosure — sheriff's deed under — recitals in — evidence.

5. A recital in the sheriff's deed under foreclosure proceedings by advertisement, that the D. S. B. Johnston Land Mortgage Company has been renamed D. S. B. Johnston Land Company, is no evidence of the fact of such change in name.

Plaintiff's alleged title — failure to establish — cannot assail defendants' title.

6. The plaintiff, having failed to establish its alleged title, or even that it is a mortgagee in possession, is not in a position to assail the validity of defendant's title and right of possession.

Champerty — statute against — cannot be urged by plaintiff — defendants' title.

7. For reasons stated in the opinion, the statute against champerty and maintenance cannot be urged by plaintiff to destroy defendants' title.

Defendants — affirmative equitable relief — claiming — must do equity — mortgage barred by limitation — must pay or offer to pay amount due.

8. To entitle defendants to affirmative equitable relief they must do equity by paying or tendering to the plaintiff all sums equitably due it, and the fact that plaintiff purchased one of its mortgages upon the land long after it became barred by the statute of limitations does not exonerate defendants from paying such sum as may be due thereon, as a condition to their obtaining affirmative relief.

Opinion filed January 27, 1915. Rehearing denied February 11, 1915.

Appeal from District Court, Sargent County, *Allen* J.

From a judgment in defendants' favor, plaintiff appeals.

Affirmed.

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

The deed by which defendants claim to be the owners of this property is champertous and void. The deed from Herrington to defendants is void. Grantor was out of possession and had not collected rents or profits for more than one year; plaintiff's possession through his tenants was sufficient to set in motion the statute. Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77; Conrad v. Adler, 13 N. D. 199, 100 N. W. 722; Burke

v. Scharf, 19 N. D. 227, 124 N. W. 79; Cotton v. Horton, 22 N. D. 1, 132 N. W. 225.

Such a deed is void as against one in possession. Brynjolfson v. Danger, 15 N. D. 332, 125 Am. St. Rep. 595, 109 N. W. 320; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357.

The defendants cannot prevail because they have not offered to do equity. They must pay or offer to pay all just claims against the land held by the plaintiff. Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A. (N.S.) 516, 107 N. W. 68; Boschker v. Van Beek, 19 N. D. 104, 122 N. W. 340; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79; Cotton v. Horton, 22 N. D. 1, 132 N. W. 225; 1 Pom. Eq. Jur. 3d ed. pp. 384–397.

Defendants' claim of title is defeated by clear acts of abandonment of their grantor, and they are estopped to assert their abandoned title. 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; Cotton v. Horton, 22 N. D. 1, 132 N. W. 227.

The defendants herein have been guilty of laches in enforcing their claim, and therefore should be debarred from recovery. They should have made their rights known. They cannot be permitted to say that they wilfully concealed their claim. Their silence is explainable consistently with honest conduct on their part, only on the theory that they consented to and acquiesced in the possession of the mortgagee and its successors; under such circumstances the law implies consent. Nash v. Northwest Land Co. 15 N. D. 573, 108 N. W. 792; Higbee v. Daeley, 15 N. D. 339, 109 N. W. 318; Hoyt v. Pawtucket Inst. for Sav. 110 Ill. 390; Goss v. Herman, 20 N. D. 295, 127 N. W. 78; Cornell v. Newkirk, 144 Ill. 241, 33 N. E. 37; Sage v. Winona & St. P. R. Co. 7 C. C. A. 237, 19 U. S. App. 1, 58 Fed. 297; 5 Pom. Eq. Jur. ¶¶ 33, 36.

The plaintiff is at least a mortgagee in possession and has acquired title as such. The affidavit of publication of the notice of foreclosure is sufficient. A substantial compliance is all the law requires. The

rule in tax proceedings is not applicable. McCardia v. Billings, 10 N. D. 381, 88 Am. St. Rep. 729, 87 N. W. 1008; Iowa State Sav. Bank v. Jacobson, 8 S. D. 292, 66 N. W. 453; Cook v. Lockerby, 16 N. D. 21, 111 N. W. 628.

A mortgagor cannot object that he has more notice of the foreclosure of a mortgage than the law requires. Atkinson v. Duffy, 16 Minn. 45, Gil. 30; McCardia v. Billings, 10 N. D. 381, 88 Am. St. Rep. 729, 87 N. W. 1008; Lee v. Clary, 38 Mich. 223.

The defendants, in offering their objections even at this late date, do not claim any loss or prejudice. McCardia v. Billings, 10 N. D. 381, 88 Am. St. Rep. 729, 87 N. W. 1008; Northwestern Mortg. Trust Co. v. Bradley, 9 S. D. 495, 70 N. W. 648; Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789; Schauble v. Schulz, 69 C. C. A. 581, 137 Fed. 390; Robinson v. Fife, 3 Ohio St. 551; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; Hubbell v. Sibley, 50 N. Y. 468; Miner v. Beekman, 50 N. Y. 337; Wood, Limitations, § 225; McPherson v. Hayward, 81 Me. 329, 17 Atl. 164; Waldo v. Rice, 14 Wis. 286; Nash v. Northwest Land Co. 15 N. D. 573, 108 N. W. 792; Boschker v. Van Beek, 19 N. D. 104, 122 N. W. 338.

The defendants had notice of, or by reasonable care could have ascertained, the claim of plaintiff in the land here involved. They cannot now take a wrong advantage of another upon mere technicalities. Rev. Codes 1905, §§ 6699, 6703; Doran v. Dazey, 5 N. D. 170, 57 Am. St. Rep. 550, 64 N. W. 1023; Fullerton Lumber Co. v. Tinker, 22 S. D. 427, 118 N. W. 702, 18 Ann. Cas. 11; Gress v. Evans, 1 Dak. 387, 46 N. W. 1134; Hunter v. Coe, 12 N. D. 507, 97 N. W. 869.

The defendants at least had implied notice of plaintiff's claim. Cooper v. Flesner, 24 Okla. 47, 23 L.R.A.(N.S.) 1187, 103 Pac. 1016, 20 Ann. Cas. 29; Fullerton Lumber Co. v. Tinker, 22 S. D. 427, 118 N. W. 702, 18 Ann. Cas. 11; Huffman v. Cooley, 28 S. D. 475, 134 N. W. 49; Wisconsin River Land Co. v. Selover, 135 Wis. 594, 16 L.R.A.(N.S.) 1073, 116 N. W. 265; Brynjolfson v. Dagner, 15 N. D. 337, 125 Am. St. Rep. 595, 109 N. W. 320; Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

Whenever a party dealing as purchaser or encumbrancer of land

is informed or knows or, is in a condition which prevents him from denying that he knows that the land is in the possession of a third person, he is thereby put upon inquiry, and is charged with constructive notice of the facts concerning the occupants' right and title. Daniel v. Hester, 29 S. C. 148, 7 S. E. 65; Veith v. McMurtry, 26 Neb. 341, 42 N. W. 6; Izard v. Kimmel, 26 Neb. 51, 41 N. W. 1068; Riley v. Quigley, 50 Ill. 304, 99 Am. Dec. 516; Fair v. Stevenot, 29 Cal. 486, 11 Mor. Min. Rep. 11; Williamson v. Brown, 15 N. Y. 354; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847; Grimstone v. Carter, 3 Paige, 421, 24 Am. Dec. 230; Thompson v. Pioche, 44 Cal. 516; Farmers' Nat. Bank v. Sperling, 113 Ill. 273; Staton v. Davenport, 95 N. C. 11; Ewing v. Burnet, 11 Pet. 54, 9 L. ed. 630; Hughes v. United States, 4 Wall. 236, 18 L. ed. 304; Brown v. Volkening, 64 N. Y. 82; Pope v. Allen, 90 N. Y. 302; Ranney v. Hardy, 43 Ohio St. 159, 1 N. E. 523 and cases cited; Evans v. Templeton, 69 Tex. 375, 5 Am. St. Rep. 71, 6 S. W. 843; Gress v. Evans, 1 Dak. 388, 46 N. W. 1134; Betts v. Letcher, 1 S. D. 182, 46 N. W. 197.

One cannot plead ignorance of a public record to which he has access, and which affords him all the means of information to enable him to obtain positive knowledge of the facts. Johnson v. Day, 2 N. D. 295, 50 N. W. 702; Com. v. Miles, 14 Ky. L. Rep. 107; Sinclair v. Learned, 51 Mich. 335, 16 N. W. 672.

Purcell & Divet and *W. V. Haagland,* for respondents.

Letter press copies of letters are not admissible as original evidence. They can be used only upon proper foundation being first laid. A showing must first be made to the effect that the originals are lost, or that seasonable demand for the production of the originals was made. Wigmore, Ev. § 1234, and collection of cases; Newell v. Clapp, 97 Wis. 104, 72 N. W. 366; State v. Halstead, 73 Iowa, 376, 35 N. W. 457; Seibert v. Ragsdale, 103 Ky. 206, 44 S. W. 653.

The same rule prevails in some jurisdictions as to carbon copies. State v. Teasdale, 120 Mo. App. 692, 97 S. W. 996.

The better rule is that if the carbon copy is produced complete to signing as well as text, so that one operation produced two complete duplicates, each is an original, and may be so used. International Harvester Co. v. Elfstrom, 101 Minn. 263, 12 L.R.A.(N.S.) 343, 118 Am. St. Rep. 626, 112 N. W. 252, 11 Ann. Cas. 107.

A county officer cannot certify as to substantive facts as to acts done in his office. The certificate of an abstractor to show the fact that a given instrument had been filed in the office of the register of deeds is insufficient. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844; Doyle v. Mizner, 42 Mich. 337, 3 N. W. 968.

The supreme court on trial *de novo* can modify the trial court's findings and conclusions, and grant relief to respondents. Wadge v. Kittleson, 12 N. D. 461, 97 N. W. 856; McKenzie v. Gussner, 22 N. D. 445, 37 L.R.A.(N.S.) 918, 134 N. W. 33.

A mere occasional entry and cutting of grass on land is not a sufficient possession by the grantee under a void deed to enforce the claim of the champerty statute. State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Bull v. Beiseker, 16 N. D. 290, 14 L.R.A.(N.S.) 514, 113 N. W. 870.

Unimproved and unoccupied land is deemed to be in the possession of the holder of the legal title, and not in the holder of title under void judicial proceedings. Herbage v. McKee, 82 Neb. 354, 117 N. W. 706; Butler v. Smith, 84 Neb. 78, 28 L.R.A.(N.S.) 436, 120 N. W. 1106.

The mortgage foreclosure proceedings by advertisement were void because there was no power of sale contained in the mortgage, and plaintiff acquired no rights thereunder. McClory v. Ricks, 11 N. D. 38, 88 N. W. 1042.

Such proceedings were void because they were not prosecuted by the owner of the legal title of record to the mortgage at the time of the sale. Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85; Hathorn v. Butler, 73 Minn. 15, 75 N. W. 743; Higbee v. Dacley, 15 N. D. 339, 109 N. W. 318; Finlayson v. Peterson, 5 N. D. 587, 33 L.R.A. 532, 57 Am. St. Rep. 584, 67 N. W. 953.

The notice of sale was insufficient because it was not published forty-two days next preceding the day of sale. More than one full calendar week intervened between the date of the last publication and date of sale. Peaslee v. Ridgway, 82 Minn. 288, 84 N. W. 1024; Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449; Finlayson v. Peterson, 5 N. D. 587, 33 L.R.A. 532, 57 Am. St. Rep. 584, 67 N. W. 953; Miller v. Lefever, 10 Neb. 77, 4 N. W. 929; Lawson v. Gibson, 18 Neb. 137, 24 N. W. 447; Mallory v. Patterson, 63 Neb. 429, 88

N. W. 686; Stevens v. Naylor, 75 Neb. 325, 106 N. W. 446; McMahan v. American Bldg. & Loan & Tontine Sav. Asso. 75 Miss. 965, 23 So. 431; Stine v. Wilkson, 10 Mo. 76; Washington v. Bassett, 15 R. I. 562, 2 Am. St. Rep. 929, 10 Atl. 625.

The certificate of sale does not convey title, but is only evidence of what transpired at the time of sale, and to show who may some time be entitled to a deed. North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453; Lindgren v. Lindgren, 73 Minn. 90, 75 N. W. 1035.

The plaintiff's negligence in failing to record his evidence of title, and the defendants purchasing the title without any knowledge of the plaintiff's claims, defendants take the property regardless of the claims of the purchaser under the mortgage sale. Pickford v. Peebles, 7 S. D. 166, 63 N. W. 779; Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390; Errett v. Wheeler, 109 Minn. 157, 26 L.R.A. (N.S.) 816, 123 N. W. 415; Berryhill v. Smith, 59 Minn. 285, 61 N. W. 144; Lindgren v. Lindgren, 73 Minn. 90, 75 N. W. 1034; Brown v. Union Depot Street R. & Transfer Co. 65 Minn. 508, 68 N. W. 1007; Peterborough Sav. Bank v. Pierce, 54 Neb. 712, 75 N. W. 20; Hare v. Murphy, 60 Neb. 135, 82 N. W. 312; Jones v. Fisher, 88 Neb. 627, 130 N. W. 269; Doran v. Dazey, 5 N. D. 170, 57 Am. St. Rep. 550, 64 N. W. 1023; Huffman v. Cooley, 28 S. D. 475, 134 N. W. 49; McClory v. Ricks, 11 N. D. 38, 88 N. W. 1042.

The plaintiff must recover upon the strength of his own title wholly. Equitable rights can be recovered upon only when properly pleaded. Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662; Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068; Travelers' Ins. Co. v. Walker, 77 Minn. 438, 80 N. W. 618; Stump v. Warfield, 104 Md. 530, 118 Am. St. Rep. 434, 65 Atl. 46, 10 Ann. Cas. 249; Pinkham v. Pinkham, 60 Neb. 600, 83 N. W. 837, 61 Neb. 336, 85 N. W. 285; Loney v. Courtnay, 24 Neb. 580, 39 N. W. 616; Rainbolt v. Strang, 39 Neb. 342, 58 N. W. 96; Woodward v. State, 58 Neb. 603, 79 N. W. 164; 1 Enc. Ev. 706.

The defendants' counterclaim was proper, and properly pleaded. The tender, performance, and offer of performance were made in all respects as the law required. Defendants are entitled to the relief prayed for in their counterclaim, even if their legal title fails. Stuart

v. Lowry, 49 Minn. 91, 51 N. W. 662; Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068; Stump v. Warfield, 104 Md. 530, 118 Am. St. Rep. 434, 65 Atl. 346, 10 Ann. Cas. 249; Dringman v. Keith, 86 Neb. 476, 125 N. W. 1080.

FISK, Ch. J. This cause is here for trial *de novo* of the entire case. It is the statutory action to determine adverse claims to real property, and comes here on appeal from the judgment of the district court of Sargent county.

The complaint is in the usual form, alleging that the plaintiff has an interest in the real property therein described; that the defendants claim certain estates or interest in, or liens or encumbrances upon, the same adverse to the plaintiff, the prayer for judgment being:

"1. That the defendants be required to set forth all their adverse claims to the property above described, and that the validity, superiority, and priority thereof be determined.

"2. That the same be adjudged null and void, and that they be decreed to have no estate or interest in, or lien or encumbrance upon, said property.

"3. That the title be quieted as to such claim, and that defendants be forever debarred and enjoined from further asserting the same.

"4. That it recover possession of the premises described.

"5. That it recover five hundred dollars ($500) as the value of the use and occupation and the value of property wasted and removed therefrom.

"6. That plaintiff have such other general relief as may be just, with its costs and disbursements."

The answer consists of a general denial with the exception that it admits that the defendants, Olivia Scoville and Louise M. Mitchell, claim an estate or interest in the lands described adverse to the plaintiffs. Such answer then contains ¶¶ 3 and 4 as follows:

"Further answering, the defendants deny that the plaintiff has any estate or interest in the said lands, but in that behalf they admit that the said plaintiff has in equity a lien or encumbrance upon the same in that, on the 15th day of July, 1884, one Frank Harrington, the then owner of said lands, did make, execute, and deliver a mortgage thereon in the sum of fifty-two and fifty-one hundredths dollars

$52.50), which mortgage was, on July 22d, 1884, filed for record, and recorded in Book G, page 133, of the mortgage records of Sargent county, North Dakota, which mortgage is now in equity owned by the plaintiff; the exact amount due thereon at this time is unknown to defendants, they having no means of knowledge of the rate of interest borne by the indebtedness secured by said mortgage, or of the payments, if any, that have been made thereon; and the defendants hereby tender to the plaintiff, and offer to pay into court for its benefit, the amount now due upon said mortgage.

"IV.

"Further answering, the defendants allege that the defendants Olivia Scoville and Louise M. Mitchell are the owners in fee simple of the lands described in the complaint, and the origin, nature, and extent of their title is as follows, to wit: On the 30th day of July, 1888, one Frank Harrington became, by patent from the United States, vested with the title thereto, and on the 6th day of June, 1901, the said Frank Harrington did, by warranty deed, duly made, executed, and delivered, convey the said lands to the said defendants, which deed was, on the 18th day of June, 1901, duly filed for record, and recorded in the office of the register of deeds of Sargent county, North Dakota, in Book V., on page 592.

"Further answering, and by way of counterclaim, the defendants allege that the defendants Olivia Scoville and Louise M. Mitchell are the owners of the lands described in the complaint, deraigning their title thereto from one Frank Harrington by deed of date June 6th, 1901, he, the said Harrington, having acquired the title thereto by patent from the government of the United States on October 30th, 1888.

"That under the deed aforesaid from the said Harrington, the said defendants went into the actual and adverse possession of the said lands, in good faith believing they were the owners thereof, and permanently improved the same by building a permanent and substantial fence thereon, the value of which improvement was and is the sum of two hundred dollars ($200). That the value of the said land, exclusive of the said improvements, is thirty-two hundred dollars ($3,200).

"Wherefore, the defendants pray that the plaintiff take nothing by this action, but that the defendants Olivia Scoville and Louise M. Mitchell be adjudged to be the owners in fee simple of the lands described; and that their title thereto, and all of the pretended claims of the plaintiff, except their mortgage right therein, as set forth in this answer, be adjudged null and void, and that the court determine the amount due upon said mortgage, and upon the payment of such amount into court for the benefit of the plaintiff, that it be decreed that they have no right or interest of any kind in and to the said lands, and in case it be determined that the said defendants have no right in and to the said lands superior to the rights asserted by the plaintiff, then that they recover of the plaintiff two hundred dollars ($200), the value of the permanent improvements aforesaid, and that the judgment therefor be declared a lien upon the said land; and that the defendants have any other and further relief that may be equitable, together with their costs and disbursements.

A reply to the counterclaim contained in the answer was served as follows:

"I.

"Denies each and every allegation therein contained.

"II.

"Further replying, plaintiff alleges that at the time that certain deed, dated June 6, 1911, in which Frank Harrington was grantor and the defendants herein, Louise M. Mitchell and Olivia Scoville, were grantees, was given, the said Frank Harrington was not in possession of, nor had he for more than twenty years last past been in possession of, the premises described in the plaintiff's complaint, and to which this action pertains, and therefore the said deed is void and of no effect, and conveys no title to these defendants, and they are barred, estopped, and enjoined from asserting any title, or claim of title, to the premises in question by reason of said above-mentioned deed.

"III.

Further replying, plaintiff alleges that at the time that certain deed, dated June 6, 1911, and in which Frank Harrington was grantor and the defendants Louise M. Mitchell and Olivia Scoville were grantees, was given, the said Frank Harrington was not in possession of said lands, nor did he collect any rents for the use of said land for the period of one year prior to the giving of said deed, and therefore the said deed is void and of no effect, and conveyed no right, title, or interest in said property to said above-mentioned defendants.

"Wherefore, plaintiff prays judgment against the defendants according to the prayer of the plaintiff's original complaint."

At the conclusion of the testimony the trial court made findings of fact and conclusions of law favorable to the defendants in so far as the plaintiff's cause of action is concerned, finding, among other things, that plaintiff has no estate or interest of any kind or character in such real property, but that the defendants Olivia Scoville and Louise M. Mitchell are the owners thereof by virtue of a warranty deed executed and delivered to them on June 6, 1901, by one Frank Harrington, who held a patent from the government of the United States to such lands, and that defendants went into actual possession of the land under such deed, and are now in the actual and exclusive possession thereof.

The court also finds that the said Frank Harrington on July 15, 1884, executed two mortgages upon such land, one to John W. Avery, to secure the payment of the sum of $350, and one to D. S. B. Johnston, Charles L. Johnston, and Horace Hance, copartners as D. S. B. Johnston, Son, & Hance, to secure the payment of $52.50, which latter mortgage was a commission mortgage and subject to the Avery mortgage, and that no portion of the indebtedness secured by such mortgages has been paid except certain payments upon the commission mortgage, and that the latter mortgage was assigned to the plaintiff some time prior to the attempted foreclosure thereof in 1887, and the Avery mortgage was assigned to plaintiff on February 8, 1902. The court further finds that in February, 1887, plaintiff caused proceedings to be instituted for the foreclosure by advertisement of such commission mortgage, causing notice of such foreclosure to be

published in a weekly newspaper for six successive weeks, the first publication being on March 12, 1887, and the last on April 23, 1887, and that on May 2, 1887, pursuant to such published notice, the premises were sold by the sheriff of Sargent county to D. S. B. Johnston Land Mortgage Company for the sum of $90.30, claimed to be due at that time, with costs and expenses of sale; that neither the notice of foreclosure sale, affidavit of publication of notice, sheriff's affidavit of sale, or sheriff's certificate of sale, or any other papers relating to such foreclosure, were filed for record in the office of the register of deeds of Sargent county until March 21, 1902, long after the purchase of the premises by the defendants, and that at the time of such purchase there was nothing of record in the office of the register of deeds disclosing that such foreclosure had ever been made, and that the defendants bought such real property in good faith and for value, and without any notice of such foreclosure proceedings; that a duplicate certificate of sale on such foreclosure was filed by the sheriff in the office of the register of deeds pursuant to § 5420, Compiled Laws 1887.

That on April 7, 1902, the sheriff of Sargent county executed and delivered to the D. S. B. Johnston Land Mortgage Company, a sheriff's deed upon such foreclosure, which deed recites that the said company is now named D. S. B. Johnston Land Company. Such deed was recorded in the office of the register of deeds of Sargent county on the same day of its issuance, and the court finds that the plaintiff at that time well knew of the rights and claims of the defendants in and to such land.

The court also finds that on February 8, 1902, at the time the plaintiff purchased the Avery mortgage, it paid the sum of $644.99 therefor, and that there was due thereon an amount in excess of this sum, and that at the time of the attempted foreclosure of the commission mortgage there was due thereon the sum of $43.20. The court further finds that Avery, under his mortgage, paid taxes on the premises from 1885 to 1901, aggregating $458.02, which amount with interest plaintiff paid to the said Avery in addition to the amount paid for an assignment of the mortgage; also that the plaintiff during the years from 1897 to 1909 paid taxes thereon aggregating the sum of $231.75; that the total amount of the plaintiff's claims under the

two mortgages held by it, and including the taxes thus paid with interest thereon, amounted, on November 1, 1912, to the sum of $2,603.27.

As conclusions of law the court found that the plaintiff's action should be dismissed, and that the defendants' counterclaim, asking that their title be quieted in them as against the plaintiff, and for a cancelation of such mortgages as clouds or apparent liens upon their title, should be dismissed unless the defendants, within ninety days from the entry of the decree, shall pay to the plaintiff, or into court for it, the sum of $2,603.27 with interest thereon at the rate of 7 per cent per annum from November 1, 1912, deducting therefrom the sum of $60 found to be the amount received by plaintiff for hay leases on the lands in the years 1905, 1906, and 1908, and in case such amount is paid or tendered within the time aforesaid, defendants' title shall be quieted against all claims of the plaintiff. Judgment was entered in the court below pursuant to such findings and conclusions, and we are asked on this appeal to retry the entire case *de novo*.

The record is very voluminous, and it is manifestly impossible in disposing of the questions of fact to do more than state our ultimate conclusions, which we have reached after a consideration of the testimony adduced.

Appellant's counsel challenge the correctness of numerous findings of fact, but the correctness of such findings is dependent largely upon the soundness of certain legal propositions advanced by counsel, and we will notice such findings in connection with the propositions thus advanced. We will here quote from appellant's brief what its counsel claim to be the ultimate facts established by the evidence, and upon which they rely for a reversal of the judgment.

"The evidence shows that plaintiff is the owner in fee simple of the land involved in this action, its legal title coming from the valid foreclosure of a mortgage. Although no sheriff's certificate or deed was placed on record at the time of this foreclosure sale, still the requirements of the law governing foreclosures of mortgages in effect at that time were completely complied with, in that the sheriff filed with the register of deeds his certificate of sale. This, pursuant to § 5420 of the Compiled Laws of 1887, was a complete and full compliance with the laws dealing with notice in cases of this kind, and

was sufficient to put defendants on inquiry, and to give them notice of plaintiff's claim to the land. Further, the plaintiff, for a period of some twenty-three years, paid all the taxes assessed against this land, and during all of said time looked after it and leased it whenever possible. Defendants' grantor herein, Harrington, abandoned this land and failed to pay taxes on it for a period of some sixteen years, and thereafter, in the year of 1901, these defendants, having received a deed to the premises from the aforementioned Harrington, failed and neglected to pay any taxes assessed against said land, but during all of said time, and until the commencement of this suit, permitted the plaintiff to pay said taxes and exercise unrestrained dominion over the land. The facts as shown by the record clearly established that these defendants are not purchasers in good faith and without notice, but on the contrary they had knowledge of facts which should have put them on their guard, and which, if followed up, would have given them notice of plaintiff's interest in the land.

"Further, the testimony shows that the deed under which defendants claim ownership of the property involved in this litigation is champertous and void, it being given by one Harrington while he was out of possession of the land, and had been out of possession for some sixteen years, and had not collected or taken the rents or profits of the land for a year prior to the giving of the deed, or as a matter of fact for a great many years prior to the giving of a deed, and the plaintiff corporation had such possession of the premises as was sufficient to put the champerty statute in motion.

"The testimony also shows that these defendants have not offered to do equity; in their answer they ask that the title to this land be quieted in them, but do not offer to repay this plaintiff for the amount of money it has expended in paying taxes on this land for a period of some twenty-three years, and do not offer to repay plaintiff for the amount due it on the first mortgage against this property, which was purchased by this plaintiff. The facts relative to the payment of the taxes and the purchase of the mortgage are record facts, and could have been ascertained by these defendants."

The propositions of law urged by appellant's counsel are, of course, predicated upon the assumption that the ultimate facts are as they

assert them to be. These propositions are set forth in appellant's brief as follows:

"1. The deed by which defendants claim to be the owners of this property is champertous and void.

"2. The defendants here cannot prevail because they have not offered to do equity.

"3. Defendants' claim of title is defeated by clear acts of abandonment of their grantor.

"4. The defendants herein have been guilty of laches in enforcing their claims, and therefore should be debarred from recovery.

"5. The plaintiff herein is at least a mortgagee in possession and has acquired title as such.

"6. The defendants herein had notice of, or with the exercise of reasonable care could have ascertained, the claims and interest of this plaintiff in the land involved in this action."

We think appellant's alleged interest in the property should logically be considered before considering the above points raised by it, for if plaintiff is without title or right to the property, it, of course, has no standing in court to question defendants' title or right to possession. In its complaint appellant alleges that it has an interest in such property, but the nature thereof is not set forth. It prays judgment against defendants, "that it recover possession of the premises described." Also, "that it recover $500 as the value of the use and occupation," etc. It thus concedes that defendants were in possession of the premises for some time prior to the bringing of its action.

As we understand appellant's contention on this appeal, it claims, first, to have acquired title through the foreclosure of the second mortgage, and, second, if for any reason it be held that such foreclosure was defective and void, it then asserts that it "is at least a mortgage in possession and has acquired title as such." The latter contention is predicated upon the rule announced in Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792, and kindred cases decided by this court. But we are unable to see how such rule can here apply, for under the facts it clearly appears that defendants, and not the plaintiff, have been and are now in the actual possession of the property. In the Nash Case this court held that a purchaser at a void foreclosure

sale is deemed an equitable assignee of the mortgage attempted to be foreclosed, and where he takes possession of the premises with the express or implied consent of the mortgagor, he is to be deemed a mortgagee in possession, and that the only remedy of the mortgagor or his grantee is an action in equity to redeem, and that unless such remedy is invoked within the statutory time allowed for bringing such action, such mortgagee in possession will, by such lapse of time, acquire the full legal title. It is apparent under the facts in the case at bar that plaintiff is not, nor was it at any time, a mortgagee in possession. But the fact that plaintiff is not the owner of the legal title, nor a mortgagee in possession, is not of controlling importance in disposing of this suit, except to the extent of plaintiff's claims for affirmative relief; for under the issues defendants, by their counterclaim, are asking for affirmative equitable relief against plaintiff in the nature of an accounting and a redemption, and praying for a decree quieting their alleged title as against all claims held or asserted by plaintiff. It goes without saying that such relief will be granted only upon condition that they first do equity by paying to plaintiff all sums to which in equity and good conscience it is entitled.

We will therefore at this time determine whether plaintiff acquired title to this real property through the foreclosure of the commission mortgage, which foreclosure took place in 1887. This mortgage ran to D. S. B. Johnston, Son, & Hance, a copartnership, and the district court found, and such finding is, we think, clearly in accordance with the evidence, that the same, together with all the property of such copartnership, was in 1885 transferred to the corporation known as D. S. B. Johnston Land Mortgage Company, which latter concern, through its attorneys, conducted such foreclosure proceedings and became the purchaser at the sale, although the published notice of sale purported to be signed by such copartnership. No assignment of such mortgage was ever recorded in the office of the register of deeds. We think this fact alone vitiates such attempted foreclosure, and renders a consideration of the numerous other grounds urged for avoiding such sale unnecessary. Section 5412, Compiled Laws of 1887, reads: "To entitle any party to give notice, as hereinafter prescribed, and to make such foreclosure, it shall be requisite. . . . 3. 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 in the county where such mortgaged premises are situated." Even under the most liberal rule for construing such statute we deem it clear that such omission to record the assignment is fatal to the sale. This is settled in this jurisdiction. Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85, and cases cited. We adhere to the views there expressed. The purpose of such statute, as we held in Hebden v. Bina, was to require that the person who attempts to exercise the power of sale in a mortgage must have and hold the record title of such mortgage. See also Hathorn v. Butler, 73 Minn. 15, 75 N. W. 743, decided under a statute the same as ours above quoted.

The conclusion is, we think, inevitable that the only effect, therefore, of such foreclosure sale, was to vest in the D. S. B. Johnston Land Mortgage Company, the purchaser at the sale, and to whom the sheriff's deed runs, the ownership of the mortgage attempted to be foreclosed, as the equitable assignee thereof. So, at the most, this plaintiff, the D. S. B. Johnston Land Company, which claims to be the Land Mortgage Company under another name, merely stands in no more favorable position.

But we think the plaintiff company failed in its proof to show that it is in fact the Land Mortgage Company under a new name, or, in other words, to identify or connect itself with such company. The mere recital of such fact by the sheriff in his deed to the Land Mortgage Company is not competent proof thereof. Hannah v. Chase, 4 N. D. 351, 50 Am. St. Rep. 656, 61 N. W. 18. No other proof of such fact was offered, although it is apparent that this omission was a mere inadvertence on the part of plaintiff's counsel, and they no doubt in good faith believed that such fact was sufficiently established by proper proof. After due consideration we have concluded, notwithstanding such failure of proof, to dispose of the merits of the litigation on the assumption that the lacking proof will be supplied if an opportunity is afforded to do so, and to the end that full relief to the parties may be administered in this action we deem it proper to afford such opportunity to the plaintiff by directing the trial court, upon the filing of the remittitur, to take further proof covering such point.

Assuming that plaintiff will be able to supply such missing link in its proof, we proceed to determine the ultimate relief to which the parties are entitled.

The plaintiff being, as before stated, merely the equitable assignee of the mortgage attempted to be foreclosed, and it also being an assignee of the first, or Avery, mortgage, which latter mortgage was sold and assigned to it in February, 1902, and it never having been in the actual possession of the premises under such mortgages, or at all, it is plain that it cannot maintain its action, nor is it in a position to assail the defendants' title or right of possession upon any of the grounds urged by it, unless, perhaps, plaintiff's contention that the deed from Harrington to these defendants was champertous and void can be successfully urged to defeat the affirmative relief sought by the defendants' counterclaim.

Was the deed from Harrington to these defendants champertous and therefore void? We are clear that this question must be answered in the negative. The fallacy in appellant's contention is apparent when we consider the evidence as to the possession of the land in controversy at the time such deed was executed and delivered. It is undisputed that the land was wild prairie land without a vestige of improvement, and at the most it is merely contended that plaintiff's possession thereof was constructive only and such as it would obtain by reason of the fact that on a few occasions it entered into leases with third persons, authorizing them to cut hay thereon. Such acts fall far short of constituting actual, open, and notorious possession sufficient to set the champerty statute in motion. This is decided by this court in State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357, the syllabus reading: "The occasional cutting and removal of hay from unoccupied lands, under a permit from one claiming title adverse to the plaintiff's grantor, is not sufficient to constitute adverse possession so as to avoid plaintiff's deed for maintenance." The authorities cited by appellant's counsel do not support their contention. These cases are Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77; Conrad v. Adler, 13 N. D. 199, 100 N. W. 722; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79; Cotton v. Horton, 22 N. D. 1, 132 N. W. 225. It will be seen

by an examination of the opinions that such cases are predicated upon actual, open, and notorious possession.

The attempted foreclosure of the commission mortgage being ineffectual to convey the legal title to the plaintiff, or to the D. S. B. Johnston Land Mortgage Company, it follows, of course, that Harrington, the defendants' grantor, and not this plaintiff, had the constructive possession of the premises which flowed from his legal title. See Bull v. Beiseker, 16 N. D. 290, 14 L.R.A.(N.S.) 514, 113 N. W. 870; also Herbage v. McKee, 82 Neb. 354, 117 N. W. 706, and Butler v. Smith, 84 Neb. 78, 28 L.R.A.(N.S.) 436, 120 N. W. 1106. In the latter cases it was correctly held that unimproved and unoccupied land is deemed to be in the possession of the holder of the legal title, and not in the holder of the title under void judicial proceedings.

This brings us to a consideration of the issues raised by defendants' counterclaim and plaintiff's reply thereto. As before stated, defendants pray for a decree in their favor quieting their title as against all claims of the plaintiff. To entitle them to such affirmative relief, they must do equity by paying all sums equitably due plaintiff, including the various items paid by it as taxes on such land, with interest. Defendants concede this, but they assert that this well recognized rule of equity jurisprudence does not require the payment by them of the first mortgage, because, as they argue, such mortgage was barred by the statute of limitations long prior to the date of its purchase by plaintiff. We fail to perceive any merit in such contention. It is apparent that it is wholly without support in the adjudicated cases, for respondents' able counsel frankly admit in their printed brief that they have labored in vain through long and diligent research to find a case in point. We are not at all surprised at this, for it seems plain, on elementary principles, that defendants occupy, as against the plaintiff, who is the purchaser and assignee of the mortgage, no more favorable position than it would have occupied as against the mortgagee had he retained the ownership thereof. Is it at all logical or reasonable to hold that the rule that those who seek equity must do equity will apply in one case, but not in the other? Why any such distinction? The equities are just as strong in the one case as in the other. By the assignment of the mortgage the mortgagor clearly transferred all his equities therein to his assignee. Surely there is no rule of law or

equity which forbids the sale and transfer of an outlawed note and mortgage. The running of the statute does not affect the chose in action, either in law or in equity, except to bar the holder's remedy by action to enforce its payment, when such bar is properly pleaded. He who asks the aid of equity to cancel such mortgage as a cloud on his title, or to quiet title as against the record liens thereon, is, in equity and good conscience, just as much bound to pay the amount justly due thereon when it has been assigned as he is when it remains the property of the original holder. In other words, he gains no advantage in law or in equity by such assignment. The rule requiring those who ask equity to do equity, is, we think, misapplied by respondents' counsel. The defendants are the parties who are seeking equity under the counterclaim, and by so doing they call into operation such rule against them. Plaintiff is not seeking to enforce payment of these mortgages and taxes, and defendants, under the rule, are required to pay the same only as a condition to obtaining the equitable relief asked, and because inherent equity and natural justice require it.

This brings us to the question of the amount of plaintiff's equities, and which defendants should be required to satisfy as a condition to the affirmative relief asked. The district court found such amount, including taxes and interest, after deducting $60 which plaintiff collected for hay leases, to be, on November 1, 1912, the sum of $2,543.27. Appellant's counsel do not seem to question the correctness of this amount, but the respondents' counsel urge that it is very materially excessive. From our examination of the record on this point we are satisfied that the learned trial court's finding is as favorable to the respondents as the testimony warrants.

Our conclusion, therefore, is that the judgment of the district court is in all things correct, provided the plaintiff shall be able to supply the proof which is lacking as to the fact that it is the same corporation as the D. S. B. Johnston Land Mortgage Company, and for the purpose of enabling plaintiff to supply such proof a new trial of such issue is granted.

If such proof is made to the satisfaction of the trial court, it will enter judgment in accordance with its former decree, but fixing a reasonable time from and after the entry of its judgment for the pay-

ment or tender into court by defendants of the sum found to be due to the plaintiff. Defendants and respondents will recover their costs and disbursements on this appeal.

ROBERT J. PRATT v. EDWARD PRATT.

(151 N. W. 294.)

Cause of action — accrued — defendant out of state — statute of limitations — local — foreign.

1. Section 6796, Rev. Codes 1905, which provides that "if, when the cause of action shall accrue against any person . . . such person shall depart from and reside out of this state and remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action," is applicable to an action brought in the state of North Dakota for money loaned to the defendant while a resident of said state, even though the defendant had resided outside of the state for more than six years, and even though, if the action had been brought in the foreign state, the bar of a foreign statute of limitations might have been interposed.

Evidence — facts undisputed — statute of limitations — application — question for court.

2. Where there is no real dispute in the evidence as to the facts, the question as to whether the statute of limitations has run or not is one for the court, and not for the jury, to pass upon.

Denominational disputable presumptions — foreign law — presumed to be the common law — must be pleaded and proved when relied upon — otherwise presumption prevails.

3. In the denominational disputable presumptions mentioned by the Code is one to the effect "that a foreign law will be presumed to be the common law in the absence of rebutting evidence." See ¶ 41, § 7936, Compiled Laws of 1913.

Note.—As to when statute of limitations will govern action in another state or country, see note in 48 L.R.A. 625.

Applicability of provision that time during which defendant is a nonresident shall not be computed, to defendant who was a nonresident when cause of action accrued, is the subject of a note in 34 L.R.A.(N.S.) 436.

For the general question of presumption as to law of other state or country, see notes in 21 L.R.A. 471, and 67 L.R.A. 33.

Both under this statute and under the decisions of the courts, the statute of limitations of a foreign state, if sought to be relied upon, must be not only pleaded, but proved, and in the absence of such pleading and proof the presumption of the existence of the common law applies.

Common law — limitations — actions.

4. At the common law there was no stated or fixed time as to bringing of actions, and in the absence of a statute the action might be commenced at any time.

Opinion filed February 12, 1915.

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

Action to recover for money loaned. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This action was commenced by the service of summons and complaint and garnishee summons. The complaint set up a cause of action for money loaned and goods, wares, and merchandise furnished by the plaintiff to the defendant on the 5th day of February, 1891, and the 8th day of July, 1892. A general denial was interposed and a plea of the bar of the statute of limitations. The garnishee appeared and disclosed a liability in the sum of $441.56 before the trial of the action, and on the 31st day of January, 1913. The plaintiff served upon the defendant a bill of particulars. On the trial a verdict was returned for the plaintiff and judgment entered thereon, and defendant has appealed from said judgment to this court.

A. C. Lacy, for appellant.

Where a cause of action is barred by the statute of limitations of a foreign state, the bar is available here. Rathbone v. Coe, 6 Dak. 91, 50 N. W. 620; Allen v. Allen, 95 Cal. 184, 16 L.R.A. 646, 30 Pac. 213; Fletcher v. Spaulding, 9 Minn. 64, Gil. 54; Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162; Rev. Codes 1905, § 6785.

It must be presumed, in the absence of evidence to the contrary, that the laws of another state are the same as ours. Marsters v. Lash, 61 Cal. 624; Tolman v. Smith, 85 Cal. 280, 24 Pac. 744; Osborn v.

Blackburn, 78 Wis. 209, 10 L.R.A. 367, 23 Am. St. Rep. 400, 47 N. W. 175; Allen v. Allen, 95 Cal. 184, 16 L.R.A. 646, 30 Pac. 213.

The court erred in denying defendant's motion for a directed verdict. Rathbone v. Coe, 6 Dak. 91, 50 N. W. 620; Allen v. Allen, 95 Cal. 184, 16 L.R.A. 646, 30 Pac. 213; Fletcher v. Spaulding, 9 Minn. 64, Gil. 54; Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162; Rev. Codes 1905, § 6786.

In pleading the statute of limitations it is not necessary to state the facts showing such defense, but it may be generally stated that the cause of action is barred. Allen v. Allen, 95 Cal. 184, 16 L.R.A. 646, 30 Pac. 213; Searls v. Knapp, 5 S. D. 325, 49 Am. St. Rep. 873, 58 N. W. 807.

Pollock & Pollock, for respondent.

An action upon a contract, obligation, or liability, express or implied, must be commenced within six years. Rev. Codes 1905, § 6787, subdiv. 1. But if, when the cause of action accrues, the defendant departs from and resides out of the state, and is continuously absent himself from the state for one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action. Rev. Codes 1905, § 6796; amended by chap. 192, Session Laws, 1911; Star Wagon Co. v. Matthiessen, 3 Dak. 233, 14 N. W. 107; Paine v. Dodds, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931; Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160; Colonial & U. S. Mortgage Co. v. Flemington, 14 N. D. 181, 116 Am. St. Rep. 670, 103 N. W. 929; Note to Moore v. Armstrong, 36 Am. Dec. 74; McConnell v. Spicker, 15 S. D. 98, 87 N. W. 574; 25 Cyc. 1232, and note 89.

It is possible that if plaintiff had sued upon the claim in the state of Washington where defendant had resided for more than six years, or a sufficient length of time to bring himself within the Washington limitation statute, such statute might apply. 25 Cyc. 1240; Rhoton v. Mendenhall, 17 Or. 199, 20 Pac. 49.

The fact that the debtor is subject to process in another state, or that the bar of the statute of another state might attach so that an action could not there be maintained, does not bar an action in this

state, where the right of action accrued. Rev. Codes 1905, §§ 6787, 6796, amended by chap. 192 of Session Laws 1911.

In this state, where the cause of action accrued and where suit is brought, the statute of the forum runs only from the time defendant comes into the jurisdiction of the forum. 25 Cyc. 1240, note 26; Brown v. Nourse, 55 Me. 230, 92 Am. Dec. 583; Bulger v. Roche, 11 Pick. 36, 22 Am. Dec. 359; Blackburn v. Blackburn, 124 Mich. 190, 83 Am. St. Rep. 325, 82 N. W. 835; Hartley v. Crawford, 12 Neb. 471, 11 N. W. 729; Miller v. Brenham, 68 N. Y. 83; Ruggles v. Keeler, 3 Johns. 263, 3 Am. Dec. 482.

Where the facts are not disputed it is a question of law only, whether the case is within the bar of the statute. Reed v. Swift, 45 Cal. 255; Clarke v. Dutcher, 9 Cow. 674; Chapin v. Warden, 15 Vt. 560; 25 Cyc. 1434, note 2.

BRUCE, J. (after stating the facts as above). There are practically five specifications of errors of law and a specification that the facts are insufficient to sustain the verdict and judgment. These specifications may be reduced to one, and that is that the court erred in its ruling that the statute of limitations did not bar the plaintiff's cause of action, and the additional proposition that the court erred, at any rate, in not submitting to the jury the question as to whether such action was barred or not.

The last item charged was in July, 1892, and it is perfectly clear that the North Dakota statute would have run except for the undisputed fact that the defendant removed from the state in the fall of 1893, and has not since been a resident thereof, but since the 27th day of January, 1904, at any rate, has been a resident of the state of Washington. We do not understand that defendant and appellant seriously contends that such absence would not toll the running of the statute in North Dakota. In fact, no such contention can be made. Section 6787, Rev. Codes, 1905, being § 7375. Compiled Laws of 1913, provides that "an action upon a contract, obligation, or liability, express or implied, . . . must be commenced within six years." Section 6796, Rev. Codes 1905, as amended by chapter 192 of the Session Laws of 1911, being § 7384, Compiled Laws of 1913, provides that "if, when the cause of action shall accrue against any person . . .

such person shall depart from and reside out of this state and remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." There can, indeed, be no doubt that if the case is one in which the North Dakota statute is applicable, the action would not be barred. Star Wagon Co. v. Matthiessen, 3 Dak. 233, 14 N. W. 107; Paine v. Dodds, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931; Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. 14 N. D. 149, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160; Colonial & U. S. Mortg. Co. v. Flemington, 14 N. D. 181, 116 Am. St. Rep. 670, 103 N. W. 929; Note to Moore v. Armstrong, 36 Am. Dec. 74; McConnell v. Spicker, 15 S. D. 98, 87 N. W. 574; 25 Cyc. 1232, and note 89.

Defendant claims, however, that the residence of the defendant being concededly in Washington for the last six years, and the presumption being, in the absence of proof to the contrary, of which there is none in this case, that the statute of Washington is the same as that of North Dakota, that the action would have been barred if brought in the state of Washington, and that therefore it is barred here. There is no merit, however, in this contention. The cause of action accrued in North Dakota. After it had accrued the defendant left the state. The statute is clear that in such a case, and where the action is brought in the state where its cause originated, that the law of the forum, and not of the foreign state, will prevail.

Nor is there any merit in the contention that the question as to whether the statute of limitations had run or not was a matter for the jury, and not for the court, to decide. There is no real dispute in the evidence as to the facts in this case, and where such is the case, whether a claim is within the bar of the statute or not is a matter of law for the court to pass upon. Reed v. Swift, 45 Cal. 255; Clarke v. Dutcher, 9 Cow. 674; Chapin v. Warden, 15 Vt. 560; 25 Cyc. 1434.

We have read the cases cited by counsel for appellant, but find them by no means applicable. In the case of Rathbone v. Coe, 6 Dak. 91, 50 N. W. 620, the cause of action arose in the state of Washington, and during all of the period of the statute of limitations the defendant was a resident of that state. All that the court held was that "a statute of limitations of a foreign state, providing that an action on a note shall

be brought within a certain time after the cause of action has accrued, bars the debt itself, if the action is not brought within the time limited, and does not merely affect the remedy, and it may be pleaded in bar of an action brought on the note in Dakota, if, during the full period of limitation, defendant was a resident of the foreign state in which the note was executed, so that an action could have been brought against him therein." In the cases of Allen v. Allen, 95 Cal. 184, 16 L.R.A. 646, 30 Pac. 213; Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162, and Fletcher v. Spaulding, 9 Minn. 64, Gil. 54, the causes of action arose outside of the state of the forum.

So, too, there is in the case at bar no proof of the statute of limitations of the state of Washington, nor, in fact, that any such statute exists. Without such proof it is clear that no reliance can be placed thereon, and it is also clear that the legal presumption is not that the state of Washington has a statute of limitations similar to that of North Dakota, as is contended by counsel for appellant, but that the common law alone prevails there, and that the state of Washington has no statute upon the subject at all. Among the denominational disputable presumptions mentioned by the Code is one to the effect "that the foreign law will be presumed to be the common law in the absence of rebutting evidence." See ¶ 41, § 7936, Compiled Laws of 1913; Hanson v. Great Northern R. Co. 18 N. D. 324, 138 Am. St. Rep. 768, 121 N. W. 78. At the common law there was no stated or fixed time as to the bringing of actions, and in the absence of statute an action might be commenced at any time. People v. Gilbert, 18 Johns. 228; Wilcox v. Fitch, 20 Johns. 472; Pearsall v. Dwight, 2 Mass. 89, 3 Am. Dec. 35; Hoyt v. McNeill, 13 Minn. 390, Gil. 362. It is also quite well established that, even in the absence of such a statute in regard to presumptions, the statute of limitations of a foreign state must, if sought to be relied upon, be not only pleaded, but proved. Eingartner v. Illinois Steel Co. 94 Wis. 70, 34 L.R.A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; Hoyt v. McNeill, 13 Minn. 390, Gil. 362; 13 Enc. Pl. & Pr. 277; Palmer v. Marshall, 60 Ill. 289.

The judgment of the District Court is affirmed.

F. N. CHAFFEE v. FRED EDINGER.

(151 N. W. 223.)

Seed-grain lien — conversion — damages — action — not triable de novo on appeal — specification of errors — demand for review on appeal.

1. An action to recover damages for conversion of grain upon which plaintiff claims to hold a seed lien is not properly triable *de novo* on appeal. Hence, it is incumbent upon appellant to furnish in this court a specification of the errors complained of, and a specification that the appellant demands a review of the entire case in the supreme court is insufficient.

Seed-grain lien — statement in writing verified by oath — description of land — necessary.

2. Section 6852, Compiled Laws of 1913, providing that any person entitled to a seed lien shall file "*a statement in writing, verified by oath,* showing the kind and quantity of seed, its value, the name of the person to whom furnished, and *a description of the land* upon which the same is to be or has been planted or sown," is not complied with where such statement wholly omits a description of the land. Following Lavin v. Bradley, 1 N. D. 291.

Opinion filed February 16, 1915.

Appeal from County Court, Wells County, *Fred Jansonius,* County Judge.

Action by F. N. Chaffee against Fred Edinger. From a judgment in defendant's favor, plaintiff appeals.

Affirmed.

T. F. McCue, for appellant.

A description of land in a statement for seed-grain lien is sufficient if one, upon examination, can locate and distinguish such land from other lands. A description in a deed would be considered sufficient if a person of ordinary prudence, acting in good faith, upon inquiries, would be enabled to identify the property from the description given. Ford v. Ford, 24 S. D. 644, 124 N. W. 1108; Schuyler v. Wheelon, 17 N. D. 161, 115 N. W. 259.

"Words used in any statute are to be understood in their ordinary sense except when a contrary intention plainly appears." Rev. Codes 1905, § 6691.

Such a description in a deed would be good. Armstrong v. Mudd,

10 B. Mon. 144, 50 Am. Dec. 545; Camley v. Stanfield, 10 Tex. 546, 60 Am. Dec. 219; Miller v. Mann, 55 Vt. 475; English v. Roche, 6 Ind. 62; Berry v. Wright, 14 Tex. 270.

A description in a deed which designates the land as that *owned by the grantor,* and gives the location, is sufficient. Eufaula Nat. Bank v. Pruett, 128 Ala. 470, 30 So. 731; Brice v. Sheffield, 118 Ga. 128, 44 S. E. 843; Means v. De La Vergne, 50 Mo. 343.

J. J. Youngblood, for respondent.

A seed lien is statutory, and must in all particulars and essentials comply with the statute which gives the right. A description of the *land* is necessary. It must be in the lien itself. Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384; Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152.

The so-called lien is not a chattel mortgage, because Bezenko had no title to the crop. Angell v. Egger, 6 N. D. 391, 71 N. W. 547; Hawk v. Konouzki, 10 N. D. 37, 84 N. W. 563; Simmons v. McConville, 19 N. D. 788, 125 N. W. 304.

The complaint is wholly insufficient because it does state *facts.* When plaintiff pleads that he filed "a proper seed lien," he only states his *conclusion.* Neither does it show any right to possession in the plaintiff at the time of bringing the action, nor any right to foreclose, even if the lien were good. Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313.

Fisk, Ch. J. This is an appeal from the county court of Wells county. The action is one to recover damages for the alleged conversion of certain grain upon which plaintiff claims to hold a seed lien. It is therefore strictly an action at law, triable before a jury; but appellant has, notwithstanding such fact, sought to have the case tried *de novo* in this court, for the only specification contained either in the notice of appeal or in the appellant's brief is that the appellant demands a review of the entire case in the supreme court. It is, of course, entirely clear that we cannot retry such case *de novo,* but can only pass upon alleged errors properly specified. The governing statute is § 7656, Compiled Laws of 1913, which provides: "A party desiring . . . to appeal from a judgment or other determination of a district court or county court with increased jurisdiction, shall serve with the notice

of motion or notice of appeal, a concise statement of the errors of law he complains of. . . ." Section 7847, Compiled Laws of 1913, which does away with the necessity of furnishing abstracts on appeal, provides what the briefs shall contain, and among other things it prescribes that the brief of appellant shall contain all of the pleadings and the decision complained of, together with the specifications of error or insufficiency of the evidence, served with the notice of motion for a new trial or notice of appeal. Appellant's counsel, acting, no doubt, through the mistaken assumption that the action is in equity and triable *de novo* in this court, has omitted in his brief to furnish any specifications of error whatever. It is therefore apparent that appellant has wholly failed to present for our consideration on this appeal, any errors of which he complains. Such specifications are as essential under the new practice as assignments of error were under the former practice, and without them there is nothing for us to do but to affirm the judgment. Appellant's counsel has also failed to include in his brief the decision complained of as required by § 7847. While, perhaps, this omission is not of vital importance, we deem it proper to call attention thereto. This court will decline to explore the original record except when necessary to prevent a miscarriage of justice.

In view of the fact that respondent's counsel has raised no objection to the practice pursued by appellant, we have examined the original record, and we find that it is also devoid of any specifications of error. Notwithstanding such omission on appellant's part to furnish such specifications, we have made a sufficient examination into the merits of the case to convince us that the judgment appealed from is correct, and we will briefly state our reasons why such judgment should be affirmed, even if its correctness were properly challenged by specifications of error.

The so-called seed lien asserted by appellant contains no description of the real property upon which the seed furnished by him was to be sown. It reads as follows:

State of North Dakota)
County of Foster) ss.

F. N. Chaffee, being duly sworn, says that on the 29th day of May,

A. D. 1911, he furnished to Jacob Bezenko 163.30 bushels of wheat of the value of $163.50; 14 bushels of oats of the value of $7, to be sown in the season of 1911 upon the following described land situate in the county of Wells and state of North Dakota; owned by said Jacob Bezenko, to wit:

That the value of the seed so furnished is $170.50, and that there is due on account of said seed furnished as aforesaid the sum of $170.50, for which a lien is claimed by affiant upon the crop grown upon the Premises hereinbefore described. F. N. Chaffee.

Subscribed and sworn to before me this 29th day of May, A. D. 1911.
J. C. Hoffert, Notary Public,
Foster County, North Dakota.

On the back of such lien statement is a statement signed by Jacob Bezenko, wherein he states that he has purchased and received from F. N. Chaffee the seed grain aforesaid, and agrees to sow all of the same during the season of 1911 upon the W.½ of sec. 12, twp. 147-68 in Wells county, N. D., and agrees to pay therefor the sum of $170.50 on October 1, 1911, with interest from the 29th day of May, 1911, at the rate of 12 per cent per annum. It also contains other statements not material to the controversy. This is a mere unsworn statement by the purchaser of the seed grain, and it is not contended that it is any part of the lien statement on the front portion of the sheet, and we are clear that it cannot be resorted to for the purpose of aiding such lien statement by furnishing a description of the land.

The statute, § 6852, Compiled Laws of 1913, is clear and specific, and must be complied with in order to obtain a lien thereunder. It provides: "Any person entitled to a lien under this chapter shall, within thirty days after the seed is furnished, file in the office of the register of deeds of the county in which the seed is to be sown or planted a statement in writing, *verified by oath, showing the kind and quantity of seed, its value, the name of the person to whom furnished, and a description of the land upon which the same is to be or has been planted or sown.* Unless the person entitled to the lien shall file such statement within the time aforesaid, he shall be deemed to have waived his right thereto."

The case at bar is ruled by Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384, wherein Mr. Justice Wallin, in speaking for the court on the point here involved, among other things, said: "The contention of appellant's counsel is that the omission to describe the right land . . . is fatal to the lien. In this counsel is entirely correct. No requirement of the statute under consideration is plainer, and certainly none is more important, than the provision of § 5492, requiring that the land on which the seed is sown or will be sown should be described in the instrument which is put on file. In construing the seed-lien statute, the fact must not be overlooked that the lien given is wholly statutory in its nature and origin. It was unknown at common law, and hence can neither be acquired nor enforced unless there has been a substantial compliance with the act of the legislature from which the lien arises. Kelly v. Seely, 27 Minn. 385, 7 N. W. 821. The lien may be obtained without the consent of the party to whom the seed is furnished, and without resort to legal proceedings. The lien is entirely analogous to the liens of mechanics and materialmen, and such liens are never extended by the courts beyond the fair and reasonable import of the language used in the statute." See also Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313.

For the above reasons the judgment appealed from is affirmed.

NORA McKILLIP v. FARMERS' STATE BANK OF DES LACS, NORTH DAKOTA.

(151 N. W. 287.)

Deed — setting aside — on ground of fraud — proof — clear and convincing.

1. Where one seeks to set aside a deed on the ground of fraud, his proof must be clear and convincing.

Conveyance — old man to daughter — consideration — care during old age — not necessity fraudulent.

2. A conveyance by an old and feeble man, of his homestead to his daughter

Note.—The question of the validity, as against creditors, of transfers of exempt property is treated in a note in 20 Am. Rep. 150.

in consideration of her caring for him in his old age, is not necessarily fraudulent.

Exempt property — transfer of by debtor — not fraudulent — creditors.

3. It is not a fraudulent act for a debtor to transfer to his wife or daughter exempt property to which his creditors could not have looked for the satisfaction of their claims.

Opinion filed February 16, 1915.

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

Action to determine adverse claims to real estate. Judgment for Plaintiff. Defendant appeals.

Affirmed.

Blaisdell, Murphy & Blaisdell, for appellant.

There was constructive fraud in the transfer of the property in question. The failure of an honest grantee to place his deed of record is held to operate as an estoppel in favor of the creditors of the grantor. It is negligence, and constitutes constructive fraud. Smith v. Cleaver, 25 S. D. 351, 126 N. W. 589; Rev. Codes 1905, § 5294; Hopkins v. Joyce, 78 Wis. 443, 47 N. W. 722.

The defendant had a lien and could have maintained an independent action as plaintiff to enforce it. He has been brought into this action, and the court has power to do complete justice between the parties. The nullity of the transfer is not based on the absence of another remedy, but on its fraudulent character. Probert v. McDonald, 2 S. D. 495, 39 Am. St. Rep. 796, 51 N. W. 212; Carson v. Stevens, 40 Neb. 112, 42 Am. St. Rep. 661, 58 N. W. 845, 58 N. W. 845; David Adler & Sons Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877.

Anything out of the usual course of business is a sign of fraud. McCarvel v. Wood, 68 Minn. 104, 70 N. W. 871.

That the plaintiff does not testify or personally appear in this case is a sign, and raises the presumption of fraud. 20 Cyc. 450; Manhard Hardware Co. v. Rothschild, 121 Mich. 657, 80 N. W. 707; Probert v. McDonald, 2 S. D. 495, 39 Am. St. Rep. 796, 51 N. W. 212.

Palda, Aaker & Greene and *F. M. Oseth,* for respondent.

The doctrine of constructive fraud is not only analogous to, but is based upon, the doctrine of estoppel *in pais;* since it arises only

where, by the omission of a duty imposed by law upon one person, another has been actually and bona fide mislead to his prejudice. Rev. Codes 1905, § 5294; Smith v. Cleaver, 25 S. D. 351, 126 N. W. 589.

The presumption that services of a member of the family are gratuitous may be overcome by actions and appearance; it is entirely overcome and destroyed by a distinct agreement. Since a father may emancipate his minor child, it has been held, that if he so does, and enters into a bona fide contract with the child under such contract, such services are a sufficient consideration to support a conveyance by the father to the child as against the father's creditors. 20 Cyc. 532, 533, and cases cited.

The transfer in this case was of exempt property, and therefore not open to question by grantor's creditors. It was property to which the liens of creditors did not attach, and was beyond the reach of an execution. It was not possible to defraud creditors by transferring property to which they could not look for the collection of their claims. Olson v. O'Connor, 9 N. D. 504; Dalrymple v. Security Improv. Co. 11 N. D. 70, 88 N. W. 1033; Baldwin v. Rogers, 28 Minn. 544, 11 N. W. 77; Blake v. Boisjoli, 51 Minn. 296, 53 N. W. 637; Merchants' Nat. Bank v. Kopplin, 1 Kan. App. 599, 42 Pac. 263; White Sewing Machine Co. v. Wooster, 74 Am. St. Rep. 100 and note, 66 Ark. 382, 50 S. W. 1000; Note to Kettleschlager v. Ferrick, 76 Am. St. Rep. 626.

Bruce, J. This is an action to determine adverse claims to real estate. Its direct object is to have the lien of an attachment set aside. This attachment was issued in an action not against the plaintiff and respondent, but against her father and grantor, Thomas McKillip, and the question to be determined is the validity of the conveyance to his daughter, and whether the land on which the attachment was levied belonged to the father and debtor, Thomas McKillip, or to his daughter, the plaintiff and respondent herein. The land was deeded to Nora McKillip, on the 15th day of March, 1910, and the attachment was levied on the 19th day of October, 1912. The question is, Was or was not the deed of March 15, 1910, a valid deed? In other words, was it issued for a good or valuable consideration, and was it free from actual or constructive fraud? The trial court found that it was, and we are asked upon this appeal to reverse its findings.

The record shows that in 1909 the plaintiff and respondent's father

sold and indorsed to the defendant bank a certain promissory note for $350, which was executed in his favor by one T. W. Young; that on said note becoming due and on April 20, 1911, and a year and twenty-five days after the date of the execution of the deed herein in question, the said plaintiff's and respondent's father and the said T. W. Young executed and delivered to the said bank a new note for $302.44, and which note was given for the purpose of taking up the indebtedness still due on the prior note. The record shows that at the time of the giving of the second note the said McKillip had some $500 worth of personal property, which he disposed of in 1912, a year after the giving of the last note and some two months before the recording of the deed by his daughter, which was on the 1st day of June, 1912. The whole contention of defendant is that it had no knowledge whatever of the existence of the deed until shortly after it was recorded, and that had it known of the deed it would never have accepted the note but would have sued McKillip on the former note, in payment of which the note of April 20, 1911, was given, and would have levied on his personal property and collected its claim in full.

The burden of proof is, of course, upon the defendant and appellant to prove its allegation of fraud, and such proof must be clear and convincing. Englert v. Dale, 25 N. D. 587, 142 N. W. 169. We find no such proof in the record before us. The deed, it is true, was not recorded until the 1st day of June, 1912. The writ of attachment, however, was not issued until the 19th day of October, 1912, nor was the action in which it was issued begun until such date. At the time of the execution of the deed to his daughter, the liability of Thomas McKillip to the defendant, the Farmers' State Bank, was that of an indorser merely, and there appears to be nothing unusual in an old man deeding his homestead to his daughter, who has come to live with him and is taking care of him, even though he happens to be an indorser on a promissory note of $350 which he has sold to a bank, especially where he has some $500 worth of personal property which the record shows in this case to be the fact, and makes an agreement with his daughter for an interest in the crops for two years with which to take care of his possible indebtedness. There can be no doubt that the plaintiff, Nora McKillip, came from St. Paul to take care of her father, who appears to have been an old and feeble man and we are not prepared to

doubt his testimony that the deed was executed in consideration of the payment of a small sum of money and the agreement to care for and nurse him. Conveyances of this kind by no means lack in bona fides, and have been universally sustained even as against the father's creditors. See 20 Cyc. 532, 533, and cases cited; Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529.

It may be true that after the execution of the deed and in April, 1912, the plaintiff's father disposed of his personal property, but what, may we ask, had the plaintiff to do with this? If she and her grantor were free from fraud or from fraudulent intent at the time of the original conveyance, and there was a valid consideration for such conveyance to her, the subsequent acts of her grantor are immaterial. The defendant, it is to be remembered, was her father's creditor, and not her own.

So, too, it is well to remember that the land was the homestead of the plaintiff's father, and did not exceed $3,500 in value. It was therefore exempt from execution under the provisions of § 5049 Rev. Codes 1905, § 5605, Compiled Laws of 1913. The courts have repeatedly held that it is not a fraudulent act for a debtor to transfer to his wife or daughter exempt property to which his creditors could not have looked for the satisfaction of their claims. "It was property," said this court, in the case of Olson v. O'Connor, 9 N. D. 504, 510, 81 Am. St. Rep. 595, 84 N. W. 359, "to which the lien of the judgment did not attach, and was beyond the reach of an execution issued thereon. It was not possible to defraud his creditors by transferring the title to his wife, for it was property to which they could not look for the collection of the claims. For these reasons, even in a proper case, the transfer was not subject to attack." See also Dalrymple v. Security Improv. Co. 11 N. D. 65–70, 88 N. W. 1033; Baldwin v. Rogers, 28 Minn. 544, 11 N. W. 77; Blake v. Boisjoli, 51 Minn. 296, 53 N. W. 637. "The homestead is something toward which the eye of the creditor need never be turned. It is an element which may never enter into his calculations in his efforts to collect his debt." Monroe v. May, 9 Kan. 476. "A debtor cannot commit a fraud upon his creditor by disposing of his homestead. A debtor in the disposition of his property can commit a fraud upon his creditor only by disposing of such of his property as the creditor has a legal right to look to for his pay." Hixon v. George, 18 Kan. 253. See also Wilson v. Taylor, 49 Kan. 774, 31

Pac. 697; Merchants' Nat. Bank v. Kopplin, 1 Kan. App. 599, 42 Pac. 263; Wells v. Anderson, 97 Iowa, 201, 59 Am. St. Rep. 409, 66 N. W. 102; White Sewing Mach. Co. v. Wooster, 66 Ark. 382, 74 Am. St. Rep. 100, 50 S. W. 1000.

The judgment of the District Court is affirmed.

WENDELL HUSTON v. ELOF JOHNSON.

(151 N. W. 774.)

Self-serving declarations — admissibility.

1. As a rule, self-serving declarations, whether oral or written, are inadmissible.

Letter — statements in, favorable to sender — self-serving declaration.

2. As a rule, a letter containing statements favorable to the sender is not admissible for himself, but should be excluded as a self-serving declaration.

Evidence — incompetent — admitting of at trial — error — prejudice — appellate court — preponderance — verdict.

3. Where incompetent evidence is admitted over objection, before such error can be disregarded as nonprejudicial, it must appear that the error did not and could not have prejudiced the rights of the complaining party. And the case must be such that the appellate court is not called upon to decide, from the preponderance of the evidence that the verdict was right, notwithstanding the error complained of.

Purchasers for lands — procuring — authority — evidence of — agency — proof of — error.

4. The defendant claimed that he never authorized the plaintiff to procure purchasers for his land, but that he made some such agreement with a man in charge of plaintiff's office in the absence of plaintiff, and that this was the only authority plaintiff could have acted upon in procuring purchasers. Defendant offered testimony to show the terms of such agreement. This evidence was excluded by the trial court on the theory that, before such evidence could be admitted, the defendant must establish the fact that such person was the duly authorized agent of the plaintiff. *Held*, that the exclusion of this testimony was error.

Pleadings — agreement — evidence — agent.

5. Under an allegation in the answer that a certain agreement was entered

into between the plaintiff and the defendant, evidence is admissible to show that such agreement was made with the defendant by plaintiff's agent.

On Petition for Rehearing.

6. The general rule that objections to evidence must be specific admits of this exception, that if they cannot in any manner be obviated, or if the evidence is clearly inadmissible for any purpose, a general objection will suffice.

7. Plaintiff offered in evidence a copy of a letter, which plaintiff claimed he had written to the defendant, the contents of which were largely self-serving declarations. The evidence already admitted at that time showed that defendant had not received the letter. *Held*, that a general objection to such letter that it was "irrelevant, incompetent, and immaterial" was sufficient; and that the admission of such letter over such objection was error.

Opinion filed February 17, 1915. On petition for rehearing March 19, 1915.

From a judgment of the District Court of Stutsman County, *Coffy*, J., defendant appeals.

Judgment reversed and new trial ordered.

A. B. Darelius, for appellant.

The essential and necessary rules of law governing the admission of secondary evidence were not complied with. A notice to produce the original letter was not given. Read v. Chambers, — Tex. Civ. App. —, 45 S. W. 742; Jameson v. Officer, 15 Tex. Civ. App. 212, 39 S. W. 190; Smith v. Holbrook, 99 Ga. 256, 25 S. E. 627; Foster v. Newbrough, 58 N. Y. 481; Westinghouse Co. v. Tilden, 56 Neb. 129, 76 N. W. 416; 11 Am. & Eng. Enc. Law, 497, and cases cited.

Geo. W. Thorp and *Russell D. Chase*, for respondent.

Where both a general and specific denial are employed in a pleading, the scope of the general denial is limited to the issues raised by the specific denials. It really amounts to a notice to the other party that only enumerated defenses will be relied upon. 31 Cyc. 694, 695, and cases cited; Pom. Code Rem. §§ 516, 517, 521.

The admission in evidence of a copy of a letter or other writing, if error, was immaterial and without prejudice, for the reason that, prior to the letter, appellant had already received notice of the facts contained, and had acted upon them. Rev. Codes 1905, § 6886; S. J. Vidger Co. v. Great Northern R. Co. 15 N. D. 501, 107 N. W. 1083; South Beach Land Asso. v. Christy, 41 Cal. 501; 2 Spelling, New Trial, § 689; Aultman, Miller Co. v. Jones, 15 N. D. 130, 106 N. W.

688; Kinney v. Brotherhood of American Yeomen, 15 N. D. 21, 106 N. W. 44; Gaffney v. Mentele, 23 S. D. 38, 119 N. W. 1030; Putnam v. Custer County, 25 S. D. 542, 127 N. W. 641; Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276; Fowler v. Iowa Land Co. 18 S. D. 131, 99 N. W. 1095, and cases cited; Cochrane v. National Elevator Co. 20 N. D. 169, 127 N. W. 725; Stephens v. Faus, 20 S. D. 367, 106 N. W. 56; Cairncross v. Omlie, 13 N. D. 387, 101 N. W. 897; 2 Enc. Pl. & Pr. 500, and cases cited; Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 462, 123 N. W. 281; Benjamin v. Huston, 16 S. D. 569, 94 N. W. 584; Waldner v. Bowden State Bank, 13 N. D. 604, 102 N. W. 169, 3 Ann. Cas. 847; Donley v. Camp, 22 Ala. 659, 58 Am. Dec. 274; Sloan v. Citizens' Nat. Bank, 1 Neb. (Unof.) 295, 95 N. W. 480; Davis v. Holy Terror Min. Co. 20 S. D. 399, 107 N. W. 374; State v. La Croix, 8 S. D. 369, 66 N. W. 944; Mathews v. Silvander, 14 S. D. 505, 85 N. W. 998; Muller v. Flavin, 13 S. D. 595, 83 N. W. 687.

If the evidence is slight or irrelevant, or if without it the fact is conclusively shown by other evidence, it may be disregarded because it could not have caused injury. State v. Staber, 20 N. D. 545, 129 N. W. 104; State v. Chase, 17 N. D. 429, 117 N. W. 537, 17 Ann. Cas. 520; Landis Mach. Co. v. Konantz Saddlery Co. 17 N. D. 310, 116 N. W. 333; State v. Denny, 17 N. D. 519, 117 N. W. 869; State v. Guy, 25 S. D. 144, 125 N. W. 570; Miller v. McConnell, 23 S. D. 137, 120 N. W. 888; Kelly v. Pierce, 16 N. D. 234, 12 L.R.A. (N.S.) 180, 112 N. W. 995; Kepner v. Ford, 16 N. D. 50, 111 N. W. 619; Greenwald v. Ford, 21 S. D. 28, 109 N. W. 516; Gale v. Shillock, 4 Dak. 182, 29 N. W. 661; Yankton Bldg. & L. Asso. v. Dowling, 10 S. D. 540, 74 N. W. 439; Stewart v. Gregory, C. & Co. 9 N. D. 618, 84 N. W. 553; Morrison v. Oium, 3 N. D. 76, 54 N. W. 288; Braithwaite v. Aikin, 1 N. D. 455, 48 N. W. 354; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; United States v. Adams, 2 Dak. 305, 9 N. W. 718; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 526, 67 N. W. 1052; State v. McGahey, 3 N. D. 293, 55 N. W. 753; Farrell v. Edwards, 8 S. D. 425, 66 N. W. 812; Taylor v. Neys, 11 S. D. 605, 79 N. W. 998; Hermiston v. Green, 11 S. D. 81, 75 N. W. 819; Fisher v. State, 1 Penn. (Del.) 388, 41 Atl. 184; Gilbert v. Moline Plough Co. 119 U. S. 491, 30 L. ed.

476, 7 Sup. Ct. Rep. 305; United States v. Homestake Min. Co. 54 C. C. A. 303, 117 Fed. 481, 22 Mor. Min. Rep. 365; Dennett v. Reisdorfer, 15 S. D. 466, 90 N. W. 138; Morris v. Hubbard, 14 S. D. 525, 86 N. W. 25; A. G. Becker & Co. v. First Nat. Bank, 15 N. D. 279, 107 N. W. 968; State use of Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846; Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215; Buchanan v. Randall, 21 S. D. 44, 109 N. W. 513; State v. Moeller, 20 N. D. 114, 126 N. W. 568; Breeden v. Martens, 21 S. D. 357, 112 N. W. 960; Neeley v. Roberts, 23 S. D. 604, 122 N. W. 655; State v. Frazer, 23 S. D. 304, 121 N. W. 790.

Notice to produce a document as a prerequisite to the admission of secondary evidence of its contents is only required when the instrument is or may be presumed to be in the possession or under the control of the other party. 17 Cyc. 558, and cases cited; Briggs v. Hervey, 130 Mass. 186; Roberts v. Spencer, 123 Mass. 397; Bickley v. Bickley, 136 Ala. 548, 34 So. 946; Hagaman v. Gillis, 9 S. D. 61, 68 N. W. 192; Nichols v. Charlebois, 10 N. D. 446, 88 N. W. 80; 5 Words & Phrases, 4275, and cases cited; Brooks, Boardman & Ford v. Day, 11 Iowa, 46; People ex rel. Soer v. Crane, 125 N. Y. 535, 26 N. E. 736.

Where facts and inferences are blended to an objectionable extent, the statement of facts may still be received if separable from the inferences. 17 Cyc. 216, 217, 223, 224, and cases cited; Townsend v. Briggs, 3 Cal. Unrep. 803, 32 Pac. 307; Neal v. Field, 68 Ga. 534; Fred Miller Brewing Co. v. De France, 90 Iowa, 395, 57 N. W. 959; Jones v. Fuller, 19 S. C. 66, 45 Am. Rep. 761; Knight v. Knight, 178 Ill. 553, 53 N. E. 306; Baltes Land, Stone & Oil Co. v. Sutton, 32 Ind. App. 14, 69 N. E. 179; Bellows v. Crane Lumber Co. 119 Mich. 424, 78 N. W. 536; Olson v. O'Connor, 9 N. D. 504, 81 Am. St. Rep. 595, 84 N. W. 359.

If a statement of inference, conclusion, or judgment is accompanied by an enumeration of the facts on which it is based, any error is usually harmless. The jury can estimate the probative value of the entire statement. 17 Cyc. 60, 61; Central R. Co. v. Allmon, 147 Ill. 471, 35 N. E. 725, 11 Am. Neg. Cas. 371; Hanish v. Kennedy, 106 Mich. 455, 64 N. W. 459; Larson v. Lombard Invest. Co. 51 Minn. 141, 53

N. W. 179; Burdick v. Haggart, 4 Dak. 13, 22 N. W. 589; Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916; Braithwaite v. Aikin, 1 N. D. 455, 48 N. W. 354; 1 Hill's Dig. pp. 151–153, 158–161; Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; 3 Cyc. 386, and cases cited; Costa v. Silva, 127 Cal. 351, 59 Pac. 695, 20 Mor. Min. Rep. 330; Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 86 Pac. 509, 691; Springfield v. Coe, 166 Ill. 22, 46 N. E. 709, 2 Am. Neg. Rep. 11; Joliet v. Johnson, 177 Ill. 178, 52 N. E. 498; Brittenham v. Robinson, 18 Ind. App. 502, 48 N. E. 616; Hollenbeck v. Marion, 116 Iowa, 69, 89 N. W. 210; Sparks v. Galena Nat. Bank, 68 Kan. 148, 74 Pac. 619; Sun Ins. Office v. Western Woolen-Mill Co. 72 Kan. 41, 82 Pac. 513; Chicago, R. I. & P. R. Co. v. Holmes, 68 Neb. 826, 94 N. W. 1007; Burrell v. Gates, 112 Mich. 307, 70 N. W. 574; Butler v. Delafield, 1 Cal. App. 367, 82 Pac. 260; Miller v. Green, 3 Ariz. 205, 73 Pac. 399; Murphy v. Coppieters, 136 Cal. 317, 68 Pac. 970; Knox v. Noble, 25 Kan. 449; Aultman, Miller Co. v. Jones, 15 N. D. 130, 106 N. W. 688; German Sav. & L. Soc. v. Collins, 145 Cal. 192, 78 Pac. 637; Raymond v. Glover, 122 Cal. 471, 55 Pac. 398; Chicago & A. R. Co. v. Esten, 178 Ill. 192, 52 N. E. 954; Lake Erie & W. R. Co. v. Rinker, 16 Ind. App. 334, 45 N. E. 80; Medearis v. Anchor Mut. F. Ins. Co. 104 Iowa, 88, 65 Am. St. Rep. 428, 73 N. W. 495; Williams v. Griffin Wheel Co. 84 Minn. 279, 87 N. W. 773; Missouri P. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, 8 Am. Neg. Rep. 463; La Rue v. Smith, 153 N. Y. 428, 47 N. E. 796; Schweikert v. Seavey, 6 Cal. Unrep. 554, 62 Pac. 600; Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108; Camp v. Dixon, 112 Ga. 872, 52 L.R.A. 755, 38 S. E. 71; Gibson v. Burlington, C. R. & N. R. Co. 107 Iowa, 596, 78 N. W. 190; Service v. Deming Invest. Co. 20 Wash. 668, 56 Pac. 837; 2 Decen. Dig. Appeal & Error, §§ 1050–1052 (2); 2 Hill's Dig. Appeal & Error, pp. 101–107.

Agency must always be pleaded in order that proof of its existence may be offered or introduced. G. W. Loverin-Browne Co. v. Bank of Buffalo, 7 N. D. 569, 75 N. W. 923; Gordon v. Vermont Loan & T. Co. 6 N. D. 454, 71 N. W. 556.

The fact of agency cannot be proved by the agent's declarations. Piano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; 31 Cyc. 1655, 1656, and cases cited.

CHRISTIANSON, J. This is an appeal from a judgment in favor of the plaintiff for a real estate broker's commission. The case was tried before a jury, and a verdict returned for the plaintiff for $4,000, and from the judgment entered on such verdict, this appeal is taken. There is a square conflict between the plaintiff and defendant upon the principal questions at issue. The plaintiff is a real estate broker living at Carrington, North Dakota. The defendant is a farmer living in Stutsman county, where he owns two tracts of land located only a short distance apart, aggregating 960 acres. The plaintiff in his complaint alleges that the defendant employed him as a broker to sell 480 acres of this land for not less than $14,000, and that the plaintiff was to receive for his commission whatever he might receive over $14,000 therefor. That, thereafter he found certain purchasers who were ready, able, and willing to buy these lands and pay therefor the sum of $18,000. The defendant in his answer asserts that no such agreement was made, but that the plaintiff agreed to sell the entire 960 acres for $26,000. The 480-acre tract which plaintiff claims to have sold was that portion of the tract on which all the buildings were located. There is also a square conflict under the testimony as to when, where, and in what manner and upon what terms the contract of employment between the plaintiff and the defendant was made. Plaintiff testified that the defendant came to his office at Carrington between August 27 and September 1, and at that time stated that he wanted plaintiff to sell some land he had near Edmunds consisting of two parcels, and that plaintiff stated he would have to sell it out in parcels, and that it would be impossible to get one purchaser to buy the whole amount of both tracts; and that the defendant gave a price of $25 per acre if the entire amount of both tracts were sold, or $14,000 for a 480-acre tract on which the buildings were located, and $12,000 for the other tract. Plaintiff further testified that in accordance with this agreement, he procured two purchasers who were willing to buy the 480-acre tract on which the building was located for $18,000, and that he entered into preliminary contracts with them, and that immediately after the deal had been made, he called the defendant on the telephone and notified him of the fact that the land had been sold; that the defendant stated that he was busy and could not get up to Carrington for a couple of days. Plaintiff further claims

that a couple days after the telephone conversation he wrote the defendant; that he kept a copy of the letter and mailed the original in the postoffice at Carrington, addressed to Elof Johnson at Edmunds, North Dakota. Without any further foundation a copy of the letter was offered and received in evidence, over objection, that the same was irrelevant, incompetent, and immaterial, and that no foundation for its introduction had been laid. The letter so received in evidence was as follows:

Exhibit "B."

October 23, 1911.

Mr. Elof Johnson,
Edmunds, N. Dak.

Dear sir:—

I have sold your farm, the west half of 15, and northwest quarter of 22, which you had listed with me. This farm is well sold. The parties who bought it are wealthy Illinois farmers, and can pay out in five years the entire amount due, after making a first payment. Wish you would call at once and we will close the matter up. Have contract for deed with abstract sent to them at once, and first payment will be turned over to you. Will say that I would like part of this first payment to pay my agents with, but I am sure you will do what is right, and I want to talk with you and we can arrange matters satisfactorily at that time. I called you up this morning but was told that you had gone to Jamestown, and I look for you back up here on to-day's train.

Hoping to see you soon, I remain,

Yours very truly,

The defendant denied having received the letter of which exhibit "B" purports to be a copy, and the plaintiff admitted that when defendant came to Carrington to see him regarding the proposed land sale, some time subsequent to the sending of the letter, he made no reference thereto, and in no manner acknowledged its receipt. No notice to produce the original was served upon defendant or his counsel, and no other foundation than that above indicated laid for its introduction. An exception was saved to the court's ruling in admit-

ting exhibit "B," and its reception is one of the errors presented on this appeal. Defendant, on the other hand, contends that the agreement under which plaintiff acted in obtaining the purchasers for the land was entirely different, and made in an entirely different manner, and upon entirely different terms than those asserted by the plaintiff. In the first place, defendant claims that he had no talk with the plaintiff personally, but that some time in the first part of September, 1911, while in Carrington, he went to the plaintiff's office, and, upon inquiry from the stenographer whether the same was a land office or not, was informed that it was, and that the stenographer thereupon called some man from the back part of the office, and that this defendant then gave to such man, in plaintiff's office, the description of the land and the prices and terms at which the defendant was willing to sell the same. The defendant also claims that at that time he stated that the entire two tracts of 960 acres must be sold at $26,000, and that the defendant was not willing to sell any part unless he sold the whole thereof. Defendant claims that this was the only time he ever extended any authority to plaintiff to sell the land, or ever gave any terms upon which he would make sale, and that therefore if plaintiff made sale at all, that he was bound by and must act under the arrangement so made at that time. Defendant further claims that some time subsequent thereto the plaintiff came to the defendant's farm, and at this time the plaintiff stated that he was going to find a purchaser for the land, but no terms of sale were discussed, and that subsequent thereto defendant received a telephone message from the plaintiff, and that defendant thereupon went to Carrington and had some talk with the plaintiff in the bank regarding the proposed sale, but that during none of these talks did the defendant in any manner agree to any deviation from the terms of sale proposed by him to the man in the plaintiff's office. The trial court sustained objections to the testimony of the defendant with reference to the conversation the defendant claimed to have had with the man in plaintiff's office, on the apparent theory that it was incumbent upon the defendant to prove that the person with whom he talked had authority to represent the plaintiff. The defendant's counsel, therefore, made an offer of proof as follows: "At this time the defendant offers to show that on or about the 1st of September, 1911, he went to the plaintiff's office, in Carrington, North Dakota, and at that time met

the stenographer or lady clerk in Mr. Huston's office, who called from the private office some man who represented to Mr. Johnson that he was the agent of Mr. Huston, and that Mr. Johnson at that time gave him a description of his lands, the lands mentioned in the complaint and the three quarters additional mentioned by the witness on the stand, and at that time told him that the whole land was for sale at $26,000 net to the defendant, with one half cash and the balance on time at 6 per cent interest per annum; that in case the same was sold, that the plaintiff should receive from the purchasers such sum over and above that amount as he might sell these six quarter sections of land for. At this time we will offer to show, by the defendant on the witness stand, that at this time, the man at Mr. Huston's office with whom Mr. Johnson talked, told Mr. Johnson that the six quarter sections would be a very large lot of land to sell at one sale, and asked if it could not be sold in separate parcels; that Mr. Johnson at that time informed this man at Mr. Huston's office that he would, in no event, sell the land that had the buildings on, unless it was all sold, and that the land must net him $26,000, or the three quarters with the buildings, $25 per acre, and the balance $14,000." In addition to the offer, proper questions were asked by the defendant's counsel for the purpose of eliciting this testimony, but such testimony was all excluded, and before the close of the case all references to the conversation, even that elicited on cross-examination, was, upon motion of plaintiff's attorney, stricken out and eliminated from the jury's consideration. Exceptions were taken to the several rulings of the court in excluding this testimony, and such rulings are presented as error on this appeal.

Did the trial court err in admitting exhibit "B" in evidence, and if so was the error prejudicial to the rights of the defendant? This letter was not offered as a part of a general correspondence. There is no evidence that defendant in any manner acknowledged its receipt, or acted or agreed to act thereon. The undisputed testimony is to the contrary. It will be observed that the letter contains several statements favorable to the plaintiff. It is not in the nature of a mere notice or demand, but particularly describes the 480-acre tract by legal numbers, and states as a fact that this tract had been listed with him. The letter further commends the sale, and states that the purchasers are wealthy Illinois farmers. The letter does not call for an answer,

but is a self-serving declaration on the part of the plaintiff, presenting the transaction in as favorable light to him as possible. In Fearing v. Kimball, 4 Allen, 125, 81 Am. Dec. 690, it was said: "The general rule that a party cannot make evidence for himself by his written communications addressed to the other party, as to the character of dealings between them, or the liability of the party to whom they are addressed, in the absence of any reply assenting to the same, is well settled, . . . a party cannot make evidence for himself by his own declarations." And in Jones on Evidence, vol. 3, § 583, p. 767, it is said: "It is almost unnecessary to say that the sender may not use his own letters against the sendee without proof of the receipt of them, or that the sendee in some manner acted or agreed to act upon them; otherwise it would amount to the party making evidence for himself." We are clearly satisfied that the reception of this letter in evidence was error. Seevers v. Cleveland Coal Co. 158 Iowa, 574, 138 N. W. 793; Hockaday v. Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094; Largent v. Beard, — Tex. Civ. App. —, 53 S. W. 90; Riddell v. Jenkins, 109 App. Div. 463, 95 N. Y. Supp. 702; Havens v. Gilmour, 83 App. Div. 84, 82 N. Y. Supp. 511; Duysters v. Crawford, 69 N. J. L. 614, 55 Atl. 823; United States Exp. Co. v. Long, 105 Ark. 130, 150 S. W. 576; Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601; Gearty v. New York, 183 N. Y. 233, 76 N. E. 12; Smith v. Shoemaker, 17 Wall. 630, 21 L. ed. 717; 16 Cyc. 1202; Mulroy v. Jacobson, 24 N. D. 354, 139 N. W. 697.

Respondent contends, however, that even though it was error to admit exhibit "B," that such error was not prejudicial. We are unable to sustain this contention. In this case the material facts depended almost entirely upon the testimony of the plaintiff and defendant, and it is obvious that any fact or circumstance which might or would be likely to cause the jury to give greater credence to the testimony of one of these parties could not be brushed aside with the mere assertion that it was immaterial, and that there is sufficient competent testimony to sustain the verdict. The letter must have been offered for some purpose. We cannot be expected to presume that it was offered as a mere idle ceremony. Plaintiff must have expected that it would aid his cause, and that its contents would weigh with the jury in considering the testimony in the case. The statements in the letter were favorable

to the plaintiff. These statements were self-serving declarations. The letter was clearly incompetent, and should have been excluded. Nor would we be justified in saying that this letter had no effect upon the minds of the jury. In considering a similar proposition, the court of appeals of the State of New York in the case of Gearty v. New York, 183 N. Y. 233, 238, 76 N. E. 12, 14, says: "Nor can we properly say that the evidence was harmless. The trial was before a jury, and these statements . . . may have had considerable weight with the jury. The burden is on the respondent to show that the reception of the letter was harmless, and this he has failed to do. Foote v. Beecher, 78 N. Y. 155; Jefferson v. New York Elev. R. Co. 132 N. Y. 483, 30 N. E. 981; People v. Strait, 154 N. Y. 165, 171, 47 N. E. 1090." In the case of Smith v. Shoemaker, 17 Wall. 630, 21 L. ed. 717, the Supreme Court of the United States considered the same question. In that case, also, certain letters were received in evidence over objection, and on appeal it was contended that the admission of such letters was error without prejudice. In disposing of this contention that court said: "We repeat the doctrine of this court laid down in Deery v. Cray, 5 Wall. 795, 18 L. ed. 653, that while it is a sound principle that no judgment should be reversed on error when the error complained of worked no injury to the party against whom the ruling was made, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party. The case must be such that this court is not called on to decide upon the preponderance of evidence that the verdict was right, notwithstanding the error complained of." 17 Wall. 630, 639, 21 L. ed. 717, 719. We are satisfied that the admission in evidence of exhibit "B" was error, prejudicial to the rights of the defendant.

We are also satisfied that the trial court erred in excluding the evidence offered by the defendant relative to what took place at the time he made arrangements for the sale of his lands at the plaintiff's office. The ruling of the trial court in excluding this evidence was based upon the theory that it was incumbent upon the defendant to show that the person with whom he had his negotiations at plaintiff's office actually represented the plaintiff. This is clearly erroneous, for the reason that the defendant claims that this is the only arrangement he ever made with plaintiff to sell his lands. And from defendant's stand-

point, therefore, if plaintiff had any authority whatsoever to sell the lands of defendant, it must have been under and by virtue of the terms mentioned in the conversation between defendant and the man in charge of plaintiff's office. Because defendant contends that he never saw plaintiff or anyone else representing plaintiff in regard to the sale of these lands until after plaintiff notified him that he had procured purchasers. Therefore, from defendant's standpoint, it is obvious that if plaintiff had any arrangement with defendant whatsoever authorizing him to procure such purchasers, it must have been the one plaintiff asserts that he made with the man in charge of plaintiff's office. And therefore, if defendant's version is correct, it is obvious that the person in charge of plaintiff's office must either have been authorized to represent plaintiff, or the plaintiff by acting under such arrangement ratified his acts. It is true that plaintiff claims that defendant came to his office at Carrington and made an entirely different arrangement with plaintiff personally, but this fact would not preclude the defendant from presenting his side of the controversy, and it would then be for the jury to say who was right or who was wrong in his contention in the matter. The mere fact that defendant's version was denied by plaintiff in no manner affected its admissibility, or changed the rules of evidence relating thereto. By the court's ruling, defendant was prevented from presenting to the jury his side of the controversy relating to the terms and conditions of the contract of employment.

Respondent, however, contends that the court properly excluded the testimony relative to the arrangement made with the man in charge of plaintiff's office by the defendant, for the reason that the defendant's answer does not plead the fact that he made such agreement with an agent of the plaintiff, but merely pleads in general terms that such agreement was made between plaintiff and defendant. This contention is of no merit. It was not necessary for the defendant to plead agency. Such evidence was admissible under the allegations of the answer, denying the contract set out in the complaint, and alleging a different contract between plaintiff and defendant. Weide v. Porter, 22 Minn. 429; Sherman v. New York C. R. Co. 22 Barb. 239; Cannon v. Bannon, 151 App. Div. 693, 136 N. Y. Supp. 139; Bibb v. Bancroft, 3 Cal. Unrep. 151, 22 Pac. 484; Poole v. Hintrager, 60 Iowa, 180, 14 N. W. 223; Acme Harvester Co. v. Curlee, 77 Neb. 666, 110 N. W. 660;

Child v. Gillis Constr. Co. 42 Utah, 120, 129 Pac. 356. The errors in the admission and rejection of evidence deprived the defendant of a fair trial. The judgment is reversed and a new trial ordered.

On Petition for Rehearing.

CHRISTIANSON, J. A reversal of the judgment in this case was ordered for errors in the exclusion and admission of testimony. In the former opinion we held that the admission of a certain letter (exhibit B) was prejudicial error. A petition for rehearing forcibly presents the proposition that no sufficient objection was made to this exhibit. The objection, as stated in the former opinion, was that the same was "irrelevant, incompetent, and immaterial, and no foundation for its introduction had been laid." The facts surrounding the admission of the evidence, as well as the reasons for the incompetency thereof, were fully set forth in the former opinion. In view, however, of the proposition raised by respondent's counsel in the petition for rehearing, we deem it desirable to more fully discuss this matter, so that no erroneous inference may be drawn from the opinion in this case.

Upon the trial of the action, the first witness called in behalf of the plaintiff was the defendant, Johnson, who was called for cross-examination under the statute, and it was upon such cross-examination that Johnson first testified to the agreement which he claimed he made with a man in charge of plaintiff's office as set forth in the former opinion; and notwithstanding the fact that this testimony was first elicited by plaintiff's own counsel upon such cross-examination of the defendant, the trial court refused to permit defendant's counsel to make any inquiry into the same subject when defendant was testifying in his own behalf, and afterwards, upon the motion of the plaintiff's attorney, the court struck out all the testimony relative thereto, including that elicited by plaintiff's own attorney upon the cross-examination. During such cross-examination the defendant Johnson specifically denied having received any letter whatever from the plaintiff, Huston. Johnson admitted, however, having received a telephone communication from the plaintiff, and also that a short time thereafter he went to Carrington to see the plaintiff. Subsequent to defendant's cross-examination, the plaintiff testified that after he had procured the purchasers,

and closed the deal with them, that he called the defendant on the telephone and notified him of the fact that the land had been sold. This telephone conversation, as already stated, was admitted by defendant during his cross-examination. Plaintiff thereupon proceeded to testify that a couple of days after the telephone conversation, he wrote a letter to the defendant, of which exhibit B was a copy. Plaintiff stated that the defendant came to Carrington the day after the letter was written, and that they had some conversation regarding the land transaction, but plaintiff admitted that during their conversation no reference was made to the letter, and that the defendant in no manner admitted its receipt. It appears, therefore, from the evidence that the defendant came to Carrington at the time designated in the telephone conversation. The question of notice of the sale was not involved, as prior to the time the letter was offered, plaintiff and defendant had both testified to the telephone conversation, during which, as conceded by both, plaintiff stated to the defendant that he had procured purchasers for defendant's lands. At the time the letter was offered, there was no testimony tending to show that its contents had ever been made known to the defendant, while there was the positive testimony of the defendant that he had never received it. The letter speaks for itself, and is clearly self-serving. The letter, under the testimony in this case, was merely a statement presenting a part of the transaction from the plaintiff's standpoint,—a written statement made in the absence of the defendant,—the contents of which had never been communicated to or acted upon by him. It was therefore clearly incompetent, not only as a self-serving declaration, but as hearsay.

It is doubtless true, as plaintiff's attorney asserts, that a general objection to evidence generally is insufficient, and that this doctrine has been repeatedly announced by this court. We have no desire to disapprove or depart from any of the decisions heretofore handed down by this court on this question, but they have no application in this case. Exhibit B was wholly inadmissible for any purpose, and hence the objection interposed was sufficient. "Where, however, evidence is wholly inadmissible on its face for any purpose a general objection to it is sufficient." 9 Enc. Ev. 63. "A general objection to evidence which is clearly hearsay is sufficient. It is incumbent on the party offering the evidence to show that it is admissible in spite of its hearsay character."

9 Enc. Ev. 80. "A general objection is sufficient where the ground therefor is so manifest that the trial court could not fail to understand it, as when the evidence offered is clearly irrelevant or incompetent or inadmissible for any purpose, or the objection is of such nature that it could not have been obviated." 38 Cyc. 1385. "The general rule that objections to evidence must be specific admits of this exception, that if they cannot in any manner be obviated, or if the evidence is clearly inadmissible for any purpose, a general objection will suffice." 8 Enc. Pl. & Pr. 228.

In discussing this matter the supreme court of Arizona, speaking through Chief Justice Dunne, in Rush v. French, 1 Ariz. 125, 25 Pac. 816, said: "As the object of requiring a specific objection is to enable the other party to obviate it if possible, if the objection is apparent, and it is clear that the defect cannot possibly be obviated, a specific objection would not help the adverse party, and in such case a general objection would be sufficient." In the case of Cooper v. Bower, 78 Kan. 164, 96 Pac. 794, the supreme court of Kansas held that a general objection to certain evidence on the ground that it was incompetent was a sufficient statement of the grounds of objection, where the testimony called for consisted of a self-serving declaration. In considering this question the court said: "But in the present instance the question called for the statement of one of the parties made out of court concerning the very matter in controversy, such a statement as would ordinarily amount to a self-serving declaration. It required no specification to advise the court why the opponent regarded such evidence as incompetent. It was rather for the proponent to suggest the special considerations that were thought to make it competent." At the time of its offer, exhibit B was clearly incompetent for any purpose, it was merely a self-serving statement on the part of the plaintiff,—the contents of which the evidence showed had never been communicated to the defendant. It was nothing more than a written statement made by the plaintiff out of court,—in the absence of the defendant,—self-serving in its nature, and purely hearsay as far as the defendant was concerned. If the plaintiff had written a complete statement of his side of the controversy, would it be contended that such statement would have been admissible over a general objection? The fact that exhibit B merely contained a partial presentation of plaintiff's case

made it none the less objectionable. It is self-evident that at the time it was offered and received in evidence, exhibit B was incompetent for any purpose. And it is likewise obvious that under the undisputed testimony in the case at that time, it could not, under any circumstances, be made competent as evidence in the case. As already stated it constituted merely a self-serving statement on the part of the plaintiff, which was hearsay so far as the defendant was concerned. It could not be made competent for any purpose, and a general objection was sufficient. Sparf v. United States, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168; Parker v. United States, 1 Ind. Terr. 592, 43 S. W. 858; Townshend v. Townshend, 84 Vt. 315, 79 Atl. 388; Roche v. Llewellyn Iron Works Co. 140 Cal. 563, 74 Pac. 147; Snowden v. Pleasant Valley Coal Co. 16 Utah, 366, 52 Pac. 599; M. Groh's Sons v. Groh, 177 N. Y. 8, 68 N. E. 992; Morehouse v. Morehouse, 140 Cal. 88, 73 Pac. 738; Denver v. Perkins, 50 Colo. 159, 114 Pac. 484; Hunt v. Allison, 77 Wash. 58, 137 Pac. 322; Strickland v. Strickland, 103 Ark. 183, 146 S. W. 501; Hydraulic-Press Brick Co. v. Green, 177 Mo. App. 308, 164 S. W. 250; Richardson v. Agnew, 46 Wash. 117, 89 Pac. 404, and Rosenberg v. Sheahan, 148 Wis. 92, 133 N. W. 645. See also Johnson v. Burks, 103 Mo. App. 221, 77 S. W. 133, and Chamberlayne, Evidence, § 2734.

We see no reason for receding from our former opinion herein. The petition for rehearing is denied, and the order heretofore entered, reversing the judgment of the trial court and remanding the case for a new trial, will stand.

THERESIA DOLWIG FISCHER v. JOHN DOLWIG and Elizabeth Willer, Susanna Kinz, Kathrina Duckhorn, and Magdalena Schiller.

(151 N. W. 431.)

Final decree of distribution — action to set aside — complaint in — demurrer — county court — jurisdiction.

1. A complaint in an action to set aside a final decree of distribution of the county court, and recover property distributed thereby is not demurrable

because it fails to set forth facts showing that the county court had jurisdiction of the probate proceedings.

Administration — petition for appointment — final decree of distribution — action to set aside — allegations of complaint — county court — jurisdictional facts — presumed that petition stated.

2. In such case, where the complaint alleges the appointment of an administrator and the rendition of the final decree, it will be presumed that the petition for the appointment of an administrator alleged the proper jurisdictional facts.

Final decree of distribution — county court — court of record — judgment of — ranks with judgment of other courts of record.

3. A final decree of distribution entered by a county court is of equal rank with a judgment entered in other courts of record in this state.

Court of equity — jurisdiction — may set aside final decree of distribution — fraud — procurement — discovery of — time of bringing action.

4. A court of equity has jurisdiction, in a proper cause, to set aside a final decree of distribution entered through the fraudulent procurement of the administrator, provided such action is commenced within three years after the discovery of the fraud.

Opinion filed February 17, 1915.

From an order of the District Court of Stark County, overruling a demurrer to the complaint, *Crawford,* J., defendant appeals.

Affirmed.

T. F. Murtha, for appellant.

The district court of Stark county has no jurisdiction over the subject of this action, and the demurrer should have been sustained. The complaint should allege the filing of a proper petition for administration in county court, and should contain allegations of all the facts necessary to show that the county court had jurisdiction to act. Dobler v. Strobel, 9 N. D. 104, 81 Am. St. Rep. 530, 81 N. W. 37.

If plaintiff has not been damaged by the decree, she is not entitled to recovery. The complaint contains no allegation of damages. Rev. Codes 1905, § 8089.

It does not appear that plaintiff was ever a resident of this state. The exemption laws are for the benefit of residents of this state only. Rev. Codes 1905, §§ 5048, 7128, 8089.

In the absence of any allegation or showing to the contrary, it will

be presumed that the probate court did its duty. Rev. Codes 1905, § 7898; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Church, Probate Law & Pr. pp. 297, 316.

Charles Simon and *Casey Burgeson,* for respondents.

The county courts of this state are courts of general jurisdiction. Jurisdictional facts need only be pleaded where the court of whose acts complaint is made is a court of limited and inferior jurisdiction. State Const. § 3; Rev. Codes 1905, § 7898.

The final decree of distribution of the county court disposes of all the property of the estate, closes the estate, and amounts to a final judgment. Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008; Olivas v. Olivas, 61 Cal. 382.

If the complaint was not clear to defendants, their remedy was by motion to make the same more definite. Weber v. Lewis, 19 N. D. 476, 34 L.R.A.(N.S.) 364, 126 N. W. 105.

CHRISTIANSON, J. The defendant, John Dolwig, has appealed from an order of the district court, overruling a demurrer to the complaint. The demurrer is based on two grounds: (1) That the court had no jurisdiction of the subject-matter of the action, and (2) that the complaint does not state facts sufficient to constitute a cause of action. The complaint sets forth that Jacob Dolwig died about December 15, 1910, and at that time was possessed of real and personal property, which is described (the real estate being located in Stark county), and that at the time of his death the plaintiff was his wife; that said Jacob Dolwig died intestate, and left surviving him, as his heirs, his wife (the plaintiff), and the defendants (who are his children by a former marriage); that on or about the 29th day of December, 1910, proceedings were commenced in the county court within and for the county of Stark and state of North Dakota for the probate of the estate of said Jacob Dolwig, and there was then and there a petition filed, asking, among other things, for the appointment of the defendant, John Dolwig, as administrator of the estate of said Jacob Dolwig, deceased; that the plaintiff is unable to understand the English language, and that through certain fraudulent representations she was induced to sign waivers of service of citation. And in general the complaint sets forth a large number of facts showing that undue advantage was taken of the plaintiff. The

complaint also alleges "that after the appointment of administrator in said estate, no notice of any kind or nature was ever served upon plaintiff, and the records show that a decree of distribution was made by W. A. Carter, the then judge of the county court on the 13th day of October, 1911, decreeing all of the property of said Jacob Dolwig, deceased, in the above defendants and giving nothing to this plaintiff." As already stated, the complaint sets forth a large number of facts which would justify a court of equity in assuming jurisdiction, and no attack is made upon the complaint, for the reason that the facts set forth are insufficient to confer equitable jurisdiction. The attack on the complaint is based upon entirely different grounds. Appellant first asserts that the district court has no jurisdiction, and his contentions on this proposition are set forth in his brief as follows: "In this case the complaint does not allege the existence of facts necessary to give the county court of Stark county jurisdiction over said estate, as provided by § 7891 of the 1905 Revised Codes. Nor does the complaint allege the filing of a petition for administration in said county court of Stark county setting forth the necessary jurisdictional facts as required by § 7895 of the 1905 Revised Codes. It is not alleged in the complaint that the county court had jurisdiction over the estate of the deceased." Johnson v. Rutherford, 28 N. D. 87, 147 N. W. 390–394.

Under the provisions of § 111 of the Constitution, the county court is vested with *exclusive original jurisdiction* in probate and testamentary matters.

Section 8533 of the Compiled Laws provides: "The proceedings of a county court in the exercise of its jurisdiction are construed in the same manner and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders, and decrees there is accorded like force, effect, and legal presumptions as to the records, orders, judgments, and decrees of courts of general jurisdiction." Under the provisions of this section as construed by this court, as well as by the construction placed thereon by the supreme court of South Dakota, a final decree of distribution entered by a county court of this state is of equal rank with judgments entered in other courts of record, and the same presumptions exist in its favor. Joy v. Elton, 9 N. D. 428, 83 N. W. 875; Blackman v. Mulhall, 19 S. D. 534, 104 N. W.

250; Howell v. Dinneen, 16 S. D. 618, 94 N. W. 698; Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008.

The complaint in the case at bar specifically alleges the death of Jacob Dolwig; that he left real and personal property in Stark county; and also enumerated the heirs of the deceased, and further states that the probate proceedings were commenced on or about December 29, 1910, to probate the estate of said Jacob Dolwig; that the defendant and appellant John Dolwig was appointed such administrator, and that thereafter, on October 13, 1911, a decree of distribution in the estate was made in the county court of Stark county. It is self-evident that this complaint is not vulnerable for failure to state the facts which would give the county court of Stark county jurisdiction over the estate. The final decree is entitled to the same faith and credit as the judgment of the district court, and it will be presumed that the petition for the administration of the estate set forth the proper jurisdictional facts. It was not necessary to allege the facts showing jurisdiction in the county court, but it was sufficient to plead in general terms that the final decree of distribution had been made. Compiled Laws, § 7460, 31 Cyc. 104.

In support of the second ground of the demurrer, the appellant contends that the complaint fails to state a cause of action, for the reason that the complaint does not show that the final decree of distribution has been entered and the estate closed. And appellant asserts that under the facts stated in the complaint there is nothing to indicate that the plaintiff would not be able to obtain the relief sought by an application to the county court. In support of this, appellant refers to § 8534 of the Compiled Laws of 1913, and contends that subdivision 7 of this section gives the county court jurisdiction to open, vacate, or modify the decree at any time. This section must, of course, be read in conjunction with the other sections of the probate code, applicable to the same matter, and, when so re ad, in no manner sustains the construction sought to be placed thereon by the appellant. This section merely specifies the authority and enumerates the powers of the probate court. Section 8595 of the Compiled Laws refers to the same matters mentioned in subdivision 7 of § 8534, and prescribes the causes for which rehearings may be granted. Section 8596 of the Compiled Laws limits the time in which such rehearing may be granted, and it

will be observed that the longest period provided is one year from the date of the decree or order. Section 8601 limits the time in which an appeal may be taken to thirty days from the date of the order or decree appealed from. The complaint in the case at bar states that the final decree of distribution was made on October 13, 1911, and the present action was not commenced until in September, 1913, or about two years after the date of the final decree.

"A decree of distribution is an instrument by virtue of which heirs receive the property of the deceased. It is the final determination of the parties to a proceeding." Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008. It is therefore obvious that the complaint sufficiently shows on its face that plaintiff could obtain no relief in the county court.

Section 8809 of the Compiled Laws expressly authorizes an action to be brought in the district court to recover real estate or to set aside a decree of the county court in proper cases, and limits the time in which such actions must be commenced to three years from the date of discovery of the fraud or other ground upon which the action is based.

The demurrer was properly overruled. The order appealed from is affirmed.

NORTH STAR LUMBER COMPANY, a Corporation, v. A. H. ROSENQUIST.

(151 N. W. 289.)

Defendant signed as surety the promissory note to plaintiff of one Jacobson, maker. To this action, brought against the surety alone, the defense was made that false statements, representations, and concealments as to material facts were made by plaintiff's agent to defendant and because of which he became surety. From a motion for new trial after judgment entered on verdict in defendant's favor, plaintiff appeals, assigning error on instructions alone. *Held:*

Note.—The question of the effect on the liability of a surety or guarantor of the fraud of the pledgee is the subject of a note in 21 L.R.A. 409, and the authorities there reviewed are in harmony with the holding in this case.

Promissory notes — surety on — action against surety only — defense — false statements — misrepresentations — concealment — motion for new trial — instructions — pleadings — issues — theory.

1. That the court did not instruct upon a theory of defense not raised by the pleadings.

Instructions on liability — sufficient in absence of request for further surety — defenses — waiver.

2. That sufficient instructions were given upon the liability of defendant as a surety, in the absence of a request for further instructions on matter not necessarily within the issues presented by the pleadings, but which should have been given had the same been requested, concerning waiver by defendant of said defense by a subsequent promise (if made) to pay the note in any event.

Assignment of error — failure to instruct on waiver — exception.

3. That such assignment of error based on failure to instruct on waiver, even if error, would not warrant a reversal, because the assignment is not based upon any exception taken to the instructions on that ground and must be ignored on appeal.

Instructions— liability of surety — obligee — fraud — concealment — deception — error if any, in favor of appellant.

4. The court could have instructed more strongly in defendant's favor and been within the law governing the liability of a surety to his obligee, where such surety has been induced to become such because of the obligee's fraud, either by fraudulent concealment of material facts or misrepresentation of purported facts. Any error in instructions on this question was error in favor of appellant and not against him.

Opinion filed February 18, 1915.

From a judgment of the District Court of Dickey County, *Allen,* J., plaintiff appeals.

Affirmed.

A. P. Guy and *Curtis & Curtis,* for appellant.

A contract of suretyship is one whereby one person engages to be answerable for the debt, default, or miscarriage of another. It is an accessory contract and presupposes the existence of a principal obligation. The surety is a debtor from the beginning, and must see that the debt is paid. 27 Am. & Eng. Enc. Law, 2d ed. 431.

Instructions to the jury must be based upon and be applicable to the pleadings and evidence. 11 Enc. Pl. & Pr. 158, note 1–5 inclusive, 159 and note 1–5 inclusive.

It is error to submit to the jury an issue which is not covered by the pleadings and evidence. 11 Enc. Pl. & Pr. 159, note 6.

Instructions should not be given on any point or matter not within the issues, and not unless there is evidence on which to base them. And where the evidence overthrows the pleading of the party offering it, it is *not* evidence upon which to instruct. 2 Thomp. Trials, § 2309, and note; 11 Enc. Pl. & Pr. 164, and note 4, 165, and note 1.

The charge should not ignore or exclude any material issue. 11 Enc. Pl. & Pr. 190, and note 5, 191 and note 5; Blashfield, Instructions to Juries, §§ 86–88, 92, 97, 100, 103, 104; 2 Thomp. Trials, §§ 2310, 2315, notes 37, 42, 2328; Templin v. Rothweiler, 56 Iowa, 259, 9 N. W. 207; Pigott v. Lilly, 55 Mich. 150, 20 N. W. 879; Bank of Monroe v. Anderson Bros. Min. & R. Co. 65 Iowa, 692, 22 N. W. 929; Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104; State v. Myer, 69 Iowa, 148, 28 N. W. 484; Locke v. Priestly Exp. Wagon & Sleigh Co. 71 Mich. 263, 39 N. W. 54.

The giving of an instruction not applicable to the case and prejudicial to either party is ground for reversal, even though the law is correctly stated. The reason is that it injects into the case a point or matter not in issue, and is confusing and misleading to the jury. Banning v. Chicago, R. I. & P. R. Co. 89 Iowa, 74, 56 N. W. 277, 11 Am. Neg. Cas. 521; DeFoe v. St. Paul City R. Co. 65 Minn. 319, 68 N. W. 35; Eggett v. Allen, 106 Wis. 633, 82 N. W. 556; Conrad v. Kelley, 106 Wis. 252, 82 N. W. 141; State v. Swallum, 111 Iowa, 37, 82 N. W. 439; State v. Kissock, 111 Iowa, 690, 83 N. W. 724; Anderson v. Roberts, 112 Iowa, 749, 84 N. W. 928; Bockoven v. Lincoln Twp. 13 S. D. 317, 83 N. W. 335; Strong v. State, 61 Neb. 35, 84 N. W. 410; Thompson v. State, 61 Neb. 210, 87 Am. St. Rep. 453, 85 N. W. 62; Slingerland v. Keyser, 127 Mich. 7, 86 N. W. 390; 11 Enc. Pl. & Pr. 159, and notes 1–5 inclusive, 164, 190, 191; Blashfield, Instructions to Juries, §§ 84, 86, 87, 92, 100, 103, 104; Bank of Monroe v. Anderson Bros. Min. & R. Co. 65 Iowa, 692, 22 N. W. 929; Miller v. Miller, 97 Mich. 151, 56 N. W. 348.

Where parties themselves ignore the pleadings, and litigate and offer evidence on an issue not in the pleadings, the instructions should be based entirely on the *evidence,* as to such matter. Fox v. Utter, 6 Wash. 299, 33 Pac. 354.

The charge of the court should have been upon the question of *fraud as to a surety,* and *not* upon fraud *generally.* 14 Am. & Eng. Enc. Law, 2d ed. 21; 27 Am. & Eng. Enc. Law, 2d ed. 431; 3 Thomp. Trials, §§ 3796, 3807; Ravicz v. Nickells, 9 N. D. 536, 84 N. W. 353.

Where the instructions ignore a material fact, and give an erroneous theory to the jury, it will be held error. Gollobitsch v. Rainbow, 84 Iowa, 567, 51 N. W. 48; Thompson v. Anderson, 86 Iowa, 703, 53 N. W. 418; Eggett v. Allen, 106 Wis. 633, 82 N. W. 556; State v. Swallum, 111 Iowa, 37, 82 N. W. 439; Bockoven v. Lincoln Twp. 13 S. D. 317, 83 N. W. 335; Slingerland v. Keyser, 127 Mich. 7, 86 N. W. 390.

If the extension to pay is attained on a note whose validity is in dispute, the defect is waived and the request and extension of time validates it. 3 Thomp. Trials, §§ 3176A, 3189; Rindskopf Bros. & Co. v. Doman, 28 Ohio St. 516.

An expression of opinion or belief, if it is nothing more and so intended and understood, is not a representation of a fact, and, though false, does not amount to fraud, and a person has no right to rely thereon. 14 Am. & Eng. Enc. Law, 2d ed. 34, 36, and notes 4, 5, 39, and note 4, 206, and notes 4, 5, 109, and note 5, 115, and note 8, 117, and notes, 4, 5, 127, 129, notes 2–6; 3 Thomp. Trials, §§ 3781, 3796, 3807; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188; First State Bank v. Borchers, 83 Neb. 530, 120 N. W. 142.

Where a party is so situated that he might, by using ordinary diligence, have become acquainted with his legal rights, and he neglects so to do, his ignorance is voluntary, and he cannot defeat recovery. Storrs v. Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316; Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104; State v. Meyer, 69 Iowa, 148, 28 N. W. 484; Wildey v. Crane, 69 Mich. 17, 36 N. W. 734; Drake v. Chicago, R. I. & P. R. Co. 70 Iowa, 59, 29 N. W. 804; Locke v. Priestly Exp. Wagon & Sleigh Co. 71 Mich. 263, 39 N. W. 54; State v. Kissock, 111 Iowa, 690, 83 N. W. 724; Anderson v. Roberts, 112 Iowa, 749, 84 N. W. 928.

The record clearly discloses that the testimony of Martin Jacobson could not be secured at the former trial; that it was new, material evidence, and the court should have granted a new trial. Grant v. Grant, 6 S. D. 147, 60 N. W. 743; Braithwaite v. Aiken, 2 N. D. 57, 49

N. W. 419; Kellogg v. Finn, 22 S. D. 578, 133 Am. St. Rep. 945, 119 N. W. 545, 18 Ann. Cas. 363; Waite v. Fish, 17 S. D. 215, 95 N. W. 928; State v. Laper, 26 S. D. 151, 128 N. W. 476.

J. A. McKee, for respondent.

"Fraud is a false representation of fact made with a knowledge of its falsity, or in a reckless disregard to whether it be true or false, with the intention that it should be acted upon by the complaining party, and actually inducing him to act." Knowlton's Anson, Contr. 2d ed. p. 199; Stearns, Suretyship, § 15 (2); 2 Dan. Neg. Inst. § 1309.

To knowingly permit another to act as though the action was confidential, and not state *material facts,* is fraudulent. Bennett v. McMillin, 179 Pa. 146, 57 Am. St. Rep. 591, 36 Atl. 188; Howe v. Martin, 23 Okla. 561, 138 Am. St. Rep. 840, 102 Pac. 128; Shackett v. Bickford, 124 Am. St. Rep. 933, and notes, 74 N. H. 57, 7 L.R.A.(N.S.) 646, 65 Atl. 252; Sockman v. Keim, 19 N. D. 317, 124 N. W. 64; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341; Fassnacht v. Emsing Gagen Co. 63 Am. St. Rep. 322, note; Powers Dry-Goods Co. v. Harlin, 68 Minn. 193, 64 Am. St. Rep. 460, 71 N. W. 16; Bank of Monroe v. Anderson Bros. Min. & R. Co. 65 Iowa, 692, 22 N. W. 299.

A purchaser has the right to rely on the statements of the seller, although he has other means of ascertaining the truth of the statement. Lewis v. Jewell, 151 Mass. 345, 21 Am. St. Rep. 454, 24 N. E. 52; Fairchild v. McMahon, 139 N. Y. 290, 36 Am. St. Rep. 701, 34 N. E. 779; Andrews v. Jackson, 168 Mass. 266, 37 L.R.A. 402, 60 Am. St. Rep. 390, 47 N. E. 412; Hunt v. Barker, 84 Am. St. Rep. 812, and notes, 22 R. I. 18, 46 Atl. 46; Backer v. Pyne, 130 Ind. 288, 30 Am. St. Rep. 231, 30 N. E. 21; Bullitt v. Farrar, 42 Minn. 8, 6 L.R.A. 149, 18 Am. St. Rep. 485, 43 N. W. 566; Kountze v. Kennedy, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; Knowlton's Anson, Contr. supra.

When it is sought to review the action of the trial court in giving or refusing instructions, the record must show that exceptions thereto were reserved in proper manner. Charlesworth v. Williams, 16 Ill. 338; Hesler v. Degant, 3 Ind. 501; 2 Cyc. 1049, and cases cited in notes; Paulsen v. Modern Woodmen, 21 N. D. 235, 130 N. W. 231;

Colby v. McDermont, 6 N. D. 495, 71 N. W. 772; Pease v. Magill, 17 N. D. 166, 115 N. W. 260; Grant v. Powers Dry Goods Co. 23 S. D. 195, 121 N. W. 95; Strohn v. Detroit & M. R. Co. 99 Am. Dec. 114, and notes, 23 Wis. 126.

Specific instructions not requested are waived. Thomp. Trials, § 2342; Tetherow v. St. Joseph & D. M. R. Co. 98 Mo. 74, 14 Am. St. Rep. 617, 11 S. W. 310; State v. Haynes, 7 N. D. 352, 75 N. W. 267; Youngblood v. South Carolina & G. R. Co. 60 S. C. 9, 85 Am. St. Rep. 824, 38 S. E. 232; Sudduth v. Sumeral, 61 S. C. 276, 85 Am. St. Rep. 883, 39 S. E. 534; McDonald v. International & G. N. R. Co. 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939; 38 Cyc. 1603, 1614 (ii); Frye v. Ferguson, 6 S. D. 392, 61 N. W. 161; Nokken v. Avery Mfg. Co. 11 N. D. 399, 92 N. W. 487; Kennedy v. Roberts, 105 Iowa, 521, 75 N. W. 363.

The newly discovered evidence is merely cumulative or impeaching, and contains no new facts, not brought out on the trial. Hayne, New Trials, §§ 87, 90; Josephson v. Sigfusson, 13 N. D. 312, 100 N. W. 703; Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032; Arnold v. Skaggs, 35 Cal. 686; Clifford v. Denver, S. P. & P. R. Co. 12 Colo. 125, 20 Pac. 333; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419.

Goss, J. The complaint seeks a recovery on a promissory note signed by defendant and one Jacobson as makers, the action being against defendant, Rosenquist, alone. The answer alleged that defendant signed the note as surety for one Jacobson, and that plaintiff procured his signature thereto under its agreement to assign to defendant a note it held against Jacobson, secured by his chattel mortgage upon eight horses and some crop; in other words, that the plaintiff assigned its chattel security to defendant in consideration of defendant's becoming surety on Jacobson's note to it. Defendant charges that it was represented to him as an inducement for his becoming such surety, that the security on the chattel mortgage was sufficient to protect him, as the horses were of the values stated in said mortgage, and that said mortgage was a first mortgage on the crop and most of said horses; whereas in truth and fact, as plaintiff and its agent then handling the transaction well knew, all of said property was covered by a first

and prior mortgage far in excess of the value of all the property, and the note was virtually wholly unsecured; that said facts plaintiff concealed from and were unknown to defendant, and were discovered by him subsequent to the time he signed and delivered the note. The testimony was sufficient to carry such questions to the jury for their determination. It is admitted that one Hauge, plaintiff's agent, together with Jacobson, its debtor, came to Rosenquist's house, and on certain representations made by Hauge induced defendant to sign the note in suit as a surety, and with the understanding that he would receive a prior note of Jacobson to the company, which note purported to be secured by some eight head of horses and crop mortgage. It is undisputed that under the arrangement then made the company secured defendant's signature as surety, and shortly afterwards delivered the old note and chattel mortgage of Jacobson, running to it as payee, to the defendant. Defendant owed plaintiff nothing, and the debt evidenced by the note in suit was Jacobson's. When first approached in the matter, and for sometime afterwards, defendant refused to sign the note for Jacobson, or at all; and it was only after representations were made to him by Hauge concerning the old note and its purported chattel security that he was finally induced to sign this new note given by Jacobson and due in one year. Some little time afterwards defendant discovered that three of the horses described in the mortgage were dead, and soon the first mortgagees foreclosed on the balance of the property, leaving unsecured the old note he held. It seems that the only reason defendant had for signing the note was to assist Jacobson, with whom he previously had had some business dealings. Jacobson has since absolved himself of his debts by bankruptcy proceedings; hence the suit against defendant alone. The evidence is not only sufficient to establish fraud, but it is convincing that a fraud was actually perpetrated upon the defendant either innocently or intentionally. The jury so found in their general verdict for the defendant. Judgment was entered accordingly, from which, after motion for new trial and judgment notwithstanding the verdict, plaintiff appeals.

To quote from the appellant's brief, "all the errors assigned in this brief relate to exceptions taken to the judge's charge to the jury and to the failure of the court to instruct the jury upon the theory of the case raised by the pleadings, and supported by the evidence introduced

in the case. . . . The record is uncontradicted that the defendant did sign the note as surety for Jacobson." The only exception taken to the instructions is the following: "Plaintiff excepts to all of the instructions to the jury on the ground and for the reason that the defendant's defense is fraud in securing his signature as a surety, and that in the general charge of the court to the jury the court failed to instruct in regard to a surety, basing its charge on the question of fraud, pure and simple, in charging on the theory of the case." On such exceptions plaintiff assigns error: (1) That the court erred in instructing the jury on a theory of defense not raised by the pleadings; and (2) error in not instructing the jury as to the liability of a surety. An inspection of the charge shows the first assignment to be without merit sufficient to warrant extended discussion of it, as the pleadings presented the question of fraud in procuring the signature, as is in fact stated in plaintiff's own exception to the instruction. Under this exception it is also urged that the allegations of fraud are not supported by evidence. We have already expressed ourselves on this feature of the proof contrary to appellant's contention.

The other exception taken, that the court failed to instruct as to the liability of the surety, is indefinite when the charge is considered, and appellant's brief does not make plain his contention. But it is not well taken in any event. The court charged the jury that "if you find that the representative of the plaintiff company represented to Rosenquist certain matters which he knew to be false, and that he made those representations in such a way and under such circumstances as to make a reasonable man to believe that what he stated was true, and the representation so made by him was acted upon, and the person to whom the representation was made, believing it to be true, acts upon the faith of it and suffers damage thereby,—if you find these matters to be true with reference to the transaction between Hauge representing the plaintiff and Rosenquist the defendant, that would vitiate and nullify this note; if you find that to be true by a preponderance of the evidence your verdict under those circumstances would be in favor of the defendant." No request for further instructions was made, and the decision of the case was thus made to turn upon the issues outlined in the complaint; *viz.*, whether defendant signed this note as surety because of the false representations in question. Preceding this instruction the court had,

with reasonable accuracy, defined the claims of the parties, and instructed that the burden was upon the defendant, as the party alleging fraud as a defense, to establish it and the facts constituting the fraud, and unless a preponderance of the evidence established the defense to be true the plaintiff must recover. The instruction fully covered the issues presented by the pleadings. After verdict it seems additional attorneys were engaged to perfect and present this appeal, and then for the first time and on appeal it is urged that there was some testimony in the record concerning whether, even though defendant's signature was procured by fraud, he had waived the fraud and procured an extension of time in which to pay the note and subsequently had promised to pay the note in any event. It is true that Hauge so testified, and that the court did not instruct on waiver. Its omission to cover waiver was probably because there was nothing of the kind mentioned in the pleadings, nor any request made for instructions thereon. It is apparent that the whole question of waiver was an afterthought, because the charge itself is not excepted to because of such omission, and the assignment taken in the belief is thus without any basis upon which to rest. It is elementary that it is not compulsory upon a trial court to present every issue that may be raised by the testimony, without request directing the attention of the court thereto, so long as the main issues, the principal contentions under the pleadings, are intelligibly defined and submitted. Assuming that the point sought to be argued in the brief is before the court, it is untenable.

The court could have instructed much more strongly in defendant's favor, and remained within the law, as to the liability of a surety. 2 Dan. Neg. Inst. § 1309; Bennett v. McMillin, 179 Pa. 146, 57 Am. St. Rep. 591, 36 Atl. 188; Fassnacht v. Emsing Gagen Co. 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 48, 63 Am. St. Rep. 322, and extensive note citing scores of cases; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032. Under these authorities it was the duty of the plaintiff to abstain from fraudulent representation in procuring defendant's signature as a surety, and fraud with reference thereto could be predicated by defendant upon any fraudulent concealment of material facts known to plaintiff, as well as any false statement by it of material facts to induce defendant to become surety. It was the duty of plaintiff to disclose fully every material fact touching the security in the mortgage as-

signed as the inducement for the signature of defendant to the note. The concealment of something plaintiff ought to have disclosed, as, for instance, the fact that three of the horses covered by the mortgage were dead, or a false representation that the first mortgage was upon but a portion of the property covered by the second, was sufficient to vitiate the note as between these original parties thereto. The judgment is affirmed.

JOHN BRUEGGER, as Trustee of the Bruegger Mercantile Company, v. JOSEPH CARTIER.

(151 N. W. 34.)

Plaintiff contracted to give good title to a tract of land which he had previously purchased from the Great Northern Railway Company under a deed containing the following reservation: "Reserving, however, to the St. Paul, Minneapolis, & Manitoba Railway Company, its successors or assigns, for right of way or other railroad purposes, a strip of land 150 feet wide, from the above granted premises where the lines of its road or any of its branches, or the line of any other railroad or the branches thereof, now owned or operated, or which may hereafter be owned or operated, by it, is now located and constructed, or may hereafter be located and constructed." When plaintiff tendered a deed to the premises objection was made to his title upon the grounds that it was unmarketable by reason of the foregoing reservation. The balance of the purchase price was, however, deposited in a reputable bank payable to the order of the plaintiff when he should be able to give a proper title to the tract.

Real estate — title — consideration — deed — tender.

1. Defendant was not obliged to accept the title offered, even though it might prove ultimately to be good, but he was justified in demanding a title not only good in fact, but one that was good beyond a reasonable doubt. Such reasonable doubt is one that would cause hesitation in the judicial mind before deciding it.

Note.—An elaborate note on the question what constitutes a marketable title is found in 38 L.R.A.(N.S.) 3, and the few cases which have considered the effect of an easement to render the title unmarketable are collated on p. 33. These cases generally hold that the existence of an easement renders the title unmarketable, although the contrary is held in one case as to a highway easement across the land to be conveyed.

Contract for deed — representations — provisions — construction — risk of title — assuming.

2. A clause in the contract whereby defendant agreed "that he has entered upon the above written contract relying on his own knowledge of such premises, and not upon any representations made by the party of the first part, or by any other persons, touching the situation, character, or quality thereof," does not mean that the defendant assumed the risks of title.

Equity — action in — forfeiture — nonpayment of purchase price — deposit — counterclaim — relief under.

3. Plaintiff brings this action in equity to enforce a forfeiture of the contract for nonpayment of the balance of the purchase price, which was deposited in the bank as aforesaid. Under the evidence, it is *held*, that such deposit was sufficient, that no grounds of forfeiture existed, and that defendant is entitled to the relief demanded in his counterclaim.

Opinion filed February 1, 1915. Rehearing denied February 19, 1915.

Appeal from the District Court of Williams County, *Leighton*, Special Judge.

Reversed.

Geo. A. Gilmore and *F. B. Lambert*, for appellant.

An agreement to sell real estate binds the seller to execute conveyances in form sufficient to pass title. Rev. Codes 1905, § 5401.

The following land burdens or servitudes upon land may be attached to other lands as incidents or appurtenances, and are then called easements: The right of way. Rev. Codes 1905, § 4975.

The following land burdens or servitudes upon land may be granted and held, though not attached to the land: The right of way. Rev. Codes 1905, § 4788.

A transfer of real property conveys all easements attached thereto. Rev. Codes 1905, § 4975.

A reservation in a deed to real property of a right of way, is binding upon the grantee. Such a reservation is good, and the part of the land necessary to the exercise of such reservation may be taken and used at any time. No title to same passed to grantee, and therefore a deed containing such a reservation does not convey a good or marketable title. Dunstan v. Northern P. R. Co. 2 N. D. 46, 49 N. W. 426; Walcott Twp. v. Skauge, 6 N. D. 382, 71 N. W. 544; Wells v. Pennington County, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305.

Such reservations in deeds are not void for uncertainty; they are not mere exceptions of the fee, and they may be enforced for the purpose or purposes designated, at any future time. Bendikson v. Great Northern R. Co. 80 Minn. 332, 83 N. W. 194; Carlson v. Duluth Short Line R. Co. 38 Minn. 305, 37 N. W. 341; Biles v. Tacoma, O. & G. H. R. Co. 5 Wash. 509, 32 Pac. 211.

An agreement for the sale of property cannot be specifically enforced in favor of the seller, who cannot give to the buyer a title free from reasonable doubt. Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623; Brandenburg v. Phillips, 18 N. D. 200, 119 N. W. 542; Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; Spencer v. Sandusky, 46 W. Va. 582, 33 S. E. 221; McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527; Vreeland v. Blauvelt, 23 N. J. Eq. 485; Easton v. Lockhart, 10 N. D. 186, 86 N. W. 697; Godfrey v. Rosenthal, 17 S. D. 452, 97 N. W. 365; Rev. Codes 1905, §§ 4787, 4795, 4797, 6617.

The plaintiff himself recognized this defect in his title, and later on obtained a new deed from the railroad company. The title, as it formerly was, being defective, it would not only be unjust but unlawful to permit plaintiff to cancel the contract. 39 Cyc. 1406 (iv) and note 6, 1441, § A, and page 1442 b; Crim v. Umbsen, 155 Cal. 697, 132 Am. St. Rep. 127, 103 Pac. 178; Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280; Tague v. McColm, 145 Iowa, 179, 123 N. W. 960; 36 Cyc. 632, and notes; Davis v. Lottich, 46 N. Y. 396; Delevan v. Duncan, 49 N. Y. 488.

No particular form is required to create an implied covenant. This is inferred from the words used by the parties where the language is plain that it was their intention to bind themselves as to all the terms of the contract. The law imputes a covenant in such case. Lovering v. Lovering, 13 N. H. 513; Frey v. Johnson, 22 How. Pr. 316; Johnson v. Hollensworth, 48 Mich. 140, 11 N. W. 843; Clark v. Devoe, 124 N. Y. 120, 21 Am. St. Rep. 652, 26 N. E. 275; Fowler v. Kent, 71 N. H. 388, 52 Atl. 554.

A purchaser under a general agreement to convey is entitled to the conveyance of a perfect title,—to a deed properly framed to convey it, and containing the usual covenants. 36 Cyc. 632; Shreck v. Pierce, 3 Iowa, 350; McCroskey v. Ladd, 3 Cal. (Unrep.) 433, 28

Pac. 216; Brown v. Widen, — Iowa, —, 103 N. W. 158; Herman v. Somers, 158 Pa. Rep. 424, 38 Am. St. Rep. 851, 27 Atl. 1050, also former citations; Rickert v. Snyder, 9 Wend. 421; Chapman v. Holmes, 10 N. J. L. 20; Real v. Hollister, 20 Neb. 112, 29 N. W. 189; Story v. Conger, 36 N. Y. 673, 93 Am. Dec. 546; Gibert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785; 11 Cyc. 1064, note 2d col.; Sanford v. Wheelan, 12 Or. 301, 7 Pac. 324; Swayne v. Lyon, 67 Pa. 436; Dobbs v. Norcross, 24 N. J. Eq. 327; Moore v. Williams, 115 N. Y. 586, 5 L.R.A. 654, 12 Am. St. Rep. 844, 22 N. E. 233; Black's Law Dict. 273; Latimer v. Capay Valley Land Co. 137 Cal. 286, 70 Pac. 82.

It is not a sufficient compliance with the contract of the vendor to convey an estate, or that he is ready and willing to convey, if he has not the title. He must show at the time all this, and that he is able to convey and deliver a perfect title, as required by his general contract, and a purchaser will not be compelled to accept a title which is in the least degree doubtful. Cunningham v. Blake, 121 Mass. 333; Jeffries v. Jeffries, 117 Mass. 184; Powell v. Conant, 33 Mich. 396; Cavenaugh v. McLaughlin, 38 Minn. 83, 35 N. W. 576; McCroskey v. Ladd, 3 Cal. (Unrep.) 433, 28 Pac. 216; Brown v. Widen, — Iowa, —, 103 N. W. 158; Richards v. Knight, 64 N. J. Eq. 196, 53 Atl. 452; Daniell v. Shaw, 166 Mass. 582, 44 N. E. 991; Latimer v. Capay Valley Land Co. 137 Cal. 286, 70 Pac. 82; 36 Cyc. 632; 44 Century Dig. cols. 1613–1625.

Nor where the title is encumbered with a condition, even though it is doubtful whether or not such condition is valid. 1 Warvelle, Vend. & P. pp. 62, 363, 377; Black Hills Nat. Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071.

An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute, and notice is given to the creditor. Rev. Codes 1905, § 5259. The defendant fully complied with this law, although in this case it was not necessary for him to do so. He was simply required to offer full performance by his pleading. McWhirter v. Crawford, 104 Iowa, 550, 72 N. W. 505, 73 N. W. 1021; Gill v. Newell, 13 Minn. 462, Gil. 430; Brown v. Eaton, 21 Minn. 409; Gray v. Dougherty, 25 Cal.

266; Bensel v. Gray, 80 N. Y. 517; Kerr v. Purdy, 50 Barb. 24; McLeod v. Hendry, 126 Ga. 167, 54 S. E. 949; Walsh v. Colvin, 53 Wash. 309, 101 Pac. 1085; Miller v. Smith, 140 Mich. 524, 103 N. W. 872.

Geo. H. Moellring and *D. C. Greenleaf,* for respondent.

According to the terms of the agreement between these parties, plaintiff as trustee did not assume to become responsible as to the condition of the title. 9 Cyc. 587; 39 Cyc. 1295, 1296, and cases cited.

There has been no tender or offer of performance on the part of defendant. The pretended tender was only a conditional one. Defendant was in default, and could not insist upon specific performance. Spier v. Schappel, 86 Neb. 335, 125 N. W. 609; Watson v. Chandler, 133 Ky. 757, 119 S. W. 186; Easton v. Lockhart, 10 N. D. 181, 86 N. W. 697.

The purported reservation contained in the deed by the railway company to plaintiff is void for indefiniteness and uncertainty. There is no location made. Lange v. Waters, 156 Cal. 142, 103 Pac. 889, 19 Ann. Cas. 1207, and cases noted.

In any event, defendant was in default under his contract with plaintiff, and plaintiff had declared a forfeiture, and had terminated the contract by due declaration, as the law then required. Foster v. Ley, 32 Neb. 404, 15 L.R.A. 737, 49 N. W. 450; Glock v. Howard & W. Colony Co. 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207.

Time being of the essence of the contract, cancelation was warranted upon default in payment, defendant having refused to pay or to accept deed. 36 Cyc. 712 and cases cited; Kulberg v. Georgia, 10 N. D. 461, 88 N. W. 87; Chambers v. Roseland, 21 S. D. 298, 112 N. W. 148.

BURKE, J. This litigation involves a tract of land situated within the limits of the city of Williston. The first instrument with which we are concerned is a deed from the St. Paul, Minneapolis, & Manitoba Railway Company (now known as the Great Northern) to the plaintiff, which deed contained the following clause: "Reserving, however, to the St. Paul, Minneapolis, & Manitoba Railway Company, its

successors or assigns, for right of way or other railroad purposes, a strip of land 150 feet wide, from the above granted premises where the lines of its road or any of its branches, or the line of any other railroad or the branches thereof, now owned or operated, or which may hereafter be owned or operated, by it, is now located and constructed, or may hereafter be located and constructed." This deed is dated July 20, A. D. 1898. After some preliminary negotiations plaintiff made written agreement with the defendant, wherein he agreed to sell said tract to the defendant in consideration of the sum of $200, of which amount $140 was paid in cash and $60 was to be paid on the 24th of September, 1899, with interest. Said contract contained the provision that "in case the second party should fail to make the payments aforesaid, or any of them, eventually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of its agreements and stipulations aforesaid, strictly and literally, without any failure or default, the time of payment being of the essence of this contract, then the party of the first part shall have the right to declare this contract null and void. . . ." This contract is dated September 24, 1898. It appears without material controversy that shortly before the $60 became due, defendant offered to pay the plaintiff said sum if he would furnish him a good title to the premises, but objected to the reservation for right of way hereinbefore set forth, and to it alone, that Bruegger offered him a sufficient deed, but refused to take any steps towards further fortifying the title which he had received from said railway company. That thereupon defendant placed the $60, together with the full amount of interest due thereon, making a total of $64.80, in a reputable bank at Williston, for which he demanded and obtained the following receipt:

Williston, N. D., August 30, 1899.

Received of Joseph Cartier, sixty-four and eighty one-hundredths dollars, to be delivered to Bruegger Mercantile Company upon receipt of a proper deed to his land.

(Signed) Williams County State Bank,
By W. H. Denny, Cashier.

Plaintiff was notified of this deposit, and further notified that one

Stewart, an attorney at Williston, had been chosen by defendant to pass upon said title, and that no deed would be accepted until the title had been approved by said attorney. As already stated, Bruegger refused to reinforce his title in any manner, and later served notice of cancelation of said contract. This action is brought by Bruegger to enforce said cancelation. The trial court found the facts substantially as above outlined, and therefrom made as conclusions of law that the title proffered by Bruegger was good, because the reservation of the right of way, being in the nature of a "float," was indefinite and void. The trial court further found that at the time of the making of said agreement, the defendant knew of the alleged right of easement, and had expressly stipulated in said agreement that he relied upon his own knowledge of said premises. Upon those two propositions, the trial court held with the plaintiff, and ordered a cancelation of contract, and quieted title in plaintiff upon payment of the purchase price with interest. Defendant appeals, demanding a trial *de novo* in this court.

(1) The first and principal contention of the respondent is that the deed and title offered by Bruegger was in all things sufficient, because the reservation of right of way was void, and we are cited to the case of Lange v. Waters, 156 Cal. 142, 103 Pac. 889, 19 Ann. Cas. 1207, and particularly to the note which follows the last citation. We think the position of the trial court in this matter is erroneous for the following reason. The defendant was entitled not only to a good title, but to a title which was good beyond a reasonable doubt. This principle is stated in Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527, as follows: "Courts will not compel a vendee to take an unmarketable title when he has stipulated for a good one; and a title is deemed unmarketable, within this rule, where, although it may be good, there is a reasonable doubt as to its validity. The term 'reasonable doubt' is always used in this connection, because, as a doubt might be suggested or question raised as to most titles, it would go far to do away with the remedy by specific performance if a mere doubt raised, without regard to its character, were permitted to defeat the action. A doubt as to the title may be raised upon a question of law or upon a question of fact, or upon both law and fact. It is impossible to state any precise and definite rule by which to determine when a doubt raised upon a question of law is to be deemed reasonable.

Without going so far as some of the English cases, . . . we can at least say that the doubt suggested must raise a question of law that is fairly debatable,—one upon which the judicial mind would hesitate before deciding it." In reading the foregoing case it must be borne in mind that the clause which the Minnesota court did not deem sufficient to raise a reasonable doubt on the title, differs from the clause in the case at bar only in that it did not contain the words "may hereafter be located." Said case was decided February 4, 1890, and it is probable that the railway company in this case thereafter caused such clause to be inserted in their deeds, and that thereafter the same court held the clause to be binding in Bendikson v. Great Northern R. Co. 80 Minn. 332, 83 N. W. 194, in the latter case the reservation clause being identical with the one in this case. This court does not decide that such clause was either valid or void, because it is unnecessary to the determination of this case, and it would be unfair to make such a decision when the Great Northern Railway Company is not a party to the action, but we do think, in view of the decision of the Minnesota supreme court holding the reservation valid, and the fact that it is the only decision which we have been able to find covering this identical reservation, that there was reasonable doubt as to the validity of Mr. Bruegger's title, and that Cartier should not have been compelled to accept the same. We reach the conclusion, in this particular, that defendant was amply justified in refusing said title. See note in 38 L.R.A.(N.S.) 3; Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071.

(2) The next proposition upon which the respondent relies is the finding of the trial court that defendant knew of the condition of the title and agreed under the terms of the contract to accept the same. The clause of the contract upon which they stand reads: "It is hereby declared and agreed by the party of the second part that he has entered the above written contract, relying on his own knowledge of said premises, and not upon any representations made by the party of the first part, or by any other person, touching the situation, character, or quality thereof." It seems clear to us that this provision relates merely to the quality and location of the land, and was inserted to prevent any question as to warranties in those particulars. It does not, however, contemplate the title, as other particulars of the contract cover that. It may be conceded that defendant actually knew of this reservation,

but the contract merged all other agreements, and therein plaintiff agreed to give him good title to the land, and he had a right to rely upon his contract.

(3) Appellant next insists that the defendant was in default in his payments because the $60 deposited with the bank was not unconditionally paid to him. In this respect, he points to the fact that it was deposited in the bank to be paid to him only upon his producing the additional evidence of title. We must consider in this connection that this action is brought by Bruegger in equity, and he must show equity upon his own part before he can obtain relief. From the foregoing findings, it is evident that he could have had his money without question by obtaining from the railway company a release of its right of way reservation. The testimony shows that the money is still in deposit, and there was no doubt at any time of the safety of the $60 payment. Under those circumstances, it would be grossly inequitable to enforce a forfeiture against the defendant. It is our conclusion that the defendant is entitled to specific performance of his contract, and that plaintiff must furnish, in addition to the warranty deed already tendered, a release from the railway company of its right of way. It is true that he might seasonably have brought an action against the railway company and quieted his title against it by establishing his contention that the reservation was void, but this he has not attempted. In fact, the evidence shows that at the present time plaintiff has obtained a release. The judgment of the trial court is reversed, with directions to enter judgment in accordance with the views herein expressed.

Goss, J., being disqualified, did not participate in the above, HANLEY, Judge of the Twelfth Judicial District, sitting in his place by request.

J. A. THARP v. GERTRUDE BLEW.

(151 N. W. 1.)

Plaintiff and defendant entered into a contract whereby plaintiff performed certain labor upon the farm of the defendant. In the trial below, the court

gave certain instructions set forth in the opinion, which are examined, and, *Held:*

Instructions to jury — inadequate — confusing — misleading — new trial — verdict — reduction.

That said instruction as a whole is inadequate, confusing, and misleading, but in view of the fact that this is the second appeal in this case to this court, and the interests of the parties demand that the matter be finally settled, it is ordered: That a new trial be granted, unless plaintiff, within thirty days after the receipt of the remittitur in the lower court, shall consent, in writing, to a reduction of the amount of the verdict to the sum of $35.10.

Opinion filed January 29, 1915. Rehearing denied February 20, 1915.

Appeal from the District Court of Sargent County, *Allen,* J. from a judgment in favor of plaintiff. Defendant appeals.

Reversed on conditions.

Wolfe & Schneller, for appellant.

Appellate courts are inclined to overlook mere technicalities and irregularities in the conduct of the trial, where from the whole record it appears that they did not render the trial unfair or the result unjust. But where well established rules of evidence and procedure are violated and ignored, such a trial cannot be considered a fair trial, to which the aggrieved party is entitled at all times. Hearsay evidence was offered and admitted. This was reversible error. State v. Ah Lee, 18 Or. 540, 23 Pac. 424; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Morell v. Morell, 157 Ind. 179, 60 N. E. 1093; Dixon v. Labry, 16 Ky. L. Rep. 522, 29 S. W. 21; Shaw v. People, 3 Hun, 272, 2 Cow. Crim. Rep. 200; 6 Enc. Ev. 443; Dysart Peerage Case, L. R. 6 App. Cas. 489; Ellicott v. Pearl, 10 Pet. 436, 9 L. ed. 485; Amann v. Lowell, 66 Cal. 306, 5 Pac. 363; Warren v. Nichols, 6 Met. 261; Westfield v. Warren, 8 N. J. L. 249; Coleman v. Southwick, 9 Johns. 45, 6 Am. Dec. 253; Lent v. Shear, 160 N. Y. 462, 55 N. E. 2; Farmers' Bank v. Whitehill, 16 Serg. & R. 89; Dr. Harter Medicine Co. v. Hopkins, 83 Wis. 309, 53 N. W. 501.

A nonexpert is not competent to testify as to the genuineness of handwriting where his opinion is founded wholly on the comparison of the handwriting in question with other genuine handwritings. 6 Enc. Ev. 394; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; Clark v. Wyatt,

15 Ind. 271, 77 Am. Dec. 90; Mixer v. Bennett, 70 Iowa, 329, 30 N. W. 587; First Nat. Bank v. Lierman, 5 Neb. 247; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; Jarvis v. Vanderford, 116 N. C. 147, 21 S. E. 302; Wimbish v. State, 89 Ga. 294, 15 S. E. 325.

The issues as made up by the pleadings have not been fairly submitted under correct and proper instructions, and defendant, by the erroneous instructions of the court and by the rulings of the court on the admission of evidence and upon the trial in other respects, has not had that fair trial to which she is entitled. Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Owen v. Owen, 22 Iowa, 270; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224; Barton v. Gray, 57 Mich. 622, 24 N. W. 638.

The creditor has the burden of proving authority for the application of money received by him, when the same is questioned. 2 Enc. Ev. 808, 809 et seq.; Boyd v. Jones, 96 Ala. 305, 38 Am. St. Rep. 100, 11 So. 405.

Or where there is only one debt, why the payment made was not applied on it. Mann v. Major, 6 Rob. (La.) 475; Hill v. Pettit, 23 Ky. L. Rep. 2001, 66 S. W. 188; 9 Enc. Ev. 703, et seq.; Hansen v. Kirtley, 11 Iowa, 565; Dougherty v. Deeney, 45 Iowa, 443.

Forbes & Lounsbury and *O. S. Sem,* for respondent.

Where error which has occurred on the trial was occasioned or invited by the appellant, he is estopped to complain. 3 Cyc. 242.

The plea of payment in the answer is an affirmative one, and the burden was upon appellant to establish such payment. 22 Am. & Eng. Enc. Law, 537 and cases cited, 587; 9 Enc. Ev. 700; Atlantic Dock Co. v. New York, 53 N. Y. 67; Gray v. Herman, 75 Wis. 453, 6 L.R.A. 691, 44 N. W. 248; Ketelman v. Chicago Brush Co. 65 Neb. 429, 91 N. W. 282.

The court submitted the question of payment to the jury and the jury found for respondent. If errors were committed, the supreme court will not grant reversal unless it clearly appears that they were prejudicial. 2 Enc. Pl. & Pr. 500; S. J. Vidger Co. v. Great Northern R. Co. 15 N. D. 501, 107 N. W. 1083.

Counsel for appellant brought out themselves the very evidence to which they now object. They are estopped to raise the question. 3 Cyc. 242; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Reisch

v. People, 229 Ill. 574, 82 N. E. 321; Jensen v. Sheard, 49 Wash. 593, 96 Pac. 2.

The trial court has the right to strike out evidence without a motion and without stating any ground or reason for so doing. 9 Enc. Ev. 134, and cases cited; Jones, Ev. De Luxe ed. §§ 172, 173 and 893.

It is the duty of the court to see that answers of witnesses to questions are both definite and responsive. Kielbach v. Chicago, M. & St. P. R. Co. 13 S. D. 629, 84 N. W. 192; State v. Carpenter, 124 Iowa, 5, 98 N. W. 775; Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591.

There was ample proof to support the verdict. 3 Cyc. 242; Hillman v. Hulett, 149 Mich. 289, 112 N. W. 918; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359.

BURKE, J. In the year 1910, defendant owned and operated a farm in Sargent county, North Dakota, containing something over 1,000 acres. In March of that year, while upon a visit in Missouri, she met plaintiff, who was a married man with two small children. While there an arrangement was made between the two, whereunder plaintiff brought his family to defendant's farm in North Dakota.

Plaintiff's version is as follows:

She wanted me to come to North Dakota to work on her farm as foreman, and she was to give me $30 a month and furnish transportation to Milnor, and I told her,—asked her if I would have to pay the car fare, and she said "Yes," and then I told her I would not come; then she said she was willing to pay $30 a month and furnish me transportation to Milnor, and that at any time either party was dissatisfied the money was due. . . .

Q. You say that your arrangement with the defendant, Miss Blew, in this case, was that she should pay you $30 a month and pay the transportation for yourself and family to Milnor?

A. For myself.

Q. Yourself alone?

A. Yes.

Q. Not for your family?

A. No.

Q. Just for yourself?

A. Yes.

The defendant's version is that she was to pay him $30 a month for an entire year, which should include his wife's labor, and that she was to advance railroad fare and pay a $23 store bill which plaintiff owed there, but that the railroad fare and the store bill were to be reimbursed her from his wages. There is no substantial dispute that defendant advanced $47.75, which paid for plaintiff and his wife and a half-fare ticket for one of the children, and there is likewise little dispute that defendant's brother signed a note with plaintiff for the store bill aforesaid, and that defendant later paid the note. Upon reaching North Dakota, plaintiff continued in the employ of the defendant until the 9th of August, when a dispute arose between himself and the defendant, regarding which plaintiff testifies:

Q. Go right on and tell what she said and what you said.

A. She wanted me to go down to the machine and haul bundles, and I refused to go off the place. I didn't think it was my place, and she said I could haul bundles or quit, so I quit,—went to settle up at the house,—she had a little house out west of the big house, and she told me to get my book and she would settle. . . . I got a settlement out of her. She told me what her account was for, and I saw it was all right, and she figured up the store account and stuff she had paid cash for, and she figured up the stuff and it came to $3.66, and that was taken up and $20 in cash.

Q. What amount, if any, was found due you?

A. $107.29.

Q. What did she say to this?

A. Why, she told me she would pay it and started to write a check, and her brother came out of the granary and told her not to pay; that they had no money in the bank.

Q. What date was that?

A. The 9th of August.

Miss Blew's version is as follows: "He said my brother had put him on a rack to go out and work, and he said he was one of the regular men, and he did not think it was fair to put one of the month men on a rack to go out and work when we had higher-priced men that were getting the going harvest wages; that he was just getting the going wages, and I said I did not think it would make any difference to my brother if he would take a grain tank,—we had just begun threshing, the ma-

chines had pulled on the place before dinner, and they were just going out threshing,—one tank had gone out and another one was to go out,—and I said to him, 'Is your team harnessed up?' and he said 'Yes,' and I wanted him to hitch onto a grain tank; 'it would be all right with my brother,' I says, 'if it is not I will make it all right,—you go out on a grain tank, it won't make a bit of difference.' And then he said 'No.' He would not do it unless I would give him $2.50 a day. That is what he asked me and I says 'I can't do it.' I says 'I can't,' and I talked to him about five minutes trying to induce him to take out a grain tank, and he would not do it. . . . Q. At that time, did you tell Tharp that he might quit? A. No."

It is admitted that defendant paid plaintiff the sum of $20 in cash and advances in groceries to the amount of $3.75 after his arrival in North Dakota. That plaintiff knew of the store bill in Missouri being paid appears from a letter introduced in evidence and written to him by De Bold Brothers, which reads as follows:

Mt. Rose, Mo., September 5, 1910.

Mr. Jess Tharp,
Milnor, North Dakota.

Dear sir:—

Yours of the 2d at hand, in regard to the note. Before you left here, I gave you a bill of your account, and you gave me your note for the amount, which was $22.52, March 29, 1910, with Adden Blew security; interest on note up to August 25 is 75 cents, making a total of $23.27. I gave this note to Bertie Blew over here, and she sent it to her sister Gertie and Bertie paid us here for that amount. If Gertie has the note in her possession,—or whoever has—you owe them that amount to August 25.

Take up this note and you are even. That is all we have against you at this store.

You must understand that whoever holds this note, you owe them that amount. Hoping this will be satisfactory,

Yours truly,

(Signed) De Bold Brothers.

P. S. Am sending Gertie a duplicate of this letter so you can agree on terms.

Plaintiff upon the stand admitted that he owed this bill and that he had given the note therefor, but said he did not ask Blew to sign with him.

Plaintiff brought suit in justice court upon his version of the contract, and the case was appealed first to the district court and then to the supreme court, being found at 23 N. D. 3, 135 N. W. 659. Upon its return to the district court, the present trial was had, which resulted in a judgment for the plaintiff in the sum of $107.29, this verdict being undoubtedly reached by allowing plaintiff $30 per month for the time he was employed, deducting therefrom only the $20 cash and $3.75 groceries paid to him in North Dakota, and disallowing the railway fare and store bill from Missouri. Defendant appeals setting up numerous assignments of error, among them objections to the charge of the court to the jury, of which he says: "Our chief objection to the instructions is that they do not define the issues in that (1) they do not limit a recovery under the terms of the contract set up in the complaint, as that contract has been construed by the supreme court; (2) under the wording and terms of that contract, they do not require or limit the jury in finding the value of the services alleged from the evidence in the case; (3) they do not submit the defendant's claims and plea of payment and offset, nor her counterclaims." They also object to that portion of the charge wherein the court instructed as follows: "If the defendant, Miss Blew, paid the note, Exhibit B, without the knowledge or consent of the plaintiff, then the payment so made by the defendant would be what is known in law as a voluntary payment, and the defendant cannot be credited with the amount of the payment."

(1) Without setting up the charge to the jury in full, we will say that after careful examination it appears to us to be wholly inadequate, confusing, and misleading, and that it not only was liable to, but did, actually mislead the jury to the prejudice of the defendant. A careful reading of the evidence has convinced us that the verdict is contrary to the evidence, and that under proper instructions a jury could not have found for the plaintiff in any sum exceeding $35.10. In view of the fact that this is the second time this case has been to the supreme court, and the interests of the parties, as well as of the state, require that the matter be brought to a conclusion, we have decided to order: "That the judgment of the trial court be reversed and a new trial ordered, un-

less within a period of thirty days after the receipt of the remittitur in the lower court, the plaintiff shall, in writing, consent to a reduction of the amount named in the verdict to said sum of $35.10. Appellant will recover her costs in this appeal.

J. A. ROBINSON v. P. CONNOLE, J. F. Connole, T. J. Connole, P. J. Doughtery and Andy Johnson, Copartners Doing Business under the Firm Name and Style of Johnson-Connole Company.

(151 N. W. 33.)

Default judgment — application to reopen — relief from — evidence — neglect.

Defendant made application to the county court under § 7483, Comp. Laws 1913, to be relieved from a default judgment. Evidence examined and shows that the defendant was not guilty of any neglect, and that the application to reopen the judgment was properly allowed.

Opinion filed January 29, 1915. Rehearing denied February 20, 1915.

Appeal from the County Court of Renville County, *Crewe*, J. Affirmed.

Henry G. Middaugh and *Rolio F. Hunt,* of Devils Lake North Dakota, for appellant.

Grace & Bryans, of Mohall, North Dakota, for respondents.

BURKE, J. Plaintiff brought suit in a county court with increased jurisdiction, asking $273 damages for wrongful discharge by the defendant as manager of their general implement business at Sherwood, North Dakota. The summons and complaint were personally served upon the defendants, who thereupon employed the firm of Greenleaf, Radford, & Nash, of Minot, to attend to the case for them. Under the practice in county courts an answer must be interposed within ten days, which period said attorneys deemed insufficient, and thereupon telephoned to the attorneys for plaintiff requesting an extension of a few days, which request was granted. After waiting until about the

sixtieth day, no answer being interposed, judgment was entered by default. Some three months later execution was issued and a levy made under the judgment, and shortly thereafter the firm of Grace & Bryans, of Mohall, North Dakota, made application to the county court for permission to reopen the judgment and file an answer under § 7483, Comp. Laws 1913, which relief was granted. Plaintiff appeals from such order. This court has passed upon this section a great many times, as will be seen from the annotations to the section of the Code above mentioned, and the law has been thereby pretty well settled. It is conceded, we think, that the defendant must excuse his neglect to the satisfaction of the trial court, and that said trial court has a wide discretion, which should not be disturbed excepting for abuse. Taking up the facts in the case at bar, we find that the defendants immediately employed reputable attorneys to look after the case, but that the contract under which plaintiff had been employed by the defendants could not be found, and that in order to give the defendants time to search therefor, said attorneys communicated with the attorneys for the plaintiff and obtained an extension of time within which an answer might be interposed. Defendant Connole excuses his default in an affidavit wherein, among other things, he states that his "attorneys informed him that they would look after the same and attend to putting in an answer in the case. . . . That affiant at no time had any information or knowledge that judgment had been taken against him, . . . until after the 24th of April, 1913, when the sheriff . . . came out to their place of business to levy under an execution that had been issued upon such judgment, and that he then took the matter up with his attorneys. . . . That this affiant at all times thought that his attorneys had answered in the case and were looking after the case." Those statements are in no manner contradicted and must be taken as true. The only affidavits that were offered in opposition were made by the attorneys for the plaintiff, one of whom deposed as follows: "At or about the time of the expiration of the time for answering in the above-entitled action, a gentleman called me on the telephone, whom I recognized as D. C. Greenleaf, of Minot, North Dakota; he referred to the above-named case and said he represented the defendants, and asked if it would make any difference if he delayed putting in an answer for three or four days, as he wished time

to look up a little documentary evidence. I replied that that would be satisfactory to us." His partner, the other attorney for plaintiff, deposes: "As nearly as I can recollect, I heard someone call Mr. Middaugh on the telephone in our office and heard him converse briefly regarding this case. I gathered from the conversation that I heard, that someone had asked him for a few days' extension of time in which to interpose an answer; that about two weeks after that, Mr. Middaugh left the office and did not return until the 25th of April. In his absence, after waiting until February 15 for the defendants to interpose an answer, and not being able to recollect the name of the attorney who had called him on the telephone, and supposing that the defendants had abandoned the case and decided to let it go by default, I prepared the papers for the entry of judgment. . . ." The summons and complaint were served on December 12, 1912, and on February 15, 1913, the default judgment was entered. No notice of the time and place of the damages was given to the defendant, or the attorney who had appeared for him and obtained the extension of time to answer, and apparently the judgment was rendered without the introduction of any evidence whatever. While no written notice of appearance was served in the case at bar, still the plaintiff's attorneys concededly recognized the appearance of Mr. Greenleaf, and stipulated with him for an extension of time to answer, and under the circumstances notice should have been served upon him of the time and place of assessment of damages. Section 7600, Comp. Laws. See also Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937. It is conceded that the order appealed from must stand unless the trial court clearly abused its discretion. Under the circumstances in this case this cannot be said, and the order is accordingly affirmed.

HARRIS E. LEACH v. ROLETTE COUNTY.

(151 N. W. 768.)

Trial *de novo* of an action to recover from the county sums paid for taxes under the Wood law, which sums had been adjudged void.

Complaint — allegations — void taxes — failure to state sale void — other facts alleged — sufficient — demurrer.

1. The complaint is not demurrable for failure to state that the "sale of land" for taxes had been declared void, when it sets up facts showing that the taxes themselves had been declared void after sale.

Answer — admission of salient facts — United States courts — action in.

2. The answer of the defendant held to be an admission of the salient facts of the action in the United States circuit court wherein said taxes were set aside.

Money paid county for assignment of tax certificate — tax is void — money may be recovered back — taxes paid after assignment — cannot be recovered back.

3. Under § 2338, Comp. Laws 1913, it is held that plaintiff can recover from the county the money paid upon taking the assignment from the county, with interest at the rate of 7 per cent, but not taxes paid after taking such assignment.

Evidence — court records — judgment — exemplified copy of decree.

4. The exemplified copies of the decree which set aside the taxes were properly received by the trial court.

United States circuit court — decree of — service on county — action to avoid taxes — record — attack.

5. The decree of the United States circuit court shows on its face that service was made upon the defendant county in the action wherein the taxes were declared void, and defendant cannot in this proceeding attack the record so made.

Action to avoid taxes — holder of claim — failure to answer — does not work estoppel here.

6. In the action wherein the said taxes were declared void, one H., who at that time held such claim, made no answer, but this fact does not work an estoppel in this suit.

Knowledge of pendency of suit — evidence fails to disclose — estoppel.

7. The evidence does not show that H. bought his claim with knowledge of the pendency of the suit in the United States circuit court, and therefore he is not estopped in the present action.

United States circuit court — decisions of — correctness of — state courts — will not inquire into.

8. This court will not inquire into the correctness of the decision of the United States circuit court in its decree setting aside said taxes.

Lien upon land — taxes — refund — statutes — application.

9. The last portion of § 2338, Comp. Laws 1913, relative to a lien upon the land, has no application to the facts in this case, as the county is not held for a refund of the taxes paid after the assignment.

Opinion filed February 25, 1915.

Appeal from the District Court of Rolette County, *Cowan*, J.

Modified and affirmed.

Charles A. Verret and *Knauf & Knauf*, for appellant.

The evidence, the decree of the United States circuit court offered in the case, fails to show that the sale of lands as provided in the Woods law has been declared void. There is only an attempted nullity of the taxes. Paine v. Dickey County, 8 N. D. 581, 80 N. W. 770.

Having taken these taxes in the manner received, the plaintiff and his assignor received and paid them all, the certificates and tax receipts, at their own risk. The purchase was made under the rule of *caveat emptor*, and without a statute authorizing a recovery for the taxes. Budge v. Grand Forks, 1 N. D. 309, 10 L.R.A. 165, 47 N. W. 390; Laws 1907, chap. 67, § 28.

Unless the sale is shown to have been declared void by judgment of the court, and the statutory provisions properly complied with, there is no right of recovery. Tyler v. Cass County, 1 N. D. 369, 48 N. W. 232.

Middaugh, Cuthbert, Smythe, & Hunt, for respondents.

"Things which a person possesses are owned by him." Rev. Codes 1905, subdiv. 11, § 7317.

This is a presumption which is satisfactory if uncontradicted. The assignment, transfer, and delivery were all established by their possession and use upon this trial. Ibid.

The county did not defend the action in the United States court. It cannot now say that Hutton should be estopped because he did not

do so. The merits and correctness of the decision there are not before us in this case. Borden v. McNamara, 20 N. D. 225, 127 N. W. 104, Ann. Cas. 1912C, 841.

The question of the jurisdiction of the United States court is not, and cannot be, before us here. The judgment there, on its face, shows service. Freeman, Judgm. § 130; Hahn v. Kelly, 34 Cal. 402, 94 Am. Dec. 742; McMinn v. Whelan, 27 Cal. 314; Carpenter v. Oakland, 30 Cal. 446.

Whatever may be the facts as to the validity of such a service, it is not a case of no service, and the record shows that the court adjudged the service sufficient; and this being a collateral proceeding, the judgment cannot be attacked. McCauley v. Fulton, 44 Cal. 355; Schee v. La Grange, 78 Iowa, 101, 42 N. W. 616; Fanning v. Krapfl, 68 Iowa, 244, 26 N. W. 133; Lees v. Wetmore, 58 Iowa, 170, 12 N. W. 238; Scaman v. Galligan, 8 S. D. 277, 66 N. W. 458; Phillips v. Phillips, 13 S. D. 231, 83 N. W. 94; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Sharp v. Daugney, 33 Cal. 505; Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572; Van Fleet, Collateral Attack, p. 121, §§ 3, 614, 616.

A written instrument is presumptive evidence of a consideration. Rev. Codes 1905, § 5325, and cases cited.

The burden of showing want of consideration is upon the party attacking it. Rev. Codes 1905, § 5326.

This is not a case where a court of equity may require the repayment to the certificate holder of the amount paid on condition that the tax sale be set aside, on the theory that the land should bear its lawful part of the taxes, for the reason that the land was not subject to taxation. State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Rev. Codes 1899, § 1270; Paine v. Dickey County, 8 N. D. 581, 80 N. W. 770.

BURKE, J. This action involves the refund of money paid to a county for void taxes under § 2338, Comp. Laws 1913. August 8, 1892, the government issued its patent to a quarter section of land in Rolette county to one Jaspard Jeanette, a homestead entryman. Prior thereto Jeanette had given a certain mortgage to one Daly, who had assigned the same to Vincent P. Cash, who in turn assigned the same

to one Simmons, all of which instruments were dated prior to the issuance of the patent.

August 24, 1893, the United States government filed its bill in equity in the circuit court for the district of North Dakota, alleging fraud upon the part of the entryman, Jeanette, and asking the cancelation of the patent. Jeanette, his wife, and Daly were the original defendants, and were all served with the jurisdictional subpœna in August or September, 1893. No *lis pendens* was filed at this time, nor were any further steps apparently taken in the action until nearly ten years later. In the meantime taxes were levied against the premises for the years 1892–3–4, and on the 22d of November, 1897, the premises were sold and bid in by the county of Rolette for the sum of $69.53, and thereafter on the 1st day of December, 1898, said tax certificate was assigned to one David Hutton by an instrument in writing signed by the treasurer of said county, said purchaser being required to pay the taxes for the year 1895–6–7, making a total of $126.66. Thereafter said purchaser likewise paid the taxes for the years 1898–1902, both inclusive, under his certificate of sale as aforesaid.

April 29, 1903, the government filed an amended bill in equity including as defendants the assignees of the mortgage, Cash and Simmons, the county of Rolette, and also Hutton. Subpœnas were served upon the new defendants in the manner which will be hereinafter mentioned, but no answer was interposed by any of them, and judgment *pro confesso* was taken on August 21, 1906. *Lis pendens* was filed April 30, 1903.

This decree canceled the patent and specifically set aside the taxes hereinbefore enumerated, upon the grounds that the land during all of the time had been the property of the United States government.

Thereafter, by an instrument in writing, the tax certificate holder, Hutton, assigned his cause of action against the county to the present plaintiff, Leach, who brings this action for a refund of the amount paid by him, basing his cause of action upon § 28, chap. 67, Sess. Laws 1897, now found at § 2338, Comp. Laws 1913, which reads as follows: "When a sale of lands as provided in this article is for any cause declared void by judgment of court, the money paid by the purchaser at the sale, or by the assignee of the state or county, upon taking

assignment, shall, with interest at the rate of 7 per cent per annum from the date of such payment, be refunded to the purchaser or assignee or the party holding his right out of the county treasury on the order of the county auditor, . . . that if such purchaser or assignee or party holding his right, shall after such purchase or assignment from the county, have paid the taxes, penalties and interest upon such piece or parcel of land, he shall have a lien upon such piece or parcel for the amount of taxes, penalties and interest so paid, with interest at the rate by this article allowed, and may enforce such lien by action, or if he is in possession of such piece or parcel shall not be ejected therefrom until such amount and interest shall be paid." The above should not be confused with § 88, chapter 126, Sess. Laws 1897, now known as § 2200, Comp. Laws 1913, which reads as follows: "When any sale of land for taxes is adjudged to be void, the judgment shall state the reason why it is void, and in all such cases and in cases where, by the mistake or wrongful act of the county treasurer or auditor, land has been sold upon which no taxes were due, and in cases where taxes have been or may be paid on lands not subject to taxation, or on lands where subsequent to payment the entry has been or may be canceled, the money so paid and all subsequent taxes, penalties and costs which have been or which may be paid, shall be refunded, with interest at 7 per cent per annum from the date of payment to the person making such payment, his heirs or assigns and the same shall be refunded out of the county treasury to which such money was paid, on an order from the county auditor, and a *pro rata* share of the money so refunded shall be charged to the state and to any incorporated city, town, village or school corporation which may have received any part of such void tax. Whenever any sale of land or certificate or tax deed made or delivered under this chapter is adjudged to be void, unless the judgment declares the tax to be illegal, the tax and all subsequent taxes returned to the purchaser or assignee, shall remain and be a lien upon the land sold, and the county auditor shall advertise and resell the same at the next succeeding annual sale for the full amount of taxes, penalties and costs due thereon." The latter section applying to lands sold for the general taxes under the ordinary process, while the former relates to taxes sold under what is known as the Woods law, wherein an action at law is instituted by the county

and an execution sale thereunder follows. This distinction is important. The trial court made findings of fact and conclusions of law favorable to plaintiff, and this appeal calls for a trial *de novo*.

(1) The first proposition advanced by appellant relates to the sufficiency of the complaint, it being attacked by demurrer and also by objection to the introduction of any evidence. He states: "The complaint does not state that a *'sale of land'* as provided by the law is for any cause declared void by judgment of court. We are called upon to have, not a tax, not a patent, not a judgment, but a 'sale of land' declared void, to entitle the return of the money paid out therefor."

The objection is too technical to have merit. The statute uses the expression *'sale of lands* shall be declared void,' of course, but in this case the *sale* was in effect declared void by the same language that declared the tax void.

(2) The second error assigned by appellant relates to the introduction in evidence of the assignment from the county to Hutton. There is no merit in this contention. Plaintiff, in paragraph three of his complaint, alleges: "That thereupon one W. A. Duncan, the then treasurer of said Rolette county, agreeable to the provisions of said law, did make, execute, and deliver to said David Hutton an assignment and transfer of the whole right, title, and interest of said county in and to said premises, so acquired by said county at said sale, which said assignment of said certificate of sale bears date of December 1st, 1898." Defendant answers as follows: "Defendant admits the allegations of the complaint set forth in paragraphs one, two, three, and eight." The matter was therefore not at issue, having been established by the admissions of the answer.

(3) Appellant's third proposition is that, in any event, plaintiff should recover for the taxes paid upon his certificates subsequent to the purchase by him from the county. He insists that the subsequent taxes were taken at the risk of the purchaser, and the county is not liable for redemption, and cites us to Tyler v. Cass County, 1 N. D. 369, 48 N. W. 232. The Tyler opinion, however, was filed November 29, 1890, almost seven years before the enactment of either of the above-mentioned sections, and construed § 1629 of the Compiled Laws of Dakota 1887, which section is quoted at page 386 of said opinion. It is therefore not authority in this case, unless possibly to hold

plaintiff to a strict construction of any refunding law. We are satisfied that plaintiff must recover, if at all, under § 28, chap. 67, Sess. Laws 1897, known as the Wood law, as the original sale to the county was made thereunder, and he was not the purchaser at any general tax sale. Reverting to said section we find: "When a sale of lands, as provided in this article [meaning the Wood law] is for any cause declared void by judgment of court, the money paid . . . by the assignee of the . . . county, upon taking the assignment, shall, with interest at the rate of 7 per cent . . . be refunded, etc."

As so read, it aids the plaintiff in this case. On the 1st day of December, 1898, Hutton paid to the county of Rolette $126.66 "upon taking the assignment." This amount he was obliged to pay under the law to obtain the interest of the county in the land, and for this amount recovery should be had with interest at 7 per cent. The payments, therefore, made by Hutton for the years 1898–9, 1900–1–2, were not paid by tax sales under the general law, nor is the county liable therefor under the Wood act. As to such voluntary payments, plaintiff is entirely without remedy. In this respect the judgment of the trial court is erroneous, and must be modified.

(4) A fourth assignment of error relates to the reception in evidence of the exemplified copies of the decree entered in the United States court. This assignment is without merit, as defendant admits in his answer that such a suit had been instituted and prosecuted to final decree "in substance, as set forth in paragraph 6 of the complaint, but defendant denies that this defendant was ever served with process." Aside from this admission of the salient facts of the decree which plaintiff had set forth in his complaint, the copies presented were certified as correct by the clerk of the United States circuit court under the seal of the court, and the whole was authenticated by the signature of the presiding judge, being substantially in compliance with § 7911, Comp. Laws 1913.

(5) The next assignment of error relates to findings of fact found by the trial court following the adjudication made by the United States circuit court, *viz.*, that the land was not subject to taxation, also that service had been made upon Rolette county of process in the above-mentioned action. The decree of the United States circuit court shows on its face that service was made upon the county on the 31st day of

May 1903, and if such were not the fact the county must appear in that court and obtain relief. Defendant cannot in a collateral proceeding attack the records of that court. The same applies to the question of whether or not the lands were in fact taxable. The United States circuit court which had jurisdiction of this matter held the same to be void, and the time for appeal from such decree had long since expired, and its correctness cannot be challenged collaterally in this action.

Freeman on Judgments, § 130, which reads: "A finding or recital showing that the court had jurisdiction is, in the vast majority of the states, not disputable when a judgment based thereon is drawn in question collaterally." Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Quivey v. Porter, 37 Cal. 458; McCauley v. Fulton, 44 Cal. 355, from which we quote: "It has been repeatedly held by this court that upon collateral attack recitals in the judgment of service upon the defendant are conclusive of the question of jurisdiction of the person, when the judgment is rendered by a court of superior jurisdiction."

Schee v. LaGrange, 78 Iowa, 101, 42 N. W. 616, from which we quote: "The record shows that the court adjudged the service sufficient; and, this being a collateral proceeding, the judgment cannot be thus attacked." Seaman v. Galligan, 8 S. D. 277, 66 N. W. 458; Phillips v. Phillips, 13 S. D. 231, 83 N. W. 94; Emery v. Kipp, 154 Cal. 83, 19 L.R.A.(N.S.) 983, 129 Am. St. Rep. 141, 97 Pac. 17, 16 Ann. Cas. 792.

It might be stated in passing that the only objection to the service upon the county is that the copy of the subpœna was served upon the wife of the chairman of the board of county commissioners, instead of upon him personally. It might also be said that the respondent insists that Rolette county was not a necessary party to the suit in the United States court, for the reason that at the time of the rendition of the decree said county had parted with all its interest and lands aforesaid to Hutton, who was duly served.

(6) The sixth position advanced by appellant is that Hutton, and therefore this plaintiff, is estopped to maintain this action because he (Hutton) did not defend the suit wherein the taxes were set aside. We do not believe this is material. It is not only possible, but probable, that the claim of the United States government to the effect that the land had been fraudulently patented was true, and if Hutton knew this

he should not be required to file an answer. It may also be said that the county might have defended in such suit had it believed the defense meritorious. As both plaintiff and defendant allowed a judgment avoiding the tax to be entered by default, it may well be presumed that the attack of the United States government could not be successfully resisted.

(7) Appellant next urges that Hutton cannot recover because he took the assignment and paid his money "long after the said action is alleged to have been commenced by the United States of America." This might be successfully urged if it were supported by evidence that Hutton knew of the suit, but upon an examination of the record we find no evidence of any knowledge upon his part, and the *lis pendens* was not filed until April 30, 1903, long after the payments hereinbefore mentioned were made.

(8) It is next urged by appellant that Hutton, had he defended, should have prevailed in the suit in the United States circuit court. A complete answer to this is that he did not so prevail. The decree as entered is the one with which we must deal.

(9) Appellant next calls our attention to the last portion of § 2338, Comp. Laws 1913, being the fact that if such purchaser shall, after such purchase or assignment from the county, have paid the tax, penalties, and interest, etc., he shall have a lien upon the land for the amount of the taxes. This relates entirely to the taxes for which, under paragraph three of this opinion, the county is not liable, and is therefore now immaterial. Moreover, in this case such section is absolutely no aid to the plaintiff, owing to the fact that the taxes themselves were swept away and the title to the land held to be in the United States government. There are other items of error so closely allied to the above that they are governed thereby, and therefore all without merit. The judgment of the trial court is modified, and as so modified affirmed. Respondent will recover his costs in this appeal.

MANDAN MERCANTILE COMPANY, a Corporation, v. PATRICK SEXTON, Frank Windmueller, and Margaret Sexton, Intervener.

(151 N. W. 780.)

Defendant and wife purchased a vacant city block, improved the same for three seasons, finally erecting a dwelling house and other buildings thereon. Immediately on completion of the house, plaintiff took a mortgage on the tract, signed only by the husband, who declares in the mortgage that the tract "does not now and never has constituted any part of his homestead." The wife refused to sign the mortgage. They owned no other real estate, but had rented in the same city since long before the purchase of this tract, which they testified to have bought "to make a home of it." The wife paid part of the purchase price. To clear the land of a $200 mortgage a lease for a term of one year was given codefendant W., and immediately on completion of the house he and family moved in. Four months afterward defendants moved their furniture into three rooms of the house not rented, intending to reside in it, but because of inconvenience from the occupancy of the W. family did not actually take up their residence therein, but attempted to oust W., but did not succeed. A cow and some chickens were moved on the tract at the same time the furniture was moved into the house, and remained there several months until feed on the place gave out. A year and four months after the mortgage was taken, and about two months after vacation by W., defendants established actual residence, since maintained continuously in said dwelling. W. had signed the notes as a joint maker with S. The husband and wife defend, claiming the mortgage to be void, and that the premises at the time it was taken was their homestead, which could not be legally encumbered, except the wife join therein. *Held:*

Homestead — mortgage on — void when.

1. The mortgaged premises was the homestead and the mortgage is void.

Recitals in mortgage — land not homestead — covenants — mere statements.

2. The recitals in the mortgage, that the premises are not a homestead, is not a covenant. It falls with the mortgage, and amounts to but a statement of the husband, which cannot of itself operate to validate the mortgage.

Homestead — property purchased for — family dwelling being built — characteristics of homestead — intent to so occupy — exemptions — in advance of actual occupancy — residence established in reasonable time.

3. Property purchased and improved in pursuance of a good-faith intent to

Note.—The general question of the conveyance or encumbrance of a homestead by one spouse alone is considered in a note in 95 Am. St. Rep. 909.

build the family dwelling thereon, and to reside therein, is impressed with homestead characteristics entitling the possessors to the homestead exemption in advance of the establishment thereon of actual residence of the claimant and family, where, pursuant to a previous good-faith intent, the actual residence is established within a reasonable time after completion of the dwelling.

Residence — delay in making — explanation and excuse.

4. The time so elapsing here before residence began is sufficiently explained and excused.

Homestead right — constitutional — to family — presumptions in favor will be indulged — good faith.

5. The homestead right of exemption is a constitutional right guaranteed the family, and all reasonable presumptions in its favor will be indulged where the facts appear consistent with a good-faith claim of homestead right.

Opinion filed February 25, 1915.

From a judgment of foreclosure ordered by the District Court of Stark County, *Leighton,* Special Judge, defendants appeal.

Modified; and judgment, against defendants for recovery of money only, directed; mortgage ordered canceled and foreclosure thereunder set aside and denied; no costs allowed either party on appeal.

Casey & Burgeson, for appellant.

Land purchased with a specific intention of making it the homestead, and in pursuance of such intention the purchaser makes improvements thereon and preparation for occupancy, may be claimed as exempt even before actual residence commences. 21 Cyc. 475; Scofield v. Hopkins, 61 Wis. 370, 21 N. W. 259; Davis v. Kelly, 62 Neb. 642, 87 N. W. 347; Woolcut v. Lerdell, 78 Iowa, 668, 43 N. W. 609.

A mortgage of the homestead that is not signed by husband and wife is void. Rev. Codes 1905, § 5082.

The husband cannot, by recitals in the mortgage, waive his wife's homestead interest. Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684.

W. F. Burnett, for respondent.

It does not follow that a bare intention to occupy property at some future time will, of itself, suffice to impress the property with the character of a homestead, much less where an unreasonable time intervenes during which tenants are in possession and claimant and his family live upon other land. Davis v. Kelly, 62 Neb. 642, 87 N. W. 347;

Evans v. Calman, 92 Mich. 427, 31 Am. St. Rep. 606, 52 N. W. 787; Ingels v. Ingels, 50 Kan. 755, 32 Pac. 387.

The plaintiff did not move into the property when completed, but rented the premises to a tenant, and resided elsewhere. Woolcut v. Lerdell, 78 Iowa, 668, 43 N. W. 609.

This property was never occupied or claimed as a homestead until after the giving of the mortgage, and not then until same had been defaulted. Brokken v. Baumann, 10 N. D. 453, 88 N. W. 84.

Residence of some kind is a necessary prerequisite to obtain homestead rights in land. Edmonson v. White, 8 N. D. 72, 76 N. W. 986; Blatchley v. Dakota Land & Cattle Co. 26 N. D. 532, 145 N. W. 95.

Goss, J. The question for decision is a mixed one of law and fact. The premises was mortgaged by the husband without the wife joining therein. If the property was the family homestead at the time, the mortgage is concededly void. If not it is valid.

The husband purchased the 2 acre tract in 1909. Plaintiff and wife owned no residence or other real property, though they have lived for many years in Dickinson. Plaintiff cropped the tract to oats and potatoes in 1909, 1910, and 1911. In 1910 they fenced it. Both testify they "bought it to make a home of it." A portion of the purchase price was paid by the wife. Plaintiff works as a stationary fireman for a livelihood. In 1911 Sexton built a six-room house, a stable, and chicken house upon the tract, procuring material of plaintiff. The house was begun the last week in July and completed about August 29th, the date of the mortgage. A small part only of the mortgage debt has been paid. This mortgage was given to secure a portion of the purchase price of building materials used in its erection, and was for the aggregate sum at the time of the rendition of the judgment appealed from, inclusive of interest, $567, remaining unpaid. The husband testifies that at the time of the giving of the mortgage he was having trouble with his wife about where they should live, and that she had refused to go out to this place to live; that he had consulted a number of people as to whether or not he could force his wife to go out there and live; that the husband came to the office of Mr. Burnett, attorney for respondent, some little time before the giving of the mortgage to see him about making a loan on this tract, and told him at that time that his wife

would not go out there, and that they had never lived on these lots at all. The mortgage contained the covenant that the husband, "first party, hereby covenants that the said above-described lot does not now and never has constituted any part of his homestead." The testimony of Crawford, managing agent for plaintiff, is that "Sexton reported to the mercantile company that his wife at this time had refused or would refuse to sign this mortgage, and he and I then went over to Burnett's office to talk it over and see if the papers would be legal, so that we could go ahead with the house to build it and turn it over; and in Burnett's office Sexton asked if the loan could be executed and go through with his signature only, and Burnett asked Sexton if he claimed that as his homestead and if he had never lived there, to which he replied that he had not lived there, as there was no building there he could not claim these premises as his homestead, and that he did not claim it as a homestead, and that he would agree to make that statement in this mortgage 'that it was not, and had not been, his homestead,' which statement was put in the mortgage at Sexton's request." The house was practically completed at the time of the execution and delivery of the mortgage. Within a few days Frank Windmueller moved his furniture and family, his wife and four children, into the house, and continued to reside there from the last of August, 1911, until about the 28th of October, 1912. He had advanced Sexton $200 to take up a mortgage that was on the land before the dwelling house was built and in return for which Sexton gave him a lease of three of the rooms of the house for one year, into which he moved his family immediately on the completion of the building. In October or November, 1911, plaintiff also moved forty or fifty chickens and his cow into buildings on the tract, and also then moved his household furniture, including beds and bedding, stoves, tables, chairs, china closets, and the like into the remaining three rooms not rented to Windmueller, preparatory to and with the intention of residing therein, but that his wife "refused to live in there on the ground that it was too crowded, two families living in there." He left his household furniture there, however, and attempted to get Windmueller to vacate, commencing legal proceedings against him for that purpose, but failed to get him out. The chickens and the cow remained on the place until February or March, when they were removed. After Windmueller vacated, defendants moved in

on December 6, 1912. Sexton defends, claiming the property to have been homestead, and that the mortgage has at all times been void. The wife intervened with the same defense. The trial court held the mortgage was a valid lien and ordered foreclosure, from which they appeal. As Windmueller also signed the notes secured by the mortgage, judgment was ordered against him also. The question is whether, under these facts, these premises constituted the homestead of the defendants.

Residence was not actually established thereon by the defendants until a year and four months after the mortgage was given and that length of time after the dwelling had been completed, although the reason for such delay is clearly apparent, more from inconvenience than from necessity. It was caused by Windmueller's occupancy. He had advanced $200 for a year's rental of the premises, and rightfully refused to vacate until he had received the consideration for money paid. Defendants had procured this advancement of $200 to pay off a mortgage on the premises, evidently preparatory to and to enable them to build the dwelling. As bearing upon whether the land had been impressed with homestead characteristics prior to the time of the execution and delivery of the mortgage in suit the facts determine the issue in favor of the defendants. Both testify they bought the place to make a home of it. While words without acts signifying an intent to make a home amount to nothing in themselves, yet when the succession of acts, coupled with such expression of intent, harmonize therewith and result in the establishment of a home thereon, all will be considered together, and if the home is built and residence therein begun within a reasonable time, under all the circumstances, the means of the parties considered, and all are consistent with a good-faith intention to establish the home as such, instead of to merely defraud creditors or intervening claimants, the homestead exemption should be allowed. The facts disclose a purchase with a reasonable inference of present intent to at some time occupy the premises; their subsequent improvement for two seasons prior to building thereon is entirely consistent with and further indicative of an existing intent to at some time reside there. This is followed by the most eloquent fact of all, to wit, the erection of a substantial dwelling house with other buildings thereon, and this dwelling was just completed ready for occupancy when the mortgage

was given for a part of the cost of the materials used in its construction. At this point plaintiff was confronted with the fact of the refusal of the wife to mortgage these premises having all characteristics of a home. It consulted an attorney to ascertain the legal effect of the wife's refusal to join in the mortgage, and as it was charged with presumed knowledge of the law it must be assumed to have known that the mortgage with but the husband's signature thereon was void, if the land was in law and fact a family homestead. But to strengthen its position it assumed the truth of the husband's statement that the wife would not join in the mortgage and notes. And without inquiry of her as to whether she claimed the premises as a homestead, but with full knowledge that she had the same right of homestead in said premises and to claim the same as had the husband, acting at its peril it accepted as the truth the husband's statement that he had never resided thereon, and did not claim any homestead rights therein. This was a half truth only. He had never actually resided thereon, as plaintiff well knew. He for himself could disavow a homestead right, but without affecting any right of the wife to claim them in and to the same tract, as the right can be exercised by the wife, and cannot be destroyed, if existing, by the husband's declaration alone. His statement in the mortgage was not a covenant, because, if the mortgage be void, it falls with it. It amounts to but a mere declaration by one member of the family, not binding upon the other members thereof. It is entitled to but such weight as would be his oral statements. "It is well settled that a covenant in a mortgage of the homestead executed by the husband alone cannot act as an estoppel against the mortgagor." Note in 95 Am. St. Rep. 922 citing Alt v. Banholzer, 39 Minn. 511, 12 Am. St. Rep. 681, 40 N. W. 830, where it is said: "To work an estoppel the mortgage itself must be a valid instrument. The covenants can have no greater validity than the deed itself. It would nullify the statute to hold that the deed which the law declares void should, by reason of the covenants of the grantor, operate effectually as a conveyance." Bigelow, Estoppel, 338–340; Thompson, Homestead & Exemption, § 474; Connor v. McMurray, 2 Allen, 202; Barton v. Drake, 21 Minn. 299; Conrad v. Lane, 26 Minn. 389, 37 Am. Rep. 412, 4 N. W. 695; Justice v. Souder, 19 N. D. 613 at pages 617 and 618, 125 N. W. 1029; Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108

N. W. 544; Gaar, S. & Co. v. Collin, 15 N. D. 623–629, 110 N. W. 81. Subsequently, and within two or three months, the chickens and cows are moved upon the place, together with his household furniture, preparatory to and as a step in the establishment of actual residence thereon. Inconvenience and the fact of partial occupancy of the house by Windmueller naturally resulted in delaying establishment of actual residence until that tenant could be removed, whereupon it was followed with reasonable promptness with residence. Deville v. Widoe, 64 Mich. 593, 8 Am. St. Rep. 852–855, 31 N. W. 533, since maintained to the time of suit. Besides Windmueller's reluctance to vacate earlier than the expiration of the term for which he had prepaid his rent, it is also but reasonable to conclude that as he was a joint maker on these notes in suit it was to his interest to hinder and delay the time of commencement of actual residence of the defendants upon said tract as long as possible in order to cause, if he could, an abandonment of any homestead rights of defendants to said tract, or to negative the existence of any; this in order that the mortgage in suit would be held valid, and that the property be made to pay the defendant's debts and relieve him, Windmueller, from his responsibility as a joint maker on the notes. The interests of Windmueller and plaintiff in this suit are identical. This must not be overlooked in considering the refusal of Mrs. Sexton to become a joint occupant with her husband of the premises already in part tenanted by Windmueller.

These conclusions are reached after fairly exhaustive research and a careful consideration of the many authorities. That property such as this may be impressed with homestead characteristics and homestead rights acquired thereby, exempting it as a homestead from sale on execution and that too prior to the actual establishment of residence thereon, has the support of all authority. Reske v. Reske, 51 Mich. 541, 47 Am. Rep. 594, 16 N. W. 895, an opinion by Judge Cooley upon closely analogous facts; Deville v. Widoe, 8 Am. St. Rep. 852, and note (64 Mich. 593, 31 N. W. 533). In this case the facts are also nearly parallel even in length of time elapsing from acquirement of the property to establishment of residence, and citing Barber v. Rorabeck, 36 Mich. 399; Bouchard v. Bourassa, 57 Mich. 8, 23 N. W. 452; Griffin v. Nichols, 51 Mich. 575, 17 N. W. 63; Scofield v. Hopkins, 61 Wis. 370, 21 N. W. 259. The note also cites Hawthorne v.

Smith, 3 Nev. 182, 93 Am. Dec. 397, and note to Arendt v. Mace, 9 Am. St. Rep. 209. See also Gill v. Gill, 69 Ark. 596, 55 L.R.A. 191, 86 Am. St. Rep. 213, 65 S. W. 112. Nor is there anything contrary to this holding in the decisions of this state. All are in harmony with the beneficent spirit and purpose of the constitutional and the statutory provisions exempting the homestead. And knowing the law, plaintiff was warned "that the homestead estate is granted for the benefit of the family, and not for the benefit of the husband and father." Rosholt v. Mehus, 3 N. D. 513, at p. 518, 23 L.R.A. 239, 57 N. W. 783, citing Fore v. Fore, 2 N. D. 260, 50 N. W. 712, and repeated many times to the present. The syllabus in Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684, reannounces the same rule in its declaration that "the homestead exemption is declared in favor of the head of the family in a representative capacity, and is not intended only for the benefit of the individual who stands in that relation, but for the protection and preservation of the home for the benefit of the family as a whole;" and as to the construction of homestead provisions it likewise declares "the constitutional and statutory provisions of this state declaring as absolutely exempt to the head of a family the homestead as created, defined, and limited by law, are wholesome and salutary regulations, remedial in character, enacted in furtherance of a wise, generous, and humane public policy to encourage the establishment and maintenance of homes, and should be liberally construed with a view of carrying into effect the obvious purpose of their enactment." Still stronger language is used in First International Bank v. Lee, 25 N. D. 197 at page 265, 141 N. W. 716. Our early decisions have been careful to recognize constructive residence as distinguished from actual residence, as sufficient for a basis of claim of homestead. "A tract of land does not necessarily cease to be a homestead, within the meaning of the law, simply because at a particular time there is no house upon it fit to live in. The absence of a house might be explained, and despite such absence it might be made to appear to the satisfaction of a court that the land was a homestead, and that its owners fully intended to rebuild and dwell upon the land as such." Edmonson v. White, 8 N. D. 72–75, 76 N. W. 986. And again, in Brokken v. Baumann, 10 N. D. 455, 88 N. W. 84, quoting from the syllabus: "Before the homestead right attaches to land under such section, there must be *actual or constructive resi-*

dence on the land with a view to making it a home. Mere intention to occupy such land is not sufficient, in the absence of some acts indicative of carrying such intention into immediate execution to some extent." And again in the opinion, p. 459: "This court has held that the presence of a house on the land in all cases at all times is not necessary. . . . The absence of the occupants during the time of rebuilding in such cases is not an abandonment or a forfeiture of homestead rights, and courts will construe efforts and intentions to build on and to *occupy premises liberally.*" Some cases heretofore cited are mentioned as supporting its conclusions. Also Smith v. Spafford, 16 N. D. 208, 112 N. W. 965, reads: "A person is not entitled to claim his land exempt as a homestead unless he is residing thereon. . . . 'Residence' under that section, is construed not to mean actual and continuous residence on the homestead." Citing Edmonson v. White, supra. No court has announced the doctrine that the family homestead right cannot attach until actual residence has been begun, when actual residence has in fact followed good-faith preparations for it, even though such preparations extend over a considerable period of time. 21 Cyc. 425d. The showing of the actual residence is but the final step in the proof that the land has possessed a homestead character during the course of the erection of the dwelling for homestead purposes. And in case of doubt, where the acts, as here, are at least as consistent with the good-faith claim of homestead right as of a contrary construction, and where the premises are shown to have been finally occupied by the family, having in mind also that a *constitutional* right guaranteed the *family* is being dealt with and administered or defeated, the doubt should be resolved in favor of the right of homestead, and not against it. Accordingly, it is ordered that the judgment appealed from be reversed and the decree of foreclosure ordered set aside, and the purported mortgage be adjudged void; but that money judgment for the amount due on the notes, with costs of district court, be entered in plaintiff's favor and against the defendants Patrick Sexton and Frank Windmueller; but that no costs be allowed to either party on this appeal.

JOSEPH JAMTGAARD v. GREENDALE TOWNSHIP, in Richland County, North Dakota.

(151 N. W. 771.)

Government survey — section mounds — location — quarter section mound — minutes — records — field notes — absence of — testimony of transit — man who made survey — competent.

Where the section mounds in a government survey are definitely located and a dispute arises as to the location of a quarter section mound and the claim is made that it is 57 feet west of the line between the said section mounds, and there is nothing in the minutes, the field notes, or the report of the government surveyor at Washington to show that said line was not in fact a straight line, it is competent for a transit man to testify that it was he who actually made the survey and ran the line, and to testify as to the facts of the case and how such line was run, and that it was in fact a straight line, even though the certificate of the surveyor which is filed at Washington is signed by the contractor merely, and does not disclose the fact that the survey was made by any other person than those in said report mentioned, and does not include the name of the witness. Such testimony is *held* to be, not for the purpose of disputing the original survey, but of showing what the location of the surface line in fact was, and that it accorded with the location which would naturally be presumed from the record filed.

Opinion filed February 25, 1915.

Appeal from the District Court of Richland County, *Allen*, J.

Action of ejectment. Judgment for defendant. Plaintiff appeals. Reversed.

Statement of facts by BRUCE, J.

This appeal is from an order of the district court of Richland county denying appellant's motion for a new trial. The action is in ejectment for the recovery of the possession of an irregular strip of land containing 3 29/43 acres.

About six years prior to the commencement of this action appellant purchased and went into possession of the west half of section 3, township 129 north, of range 49 west, in Richland county, North Dakota, and has continuously remained in possession thereof up to the present

time. The respondent township is one of the duly organized and existing civil townships in Richland county, and embraces the land involved in the action. The point in dispute is the location of the section line separating sections 3 and 4 in the township and range above named. There is a public highway running north and south between said sections 3 and 4. It is conceded by all parties that at both the north and south ends of this section line the highway is located exactly on the line as originally surveyed. Beginning at the north end of this section line and proceeding south, the highway continuously and uniformly deflects to the east until the quarter line is reached. At this point the variation to the east is 57 feet. Precisely at the quarter line the highway abruptly changes its course, and, proceeding south, continuously and uniformly deflects to the west until the south end of the section line is reached, and at the south end as at the north end, the highway is exactly on the section line. As now existing, the highway forms two sides of an obtuse angle, the vertex of the angle being exactly at the quarter line. It is appellant's contention that this section line, as originally surveyed, was a straight line, and was located at the quarter line, 57 feet west of where the highway is now located, and that the strip of land, consisting of two right angle triangles, with the base of both at the quarter line, and lying between the highway as now located and a straight line north and south from the two ends of this highway, belonged to appellant, as forming part of said section 3, and the action is brought against the township, which claims to be entitled to the possession of the same for highway purposes. Respondent, on the other hand, contends that the highway, as now located and as shown on these plats, follows exactly the original survey of the section line separating said sections 3 and 4; that the original quarter mound built by the surveyors who made the original survey, and the quarter post set in said mound, were located exactly where the middle of the highway now crosses the quarter line. Respondent does not contend that this mile of highway extends in a straight line. It is not disputed that the variation from a straight line at the quarter line is 57 feet. Respondent, however, contends that this deviation was made in the original survey, and that, whether straight or crooked, appellant and all other persons are bound by the survey as in fact made. Appellant contends that the highway does not follow the line of the survey, but had its origin at

a time when the country was sparsely settled and the land open and unimproved, and when no effort was made to have highways conform to section lines; that the section line as originally run was a straight line, and that the original mound and stake at the quarter line were in fact located on this straight line, and 57 feet west of the point where the highway crosses the quarter line.

W. S. Lowry and *W. S. Lauder,* for appellant.

We concede that it is the settled law of this state that in disputes as to the boundary lines of lands derived from the government, the monuments made or constructed upon the original government survey control, and that this is true whether the original survey was correctly made or not. Radford v. Johnson, 8 N. D. 182, 77 N. W. 601; Propper v. Wohlwend, 16 N. D. 110, 112 N. W. 967; Tyler v. Haggart, 19 S. D. 167, 102 N. W. 682; Unzelmann v. Shelton, 19 S. D. 389, 103 N. W. 646; Matheny v. Allen, 129 Am. St. Rep. 996, and extended note, 63 W. Va. 443, 60 S. E. 407.

The witness Burbank was present when the original survey was made; he saw the lines run; he was present when the quarter mound was made, and the quarter post set; that he knew this mound and post were placed on a straight line between the ends of the section line, and were placed 57 feet west of the center of the highway as it now crosses the quarter line; that he knew all about all the facts in relation to such matter. Plaintiff's offer of proof embodied all these facts. The examining party has the right to make an offer of proof of facts which he assumes his question will elicit. Eagon v. Eagon, 60 Kan. 697, 57 Pac. 942.

Such evidence as the offer included was competent for the purpose offered. Russell v. Maxwell Land Grant Co. 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966; Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449.

Assuming that the approval of the survey made by blanding was in the nature of a judgment, and that the record thereof at Washington had the force of the record of a judicial proceeding, it is evident that appellant, in the proof which he offered, and which was rejected, was

not attempted to "impeach" or "impair" the original survey. Bagby v. Warren Deposit Bank, 20 Ky. L. Rep. 1357, 49 S. W. 177.

Purcell, Divet, & Perkins, for respondents.

If the evidence offered had been received, and a verdict rendered for plaintiff, the court would have been required to set it aside. Luick v. Arends, 21 N. D. 614, 132 N. W. 353.

Field notes of an official surveyor are admissible and have the force of a deposition, because made under his official oath. Kirby v. Lewis, 39 Fed. 75.

A survey is not complete until it is filed and approved. United States v. Curtner, 38 Fed. 10.

A surveyor of public lands is not a clerk or employee, but a public officer acting under oath, and making return of his work under a further oath as to its correctness. A witness cannot give evidence which would show that the survey adopted by the government was not made. The question is not what the witness did, but what the government, through its official surveyor, did. Kelley v. Dresser, 11 Allen, 33; Pollard v. Dwight, 4 Cranch, 421, 2 L. ed. 666.

Where a record is required to be kept, such record is the best evidence. 17 Cyc. 497, 498; Benninghoof v. Finney, 22 Ind. 101; Bovee v. McLean, 24 Wis. 225.

And such records cannot be contradicted or supplemented by parol. People ex rel. Greenwood v. Madison County, 125 Ill. 334, 17 N. E. 805; 17 Cyc. 696, last ¶ in note; United States v. Scott, 25 Fed. 470; Re Prickett, 20 N. J. L. 134; Griffin v. Rising, 2 Cush. 75; Saxton v. Nimms, 14 Mass. 319; Kelley v. Dresser, 11 Allen, 33; Boynton v. People, 155 Ill. 66, 39 N. E. 622; Rood v. Wallace, 109 Iowa, 5, 79 N. W. 451.

One cannot offer a record in evidence and then attempt to show that it is incorrect in part. Monk v. Corbin, 58 Iowa, 503, 12 N. W. 571.

The basic reason why matters connected with the government surveys are conclusively settled by action of the department, is that they concern the exercise of political functions, and the department and its officers constitute special tribunals for their settlement, and the courts cannot go back of such settlement. Knight v. United Land Asso. 142 U. S. 176, 35 L. ed. 979, 12 Sup. Ct. Rep. 258; Russell v. Maxwell

Land Grant Co. 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827; McBride v. Whitaker, 65 Neb. 137, 90 N. W. 970; Throop, Pub. Off. § 645; 17 Cyc. 496, 497, note 75.

A verdict will not be disturbed to enable a party to put in, but in a different form, evidence of that which he already has in the record. Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 659.

BRUCE, J. (after stating the facts as above). Although there are numerous assignments of error in this case, the real and only controversy is over the location of the original monument at the quarter line running east and west through the section, and in this connection whether the learned trial court erred in rejecting the following offer of proof: "The plaintiff now offers to prove by the witness on the stand, John Q. Burbank, that in the summer and fall of the year 1874 he was employed by one James C. Blanding; that the said James C. Blanding then held a contract with the United States to subdivide into sections and quarter sections congressional township No. 129 in range 49, now embraced in Greendale township, and to do other surveying of the same kind and character; that in the year 1874, and on or about the month of September of said year, he, the said witness, while still in the employ of the said James C. Blanding, himself in person surveyed and ran the section line separating sections 3 and 4 in said township, and himself in person made the field notes of said survey and also ran all the other lines subdividing the said township into sections and quarter sections; that the said line separating said sections 3 and 4 as originally surveyed by the said witness as above stated was run in a straight line from north to south and from south to north, and that there was in fact in running said line no variation to the east from a straight line; that the digging of the pits and the building of the mounds and placing of the stakes in connection with the survey of the said township as aforesaid, by the said witness, were dug, built, and set under the direct supervision of the said witness, and among others the pits, mound, and stake at the quarter line or half section corner at the southwest corner of the northwest quarter of section 3, and the southeast corner of the northeast quarter of section 4, and that the said mound was built and a proper stake inserted therein on the section line as surveyed by this witness as before stated, and that the

said mount was built and said quarter stakes set on a straight line directly on the section line as surveyed by the witness as before stated, and that the said section line was surveyed strictly in accordance with the field notes as shown in exhibit "B;" that the center of the highway as now existing, where the same crosses the quarter line separating the southwest quarter of said section 3 from the northwest quarter of said section 3, is 57 feet directly east of the spot where the said mound was built and the said quarter stake set at the time the said survey was made by this witness; that the said James C. Blanding did not make or superintend or was not connected with any other or different survey of the said township and range at any time during the said year of 1874."

To this offer the following objection was made: "To the offer as contained in exhibit "J," taken as a whole, the defendant objects upon the ground that said offer is an offer to prove things as to which the witness has not shown himself competent to testify; that no proper foundation has been laid for the testimony of the witness upon the matters and things contained in the offer; upon the further ground that there is contained in said offer matters and things irrelevant and immaterial to any issue involved herein; that the said offer contemplates proof of a survey by a person not shown to be a competent person to make said survey under the laws of the United States, and a person shown by the record not to be authorized to make said survey or to take any part therein, and that as the said offer tends to contradict by parol the records in the Department of the Interior in regard to the making and return of the official survey; that in so far as said offer attempts to prove a survey by anyone except the deputy surveyor acting under his oath of office, it is irrelevant and immaterial, and the record now is shown that the official survey finally adopted by the government was the survey of James C. Blanding mentioned in the offer, and not the survey of this witness; and upon the further ground that this witness has not shown himself competent to testify, and could only testify as to his conclusion as to the connection of James C. Blanding with any other or different survey that may have been made of the lands in question."

The objection of respondent is to the effect that appellant, to establish the fact that the original survey was on a straight line between the section corners, introduced in evidence a certified copy of the field notes

of the survey; that these field notes purported to be under the official oath of James C. Blanding; that the record shows that the survey accepted and acted upon by the government was made by James C. Blanding, and that the plaintiff and appellant by his offer seeks to show that such field notes were not made by Blanding, but by the witness, Burbank, and then to show that in the survey the line ran in a straight line, and that he is thus seeking to dispute the government record, which he cannot do.

There would, we believe, be much merit in this contention if the plaintiff and appellant were in any way seeking to dispute the survey or the field notes which were certified to by James C. Blanding. The offer of counsel, however, was not to dispute the record, but rather to corroborate it, and to overcome the contention of the respondent that the survey which had been made according to such notes, and which would apparently seem to have been made along straight lines, was not in fact so made. We find, indeed, nothing in the field notes certified to by Blanding which locates the quarter section mound at the point which is contended for by the respondent, or which would lead anyone to believe that it was not in a straight line with the section mounds, which are conceded to have been in a straight line with one another and with those which preceded them. The offer of appellant, in short, was not to dispute the record at Washington, but to show that a line that was run between two fixed points was—what it should have been and what everyone would have a right to assume it to have been—a straight line. The situation, indeed, is a peculiar one. The respondents base their claim upon the proposition that in making the original survey, for some unaccountable reason, the transit man deflected his instrument to the east until he came to the quarter section line and then deflected it again to the west, and that not only did he violate the geometrical maxim that a straight line is the shortest distance between two given points, but the ordinary rules of surveying, and seeks to prove this by the testimony of outside witnesses as to their remembrance as to the location of a mound which was claimed to have been placed at the quarter section line. The appellant, however, is not allowed to prove the falsity of this attack upon the plain import of the original survey in the records at Washington as they would usually be construed and understood, and this by the testimony of the very

man who ran the transit and made the survey. It may be true that if the minutes as recorded at Washington had definitely located the quarter section monument, and this outside of the straight line, the testimony of the transit man would have been incompetent, but this was not the case.

It is true that in order that titles may be established with a reasonable degree of certainty, the courts have uniformly held that the record of what the survey actually is may not be contradicted, and that the report or record of the government surveyor is final, except where the monuments may be definitely located.

It is also true that under the law and his contract, a deputy surveyor is required to include as a part of his record of the government survey the names of his chainmen, flagmen, and mound builders, and that in the report made by Mr. Blanding the name of the witness does not appear. We do not believe, however, that the report as to names of the assistants was ever intended to be final and conclusive, and we are quite sure that this part of the report may be contradicted where such contradiction is not made for the purpose of disproving the survey, but merely for the purpose of explaining it. "Whether," says the Supreme Court of the United States in Russell v. Maxwell Land Grant Co. 158 U. S. 253, 259, 39 L. ed. 971, 973, 15 Sup. Ct. Rep. 827, "a survey . . . is correct or not is one thing, and that, as we have seen, is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction otherwise than by original proceedings in equity. While, on the other hand, where the lines run by such survey lie on the ground or whether any particular tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts. In the case before us the offer was not to show that the land in controversy was one side or other of the line established by the survey. On the contrary it was conceded that it was within the limits of the survey, and the offer was simply to show that that survey was inaccurate, and that the lines should have been run elsewhere; but this is not a matter for inquiry in this collateral way in the courts."

The evidence sought to be introduced was, in our opinion, based upon a more accurate foundation than that of the witnesses who merely testified as to their remembrance of the location of the quarter section

monument. If this is the case, and we think it is, there is no merit in the contention that, even if the evidence was improperly excluded, no prejudice resulted to the plaintiff and appellant as the testimony of the other witnesses as to the location of the mound was overwhelming and conclusive. It is well settled, indeed, that a verdict cannot be directed if there is a substantial conflict in the evidence, even though those testifying in favor of such verdict largely outnumber those who oppose it; in other words, where different minds might reasonably and legally arrive at different conclusions. See Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A. (N.S.) 75, 140 N. W. 719.

The evidence sought to be introduced was, we believe, competent. It was really as high a quality of evidence and as conclusive as could under the circumstances be obtained. It was in support of, and not in contradiction to, the natural import of the field notes and of the government survey. It was opposed, it is true, by the testimony of numerous witnesses, but that testimony was, like the testimony as to all monuments and boundaries which have long since departed, and which is based upon remembrances alone of a long past fact and upon conclusions merely, by no means conclusive.

We are, indeed, not prepared to hold that a certificate of one holding a government surveyor's contract, and to the effect that he has made a certain survey in strict accordance with the laws of the United States and his contract and manual of instructions, is in all cases conclusive of the fact that he himself personally operated the transit and personally ran the line. The field notes and record of the survey are, for many good reasons, held to be conclusive, but even this rule does not apply where there is a conflict between the field notes and the monuments, and where such monuments can be definitely located. The courts, indeed, at any rate those of our western states, may take judicial notice that large surveying contracts were taken even by men who were absolutely ignorant of the use of transits and compasses, and that the exception, rather than the rule, was for the contractor to run the instrument himself instead of employing transit men to do the work. We cannot, as judges, be ignorant of that which we, as men, must know.

So, too, the case is in no way different from one in which the location of a monument is in dispute and a bystander who saw it located in

the first place seeks to testify as to his knowledge of the fact and as to the location. Numerous farmers were allowed to testify as to their remembrance of the location of the monument which they admit had disappeared long before the trial of the action. They seek to disprove the clear import of the field notes and of the records at Washington, and this by the memory of a long past view of estimate merely. Surely the testimony of the transit man was as competent as was theirs.

The judgment of the District Court is reversed and the cause is remanded for further proceedings according to law.

STATE OF NORTH DAKOTA v. HERBERT GLASS.

(151 N. W. 229.)

New trial — motion for — rulings of the trial court — grounds for new trial — must be presented — otherwise waived.

1. Where there is a motion for a new trial, rulings of the trial court constituting proper grounds for a new trial under the statute must be so presented; otherwise they will be deemed waived.

2. The sufficiency of the evidence to sustain the verdict in a criminal action will not be reviewed on appeal unless the motion for a new trial specifies as error that the verdict is against the evidence.

Instructions — circumstantial evidence — weight of — statement of the law.

3. An instruction "that circumstantial evidence is legal and competent in criminal cases such as this is, and, if it is of such character as to exclude every reasonable hypothesis other than that the defendant is guilty, is entitled to

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Note.—The old common-law rule that in any criminal case the jury must be kept together until a verdict was rendered has been modified in recent times, and there are but few recent cases which hold that a mere separation of a jury is cause for a reversal of a judgment of conviction. The same modern rule applies to capital cases, although in some jurisdictions a distinction between capital cases and others is still recognized and a stricter rule applied in capital cases. A rule followed by numerous cases, as shown by a review of all the authorities in a note in 24 L.R.A. (N.S.) 776, is that it is within the discretion of the court to permit the jury to separate even in capital cases, and that unless there is an abuse of discretion a new trial will not be granted. The general question of separation of jurors in criminal cases is also treated in a note in 60 Am. Rep. 73.

On the question of instructions as to alibi, see note in 41 L.R.A. 539.

the same weight as direct testimony," is not open to attack as an erroneous statement of law, especially where no request for additional instructions is made.

Accomplice — testimony of — law governing — failure of court to instruct on — not error unless same was requested.

4. Failure of the trial court to instruct the jury as to the law governing the testimony of an accomplice cannot be urged as prejudicial error, in the absence of a request for such instruction.

Alibi — subject — failure to instruct on — not error unless requested.

5. Failure to instruct on the subject of an alibi is not reversible error, where no request to charge upon that feature of the case was made.

Criminal action — jury — court — discretion in permitting jury to separate — before case finally submitted.

6. A jury sworn to try a criminal action may, at any time before the cause is submitted to the jury, in the discretion of the court, be permitted to separate.

Prosecuting attorney — language used — objection to — before submission of case — must be made.

7. If prejudicial language on the part of the prosecuting attorney is not objected to or called to the court's attention before the case is submitted to the jury, error cannot be assigned thereon.

Opinion filed January 19, 1915. Rehearing denied March 1, 1915.

Appeal from the District Court of Bowman County, *Hon. W. L. Nuessle,* Judge.

Affirmed.

Bangs, Netcher, & Hamilton, for appellant.

Circumstantial evidence should be expressly defined, and the rules governing its effect should be concisely stated. It is always the duty of the trial court to so clearly define such evidence, whether requested or not, and a failure to do so is prejudicial error. The court failed to do so in this case, and the defendant's substantial rights were prejudiced, and he is entitled to a new trial. 12 Cyc. 633; 1 Greenl. Ev. 15th ed. § 13, note A; People v. Strong, 30 Cal. 151; Burton v. State, 107 Ala. 108, 18 So. 284; Casey v. State, 20 Neb. 138, 29 N. W. 264; Brookin v. State, 26 Tex. App. 121, 9 S. W. 735; State v. Johnson, 19 Iowa, 231; Horne v. State, 1 Kan. 42, 81 Am. Dec. 499; People v. Lambert, 5 Mich. 367, 72 Am. Dec. 49; State v. Novak, 109 Iowa, 717, 79 N. W. 465.

Where the proof rests upon circumstantial evidence, it must be so clear and convincing as to exclude every other reasonable hypothesis than that of the guilt of the accused. Barnard v. State, 88 Tenn. 183, 12 S. W. 444; Turner v. Enrille, 4 Dall. 7, 1 L. ed. 717; 1 Greenl. Ev. 15th ed. § 13, note A; People v. Strong, 30 Cal. 151; 12 Cyc. 633; Burton v. State, 107 Ala. 108, 18 So. 284; People v. Lambert, 5 Mich. 367, 72 Am. Dec. 49; Casey v. State, 20 Neb. 138, 29 N. W. 264; Carlton v. People, 150 Ill. 181, 41 Am. St. Rep. 346, 37 N. E. 244, 9 Am. Crim. Rep. 62; Brookin v. State, 26 Tex. App. 121, 9 S. W. 735; State v. Johnson, 19 Iowa, 231; Horne v. State, 1 Kan. 42, 81 Am. Dec. 499; State v. Novak, 109 Iowa, 717, 79 N. W. 465; Territory v. Lermo, 8 N. M. 566, 46 Pac. 16; Harrison v. State, 9 Tex. App. 407; Com. v. Goodwin, 14 Gray, 55; Com. v. Costley, 118 Mass. 1; Sumner v. State, 5 Blackf. 579, 36 Am. Dec. 561; People v. Aikin, 66 Mich. 461, 11 Am. St. Rep. 512, 33 N. W. 821, 7 Am. Crim. Rep. 345; Barnes v. State, 41 Tex. 344; Wroth v. Norton, 33 Tex. 192; People v. Phipps, 39 Cal. 326.

The court erred by his failure to fully and clearly charge the jury upon the question of the alibi claimed by defendant. What the court said and what it failed to say, as it was its duty to do, was clearly prejudicial to defendant. This was a material issue in the case, and, whether requested to do so or not, it was the duty of the trial court to tell the jury fully the law upon the question, and its application to this case. Rev. Codes 1905, § 10026; State v. Fenlason, 78 Me. 495, 7 Atl. 385; 12 Cyc. 659; Lang v. State, 16 Lea, 433, 1 S. W. 319; State v. Matthews, 20 Mo. 55; State v. Palmer, 88 Mo. 568; State v. Stonum, 62 Mo. 596; Fulcher v. State, 41 Tex. 233; Sanders v. State, 41 Tex. 307; Elam v. State, 16 Tex. App. 34; Crist v. State, 21 Tex. App. 361, 17 S. W. 260; Lewis v. State, 18 Tex. App. 408.

Where the proof, as in this case, fairly raises the defense of an alibi, the jury should be instructed that if such evidence in connection with the other proof in the case raised a reasonable doubt as to whether the defendant was present at the place of the homicide, or at a different place, the defendant should be acquitted. Legere v. State, 111 Tenn. 368, 102 Am. St. 786, 77 S. W. 1059; Davis v. State, 5 Baxt. 612;

Wiley v. State, 5 Baxt. 662; Jefferson v. State, 3 Shannon, Cas. 330; Prince v. State, 100 Ala. 144, 46 Am. St. Rep. 28, 14 So. 409; Miles v. State, 93 Ga. 117, 44 Am. St. Rep. 140, 19 S. E. 805; Carlton v. People, 150 Ill. 181, 41 Am. St. Rep. 346, 37 N. E. 244, 9 Am. Crim. Rep. 62; People v. Roberts, 122 Cal. 377, 55 Pac. 137, 11 Am. Crim. Rep. 31; Flanagan v. People, 214 Ill. 170, 73 N. E. 347; State v. Wollard, 111 Mo. 248, 20 S. W. 27; Peyton v. State, 54 Neb. 188, 74 N. W. 597, 11 Am. Crim. Rep. 47; Tipton v. State, 119 Ga. 304, 46 S. E. 436, 15 Am. Crim. Rep. 209; State v. King, 174 Mo. 647, 74 S. W. 627, 15 Am. Crim. Rep. 616; State v. MacQueen, 69 N. J. L. 522, 55 Atl. 1006; State v. Gadsden, 70 S. C. 430, 50 S. E. 16; 2 Thomp. Trials, § 2287; State v. Thornton, 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196; Arismendis v. State, — Tex. Crim. Rep. —, 60 S. W. 47; Smith v. State, — Tex. Crim. Rep. —, 50 S. W. 362.

The rule is that where defendant's evidence tends to prove an alibi, a refusal to instruct specially on the law of alibi is error. 14 Century Dig. col. 2574, § 1833, and cases cited; 12 Cyc. 619; Binns v. State, 46 Ind. 311; State v. Conway, 55 Kan. 323, 40 Pac. 661; Wiley v. State, 5 Baxt. 662; State v. Powers, 72 Vt. 168, 47 Atl. 830; Burton v. State, 107 Ala. 108, 18 So. 285; State v. Edwards, 109 Mo. 315, 19 S. W. 91; 2 Am. & Eng. Enc. Law, 55, cases cited in note 1; Deggs v. State, 7 Tex. App. 359; McGrew v. State, 10 Tex. App. 539; Granger v. State, 11 Tex. App. 454; Ayres v. State, 21 Tex. App. 399, 17 S. W. 253; People v. Stone, 117 N. Y. 480, 23 N. E. 13; State v. Childs, 40 Kan. 482, 20 Pac. 275; Howard v. State, 50 Ind. 190; Bishop v. State, 43 Tex. 402; 2 Thomp. Trials, § 2317; Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 73; Boots v. Canine, 94 Ind. 408; State v. Nadal, 69 Iowa, 478, 29 N. W. 451; State v. Johnson, 40 Kan. 266, 19 Pac. 749.

The burden of proof in such cases is at all times upon the state, and does not shift because of the attempt of defendant to prove an alibi, and if, by reason of such claim or of defendant's evidence to support it, the jury should doubt the guilt of the accused, he should be acquitted, and the court should so instruct. State v. Conway, 55 Kan. 323, 40 Pac. 661; People v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 310; State v. Child, 40 Kan. 482, 20 Pac. 275; Pollard v. State, 53 Miss. 410, 24 Am. Rep. 703; State v. Jackson, 36 S. C. 487, 31 Am. St. Rep. 890,

15 S. E. 559; Sharp v. State, 51 Ark. 147, 14 Am. St. Rep. 27, 10 S. W. 228.

The defendant on appeal can take advantage of the failure of the court to instruct upon all material questions, without an exception on the trial. People v. McGuire, 89 Mich. 64, 50 N. W. 786; State v. Murray, 91 Mo. 95, 3 S. W. 397; People v. Macard, 73 Mich. 15, 40 N. W. 784; Whaley v. State, 9 Tex. App. 306; Heath v. State, 7 Tex. App. 464; McGrew v. State, 10 Tex. App. 539; Vincent v. State, 9 Tex. App. 303; Bishop v. State, 43 Tex. 390; Wilson v. State, 41 Tex. Crim. Rep. 115, 51 S. W. 916; Joy v. State, — Tex. Crim. Rep. —, 51 S. W. 935; State v. Rowland, — Iowa, —, 33 N. W. 137; People v. Lee Gam, 69 Cal. 552, 11 Pac. 183, 7 Am. Crim. Rep. 61; State v. Fenlason, 78 Me. 495, 7 Atl. 385; State v. Fry, 67 Iowa, 475, 25 N. W. 738; State v. Johnson, 72 Iowa, 393, 34 N. W. 177; State v. Mahan, 68 Iowa, 304, 20 N. W. 449, 27 N. W. 249; Landis v. State, 70 Ga. 651, 48 Am. Rep. 588; State v. Hardin, 46 Iowa, 623, 26 Am. Rep. 174; State v. Lightfoot, 107 Iowa, 344, 78 N. W. 41, 11 Am. Crim. Rep. 588; Barbe v. Territory, 16 Okla. 562, 86 Pac. 61; Legere v. State, 111 Tenn. 368, 102 Am. St. Rep. 781, 77 S. W. 1059; Davis v. State, 5 Baxt. 612; Wiley v. State, 3 Shannon, Cas. 330; People v. Stone, 117 N. Y. 480, 23 N. E. 13; People v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 310; State v. Child, 40 Kan. 482, 20 Pac. 275; State v. Chee Gong, 16 Or. 534, 19 Pac. 607; Pollard v. State, 53 Miss. 410, 24 Am. Rep. 703; Peyton v. State, 54 Neb. 188, 74 N. W. 597, 11 Am. Crim. Rep. 47; State v. Conway, 55 Kan. 323, 40 Pac. 661; Prince v. State, 100 Ala. 144, 46 Am. St. Rep. 28, 14 So. 409; Miles v. State, 93 Ga. 117, 44 Am. St. Rep. 140, 19 S. E. 805; People v. Roberts, 122 Cal. 377, 55 Pac. 138, 11 Am. Crim. Rep. 31; Flanagan v. People, 214 Ill. 170, 73 N. E. 347; Tipton v. State, 119 Ga. 304, 46 S. E. 436, 15 Am. Crim. Rep. 209; State v. King, 174 Mo. 647, 74 S. W. 627, 15 Am. Crim. Rep. 616; State v. MacQueen, 69 N. J. L. 522, 55 Atl. 1006; State v. Gadsden, 70 S. C. 430, 50 S. E. 15; State v. Ward, 61 Vt. 153, 17 Atl. 486, 8 Am. Crim. Rep. 207; 12 Cyc. 659; Lang v. State, 16 Lea, 433, 1 S. W. 319; State v. Matthews, 20 Mo. 55; State v. Palmer, 88 Mo. 568; State v. Stonum, 62 Mo. 596; Fulcher v. State, 41 Tex. 233; Sanders v. State, 41 Tex. 307; Elam v. State, 16 Tex. App. 34; Crist v. State, 21 Tex. App. 361, 17 S. W. 260;

Lewis v. State, 18 Tex. App. 408; 2 Thomp. Trials, § 2287; State v. Thornton, 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196; Arismendes v. State, — Tex. Crim. Rep. —, 60 S. W. 47; Smith v. State, — Tex. Crim. Rep. —, 50 S. W. 362; Binns v. State, 46 Ind. 311; State v. Conway, 55 Kan. 323, 40 Pac. 661; State v. Powers, 72 Vt. 168, 47 Atl. 830; Burton v. State, 107 Ala. 108, 18 So. 285; State v. Edwards, 109 Mo. 315, 19 S. W. 91; 2 Am. & Eng. Enc. Law, 55; Deggs v. State, 7 Tex. App. 359; Granger v. State, 11 Tex. App. 454; Ayres v. State, 21 Tex. App. 399, 17 S. W. 253; State v. Nadal, 69 Iowa, 478, 29 N. W. 451.

The witness Thomas Carberry was in law an accomplice, and his testimony must be corroborated not only in a material part of the story, but particularly in that part which goes to establish the guilt of the accused. The corroborated testimony must connect or tend to connect the defendant with the commission of the crime. Ortis v. State, 18 Tex. App. 282; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; State v. Kellar, 8 N. D. 563, 73 Am. St. Rep. 775, 80 N. W. 476.

"An accomplice in crime is one who co-operates, aids, or assists in committing it." Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; State v. Jones, 115 Iowa, 113, 88 N. W. 196; State v. Douglas, 26 Nev. 196, 99 Am. St. Rep. 688, 65 Pac. 802; Rev. Codes 1905, § 10004; State v. Kellar, 8 N. D. 563, 73 Am. St. Rep. 775, 80 N. W. 476; State v. Coudotte, 7 N. D. 109, 72 N. W. 913; Fort v. State, 52 Ark. 180, 20 Am. St. Rep. 163, 11 S. W. 959; State v. Odell, 8 Or. 31; State v. Mikesele, 70 Iowa, 176, 30 N. W. 474; Wright v. State, 43 Tex. 170; People v. Davis, 21 Wend. 309; Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; Chambers v. State, — Tex. Crim. Rep. —, 44 S. W. 495; State v. Lawlar, 28 Minn. 216, 9 N. W. 698; State v. Clements, 82 Minn. 434, 85 N. W. 229; State v. Stevenson, 26 Mont. 332, 67 Pac. 1001; Com. v. Bosworth, 22 Pick. 397; Abbott, Trial Brief, Crim. § 720; People v. Everhardt, 104 N. Y. 591, 11 N. E. 62; Childers v. State, 52 Ga. 106; Hammack v. State, 52 Ga. 397; Middleton v. State, 52 Ga. 527, 1 Am. Crim. Rep. 194; State v. Knudtson, 11 Idaho, 524, 83 Pac. 226; Johnson v. State, — Tex. Crim. Rep. —, 37 S. W. 327; Wright v. State, 47 Tex. Crim. Rep. 433, 84 S. W. 593; People v. Elliott, 106 N. Y. 288, 12 N. E. 602; People v. Kunz, 73 Cal. 313, 14 Pac. 836; Patterson v. Com. 86 Ky. 313, 5 S. W. 387; People v.

Clough, 73 Cal. 348, 15 Pac. 5; State v. Dana, 59 Vt. 614, 10 Atl. 727; Dodson v. State, 24 Tex. App. 514, 6 S. W. 548; Whart. Crim. Ev. 9th ed. §§ 441, 442; State v. Coudotte, 7 N. D. 109, 72 N. W. 913; Miller v. State, 4 Tex. App. 251; Welden v. State, 10 Tex. App. 400; Simms v. State, 8 Tex. App. 230; People v. Ryland, 28 Hun, 568; People v. Barker, 114 Cal. 617, 46 Pac. 601; People v. Morton, 139 Cal. 719, 73 Pac. 609; Com. v. Price, 10 Gray, 472, 71 Am. Dec. 671.

Whenever this question arises, it is the duty of the court to properly and fully instruct the jury as to what constitutes an accomplice, and as to the necessity for corroboration. 1 Enc. Ev. 112; People v. Kraker, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; Com. v. Elliot, 110 Mass. 106; Com. v. Ford, 111 Mass. 394; State v. Schlagel, 19 Iowa, 169; State v. Carr, 28 Or. 389, 42 Pac. 215; Williams v. State, 33 Tex. Crim. Rep. 128, 47 Am. St. Rep. 21, 25 S. W. 629, 28 S. W. 958; Ortis v. State, 18 Tex. App. 282; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; Whart. Crim. Ev. §§ 440, 441; State v. Jones, 115 Iowa, 113, 88 N. W. 196; Smith v. State, 23 Tex. App. 357, 59 Am. Rep. 773, 5 S. W. 219; State v. Phelps, 5 S. D. 480, 59 N. W. 474; State v. Kent, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 638; State v. Douglas, 26 Nev. 196, 99 Am. St. Rep. 688, 65 Pac. 802; Rev. Codes 1905, § 10004; State v. Kellar, 8 N. D. 563, 73 Am. St. Rep. 775, 80 N. W. 476; State v. Coudotte, 7 N. D. 109, 72 N. W. 913; Com. v. Bosworth, 22 Pick. 397; Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81; People v. Schweitzer, 23 Mich. 301; Wright v. State, 43 Tex. 170; People v. Davis, 21 Wend. 309; Chambers v. State, — Tex. Crim. Rep. —, 44 S. W. 495; State v. Lawlar, 28 Minn. 216, 9 N. W. 698; State v. Clements, 82 Minn. 434, 85 N. W. 229; State v. Stevenson, 26 Mont. 332, 67 Pac. 1001; State v. Knudtson, 11 Idaho, 524, 83 Pac. 226; Johnson v. State, — Tex. Crim. Rep. —, 37 S. W. 327.

Where malice is a necessary ingredient of the crime charged, as in this case, it is a question of fact for the jury to find, and not a question of law to be inferred by the court, and it is error to instruct the jury that the law presumes malice from the fact of intention of killing. Nilan v. People, 27 Colo. 206, 60 Pac. 485; Whart. Crim. Ev. 9th ed. § 48; Abbott, Trial Brief, Crim. § 598; People v. Place, 157 N. Y. 584, 52 N. E. 576; People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017; Boyd v. United States, 142 U. S. 450, 35 L. ed. 1077, 12 Sup.

Ct. Rep. 292; People v. Jacks, 76 Mich. 218, 42 N. W. 1134; People v. Jenness, 5 Mich. 305; Lightfoot v. People, 16 Mich. 507; Coleman v. People, 55 N. Y. 81; Copperman v. People, 56 N. Y. 591; State v. Lapage, 57 N. H. 279, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; State v. Kirby, 62 Kan. 436, 63 Pac. 752, 15 Am. Crim. Rep. 212.

Where the fact that defendant committed other crimes has no tendency to prove the commission of the crime charged, or of an essential ingredient of that crime, such evidence is inadmissible, and it is error for the court to fail to limit and restrict the purposes for which such testimony could alone be considered by the jury. Thornley v. State, 36 Tex. Crim. Rep. 118, 61 Am. St. Rep. 837, 34 S. W. 264, 35 S. W. 981; Burks v. State, 24 Tex. App. 326, 6 S. W. 300; Hennessy v. State, 23 Tex. App. 340, 5 S. W. 215; State v. Fallon, 2 N. D. 514, 52 N. W. 318; Com. v. Merrill, 14 Gray, 415, 77 Am. Dec. 336; Thurston v. State, 3 Coldw. 115; Maloy v. State, 33 Tex. 599.

Whenever, upon the general evidence, the guilt of the accused appears to the jury to be doubtful, the absence of any testimony in proof of motive, is a circumstance for the jury to consider. State v. Miller, 9 Houst. (Del.) 564, 32 Atl. 137; Carlton v. People, 150 Ill. 181, 41 Am. St. Rep. 346, 37 N. E. 244, 9 Am. Crim. Rep. 62; Sumner v. State, 5 Blackf. 579, 36 Am. Dec. 561; People v. Phipps, 39 Cal. 326.

The sole object in setting aside a verdict and granting a new trial is to prevent injustice, and to insure to everyone a fair and honest trial. To this end greater latitude is given in criminal cases, and where there is reasonable doubt that the accused had a fair trial, a new trial should be granted. 3 Gray & W. New Trial, 1227; Dains v. State, 2 Humph. 442; Bedford v. State, 5 Humph. 552; Whart. Crim. Law; 1 Bishop, Crim. Proc. § 978; People v. Levison, 16 Cal. 199, 76 Am. Dec. 505; People v. Strong, 30 Cal. 158; Roscoe, Crim. Ev.; Code, Crim. Proc. § 10000; State v. Kellar, 8 N. D. 563, 73 Am. St. Rep. 775, 80 N. W. 476; State v. Coudotte, 7 N. D. 109, 72 N. W. 913; State v. Scott, 28 Or. 331, 42 Pac. 1, 10 Am. Crim. Rep. 13; People v. Barberi, 149 N. Y. 256, 52 Am. St. Rep. 717, 43 N. E. 635; Burt v. State, 38 Tex. Crim. Rep. 397, 39 L.R.A. 305, 40 S. W. 1000, 43 S. W. 344.

Evidence cannot be given to show that defendant has committed other crimes than that with which he is charged, and admission of such

evidence is prejudicial error. People v. McNutt, 64 Cal. 116, 28 Pac. 64; People v. Smith, 106 Cal. 73, 39 Pac. 40; People v. Gray, 66 Cal. 271, 5 Pac. 240; 1 Greenl. Ev. §§ 51, 52; Com. v. Tuckerman, 10 Gray, 197; Com. v. Stearns, 10 Met. 256; Com. v. Choate, 105 Mass. 451; Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; 3 Rice, Crim. Ev. 216, 217; Coleman v. People, 55 N. Y. 81; State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; Shaffner v. Com. 72 Pa. 60, 13 Am. Rep. 651; People v. Greenwall, 108 N. Y. 301, 2 Am. St. Rep. 415, 15 N. E. 404; Schick v. United States, 195 U. S. 88, 49 L. ed. 109, 24 Sup. Ct. Rep. 826, 1 Ann. Cas. 585; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

John Carmody, Assistant Attorney General, and *W. F. Burnett,* for respondent.

The charge of the court on the question of circumstantial evidence was a correct, clear, and concise statement of the law. No request was made to the court to further explain or make its charge more explicit. The charge was sufficient even though the case depended wholly on such evidence. There was, however, much other evidence. 12 Cyc. 635; State v. Colman, 17 S. D. 594, 98 N. W. 175.

Even if the court erred in instructing as to circumstantial evidence, it could not have been prejudicial to defendant, for there was ample other evidence, which, if the jury believed, was sufficient to warrant a conviction. State v. Foster, 14 N. D. 561, 105 N. W. 938; State v. Thornton, 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196; State v. Haynes, 7 N. D. 353, 75 N. W. 267; State v. Lawlor, 28 Minn. 216, 9 N. W. 698; Landis v. Fyles, 18 N. D. 591, 120 N. W. 566; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 218, 112 N. W. 972; State ex rel. Pepple v. Banik, 21 N. D. 417, 131 N. W. 262; State v. Rosencrans, 9 N. D. 163, 82 N. W. 422; Thomp. Trials, §§ 2338–2341.

Homicide is murder when perpetrated without authority of law, and with premeditated design to effect the death of the person killed or of any other human being. Rev. Codes 1905, §§ 8789, 8791, 8792.

Evidence of other offenses committed by defendant was proper. State v. Kent (State v. Pancoast), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; State v. Empting, 21 N. D. 128, 128 N. W. 1119.

CHRISTIANSON, J. The defendant was convicted of the crime of murder in the second degree in the district court of Bowman county

upon a change of venue from Billings county, and sentenced to twenty-five years' imprisonment for the murder of one Thomas Corcoran. After the return of the verdict, and before sentence was pronounced, defendant's counsel made a motion for a new trial, which was denied. Judgment was pronounced pursuant to the verdict, and this appeal is taken from such judgment.

The only errors urged by appellant for a reversal relate to certain rulings made by the trial court during the introduction of evidence; failure to give more specific instructions upon certain propositions of law, namely, circumstantial evidence, corroboration of an accomplice, and an alibi; and the insufficiency of the evidence to sustain the verdict.

The trial court submitted a written charge, and no requests were made for any further or additional instructions, nor were any exceptions taken to any part of the charge as given. In the motion for new trial, the only reasons urged are: (1) That during the trial of the action the jurors were permitted to go at large, and were not confined in the custody of bailiffs, and that, at that time, there were present a large number of witnesses and other persons who were hostile to the defendant in the court room, hotels, restaurants, and other places where the jurors necessarily had to go, and that a great deal of bitterness existed against the defendant among the people where he was being tried; and (2) that during his argument to the jury, one of the attorneys for the prosecution made certain statements indicating that the defendant and one Thomas Carberry, the principal witness for the state, were accomplices. These facts were asserted upon the affidavit of T. D. Casey, the attorney for the defendant, and no other affidavits or evidence of any kind submitted in support of said motion for a new trial. In opposition to said motion the state submitted the affidavits of one of the attorneys for the prosecution, who denies making the statement referred to; the affidavit of the presiding judge, who states "that when the jury in said action was impaneled, the attorneys for the state and T. D. Casey, attorney for the defendant, in open court, requested the judge not to put the jurors in said action in custody of bailiffs, but to permit them to separate, for the reason that there were no adequate quarters available for the lodging of the jury during the trial of said action, and that the court thereupon, at the request of the said T. D. Casey, attorney for the defendant, and J. K. Swihart and W. F. Burnett, attorneys for the

plaintiff, made in open court, ordered that said jury be allowed to separate, and specially admonish the jury as to the law and their duties during the trial of said action;" and the affidavits of eleven of the jurors who state that "the Court specially admonished the jury that they must not talk about the case with anyone, or allow anyone else to talk about it in their presence, nor form nor express any opinion until the case was finally submitted. That during the trial of said action no one talked about said case to affiant or in affiant's presence, nor was affiant in any way influenced in arriving at his verdict by any person or persons, but affiant arrived at his verdict solely from the evidence given in open court and under the instructions given by the court." No contention is made that the jury was permitted to separate after the submission of the case.

The defendant in no manner challenged the sufficiency of the evidence, either by motion for an advised verdict of not guilty, or by motion for new trial; neither did he assert in his motion for new trial any error in the court's rulings on the admission or rejection of evidence, or in the instructions given to the jury or the failure to instruct. Therefore, so far as the trial court was concerned, it was led to believe that no complaint was made as to any ruling made by the court relative to the admission or rejection of evidence, the court's instructions to the jury, or the sufficiency of the evidence to sustain the verdict.

The laws of this state enumerate seven causes for granting new trials in criminal actions, among which are the following: ". . . [¶] 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, or has done or allowed any act in the action prejudicial to the substantial rights of the defendant. 6. When the verdict is contrary to law or clearly against the evidence." Comp. Laws 1913, § 10917.

The only errors asserted by appellant on this appeal fall within the provisions of the above two quoted statutory provisions; but, as already stated, defendant did not embody any of these grounds in his motion for a new trial, but seeks to assert them for the first time on this appeal. The question is therefore presented, whether the defendant, having failed to incorporate these grounds in his motion for new trial, can now predicate error thereon in this court.

It is contended by defendant's counsel on oral argument that in view

of the fact that an order denying a new trial is appealable, and no appeal was taken from such order, that defendant is not precluded from presenting on this appeal errors relating to the failure of the trial court to give certain instructions, even though these were not assigned as error in the motion for a new trial. We do not believe that this position is well taken, as defendant, when making a motion for a new trial, was required to assert any and all grounds which might be asserted under the statute by such motion. If the trial court erred in its rulings on the admission of evidence or in its instructions to the jury, or if the evidence was insufficient to sustain the verdict, any of these grounds constituted a sufficient cause for a new trial, but the defendant, in persenting a motion for new trial solely on other grounds, led the trial court to believe that the verdict was not attacked for any of these reasons. In other words, the defendant in the district court took the position that he was not entitled to a new trial on any of these grounds, but upon entirely different ones. This he is not permitted to do. Defendant cannot take the position in the court below in presenting a motion for new trial, that the court's rulings on evidence and its instructions to the jury are correct, and the evidence sufficient to sustain the verdict, and then on appeal to this court assume the contrary position. "Where a motion for new trial is made by a losing party, all errors complained of must be embraced therein, otherwise they will be considered as having been waived; any other practice would operate unjustly to the court below, the presumption being that he would have corrected those errors if he had had an opportunity." Lowery v. State, 72 Ga. 649. These views are also sustained by the following authorities: Collier v. State, 20 Ark. 36; Wilson v. State, — Tex. Crim. Rep. —, 158 S. W. 1114; Haynes v. State, — Tex. Crim. Rep. —, 159 S. W. 1059; Thompson v. State, — Tex. Crim. Rep. —, 160 S. W. 685; Romero v. State, — Tex. Crim. Rep. —, 160 S. W. 1193; Louisville & N. R. Co. v. Com. 154 Ky. 293, 157 S. W. 369; Huffman v. State, — Tex. Crim. Rep. —, 152 S. W. 638; State v. Sydnor, 253 Mo. 375, 161 S. W. 692; State v. Johnson, 255 Mo. 281, 164 S. W. 209; Coulter v. State, — Tex. Crim. Rep. —, 162 S. W. 885; State v. Connors, 245 Mo. 477, 150 S. W. 1063; Coleman v. State, — Tex. Crim. Rep. —, 150 S. W. 1177; Norton v. State, 181 Ind. 123, 100 N. E. 449; State v. Eaker, 17 N. M. 479, 131 Pac. 489; State v. Gatlin, 170 Mo. 354, 70 S. W. 885;

Hill v. State, 112 Ga. 32, 37 S. E. 441; State v. Whitesell, 142 Mo. 467, 44 S. W. 332; Allen v. State, 74 Ind. 216; McCalment v. State, 77 Ind. 250; State v. McKinnon, 158 Iowa, 619, 138 N. W. 523; Weidenhammer v. State, 181 Ind. 349, 103 N. E. 413, 104 N. E. 577. These views have also been sustained by this court in the case of State v. Empting, 21 N. D. 128, 128 N. W. 1119, wherein this court, speaking through Chief Justice Morgan, says: "It is now claimed that the verdict is not sustained by the evidence. . . . A motion for a new trial was made and overruled. . . . There is no specification in the motion for a new trial that the verdict is not sustained by the evidence, or that it is against the evidence. The insufficiency of the evidence was nowhere raised or challenged before the trial court, so far as the record shows. We cannot therefore review the evidence to determine its sufficiency. . . . *The requirement is that the motion for a new trial must state the ground. Among these grounds is that the verdict is clearly against the evidence. Without such or an equivalent specification the state or the trial judge may well presume that the verdict is not attacked as being based on insufficient evidence. In this case we have before us nothing showing that the trial court has ever considered whether the evidence sustains a conviction or not. This omission in the motion precludes our right to review the sufficiency of the evidence.*"

In the case of State v. Campbell, 7 N. D. 67, 72 N. W. 935, this court, in considering the question of whether or not, in a case where specific exceptions had been taken by the defendant to certain portions of the court's instructions, he might avail himself of the provisions of the statute whereby the instructions were deemed excepted to by operation of law, uses the following language: "It appears that the defendant's counsel in this case saw fit to file exceptions with the clerk of the district court to the instructions given in the charge to the jury. This he might lawfully elect to do under the provisions of § 8178 of the Rev. Codes. *But, having pursued this course, he must be governed by such election, and will be limited to the exceptions which he has seen fit to write out and file with the clerk of the district court. By filing exceptions he has notified counsel for the state, as well as the courts, that he will predicate error on such exceptions, and none others so far as relates to the instructions given to the jury.*" "Where rulings of the trial court constitute proper grounds for a new

trial, they cannot be assigned on appeal as independent errors. If presented to the trial court by the proper motion, they are covered by an assignment on that motion; *if not so presented, they cannot be made available in the supreme court in any manner.*" Allen v. State, 74 Ind. 216.

It is contended that the evidence is insufficient to sustain the verdict. This question cannot be reviewed on this appeal. The failure to assert such insufficiency as one of the grounds for new trial in the court below precludes the defendant from doing so in the appellate court. State v. Empting, supra; State v. Reilly, 25 N. D. 339, 141 N. W. 720; State v. Harbour, 27 S. D. 42, 129 N. W. 565. "An objection to the sufficiency of the evidence upon which a conviction was based cannot be raised for the first time on appeal." 12 Cyc. 813.

We are satisfied, however, that the contentions of the defendant are untenable for other reasons. As already stated, it is conceded that no requests for additional instructions were made, and no exceptions to the charge taken for want of such instructions, nor was this made one of the grounds for a new trial. It is not contended that any of the principles of law laid down by the trial court in its charge are erroneous, the only complaint being that the court failed to charge on certain propositions of law. And while we do not believe that the question of the sufficiency or insufficiency of the instructions is before this court for consideration, still, in view of the importance of the case we have carefully examined the instructions and are satisfied that they fairly submitted the case to the jury.

The defendant's first contention is that the trial court's instructions on circumstantial evidence were insufficient. This contention is wholly without merit. In the case at bar the state's case does not rest wholly upon circumstantial evidence, as the witness Carberry gave direct testimony against the defense, hence, error cannot be assigned upon the failure of the trial court to instruct as to circumstantial evidence. State v. Foster, 14 N. D. 561. The defendant's contention is of no merit for another reason, *viz.*, the trial court gave the following instructions to the jury: "I charge you, gentlemen of the jury, that circumstantial evidence is legal and competent in criminal cases such as this is, and, if it is of such character as to exclude every reasonable hypothesis other than that the defendant is guilty, is entitled

to the same weight as direct testimony." This has been held to be a correct statement of the law. Longley v. Com. 99 Va. 807, 37 S. E. 339, 341; Brickwood's Sackett, Instructions to Juries, § 2494. See also Cunningham v. State, 56 Neb. 691, 77 N. W. 60. We are satisfied that in the absence of a request for more specific instructions, the defendant cannot complain of this instruction. There is also good authority to the effect that in the absence of a request for such instruction, error cannot be predicated upon the failure of the court to instruct upon the law applicable to circumstantial evidence. Romero v. State, — Tex. Crim. Rep. —, 160 S. W. 1193; State v. Alley, 149 Iowa, 196, 128 N. W. 343; State v. Colvin, 24 S. D. 567, 124 N. W. 749. See also State v. Rosencrans, 9 N. D. 163, 82 N. W. 422; State v. Woods, 24 N. D. 156, 139 N. W. 321. Although we find it unnecessary to pass on that question in this case.

The question whether the court is required to instruct the jury with reference to the corroboration of the testimony of an accomplice in the absence of a request so to do, is no longer an open question in this state, as the rule is well settled that it is not error for the court to omit such instructions in the absence of a request. State v. Haynes, 7 N. D. 353, 75 N. W. 267; State v. Rosencrans, supra; see also State v. Hams, 24 S. D. 639, 124 N. W. 955, Ann. Cas. 1912A, 1070.

Neither was it reversible error on the part of the trial court to fail to instruct on the subject of an alibi where no request was made for an instruction on that feature of the case. Ferguson v. State, 52 Neb. 432, 66 Am. St. Rep. 512, 72 N. W. 590; Rider v. State, 26 Tex. App. 334, 9 S. W. 689; Lyon v. State, — Tex. Crim. Rep. —, 34 S. W. 947; Smith v. State, — Tex. Crim. Rep. —, 49 S. W. 583; Goldsby v. United States, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216; Com. v. Boschino, 176 Pa. 103, 34 Atl. 964; Gadlin v. State, 13 Ga. App. 660, 79 S. E. 751; Banks v. State, — Tex. Crim. Rep. —, 150 S. W. 184; Inklebarger v. State, 8 Okla. Crim. Rep. 316, 127 Pac. 707. And, as a general rule, in order to predicate error on incomplete instructions, it is necessary to submit a request to the trial court for appropriate instructions. And this court has held that it is not error for the trial court to omit a definition of reasonable doubt in the absence of a request therefor. State v. Montgomery, 9 N. D. 405, 83 N. W. 873. See also People v. Carter, 117 Mich.

576, 76 N. W. 90; Birmingham v. State, 145 Wis. 90, 129 N. W. 670; Guenther v. State, 137 Wis. 183, 118 N. W. 640; State v. Frazer, 23 S. D. 304, 121 N. W. 790; State v. Jones, 145 Iowa, 176, 123 N. W. 960; Territory v. Chartrand, 1 Dak. 379, 46 N. W. 583; State v. Woods, 24 N. D. 156, 139 N. W. 321. The court in its instructions to the jury minutely defined all the elements of the several crimes included in the information, from murder in the first degree to manslaughter in the second degree; defined all the elements of the crimes so included, and charged the jury that in order to find the defendant guilty of murder in the second degree, they must find from all the evidence in the case each and all of the facts necessary to be found in order to make such charge to be true to their satisfaction beyond a reasonable doubt; and that they must be satisfied beyond a reasonable doubt from the evidence that defendant intentionally, purposely, and without legal justification or excuse, killed Thomas Corcoran at the time and *place* charged in the information in this case; and the court further charged that if the jury had any reasonable doubt as to the defendant's guilt of any of the crimes defined in the instructions, then it was their duty to find him not guilty; that the defendant is presumed to be innocent, and that the burden of proof to establish his guilt was upon the state; and that the evidence must be sufficient to establish it beyond a reasonable doubt. The jury, therefore, guided by these instructions, necessarily must have understood that if the defendant was at some place different from where the crime was committed at the time of its commission, or if they had any reasonable doubt as to such fact, that they must acquit him.

The court's failure to instruct on the law relative to the corroboration of an accomplice might be justified on another ground. We find that the defendant's attorney, in his affidavit submitted in support of the motion for a new trial, after setting forth the statements claimed to have been made by one of the prosecuting attorneys in his argument to the jury, goes on to say: "Thus prejudicing the defendant in the eyes of the jury, and leading them to believe that said Carberry . . . was an accomplice in such crime with said defendant, Herbert Glass; that no evidence of such fact was produced in the trial of said case, nor was the case tried, nor were the instructions of the court given, upon the theory that Herbert Glass was an accomplice with Carberry in

the commission of said murder, or that Carberry was an accomplice of Glass; that no instruction was given by the court upon the theory that Glass and Carberry acted together in this murder."

The alleged errors concerning the admission of evidence are wholly without merit. The principal portion of the testimony complained of was received without objection,—some of it in response to questions asked by defendant's counsel. No error can be predicated thereon.

We have already enumerated the grounds set forth in the motion for new trial and the affidavits submitted for and against the same. The first ground of such motion is that the jury was permitted to separate while the case was being tried, and before its submission to the jury. Under the laws of this state it was within the discretion of the trial court to permit the jury to separate while the cause was being tried. Comp. Laws, § 10857. And in view of the fact that such separation was permitted at the request of defendant's own attorney, it is obvious that the trial court did not abuse its discretion in permitting such separation. The other ground of such motion, as already stated, is that one of the attorneys for the prosecution, during his argument to the jury, made certain remarks prejudicial to the defendant, and this is apparently the only ground that was seriously urged in the court below. No exceptions were taken by defendant's counsel to the remarks alleged to have been made by the state's attorney during his argument to the jury, and no request was made to have the jury instructed to disregard such statements. In fact, so far as the record shows there is nothing to indicate that such statements were made. In order to predicate error on such statements, however, it is essential to take proper exceptions thereto, and give the trial court opportunity to rectify the error if any. State v. Matheson, 142 Iowa, 414, 134 Am. St. Rep. 426, 120 N. W. 1036; People v. Giddings, 159 Mich. 523, 124 N. W. 546, 18 Ann. Cas. 844; Holmes v. State, 82 Neb. 406, 118 N. W. 99; State v. Holburn, 23 S. D. 209, 121 N. W. 100. But even though no such request was made, we find that the trial court in its instructions to the jury expressly instructed the jury as follows: "The argument of counsel here before you was made for the purpose of assisting you in determining the true facts in this case. Any statements made by them are not to be considered as evidence by you in this case. If they have expressed opinions in your

hearing to the effect that they believe the defendant guilty or innocent of the crime charged in the information, you should disregard such opinions of counsel, and be guided solely by the evidence in the case and the law as contained in these instructions, in making up your verdict. If the attorneys have misstated the testimony to you in any way, you should disregard such misstatements. . . . You are the sole and exclusive judges of all questions of fact herein involved."

The defendant was tried in a different county from the one wherein the crime was committed, at a period almost two years subsequent to the commission of the crime. There is nothing in the record to indicate that the defendant did not receive just and fair consideration at the hands of the trial court and jury. The motion for a new trial was properly denied. It follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

On Petition for Rehearing.

CHRISTIANSON, J. A strenuous petition for rehearing has been filed in this case. It may be remarked at the outset that the petition in no manner complies with the rules of this court relating to such petitions, and sets forth no ground on which a rehearing may properly be asked, but is merely a reargument of certain portions of the case. The only points argued are those coming under ¶¶ 1, 2, 4, and 5 of the syllabus. Appellant's counsel virtually contends that in a criminal case there can be no such thing as waiver of or estoppel to assert error, and that these rules apply only to civil litigants. To quote from the petition for rehearing itself: "While the legislature has seen fit to surround the civil litigant with certain restrictions so that he may be bound by the act of his counsel, no matter how foolish it may be, such is not the case with respect to men who are charged with crimes. The state is so anxious to protect the man charged with the commission of an offense, that it even furnishes him counsel, if he is unable to procure it himself; and is it possible that the legislature has provided a law by which it will say that we will protect a citizen by furnishing him a counsel, and then make him responsible for all of the foolishness of that counsel?" The doctrine contended for by appellant's counsel is, to say the least, somewhat strange, and if carried on to its logical conclusion

would doubtless result in reversal in practically every criminal case coming to this court. If defendant and his counsel can be permitted to stand by and permit error to be committed in the trial court, or even induce the trial court to commit error, and then on appeal assert that they should not be bound thereby, a criminal trial would become a mere farce. It is so well settled, however, as to be elementary, that the doctrine of waiver and estoppel applies to a defendant in a criminal case, and he cannot be permitted to take one position in the court below and assume an entirely different position in the appellate court. And it has been held that want of preliminary examination (State v. Calkins, 21 S. D. 24, 109 N. W. 515), alleged improper change of venue to another county (State v. Kent (State v. Pancoast), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052), duplicity or uncertainty in the information (State v. Burns, 25 S. D. 364, 126 N. W. 572), insufficient verification of a criminal complaint (State ex rel. Poul v. McLain, 13 N. D. 368, 102 N. W. 407), alleged error in denying a continuance (State v. Thompson, 141 Mo. 408, 42 S. W. 949), disqualification of prosecuting attorney (State v. Smith, 108 Iowa, 440, 79 N. W. 115), or of juror (Self v. State, 39 Tex. Crim. Rep. 455, 47 S. W. 26), the right to be confronted by the witnesses against him (Gillespie v. People, 176 Ill. 238, 52 N. E. 250; State v. Olds, 106 Iowa, 110, 76 N. W. 644; State v. Williford, 111 Mo. App. 668, 86 S. W. 570; Odell v. State, 44 Tex. Crim. Rep. 307, 70 S. W. 964; State v. Mortensen, 26 Utah, 312, 73 Pac. 562, 633), may be waived by the defendant in a criminal case by his conduct or consent in the trial court. And the defendant's failure to interpose the plea of former jeopardy prior to verdict was a waiver of the right to assert such defense. State v. Barnes, ante, 164, 150 N. W. 557. So, if defendant and his counsel permit incompetent evidence to be received without objection, the defendant will be deemed to have waived his right to object to such testimony. State v. McDonough, 104 Iowa, 6, 73 N. W. 357; People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098; State v. Marshall, 105 Iowa, 38, 74 N. W. 763; People v. Ardell, 6 Cal. Unrep. 827, 66 Pac. 970. And if an objection is overruled and an answer not responsive to the question is permitted to stand without motion to strike out the answer, the objection will be deemed waived. People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833; People v. Durrant, 116

Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; People v. Colvin, 118 Cal. 349, 50 Pac. 539; People v. Lawrence, 143 Cal. 148, 68 L.R.A. 193, 76 Pac. 893. And if a defendant objects to the admission of, or moves to strike out, testimony, on certain grounds, he cannot afterwards be heard to say that the objection or motion should have been sustained on other and different grounds. State v. Merry, 20 N. D. 338, 127 N. W. 83; People v. Lang, 142 Cal. 482, 76 Pac. 232; State v. Van Tassel, 103 Iowa, 6, 72 N. W. 497; State v. Stephenson, 69 Kan. 874, 77 Pac. 582; State v. Heacock, 106 Iowa, 191, 76 N. W. 654; Donaldson v. People, 33 Colo. 333, 80 Pac. 906. And so error preserved in the court below will be deemed abandoned and waived unless discussed in the brief on appeal. State v. Wright, 20 N. D. 216, 126 N. W. 1023, Ann. Cas. 1912C, 795.

In discussing the doctrine of waiver of rights, Bishop's New Criminal Procedure says: "In natural reason, one should not complain of a thing done with his consent. And the law, in all its departments, follows this principle. It is analogous to estoppel, or a species of it. Like any other legal doctrine, the circumstances of a particular instance may compel it to give way to another. . . . If, except where some counter doctrine presses with a superior force forbidding, a party has requested or consented to any step taken in the proceedings, or if at the time for him to object thereto he did not, he cannot afterward complain of it, however contrary it was to his constitutional, statutory, or common-law rights. Necessity is the chief foundation for this doctrine. Without it, a cause could rarely be kept from miscarrying. The mind, whether of the judge or the counsel, cannot always be held taut like a bow about to send forth the arrow; and if every step in a cause were open to objection as well after verdict or sentence as before, a shrewd practitioner could ordinarily so manage that a judgment against his client might be overthrown. Even by lying by and watching, if he did nothing to mislead, he would find something amiss to note and bring forward after the time to correct the error had passed." Bishop, New Crim. Proc. §§ 117–119, pp. 88 and 89.

By application of the same principle, we held in the opinion in this case that where the defendant makes a motion for a new trial, he is bound by the reasons assigned therein, and that all matters which would constitute grounds for a new trial and which are not set forth

in the motion are waived. 29 Cyc. 944. The mere fact that some of the alleged errors might have been available on appeal from the judgment without making a motion for a new trial does not change the rule. The laws of this state give to a defendant in a criminal case the privilege, if he so desires, to move for a new trial upon certain specified grounds, and if he desires to avail himself thereof, it is his duty to present all reasons why a new trial should be had. The defendant cannot be permitted to say to the trial court: "I am entitled to a new trial on these grounds, and these alone," and then afterwards assume an entirely contrary position, and say to the appellate court: "The reasons I presented to the trial court were not the proper ones, but there are certain additional and entirely different grounds which I did not present to the trial court which entitle me to a new trial." The defendant saw fit to make a motion for a new trial in the court below, and having availed himself of this right he is required to present to the trial court any and all grounds which might be asserted by such motion, and is bound by the reasons assigned, and all other matters which he might have so asserted and failed to do will be deemed waived. We believe that the rule laid down in the opinion is sound in principle, and see no reason to depart therefrom.

Doubtless the appellate court has the right, in order to prevent an unjust conviction to stand, to disregard the waiver of the defendant, and in this case this court disregarded such waiver and passed upon all the various propositions raised, and decided the same adversely to the appellant.

In the petition for rehearing, appellant vehemently asserts that because the trial court failed to incorporate an instruction on the law relative to an alibi, that the defendant was deprived of a substantial right, and that the judgment should be reversed. And in support of this contention, counsel for defendant cites § 11013 of the Compiled Laws, which reads as follows: "After hearing the appeal, the court must give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties." The argument of appellant's counsel seeks to defeat the obvious purpose for the enactment of the section cited. Stripped of all legal phrases, the question submitted to the jury in this case was: "Did the defendant, Herbert Glass, shoot and kill Thomas Corcoran at the

time and place described in the information?" This was the prime question in the case, and this question was, as we have indicated in the opinion, submitted to the jury fully and fairly. The contention that twelve intelligent men could have and did under the court's instructions in this case find the defendant guilty, if they had any reasonable doubt as to whether or not the defendant was at the place where Corcoran was killed at the time the shooting took place, is entirely untenable.

An alibi in criminal law is defined in Black's Law Dictionary as follows: "Elsewhere: in another place. A term used to express that mode of defense to a criminal prosecution, where the party accused, in order to prove that he could not have committed the crime with which he is charged, offers evidence to show that he was in another place at the time; which is termed setting up an alibi." And in Bouvier's Law Dictionary: "Presence in another place than that described. When a person charged with a crime proves (*se eadem die fuisse alibi*) that he was, at the time alleged, in a different place from that in which it was committed, he is said to prove an alibi, the effect of which is to lay a foundation for the necessary inference that he could not have committed it." And in 2 Cyc. 79, "Literally, 'elsewhere.' A defense in criminal law in which the defendant shows that he was at another place at the time the crime charged was committed." And in 2 Am. & Eng. Enc. Law, 2d ed. 53, "The word 'alibi' means literally, 'elsewhere,' and a prisoner or accused person is said to set up an *alibi* when he alleges that, at the time when the offense with which he is charged was committed, he was 'elsewhere;' that is, in a place different from that in which it was committed."

It is defined by Bishop as follows: "An alibi is, in criminal evidence, the defendant's showing, under his plea of not guilty and without special averment, *that when the criminal thing was done, he was at some place where he could not be the doer.*" Bishop, New Crim. Proc. § 1061.

With reference to the evidence admissible and the facts to be considered in connection with an alibi, it is said: "On the question of alibi the relevant facts are the distance between the scene of the crime and the prisoner's alleged whereabouts at the time of its commission, and the time of the crime, as compared with that of the alibi, allow-

ing for difference in timepieces and in opinions respecting time and the means of travel." 12 Cyc. 404.

And in Wharton's Criminal Law, 11th ed. § 380, it is said: "The defense of alibi, *i, e.,* 'elsewhere,' or presence in another place than that described at the time the alleged offense was committed, is not, properly speaking, a defense within any accurate meaning of the word 'defense,' but is a mere fact shown in rebuttal of the evidence introduced by the state. . . . *Impossibility of presence at the time and in the place charged is the essential feature of this defense,* and any proof tending to show that it was reasonably impossible for the accused to have been present at the time and place of the commission of the offense charged is sufficient to establish the defense." In our original decision in this case, we did not deem it necessary to refer to the evidence in the case to any great extent, and based our conclusions upon general legal principles, but in view of the ardent and strenuous assertions in the petition for rehearing that the trial court's failure to instruct the jury upon the law applicable to an alibi and corroboration of an accomplice deprived defendant of his substantial and fundamental rights, we deem it desirable to briefly present the evidence, as contained in the record, applicable to these two propositions.

The court's instructions are given to aid the jury in determining the issues involved. And instructions which would tend to confuse rather than enlighten would therefore be improper. The instructions necessarily ought to be confined to the issues presented by the evidence. According to the undisputed testimony of all witnesses, including that of the defendant himself, Thomas Corcoran was shot in or by the side of his wagon during the night of September 3d, and his dead body found in the wagon on the morning following. The defendant, Glass, testified that Thomas Corcoran's wagon was situated in the same block as Glass's house, and only between 80 and 100 feet from the defendant's house. The defendant and his wife both testified that some time after 10 o'clock at night they heard a shot fired, and then went to a window and looked out and saw two men at the wagon in an altercation, and that while they so stood and watched one man fired a shot at the other,—the two men by the wagon being then about 6 or 8 feet apart. That after the shot was fired the man at whom the shot was fired slowly got into the wagon, and

that thereafter the man who fired the shot also got into the wagon. The defendant says that the window through which he watched the shooting was 100 feet from the wagon where the shooting took place and Thomas Corcoran's dead body found the next day. Can it be said that a person who claims that he stood within 100 feet or less of where a murder was committed and saw the shot fired has proved an alibi, and that this testimony requires the trial court to instruct on the law relative to alibi? It seems self-evident that an instruction on the law relative to alibi has no place under such evidence, and certainly not in the absence of a specific request therefor.

The other proposition argued in the petition for rehearing is that the court should have submitted an instruction on the law relative to the corroboration of an accomplice. As we have already stated in the original decision, it was expressly contended in the court below that Carberry and Glass were not accomplices. This appears from the affidavit of defendant's attorney submitted in support of the motion for new trial, and Glass testifies that he had absolutely nothing to do with the murder of Thomas Corcoran, had no connection whatever with Carberry, and had no notice or knowledge of the murder until the next day, and that at the time he suspected Carberry of having committed the murder. Thomas Carberry, on the other hand, positively denies any connection with the murder, and testifies positively as an eyewitness that Herbert Glass shot and killed Thomas Corcoran. Carberry's testimony on various points is corroborated by other witnesses. Therefore, in order for the trial court to instruct on the law relative to the corroboration of an accomplice, it would have been necessary for the trial court to instruct in absolute disregard of the theory of defendant's counsel, and in direct contravention not only of the testimony of the defendant and his wife, but of all the witnesses who testified in the case. And we have no doubt that if the trial court had instructed of its own volition on the law relative to the corroboration of an accomplice or the law relative to an alibi, that it would now be just as earnestly urged on this appeal that such instructions were erroneous and prejudicial to the substantial rights of the defendant. The argument submitted by appellant's counsel in this case shows to what extent technicalities have been permitted to permeate our system of criminal procedure. The business of the courts is to try and deter-

mine issues. This applies equally to criminal as well as to civil cases. A criminal trial is not a mere game of wits or contest of skill between opposing counsel, or a ceremony for the display of forensic ability, but it is a solemn proceeding to ascertain the guilt or innocence of a person accused of crime. A fact is a fact whether it arises in a criminal or in a civil action. In this case the question, and really the only question, to be determined by the jury, was whether or not Herbert Glass murdered Thomas Corcoran. This question was submitted to the jury under fair instructions, and all the legal presumptions existing in defendant's favor were fully and fairly explained to the jury. The jury in its verdict said that Glass murdered Corcoran. The trial judge, who saw and heard the witnesses and was familiar with the entire case, refused to set aside the verdict. This court would abuse its power by interfering with these findings in this case. We see no reason for modifying or altering our former opinion herein. The petition for rehearing is denied.

J. W. LAHART v. J. A. COFFEY, as Judge of the Fifth Judicial District, State of North Dakota.

(151 N. W. 287.)

An alternative writ of mandamus directed to a district judge commanding him to decide a pending suit, or show cause why he does not do so, will be quashed where the return to such writ shows without dispute that the delay complained of was occasioned by the conduct of counsel for the complaining party in volunteering at the close of the trial to furnish a transcript of the evidence for the assistance of such judge, which transcript was not furnished.

Opinion filed March 8, 1915.

Original writ of mandamus issued by the Supreme Court under its general superintending control over inferior courts. On the return day of the alternative writ a hearing was had and such writ quashed.

Maddux & Rinker, New Rockford, North Dakota, for relator.

Hon. J. A. Coffey, District Judge of the Fifth Judicial District, *pro se.*

FISK, Ch. J. On application of plaintiff and relator this court granted an alternative writ of mandamus returnable March 8th, commanding respondent to proceed forthwith and with all convenient speed to decide the matters in issue, and which it is alleged had been fully submitted to him for decision in March, 1914, in certain litigation pending before him in which one J. W. Lahart is plaintiff and the Minnesota Grain Company is defendant, or show cause why he has not done so. On such return day respondent filed a return to such writ, in which he shows that the litigation aforesaid involves a long account between the parties, calling in question numerous grain and elevator transactions in nine elevators situated in four or five counties in this state, and covering a period of operations beginning in 1907 and continuing for several years thereafter, and in which litigation vast sums of money are involved, the plaintiff demanding in his complaint a judgment for some $30,000 to $40,000. The return also sets forth the fact that at the trial, although some two years after the action was commenced, counsel proceeded without the presence in court of certain essential documentary evidence in the form of certain books of account covering the transactions, counsel for plaintiff evidently relying upon their production by defendant, in whose custody they were. As a result of such failure to put the books in evidence, the respondent sets forth in his return that he announced at the conclusion of the trial that it was very doubtful whether any judgment could be sustained from the evidence owing to the very indefinite character thereof. Whereupon counsel for plaintiff insisted that the evidence would show sufficient facts to entitle plaintiff to a judgment, and volunteer to procure a transcript of the testimony from the reporter to assist the court in properly analyzing the same. The return also sets forth that some months later a transcript was ordered by plaintiff, and the same was not completed until February 10, 1915, and further that he has not as yet been furnished with a copy thereof, nor with any of the pleadings or exhibits, but that he borrowed from the reporter a copy of such transcript and has recently fully examined the evidence, and notified counsel for both parties that he considered it necessary to a proper determination of the case that a certain account book be produced, and pursuant thereto defendant's counsel, on March 1st, served a notice of motion on plaintiff's counsel returnable March 9th,

for an order opening the case for the purpose of permitting such book to be introduced in evidence. As a part of his return and in corroboration of the above facts, respondent annexes a letter dated February 17, 1915, addressed to him and signed by one of plaintiff's attorneys, as follows:

My Dear Judge:—

We have just received from your reporter the transcript of the evidence in the above-entitled cause.

We are in throes of a jury term of court, in which we have one side of practically all the cases, and quite a number of them involve large amounts. Our term will probably last two weeks, and probably a little more, and if you have no objection, we will not prepare and send you our statement as shown by the transcript of the evidence until we get a little time at the close of the term.

If this is satisfactory to you, we hope that you will so indicate by return mail, and if not satisfactory we will work out of court hours immediately, and get you our statement. . . .

Very truly yours,
C. J. Maddux.

In the light of these undisputed facts it is entirely clear that the writ should be quashed. Plaintiff's counsel is in no position to complain of the delay, even conceding that they would have been entitled to a decision without such transcript had they not volunteered to furnish it. Having consented to procure the same for the aid of the court, respondent clearly had a right to delay further consideration of the cause until such time as it was furnished to him.

Writ quashed.

Goss and BRUCE, JJ., absent and not participating.

JACOB ERSTAD v. MARTIN JACOBSON.

(150 N. W. 534.)

Money — safe-keeping — conversion of — complaint — answer — alleging facts showing off-set — demurrer.

Plaintiff, who had intrusted certain money to defendant for safe-keeping, to be returned upon demand, brought suit for the conversion thereof. Defendant answered, admitting that he received such money from plaintiff, but denied all the other allegations of the complaint, and alleged that a portion of such money had been repaid to plaintiff and the balance tendered, which tender plaintiff refused. Then follows what is designated a "second and further defense," wherein defendant, after realleging all the prior allegations in the answer, alleges in effect that he notified plaintiff that if he and his family continued to board and room in defendant's home, he would be charged therefor, and the reasonable value thereof would be deducted from the moneys in defendant's hands belonging to plaintiff, and that plaintiff and his family did thereafter continue to board and room with defendant, and that the reasonable value of such board and room was more than the balance of such funds in defendant's custody. A demurrer to such second defense upon the ground that it fails to allege a defense was interposed and overruled. *Held*, that such ruling was not error.

Opinion filed February 9, 1915. Rehearing denied March 15, 1915.

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

From an order overruling a demurrer to a portion of defendant's answer, plaintiff appeals.

Affirmed.

W. F. Doherty, for appellant.

The counterclaim mentioned in the action must be one in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action. (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. Rev. Codes 1905, § 6860; Braithwaite v. Akin, 3 N. D. 373, 56 N. W. 133; Pom. Code Rem. 4th ed. p. 654, note 2.

The plaintiff's action is in tort. The defendant's counterclaim is upon an implied contract. It is not connected with the subject of the

action. It is a matter not allowed as a counterclaim, and the demurrer should have been sustained. Barr v. Post, 56 Neb. 698, 77 N. W. 123; Heckman v. Swartz, 55 Wis. 173, 12 N. W. 439; Ring v. Ogden, 45 Wis. 303; Rothschild v. Whitman, 132 N. Y. 472, 30 N. E. 858; Simkins v. Columbia & G. R. Co. 20 S. C. 258; Street v. Andrews, 115 N. C. 417, 20 S. E. 450; Bernheimer v. Hartmayer, 50 App. Div. 316, 63 N. Y. Supp. 978; Chandler v. Lazarus, 55 Ark. 312, 18 S. W. 181; Bazemore v. Bridgers, 105 N. C. 191, 10 S. E. 888; Marks v. Tompkins, 7 Utah, 421, 27 Pac. 6.

In an action for conversion of plaintiff's property stored with defendant, a demand for storage charges due prior to the alleged conversion does not arise out of the same transaction, and is not a proper counterclaim. Schaeffer v. Empire Lithographing Co. 28 App. Div. 469, 51 N. Y. Supp. 104.

In an action by a lessee for conversion by the lessor of hay and grain, a counterclaim for plaintiff's breach of the conditions of the lease under which they were grown was not allowed. Adams v. Loomis, 4 Silv. Sup. Ct. 558, 8 N. Y. Supp. 17.

Defendant under a power of attorney collected money belonging to plaintiff, and plaintiff brought action to recover. Such action was *ex delicto,* and a contract connected therewith could not be counterclaimed. Reichmann v. Nelson, 13 Misc. 502, 34 N. Y. Supp. 953.

The counterclaim must grow out of the original transaction, or be connected therewith. Barker v. Platt, 15 N. Y. Civ. Proc. Rep. 52, 1 N. Y. Supp. 416; Chambers v. Lewis, 11 Abb. Pr. 210; Scheunert v. Kaehler, 23 Wis. 523.

Halvorson & Wysong, for respondent.

Where the complaint does not state facts sufficient to constitute a cause of action, such insufficiency can be raised at any time, or in any way, by defendant, even after the cause has come before the supreme court on appeal. Rev. Codes 1905, § 6854; Cal. Code, Civ. Proc. § 430; Weinreich v. Johnston, 78 Cal. 254, 20 Pac. 556; Bell v. Thompson, 147 Cal. 689, 82 Pac. 327; Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445.

Our statute provides for a defense or counterclaim. Either may be set forth. The statute is in the disjunctive. Nollman v. Evenson, 5 N. D. 344, 65 N. W. 686.

FISK, Ch. J. This is an appeal from an order overruling a demurrer to a portion of the defendant's answer. The action, as disclosed by the complaint, is in tort to recover damages for the alleged conversion of $200 in money which plaintiff alleges that he delivered to the defendant on November 21, 1912, for safe-keeping, upon defendant's promise to return the same to plaintiff upon demand. The plaintiff alleges that on or about March 1, 1913, he demanded of the defendant the return thereof, which demand was refused. He also alleges that at divers times since said last-mentioned date he demanded a return of such money from defendant, which demands were refused. The fifth and last paragraph of the complaint alleges "that the defendant unlawfully took and converted the said $200 to his own use, to the damage of the plaintiff in the sum of $200; that this action is in tort."

To such complaint defendant answered as follows:

"I. Admits the receipt of $200 from and of the plaintiff on or about the 21st day of November, 1912, and, except as hereinafter qualified, admitted, or otherwise explained, denies each and every matter, allegation, and thing in said complaint contained.

"II. Alleges that at various dates since said 21st day of November, 1912, and prior to the 18th day of March, 1913, the defendant paid back to the plaintiff, at plaintiff's instance and request, various sums of the total aggregate sum of $78, for and on account of said $200 aforesaid, and at that time tendered to plaintiff the balance of said sum, to wit, the sum of $122, and that the plaintiff refused to accept the same.

"For a second and further defense:

"1. Defendant realleges and restates each and every allegation, matter and thing hereinbefore contained.

"2. Alleges that on or about the 18th day of March, 1913, the plaintiff, who had heretofore been in the employ of this defendant, quit his said employment, and with himself and family, consisting of a wife and three children, continued to board and room with this defendant; that this defendant at that time notified the plaintiff that in the event he continued to board and room with defendant, with himself and family, he would be charged the reasonable value of said room and board for himself, wife, and three children, and that said amount would be deducted from the residue of said money in the possession of this defend-

ant as hereinbefore set forth; that the said wife and children of this plaintiff did so board and room with this defendant from the 18th day of March, 1913, until the 12th day of April, 1913, inclusive, and that the plaintiff herein boarded and roomed, with this defendant from said 18th day of March, 1913, until the 1st day of May, 1913, inclusive, and that said board and room, as aforesaid, is of the value of $140, and that no part thereof has ever been paid except the application of the balance of the $200 left with this defendant, being the sum of $122, and that there is due and owing to the defendant by reason thereof the further sum of $18.

"Wherefore, the defendant demands judgment against the plaintiff in the sum of eighteen and no/100 dollars ($18), with interest thereon at 7 per cent per annum from and after the 1st day of May, 1913, together with his costs and disbursements in this action."

To such answer plaintiff served a pleading which he styles a reply, but which is somewhat of an anomaly, as it assumes to be an answer to certain portions of the defendant's answer consisting of new matter by way of defense only, coupled with a sort of combination of both a reply and a demurrer to defendant's so-called "second and further defense." We quote the following from such pleading:

"That the plaintiff for a reply to that part of the defendant's answer denominated by the defendant 'a second and further defense,' and to the defendant's counterclaim, alleges:

"I. That the plaintiff demurs to the second defense and counterclaim stated in the defendant's answer herein, on the grounds that on the face thereof the said answer does not state facts sufficient to constitute a defense.

II. That the plaintiff demurs to the second defense and counterclaim stated in the defendant's answer herein, on the grounds that on the face thereof, the said answer does not state facts sufficient to constitute a counterclaim."

The sole question for determination on this appeal is whether the trial court erred in overruling the above-quoted portion of plaintiff's so-called reply, but which is in effect a demurrer. We have reached the conclusion that the same was properly overruled. The pleadings on both sides are very inartistically drawn, but as we construe the portion of the answer thus challenged, we think it states a sufficient de-

fense to the plaintiff's cause of action, conceding that the complaint properly alleges a conversion by defendant of the plaintiff's money. Such answer, if true, shows that no such alleged conversion took place, for it alleges that between November 21, 1912, the date such money was intrusted for safe-keeping with defendant, and March 18, 1913, the defendant, at plaintiff's instance and request, returned to him various sums aggregating $78, and tendered the balance, $122, to the plaintiff, which tender was refused. Such answer also alleges that on or about March 18, 1913, defendant notified plaintiff that if he and his family, who had theretofore lived with the defendant, continued to board and room with him, he, the plaintiff, would be charged with the reasonable value of their board and room, and that such reasonable value thereof would be deducted from the residue of said money in defendant's possession; and it is further alleged that, notwithstanding such notice, the plaintiff and his wife and children continued thereafter to room and board at defendant's home for a considerable period of time, and that the reasonable value thereof was $140, which entirely exhausted the balance of the fund thus in defendant's hands belonging to the plaintiff, and left a balance of $18 in defendant's favor, for which he demanded an affirmative judgment. While such answer does not allege an express consent on plaintiff's part to the terms of such notice, we think the fair inference, in the absence of anything to the contrary, is that he agreed thereto by thereafter continuing to remain with his family in defendant's home, receiving room and board. This being true, no conversion of such money took place as alleged in the complaint; or, if such conversion had taken place prior thereto, it was waived by such implied agreement. If the demurrer had been aimed merely at that portion of the answer wherein the defendant seeks an affirmative recovery for the sum of $18, our decision might have been different.

The order appealed from is affirmed.

INDEX.

LIENS.

1. Section 6852, Compiled Laws of 1913, providing that any person entitled to a seed lien shall file "*a statement in writing, verified by oath*, showing the kind and quantity of seed, its value, the name of the person to whom furnished, and *a description of the land* upon which the same is to be or has been planted or sown," is not complied with where such statement wholly omits a description of the land. Following Lavin v. Bradley, 1 N. D. 291. Chaffee v. Edinger, 537.

Decisions Appealable.

1. Under the provisions of §§ 8599 and 8600, Comp. Laws of 1913, an order of a county court denying an application for the entry of a decree approving a final account and ordering a final distribution of an estate, on the sole ground that the inheritance tax provided by chap. 185 of the Laws of 1913, has not been paid, is an appealable order. *Held*, further, that the provision for an appeal from such order furnishes a remedy in the ordinary course of law. Strauss v. Costello, 215.

Specifications of Errors.

See also infra, 7.

2. Defendant has appealed upon alleged error appearing upon the judgment roll only, and without settling a statement of the case. Where a statement of the case is not settled, and the questions to be raised on the appeal are not errors of law occurring on the trial, but, instead, only errors appearing on the face of the judgment roll, no specification of error need be taken at all, and no specification of error therefore need be served with the notice of appeal, or at all. All that is necessary to have such error appearing on the face of the judgment roll only reviewed is to assign and argue in the brief the error complained of. The insufficient specification of error here taken and served, not being necessary, is disregarded, and the alleged error assigned in the brief on the judgment roll is passed upon. Wilson v. Kryger, 28.

APPEAL AND ERROR—continued.

Dismissal of Appeal.

3. Where it appears that a conditional order from which an appeal has been taken, made after judgment in plaintiff's favor in an action in claim and delivery, directing the clerk to satisfy of record such judgment, which was for the return and delivery by defendant to plaintiff of a horse, upon proof that such horse had been returned or tendered to the plaintiff by the defendant, the appeal will be dismissed when it is made to appear that the conditions of such order could not be complied with by reason of the death of such horse prior to the making of the order. Proof of such fact discloses that the order could not affect, in the least, the substantial rights of the plaintiff under his judgment, and the appeal therefore presents nothing but a moot question. Tubbs v. Sather, 84.

4. In an action for the recovery of money only, brought against the Western Grain Company, an order was made, on defendant's motion, substituting Albert Lane, as receiver, as the defendant in lieu of such Grain Company, from which order of substitution plaintiffs appeal. After such substitution Lane procured a judgment dismissing the action as to him upon the ground that the complaint fails to state facts sufficient to constitute a cause of action, and that permission to sue him, as such receiver, had not been granted. He now moves to dismiss plaintiffs' appeal from such order of substitution, upon the ground that the entry of the judgment of dismissal renders the question involved on the appeal wholly moot. *Held*, that the grounds of such motion are untenable. More v. Western Grain Co. 88.

5. The fact that pending an appeal from an adverse judgment in an action by a surviving husband to replevin property which has been scheduled with the assets of the estate of his deceased wife and which he claims to own, such husband files a claim for exemptions in such estate as the husband of the deceased, which if allowed in full would require the conveyance to him of all the property in dispute, does not amount to a repudiation of his prior claim of ownership or justify a dismissal of such appeal. Truman v. Dakota Trust Co. 456.

Trial de Novo on Appeal.

See also Corporations, 2.

6. In an equity case where the district court calls in a jury for advisory purposes, the trial is not governed by the provisions of § 7846, Compiled Laws of 1913, nor does the supreme court try such cases anew upon appeal. That statute applies only to such cases as are tried in the district court without a jury. Merritt v. Adams County Land & Invest. Co. 496.

APPEAL AND ERROR—continued.

What Errors Warrant Reversal.

Defective Title.

1. The title of a payee of a promissory note is defective within the meaning of the above statute, only "when he obtained the instrument or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Tested by this statutory rule it is held that the title of the payee of the note in suit was not defective. Commercial Security Co. v. Jack, 67.

Presumptions and Burden of Proof.

2. Defendant's contention that plaintiff waived the benefit of the presumption created by § 6944, Comp. Laws, by the introduction of certain testimony for the purpose of proving the sale and indorsement of the note by the payee to the plaintiff, is held untenable. Commercial Security Co. v. Jack, 67.
3. In a suit by the indorsee of a negotiable promissory note, the title of the payee of which is not shown to have been defective within the meaning of § 6940, Comp. Laws 1913 (Rev. Codes 1905, § 6357), the burden is upon the maker, who seeks to defeat payment, to first prove that plaintiff is not an indorsee thereof in due course. In other words, the burden is upon him of overthrowing the prima facie presumption, as prescribed in § 6944, Comp. Laws, that plaintiff is a holder in due course. *Held*, that defendant failed to meet such burden. Commercial Security Co. v. Jack, 67.

Questions for Jury.

4. The contention that the testimony of the plaintiff's witness who was called to prove the sale and indorsement of the note, and who testified that such

CORPORATIONS.

Exercise of power of sale in mortgage by corporation succeeding partnership originally owning, see Mortgages, 1.

Officers and Their Authority.

1. Where a corporation chooses to incorporate under the laws of North Dakota, a third party has the right to believe that the vice president of the company, when acting in the town, and, if not in the principal place of business, in the office of the attorney of the company, and in relation to a sale of the land of the company, for the purpose of buying and selling which the company alone was incorporated, is authorized by the by-laws to make such contract of sale, and when such officer tells such third party, upon express inquiry, that he has such authority, and the third party relies upon such statement, and not only pays down an earnest price, but obligates himself on a contract with still another party on the reliance therewith, and of which fact he informs the vice president, such purchaser has the right to believe in the statement of the vice president, and to pay the money on the strength of such belief, and when the vice president receives the money, he receives it for and on behalf of the company he represents, and such ostensible authority is not weakened by the fact that the attorney who draws the papers suggests to the plaintiff that it would be well to send them to another state where the other officers of the company reside for approval, it being shown by the evidence that, on and after such statement, the said vice president positively assured the plaintiff of his authority and of the validity of the agreement. In such a case also the knowledge of the vice president of the receipt of and payment of the earnest price will be presumed to be the knowledge of the company, and its retention will amount to a ratification of the contract. Merritt v. Adams County Land & Invest. Co. 496.
2. Upon a trial *de novo*, in an action for specific performance of a contract to sell real estate, performed by the plaintiff, evidence is examined, and it is held sufficient to authorize a judgment for specific performance; also that the contract was binding upon the corporation defendant under both actual and ostensible authority in the treasurer to enter into and partially perform the same, as was done; that the statute of frauds is of no avail as a defense. Ketchum v. Zeeland Mercantile Co. 119.
3. Evidence examined, and *held* that the agent of the plaintiff company made an agreement within the scope of his authority, whereby defendant was to have a 25 per cent discount from list prices upon the goods brought by him from plaintiff. Bovey-Shute Lumber Co. v. Lind, 394.
4. The evidence further shows a ratification of such agreement by the officers of the company. Bovey-Shute Lumber Co. v. Lind, 394.

Controlling Effect of Previous Decisions.

1. The decisions of the Supreme Court of the United States on Federal questions are absolutely controlling, when the same questions are presented in state courts, and the latter have no alternative but to follow the Federal authorities. In D. E. Foote & Co. v. Stanley, 232 U. S. 494, the Supreme Court of the United States had under consideration the validity of a tax provided by a police inspection law of the state of Maryland. The facts and principles were in all respects identical with those in the case at bar, except that the revenue derived from the inspection fee was less in proportion to the cost of inspection than under the law which we are considering. The Supreme Court of the United States held the tax or inspection fee invalid. This decision is controlling, and must be followed by the courts of this state. Bartels Northern Oil Co. v. Jackman, 236.

Former Jeopardy.

1. A criminal complaint was laid in justice court against defendant Barnes, charging him with assault and battery, a misdemeanor. He pleaded guilty, and paid a fine and costs imposed on judgment. Subsequently he was prosecuted for felony,—assault and battery with intent to kill. On trial thereon the jury found him guilty of the included offense charged, of assault and

DEEDS—continued.

SETTING ASIDE.

3. Where one seeks to set aside a deed on the ground of fraud, his proof must be clear and convincing. McKillip v. Farmers' State Bank, 541.

DEFAULT.

Cancelation of contract by notice of, see Cancelation of Instruments, 2.

Judgment by, see Judgment, 1, 2.

DEFECTIVE TITLE.

To note, see Bills and Notes, 1.

DEFENSES.

Invalidity of tax paid by mortgagee for nonpayment of which foreclosure action is brought, see Mortgages, 4.

In action against surety, see Principal and Surety, 1, 2.

DEFINITION.

Peace officers, see Injunction, 8.

DELIVERY.

Of deeds, see Deeds, 2.

DE NOVO.

Trial *de novo* on appeal, see Appeal and Error, 6, 7; Corporations, 2.

DEPOSITARY.

Depositing with, proceeds of crops covered by chattel mortgage, see Interpleader.

DESCRIPTION.

In seed grain lien, see Agriculture; Appeal and Error, 7.

In insurance contract, see Insurance, 3.

In assessment roll, see Taxation, 2.

By Receiving Benefits.

1. Under the evidence, it is held that the plaintiffs are estopped to take advantage of the conduct of their agent whereby they received material benefit and the intervening bank was materially injured by such conduct, unless plaintiffs are in a position to restore the bank to as favorable a position as it occupied at the beginning of the transaction. McCaull v. Nichols, 405.

EVIDENCE.

Judicial Notice.

1. The courts will take judicial notice of the fact of the incorporation of the villages of the state; and such being the case, no allegation or proof of the fact is necessary upon a trial. Page v. Farmery, 209.

Presumptions and Burden of Proof.

2. In the denominational disputable presumptions mentioned by the Code is one to the effect "that a foreign law will be presumed to be the common law in the absence of rebutting evidence." See ¶ 41, § 7936, Compiled Laws of 1913. Both under this statute and under the decisions of the courts, the statute of limitations of a foreign state, if sought to be relied upon, must be not only pleaded, but proved, and in the absence of such pleading and proof the presumption of the existence of the common law applies. Pratt v. Pratt, 531.

FRAUDULENT CONVEYANCES.

1. J. made a general assignment for the benefit of creditors to G., which assignment is concededly void upon its face. Thereafter G., as such assignee, with the knowledge, consent, and acquiescence of J., sold to plaintiff a certain stock of drugs and fixtures supposedly acquired by G. under such assignment, plaintiff, under the undisputed evidence, being an innocent purchaser thereof for value and in good faith. Two months later defendant, as sheriff, at the suit of two of J.'s creditors levied warrants of attachments upon such property, whereupon plaintiff brought this action against the sheriff to recover the possession thereof. *Held*, that plaintiff acquired a good title to such property, not only as against J., but also as against his subsequently attaching creditors. *Held*, further, that the so-called bulk sales law, chapter 221, Laws 1907, even if applicable, creates merely a rebuttable presumption that such sale was fraudulent and void, which presumption was effectually rebutted by the undisputed evidence that plaintiff purchased such stock in good faith and for full value. Greene v. Robbins, 131.

Exempt Property.

2. A conveyance by an old and feeble man, of his homestead to his daughter in consideration of her caring for him in his old age, is not necessarily fraudulent. McKillip v. Farmers' State Bank, 541.
3. It is not a fraudulent act for a debtor to transfer to his wife or daughter exempt property to which his creditors could not have looked for the satisfaction of their claims. McKillip v. Farmers' State Bank, 541.

GARNISHMENT.

Procedure in, in justice's court, see Justice of the Peace, 1, 2.

GASOLENE.

Excessive fee for inspection of, see Taxation, 1.

GRAIN.

Remoteness of damages for refusal to finish threshing of, see Damages, 4.

GROUNDS FOR REVERSAL. See Appeal and Error, 13–19; Criminal Law, 14, 15.

INADEQUACY OF REMEDY AT LAW.

1. Injunction will lie to prevent the state oil inspector and his deputies from holding up oil in transit from other states into this state, for nonpayment of inspection fees, if such fees are materially in excess of the amount necessary to pay the expense of inspection, when none of the ordinary actions at law would furnish an adequate or complete remedy for the damages which could be sustained by the plaintiff. Bartels Northern Oil Co. v. Jackman, 236.
2. Where the plaintiff is receiving almost daily shipments of oil and gasolene, and is selling the same to consumers, and must depend on such shipments to supply his customers, and they are unlawfully held up by the oil inspector, neither an action for conversion, claim and delivery nor for damages, furnishes an adequate remedy for the injury to his property and business. Bartels Northern Oil Co. v. Jackman, 236.
3. When courts of law and equity were separate and distinct courts, neither one had jurisdiction over subjects within the jurisdiction of the other; but in this state the same court has jurisdiction of proceedings in both law and equity, and it is not necessary to as clearly and completely dif-

MECHANICS' LIENS—continued.

PROCEEDINGS TO PERFECT LIEN.

1. That the notices to the landowners set forth in the opinion are sufficient as between the parties to this action. Meyers Lumber Co. v. Tompkins, 76.
2. Two adjoining lot owners made separate contracts for the erection of buildings upon their adjoining lots. When erected, the two buildings were so connected as to appear as one. The defendant was the owner of the smaller building, which comprised one third of the entire structure. The contractor failed to pay for the material bought by him of the plaintiff, who filed one lien against both lots and the buildings thereon. This court in the case of Meyer Lumber Co. v. Trygstad, 22 N. D. 558, 134 N. W. 714, held such lien void. Plaintiff thereafter filed separate liens against the buildings. *Held* that the filing of the void lien was not such an election of remedies as preclude the filing of the proper liens thereafter. Meyers Lumber Co. v. Tompkins, 76.

ENFORCEMENT.

3. Judgment in foreclosure is awarded that the property may be sold and the proceeds applied in payment of the amount secured by the lien, with costs, but no deficiency judgment as on the lien debt will be entered against defendant after sale of the property. Moreau Lumber Co. v. Johnson, 113.
4. The allegation that one third of the material was furnished for the defendant's building, coupled with an itemized statement of the material furnished for both buildings, is sufficient to support the lien. Meyers Lumber Co. v. Tompkins, 76.

MISDESCRIPTION.

In insurance contract, see Insurance, 3.

MISTAKE.

In application for insurance, see Insurance, 2.

MODIFICATION.

Of judgment, see Judgment, 3.

MOOT QUESTION.

Dismissal of appeal relating to, see Appeal and Error, 4.

FORECLOSURE.

Redemption from, see infra, 6.

1. Plaintiff's only source of title is through an alleged foreclosure in 1887 of a commission mortgage on the premises upon which there was only a small sum due. Such mortgage was given in 1884 and ran to a copartnership under the firm name of D. S. B. Johnston, Son, & Hance. In 1885 a corporation was organized under the name of D. S. B. Johnston Land Mortgage Company, which purchased and took over the assets of such copartnership, including such mortgage. At the date of such attempted foreclosure proceedings there was nothing of record to show ownership of this mortgage in such corporation. *Held*, following Hebden v. Bina, 17 N. D. 235, that the exercise of the power of sale in said mortgage by such corporation was not authorized under the provisions of § 5412, Comp. Laws of 1887, and consequently the foreclosure was void, and the purchaser at the sale, the D. S. B. Johnston Land Mortgage Company, acquired no title thereunder, but merely became an equitable assignee of such mortgage. D. S. B. Johnston Land Co. v. Mitchell, 510.

2. A purchaser at a void foreclosure sale does not become a mortgagee in possession, unless he acquires the actual possession of the premises through the express or implied consent of the mortgagor or owner of the land. The premises being at the time unoccupied wild prairie land, the fee owner will be deemed to be in the possession thereof. D. S. B. Johnston Land Co. v. Mitchell, 510.

3. Where property is sold on the foreclosure of a usurious mortgage, one who purchases at the foreclosure sale and pays his money without notice of the usurious character of the mortgage is protected as a bona fide purchaser of the property; and the same is true where, after the foreclosure sale and

Time of Serving.

1. The last day of the thirty-day period for answer expired with Sunday, and the answer was served the following day, but before its service, plaintiff's attorney applied for default judgment, which was ordered the day later, and immediately entered. The answer served on Monday was returned to defendant's attorney as served too late. Levy on execution was made. Before sale thereon defendant moved to vacate the judgment as one wrongfully taken by default over answer served in time. Before said motion was heard, defendant's property was sold on execution sale to third parties, and said judgment of $1,398.50 and costs was satisfied in full. Plaintiff claims (1) that the answer was not served in time, and (2) if served in time the court lost jurisdiction to grant relief by motion, by the satisfaction of said judgment, and that to secure relief, defendant must resort to an action in equity for that purpose. *Held:* Following Styles v. Dickey, 22 N. D. 515, 134 N. W. 702, that the answer was served in time. Section 7324, Comp. Laws 1913, excludes Sunday, the last day of the thirty-day period, from being counted as a part of the thirty-day period for answer, and that the answer served on Monday, the thirty-first day after service of summons, was served within time, and defendant was not in default of answer when judgment was erroneously entered as by default. Hogg v. Christenson, 8.

Amendment.

2. Where it clearly appears that the defendant was not misled, surprised, or in any way prejudiced from maintaining his defense upon the merits, an amendment of the complaint to conform to the facts proved should be allowed. French v. State Farmers' Mut. Hail Ins. Co. 426.

3. The allowance of amendments rests largely within the sound discretion of the trial court. French v. State Farmers' Mut. Hail Ins. Co. 426.

Evidence Admissible under Pleading.

4. Under an allegation in the answer that a certain agreement was entered into between the plaintiff and the defendant, evidence is admissible to show that such agreement was made with the defendant by plaintiff's agent. Huston v. Johnson, 546.

PRINCIPAL AND SURETY.

Prejudicial error in instructions where surety is induced to become such by obligee's fraud, see Appeal and Error, 18.

1. Defendant signed as surety the promissory note to plaintiff of one Jacobson, maker. To this action, brought against the surety alone, the defense was made that false statements, representations, and concealments as to material facts were made by plaintiff's agent to defendant and because of which he became surety. From a motion for new trial after judgment entered on verdict in defendant's favor, plaintiff appeals, assigning error on instructions alone. *Held:* That the court did not instruct upon a theory of defense not raised by the pleadings. North Star Lumber Co. v. Rosenquist, 566.

2. That sufficient instructions were given upon the liability of defendant as a surety, in the absence of a request for further instructions on matter not necessarily within the issues presented by the pleadings, but which should have been given had the same been requested, concerning waiver by defendant of said defense by a subsequent promise (if made) to pay the note in any event. North Star Lumber Co. v. Rosenquist, 566.

Discharge of Surety.

3. These nine defendants, with eighteen other persons, in 1909 executed to plaintiff county a bond in the sum of $3,000 in the matter of a courthouse site, should bonds for the erection of a new courthouse be voted, which was done. A new site was required. Construction of the bond is the sole question. County urges that the bond was in effect a subscription of money to be applied to reimburse it for the expense of such new site. Defendants assert that by the bond they merely became sureties that upon selection of a site by the county board they would furnish and deliver to the county, free of expense, on demand, the site so chosen; that they have never been called upon to furnish title to such site, but that the county purchased it, making it impossible for them to do so, and thereby discharged them from liability. *Held,* that the bond is one of suretyship, and not a subscription. That as the county purchased the site from many different owners holding portions thereof, and this without notice to or demand upon the sureties to perform by furnishing plaintiff with title, and not affording the sureties an opportunity to perform their contract of suretyship, these sureties are discharged. Judgment entered against them ordered vacated and the action dismissed. Foster County v. Morris, 1.

PRIORITY.

Of claims against bankrupt, see Bankruptcy, 2.

RELIGIOUS SOCIETIES.

Division of Society.

Uniformity.

1. If on proof the allegations of the complaint in the case at bar, with reference to the excessiveness of the fee charged for inspecting oil and gasolene, are found correct, such fee is a tax on property, not according to its true value in money, and to the extent that it exceeds the cost of inspection is a revenue measure, and in conflict with § 176 of the Constitution, which provides that laws shall be passed taxing by uniform rule all property according to its true value in money. See Malin v. Lamoure County, 27 N. D. 140. Bartels Northern Oil Co. v. Jackman, 236.

Assessment.

2. This opinion decides two appeals. Plaintiff foreclosed two mortgages, exercising power of foreclosure under the mortgages, because of failure of the mortgagors to pay the real estate taxes prior to delinquency, after which time plaintiff paid them, and immediately foreclosed because of such defaults. Defendants contend that, because of defective descriptions of the land in the assessment roll, the taxes are invalid and insufficient as a basis for any foreclosure proceedings. *Held:* That the tax description would be void in an action wherein the tax could be assailed. Farmers Security Bank v. Martin, 269.

Recovery Back of Taxes Paid.

3. Trial *de novo* of an action to recover from the county sums paid for taxes under the Wood law, which sums had been adjudged void. The complaint

SUFFICIENCY OF PLEADING.

1. Plaintiff, who had intrusted certain money to defendant for safe-keeping, to be returned upon demand, brought suit for the conversion thereof. Defendant answered, admitting that he received such money from plaintiff, but denied all the other allegations of the complaint, and alleged that a portion of such money had been repaid to plaintiff and the balance tendered, which tender plaintiff refused. Then follows what is designated a "second and further defense," wherein defendant, after realleging all the prior allegations in the answer, alleges in effect that he notified plaintiff that if he and his family continued to board and room in defendant's home, he would be charged therefor, and the reasonable value thereof would be deducted from the moneys in defendant's hands belonging to plaintiff, and that plaintiff and his family did thereafter continue to board and room with defendant, and that the reasonable value of such board and room was more than the balance of such funds in defendant's custody. A demurrer to such second defense upon the ground that it fails to allege a defense was interposed and overruled. *Held*, that such ruling was not error. Erstad v. Jacobson, 647.

VENDOR AND PURCHASER.

Title and Estate of Vendor.

1. Plaintiff contracted to give good title to a tract of land which he had previously purchased from the Great Northern Railway Company under a deed containing the following reservation: "Reserving, however, to the St. Paul, Minneapolis, & Manitoba Railway Company, its successors or assigns, for right of way or other railroad purposes, a strip of land 150 feet wide, from the above granted premises where the lines of its road or any of its branches, or the line of any other railroad or the branches thereof, now owned or operated, or which may hereafter be owned or operated, by it, is now located and constructed, or may hereafter be located and constructed." When plaintiff tendered a deed to the premises objection was made to his title upon the grounds that it was unmarketable by reason of the foregoing reservation. The balance of the purchase price was, however, deposited in a reputable bank payable to the order of the plaintiff when he should be able to give a proper title to the tract. Defendant was not obliged to accept the title offered, even though it might prove ultimately to be good, but he was justified in demanding a title not only good in fact, but one that was good beyond a reasonable doubt. Such reasonable doubt is one that would cause hesitation in the judicial mind before deciding it. Bruegger v. Cartier, 575.

2. A clause in the contract whereby defendant agreed "that he has entered upon the above written contract relying on his own knowledge of such premises, and not upon any representations made by the party of the first part, or by any other persons, touching the situation, character, or quality thereof," does not mean that the defendant assumed the risks of title. Bruegger v. Cartier, 575.

Rescission of Contract.

3. A vendor in an executory contract for the sale of land, who has clearly