REPORT OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

FEBRUARY, 1908, TO NOVEMBER, 1909

F. W. AMES
Reporter

VOLUME 18

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

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

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

1. Elected to fill vacancy caused by resignation of Judge Young, and qualified January 10, 1907.
2. By constitutional amendment, adopted November 3, 1908, the membership of the court was increased to five, and Judges Carmody, who qualified January 18, 1909, and Ellsworth, who qualified January 18, 1909, were appointed additional members.

CONSITUTION 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.

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*This note by G. A. Newton of Burleigh County Bar.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, A CORPORATION v. HANS OPPEGARD, SHERIFF OF BARNES COUNTY, AND BARNES COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION.

Opinion filed November 18, 1908.

Railroads — Taxation — Exemption.

1. Property used as a telegraph line, built by a railway company, is not exempt from taxation as property reasonably necessary for the running of trains and the transaction of railroad business, when such telegraph property is used for commercial purposes for compensation, paid by patrons.

Same — Property Subject — Estoppel — Railway Telegraph Lines.

2. The fact that a railway company is not shown to have a separate franchise or authority to do a telegraph business for compensation is immaterial, where the railway company is shown to have assumed such franchise or authority fully, and is therefore estopped to show, as against the state, that it has no franchise, as a defense to the collection of a tax levied by the state on a franchise, and other property used in the telegraph business.

Same — "Roadbeds."

3. A "roadway," within Constitution, section 179, providing for taxation of the franchise, roadway, etc., of all railroads, includes not only the strip of ground on which the main line is constructed, but all grounds necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and other accommodations reasonably necessary to accomplish the object of their incorporation.

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

Action by the Minneapolis, St. Paul & Sault Ste. Marie Railway Company against Hans Oppegard, sheriff of Barnes county, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Lee Combs, for appellant.

"Roadbed" includes grounds necessary for side tracks, turnouts. station houses, freight houses and all other accommodations to accomplish the objects of railway incorporation. C. M. & St. P. Ry. Co., v. Cass County, et al, 8 N. D. 18, 76, N. W. 239.

Franchises are grants of privileges by the government. Fietsam v. Hay, 3 Am. St. Rep. 493; State v. Western Irr. Co. 19 Pac. 349; Abbott v. Omaha Smithing Co., 4 Neb.. 416; Augusta Bank v. Earle, 13 Pet. 519.

A telegraph line indispensable to railroad operation is a part of the freehold and taxable as such. Am. U. Tel. Co. v. Middleton, 80 N. Y. 408; Badger Lbr. Co. v. Marion Water Supply Co, 15 L. R. A. 652; Hughes v. Lambertville Electric Co. 53 N. J. Eq. 435; Western U. Tel. Co. v. Tennessee, 9 Baxt. 509, 40 Am. Rep. 99; Jov v. St. Louis, 138 U. S. 1; Union Trust Co. v. Weber, 96 Ill. 346.

Property requisite to the exercise of corporate franchise, although used in independent enterprise, is exempt from local or specific taxation. Schuylkill Nav. Co. v. Berks Co. 11 Pa. 202; People ex rel Seip v. Chgo. Ry. Co. 116 Ill. 181, 4 N. E. 480; C. M. & St. P. Ry Co. v. Bayfield County, 58 N. W. 245; S. E. L. & P. Co. v. Philadelphia, 191 Pa. 170; Tillery v. H. & St. Jo. Ry. Co. 97 Mo. 348; State Penn. B. Co. v. Jersey City, 49 N. J. L. 540; C. M. & St. P. Ry. Co. v. Houston Co., 38 N. W. 619; Detroit Union R. Co. v. City, 50 N. W. 302; Carondolet Canal Nav. Co. v. New Orleans, 44 La. Ann. 394; Columbia & P. S. R. Co. v. Chilberg, 34 Pac. 163; McHenry v. Alford, 168 U. S. 651; Vicksburg Bank v. Warrell, 67 Miss. 47; Louisville Tob. Warehouse Co. v. Commonwealth, 57 L. R. A. 33; Jones on Telegraph and Telephone Companies, Sec. 148; Adams v. Ry. Co., 13 So. 932; C. M. & St. P. Ry. Co. v. Supervisors of Crawford Co. 5 N. W. 3.

Alfred Zuger and *Theodore S. Lindland,* for respondent.

Railroads and telegraph lines are personal property. M. St. P. & S. Ste. M. Ry. Co. v. Dickey Co., 11 N. D. 107, 90 N. W. 260; C. M. & St. P. Ry. Co. v. Cass Co., 8 N. D. 18, 76 N. W. 239; Rev. Codes, 1905, Secs. 1629 and 1536.

Only corporate property in actual use in corporate operations is exempt from taxation. See Rules in Louisville Tob. Warehouse Co. v. Commonwealth, 57 L. R. A. 33.

MORGAN, C. J. During the years 1901 to 1904, inclusive, the State Board of Equalization assessed certain taxes against the plaintiff, upon property owned and used by it in maintaining a telegraph line along and upon its right of way, and extending wherever its right of way and roadbed extends within the state. The assessment was made at a specified sum per mile upon the franchise, and a specified sum per mile upon the other property of the plaintiff within the state. The assessment was not made, nor was the levy of the taxes made, directly upon the property, as the property of the plaintiff, but was assessed and levied under various designations as to the ownership of the property, such as "Soo Telegraph Company," "Minneapolis, St. Paul & S. Ste. Marie Telegraph Company," and "Operated and controlled by the Minneapolis, St. Paul & S. Ste. Marie Ry. Co., as the commercial department of said company." The plaintiff company refused to pay the taxes so assessed, claiming that the property taxed was a part of the roadway of its railway, and included within the tax levied upon its railway property and paid by it during the years in question. The taxes so levied upon the so-called telegraph system of the Soo Railway Company, was certified to the auditor of Barnes county by the State Auditor, and was by the auditor of said county extended upon the tax rolls of the county. Upon the refusal of the plaintiff to pay these taxes, the sheriff levied upon certain property of the plaintiff under a tax warrant, and advertised the same for sale to pay said taxes. The plaintiff paid the full amount of the taxes to the sheriff under protest, and brings this action against the county to recover back the money so paid, with costs. The jury found in favor of the defendant county, and judgment was rendered upon the verdict by the district court. The plaintiff has appealed from the judgment.

The plaintiff contends that the telegraph line was constructed, and during the years in question was used, as an indispensable means

of operating its railway system and performing its duties as a common carrier. There are certain undisputed facts in the record which should now be enumerated. The property which was assessed belonged to the plaintiff company. Plaintiff company is not shown to have a charter or franchise to carry on a telegraph business. The only charter it has is as a railroad company, so far as is shown by the record. The company operates a railway line across the state from southeast to northwest, and a line across the state, or nearly so, from east to west, and numerous branch lines, and maintains a telegraph line wherever it has a railway line. It does all the commercial business that is offered to it at every public place along its railway line, and at one place at least, maintains an office for taking care of commercial business alone. It will not be disputed that a telegraph line, used exclusively for the moving of trains and the dispatching of railroad business, is not assessable independently or separately from the railroad property. In C. M. & St. P. Ry. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239, the rule as to taxation of property owned by a railway company, and included as part of the "roadway," as that term is used in section 179 of the Constitution, was laid down to the effect that the word "roadway" includes, "not only the strip of ground upon which the main line is constructed, but all grounds necessary for the construction of side tracks, turnouts, connecting tracts, station houses, freighthouses and all other accommodations reasonably necessary to accomplish the object of their incorporation." The appellant contends that under this rule the property taxed in this case is exempt from separate taxation. It contends that the property is reasonably necessary for the operation of its railway. If the fact that the telegraph line is used for profit in handling commercial business could be eliminated from the case, this contention could be upheld as based upon reason and authority. While the business of a railroad company and the running of its trains require a telegraph line and equipment, and the same are reasonably necessary for these purposes, it is nevertheless a self-evident fact that it is not necessary for the railroad company to do commercial business for compensation in order to run its trains. What is the effect upon the taxability of this telegraph property that it has not been used exclusively for railroad business? The evidence is not satisfactory as to the amount of commercial business that is done by the telegraph department of the plaintiff company. By way of general conclusions it is stated by the officers of the

company that the volume of commercial business was small, during these years, as compared with the business of running the trains and doing the other railroad business. No facts were given in evidence on which a conclusion could be formed as to the relative amount or volume of work required to perform the two classes of business. The court will take judicial notice of the fact that the railroad runs through portions of the state that are thickly populated, and that there ane many villages and cities on this road, and that, so far as population is concerned, the territory traversed by the plaintiff road is practically the same as the territory traversed by the railway lines operated through the Western Union Telegraph system. We do not think it material that the revenue from the telegraph business is not definitely given. The evidence will sustain a finding that the revenue derived from the use of the telegraph line for other than railway business is sufficiently large to warrant the conclusion that such telegraph property is not used as reasonably necessary to carry out the object of the incorporation of the plaintiff as a railroad corporation. It is true, as stated before, that a telegraph system is necessary to operate a railroad, and to run its trains in a safe and orderly manner, but it does not appear to be shown or claimed that it was necessary for the plaintiff company to build its own telegraph system, and from what other railroads are doing in that regard such a contention could not be sustained. The fact, therefore, that the ownership of the telegraph line by the railroad company was not necessary, and such ownership not indispensable to it for operating its railway system, does not exempt the telegraph property from taxation as a part of the railroad property, and the fact that the railroad company had paid its taxes for these years on its roadbed, right of way, rolling stock, and other railway property becomes immaterial. The property used for the construction and maintenance of the telegraph line was not included in the property of the railroad company taxed by the board of equalization. The use of the property in running a telegraph system for compensation cannot be said to be reasonably necessary to carry out the purposes for which the railroad company was formed. The following cases are in point as sustaining the taxation of property under similar circumstances: C. M. & St. P. Ry. Co. v. Board of Supervisors, 48 Wis. 666, 5 N. W. 3; M. & St. P. Ry. Co. v. City of Milwaukee, 34 Wis. 271; C. M. & St. P. Ry. Co. v. Crawford Co., 29 Wis. 116.

In the year 1900 an amendment to the Constitution of the state was adopted, and under this amendment the board of equalization was empowered to assess "the franchise * * * and all other property of all telegraph or telephone companies, or corporations operated in this state and used directly or indirectly in the carrying of * * * messages." Pursuant to this amendment the Legislature passed chapter 26, p. 30, Laws 1901. Under this chapter it is provided that the State Board of Equalization "shall * * * in each year assess at its actual value the franchise and all other property within the state, of all * * * telegraph or telephone companies." The evidence in this case does not show that the plaintiff company was ever granted a charter or articles of incorporation or any express authority or franchise to carry on business as a telegraph company. The complaint alleges that the plaintiff is a duly incorporated company engaged in operating a railway in North Dakota. It is duly authorized to operate a railroad only, so far as this record shows. It is shown that, as such railway company, it has built, and now maintains and operates, a complete telegraph system, and operates the same for the accommodation of the public for compensation, in addition to using such telegraph equipment in directing the running of its trains and doing a purely railroad business. It is shown, as we have seen, that the company has carried on a telegraph business for compensation as fully as though it had a separate franchise or authority to do such telegraph business. The plaintiff does a general telegraph business to the same extent as a company expressly and solely authorized to do such business. The question is therefore presented whether the fact that plaintiff is not shown to be authorized by sovereign authority to do a telegraph business is a defense available to it to defeat the levy and collection of a tax upon its telegraph property by the State Board of Equalization, pursuant to said chapter 26, p. 30, Laws 1901. If the word "franchise" is to be taken as meaning simply a direct authority from the state to do business, then the record does not show that it possessed any authority to do a telegraph business independently of operating its railroad. The record fails to show that a franchise or right to carry on a telegraph business, for or upon the plaintiff's railway line, was ever granted to any company or corporation. The plaintiff claims that this fact is fatal to the tax. The defendant claims that plaintiff should not be permitted to interpose that fact as a defense, nor as a fact in an affirmative cause of action to recover

back the money paid on account of said taxes. We think that the defendant's contention should be sustained. The plaintiff is an incorporated railroad company carrying on a distinct telegraph business in connection with its railroad business. The state has not objected or taken any steps to prevent the plaintiff from carrying on a business for compensation not directly connected with the business of a strictly railroad company. The carrying on of a telegraph business for compensation is not included within the duties or privileges of a company organized for railroad purposes. A company chartered to do a railway business has no authority, by virtue of such charter, to maintain a telegraph line independently of its railroad business. In Railroad Company v. Telegraph Company, 38 Ohio St. 24, the court said: " Another view of the case leads to the same result. Neither the Marietta & Cincinnati Railroad Company, nor the plaintiff in error, ever had or have the capacity to engage in the telegraph business for the public generally, whether local or general in its character. The only extent to which either of them could engage in the business of telegraphy was such as might be necessary or convenient to the management of the railroad for its business. For this purpose only can a railroad company in this state erect and maintain a line of telegraph poles and wires. True, having built such lines for such use, it is competent for the railroad company to grant to another, having such capacity to engage in the business, the right to use such poles and wires for the purpose of general telegraphy, and the right so transferable may be exclusive or partial as the parties may agree." The plaintiff has reaped the full benefit to be derived from operating a telegraph line, and the state has, by its inaction, impliedly assented thereto. The plaintiff, having carried on a general telegraph business in connection with its railroad business, cannot be heard to now say it had no franchise or authority to do a telegraph business, for the purpose of defeating a tax levied upon its property that was used independently of any railroad business, and so used for compensation. The actual existence of a franchise from the state becomes immaterial, inasmuch as the plaintiff has actually assumed one. To permit it to defeat a tax now, on the ground that it has no franchise, or authority, as a matter of fact, to do a telegraph business, would be permitting it to take advantage of its own wrong. The company will not now be heard to assert the fact that it had no authority to do a telegraph business. The company is estopped from showing such fact by reason of having

assumed and asserted that authority. The tax will be upheld, not as levied upon an actual or assumed franchise, but upon the ground that the plaintiff has estopped itself from asserting that it had no franchise. Adams Express Co. v. Kentucky, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960.

The judgment is affirmed. All concur.

(118 N. W. 830.)

SUCKER STATE DRILL COMPANY, A CORPORATION, v R. J. BROCK AND R. L. RICHARDSON, AS INDIVIDUALS AND AS A COPARTNERSHIP, DOING BUSINESS UNDER THE FIRM NAME OF BROCK & RICHARDSON.

Opinion filed November 20, 1908.

Appeal and Error — Double Appeal.

1. An appeal from a judgment and from two orders denying motions for a new trial, made upon the same grounds after judgment, is not a double appeal.

Same — Bond — Defects.

2. Defects or omissions in an undertaking on appeal may be supplied by amendment or by giving a new undertaking, under the provisions of section 7224, Rev. Codes 1905.

Appeal from District Court.

Action by the Sucker State Drill Company against R. J. Brock and R. L. Richardson. Judgment for defendant, and plaintiff appeals.

Motion to dismiss appeal denied.

D. J. O'Connell and C. W. Hookway, for appellant.

Leave to amend should be granted. Rev. Codes 1905, Sec. 7224; Tollerton v. Casperson, 63 N. W. 908; Skinner v. Holt, 69 N. W. 595.

Christianson & Weber, for respondent.

Appeal cannot be taken from two separate orders. Ewing & Harsch v. Lunn, 109 N. W. 642; Prodzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23.

One undertaking is insufficient where there is one appeal from a judgment and another from an order. Corcoran v. Desmond, 11 Pac. 815; Carter v. Butte etc. 63 Pac. 667; Weil v. Sutter, 44 Pac. 555; In re Heydenfeldt's Estate, 51 Pac. 543; Kelley v. Loachman, et al, 51 Pac. 407; Creek v. Bozeman Co. 56 Pac. 362; Murphy v N. P. Ry. Co. 57 Pac. 278; Washoe Copper Co. v. Hickey, 58 Pac. 866; Grage v. Paulson, 59 Pac. 1; Baker v. Butte City Water Co., 60 Pac. 488; Richter v. Eagle Life Assn., 61 Pac. 878.

MORGAN, C. J. This is a motion to dismiss an appeal. The notice of appeal is as follows: "Please take notice that the * * * plaintiff appeals to the Supreme Court * * * from the judgment of said district court, entered herein on the 19th day of December, 1906, and also from the order of said court entered herein on November 5, 1907, overruling plaintiff's motion for a new trial, and the order of said court entered herein dated November 30, 1907, overruling the motion of plaintiff for a new trial herein, and from the whole thereof." The ground urged in favor of the motion to dismiss is that the appeal is a double one, being an appeal from a final judgment and an appeal from two alleged separate, independent, appealable orders. The record shows that both motions for a new trial were made and decided after the judgment had been rendered. The record also shows that the two motions were made for the following reasons: The action was originally tried before Judge Goss. After verdict and judgment Judge Burr was appointed judge of the Ninth judicial district, which district was created by the Legislature of 1907. After Judge Burr had qualified and entered upon the duties of his office, a motion for a new trial was made before him and denied. Very soon after said motion was denied, the appointment of Judge Burr was declared of no effect by this court, and he ceased to perform the duties of the office. The plaintiff, by reason of that decision, deemed that the order of Judge Burr denying the motion for a new trial was of no effect, and he thereupon made another motion for a new trial, and noticed it for argument before Judge Goss, who denied the same. The motions each presented precisely the same alleged grounds for a new trial.

The defendants contend that these two orders are separate, independent, appealable orders, and that their insertion in one notice of appeal renders the appeal duplicitous. It is contended that the rule announced by this court in Pronzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23, is applicable, and that the appeal should be dismissed

Since the decision of that case, this court has had occasion to again pass upon the question of what constitutes a double appeal, and in Kinney v. Brotherhood of American Yeomen, 15 N. D. 21, 106 N. W. 44, the rule announced in that case was disapproved as to certain points thereof. Although that decision was based upon earlier decisions of the Supreme Court of Wisconsin, and upon the case of Hackett v. Gunderson, 1 S. D. 479, 47 N. W. 546, and Anderson v. Hultman, 12 S. D. 105, 80 N. W. 165, the principle of these cases was not adhered to, as it was deemed that they declared a rule that was technical and harsh. In the Kinney case, the appeal was from a judgment and a subsequent order denying a new trial, and this language was used: "No case has been cited, and we have found none wherein it has been held, under laws similar to ours, that an appeal from a final judgment and from a subsequent order denying a motion for a new trial is objectionable for duplicity. We can conceive of no good reason for condemning such a practice, unless we regard the general rule as broadly declared in Hackett v. Gunderson to be an inflexible one to which there is no exception. * * * It seems to us that the practice is one which ought to be commended rather than condemned. Errors of law can be reviewed on appeal from the judgment without a motion for a new trial; but the statute forbids us to examine into the sufficiency of the evidence to support the verdict, unless the trial court has had an opportunity on a motion for a new trial to remedy the jury's erroneous decision of the facts. If the jury has taken an erroneous view of the evidence, it is an error at the trial which necessarily affects the judgment, and, although the trial court after judgment may refuse to grant a new trial, and thus commit error after judgment by refusing to rectify the error which the jury committed, the fact remains that the inquiry on appeal as to the sufficiency of the evidence is in reality a review of the error before judgment. The trial court's ruling is merely a condition precedent to the right of the appellate court to examine into and remedy the error which the jury is alleged to have committed. Clearly, if the defeated party challenges the propriety of the judgment on the ground that there was error of law or fact in the proceedings which resulted in the judgment, he ought to be required to present all the reasons he assigns for reviewing the judgment in a single proceeding, unless there is some good reason for not doing so."

Appellant concedes that an appeal from a judgment and from a subsequent order overruling a motion for a new trial is not double. His contention is that an appeal from the two orders and from the judgment in this case renders the appeal a double one. The orders are identical so far as the subject-matter of them is concerned. They are independent only in form. The latter order adds nothing to plaintiff's remedies. The first order included everything covered by the second. The second order was undoubtedly procured to obviate the result of a holding that all of Judge Burr's acts were without authority and void, but all of his acts were held valid on the ground that he was a de facto judge by virtue of his appointment. State v. Ely, 16 N. D. 569, 113 N. W. 711, 14 L. R. A. (N. S.) 638. The two orders were not therefore separate or independent in fact, but simply in form, and the second one did not determine anything that had not been determined by the previous order. The latter order was unnecessary, as the relief or object sought to be gained had been fully covered by the first order. As a matter of law, these two orders should be considered as one order, and their inclusion in the notice of appeal with the judgment did not render the appeals duplicitous. Kinney v. Brotherhood of American Yeomen, supra; Kountz v. Kountz, 15 S. D. 66, 87 N. W. 523; Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. 774. The notice did not therefore, as a matter of law, include an appeal from but one order and from the judgment. Under the cases cited, this appeal is not a double one.

The undertaking on appeal was signed by the sureties only, and not by the plaintiff as the principal in the bond, and the justification of the sureties was not in compliance with the provisions of the statute. The defendants included these defects or omissions among the grounds on which they based their motion to dismiss the appeal. The plaintiff made a counter motion in this court to supply a new undertaking or to amend the one filed to cure the admitted defects. The motion to supply a new bond or to amend the old one is based upon section 7224, Rev. Codes 1905. Under this section any omission to do any acts necessary to render an appeal to the Supreme Court effectual may be supplied upon permission first granted by this court, or by one of the justices thereof. Without determining whether the appeal bond in this case would be valid, although not signed by the appellant, we deem the motion to supply a new undertaking a proper one to be made under the section quoted. That

section is intended to give an opportunity to remedy defects or omissions in doing certain acts necessary on the appeal, without going to the trouble and expense of a new appeal. The statute is remedial in its character, and is intended to favor the perfecting of attempted appeals. It is held to apply to defects like the one in this undertaking. There is a statute identical in terms with section 7224 in the South Dakota Code (Comp. Laws 1887, § 5235), and the Supreme Court of that state has held that it applies to remedying defects in undertakings similar to the defects in this case. Tolerton v. Casperson, 7 S. D. 206, 63 N. W. 908; Skinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; Martin v. Smith, 11 S. D. 437, 78 N. W. 1001.

The motion to dismiss the appeal is denied. All concur.

(118 N. W. 348.)

O. A. KNUDTSON v. JOHN J. ROBINSON AND MARY E. ROBINSON, DEFENDANTS AND RESPONDENTS AND MARY E. ROBINSON AND GEORGE L. ROBINSON, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOHN J. ROBINSON, DECEASED, SUBSTITUTED DEFENDANTS AND RESPONDENTS, AND MARY E. ROBINSON, GEORGE M. ROBINSON, MOLLIE E. CASSELMAN AND CHARLOTTE R. SKULASON, EMMA RAY, CLARA P. ROVIG AND JOHN W. ROBINSON, HEIRS AT LAW OF JOHN J. ROBINSON, DECEASED, SUBSTITUTED DEFENDANTS AND RESPONDENTS.

Opinion filed November 21, 1908.

Specific Performance — Mutuality of Obligation is Essential to Enforcement.

1. Under section 6610, Rev. Codes 1905, where there is no mutuality of remedy between parties to a contract, an action for the specific performance thereof will not lie by a party thereto, unless such party has performed the contract on his part, or he can be compelled to specifically perform the same.

Same — Tender.

2. Performance within the meaning of said action is not complied with by an offer or tender of performance.

Same — Compensation for Deficiency.

3. In cases where specific performance of a contract will not lie on account of the absence of mutuality in the contract, the principle of compensation for deficiency or abatement of price has no application.

Same — Retention of Jurisdiction to Assess Damages — Liability of Heirs of Deceased Vendor.

4. Where the fact that specific performance of the contract could not be awarded was known to the plaintiff when the action was commenced, and the party to the contract who was originally made a defendant in this action has since died, and his heirs at law and the devisees and executors of his will have been substituted as defendants, and the estate has been finally settled, jurisdiction of the action will not be retained for the purpose of assessing damages, but the action will be dismissed as not properly brought.

Words and Phrases — "Performance."

5. "Performance" means the doing or completing of an act.

Appeal from District Court, McLean county, *Winchester*, J.

Specific performance by O. A. Knudtson against John J. Robinson and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Lee & Fowler, for appellent.

Wherever the deficiency in the quantity of land contracted to be sold by the vendor, or defect in the title, does not substantially alter the contract, the vendee can enforce the contract with compensation for the deficiency; if the deficiency or defect is material, vendee may refuse performance, or have performance with compensation or abatement; if so great as to make compensation or damages the main object of the suit, vendee will be denied specific performance with compensation; to entitle buyer to specific performance he must have been unaware of deficiency at time of the bargain. Rev. Codes 1905, Sec. 6610; 6 Pom. Eq. Jui. Sec. 833; 3 Pom. Eq. Jur. (2nd Ed.) 1405; Clark v. Reius, 12 Gratt 98; Waters v. Travis, 9 Johns, 450; Hebers v. Godsen, 6 Rich's Eq. 284; Vorhee v. De Myer, 3 Sanf. Ch. 614; Jacobs v. Locke, 2 Fred. Eq. 286; Erwin v. Myers, 46 Pa. St. 96; Mapier v. Darlington, 70 Pa. St. 96; Wetherford v. Jones, 2 Ala. 170; Gartell v. Stafford, 11 N. W. 732.

If vendor cannot make the title that he professed, vendee will not be compelled to accept less, but the rule does not prevail if

vendee demands performance and will accept vendor's title. Water v. Travis, supra; Sutherland v. Briggs, 1 Hare, 34; White and Tudors Leading Cases in Eq. par. 2; Bell v. Thompson, 34 Ala. 633; Collins v. Smith, 38 Tenn. 251; Wright v. Young, 4 Wis. 144, 70 Am. Dec. 453; Crockett v. Gray, 2 Pac. 809; Rankin v. Bonwell's Heirs, 12 Am. Dec. 431; Mathews v. Patterson, 3 Miss, 729; Jacobs v. Lake, 37 N. C. 286; Stockton v. Oil Co., 4 W. Va. 273; 20 Enc. Pl. & Pr. 491; 26 Am. & Eng. Enc. L. (2nd. Ed.) 83; Woodbury v. Luddy, 14 Allen 1, 92 Am. Dec. 731; Martin v. Meritt, 26 Am. Rep. 45; Zebley v. Sears, 38 Ia. 507; Park v. Johnson, 4 Allen, 259; Sanborn v. Nockin, 20 Minn, 178; Young v. Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456; Walker v. Kelly, 51 N. W. 934; Harding v. Parshall, 56 Ill. 219.

Unless the remedy is mutual, specific performance will not be decreed, except where there is full performance by one of what the other is entitled to, or nearly so, and full compensation for deficiency is made. Marshall v. Calwell, 41 Cal. 611; Pederson v. Dibble, 12 N. D. 572, 98 N. W. 411; Flight v. Bullard, 4 Russ, 298; Hargrave v. Hargrave, 12 Penn. 411; Peto v. Brighton etc. Ry. Co. 1 Hem. & Mil. 468.

B. G. Skulason and *Newton & Dullam,* for respondents.

Equity will not take jurisdiction for specific performance or damages when plaintiff knew at the commencement of the action, that without defendant's fault specific performance, or other equitable relief was impossible. Morgan v. Bell, 16 L. R. A. 614; Lewis v. Yale, 4 Fla. 438; Sellers v. Greer, 40 L. R. A. 589; Kempshall v. Stone, 5 Johns, Ch. 193, 1 L. Ed. 1054; Kennedy v. Hazelton, 128 U. S. 667, 9 Sup. Ct. Rep. 202; Morss v. Etmendord, 11 Paige 277; Milkman v. Ordway, 106 Mass, 232; Welty v. Jacobs, 40 L. R. A. 98; Baldwin v. Fletcher, 48 Mich. 604.

Court cannot grant specific performance as to land a portion of which is homestead, but not selected. Foogman v. Patterson, 9 N. D. 254, 83 N. W. 15; Goodrich v. Brown, 18 N. W. 893; Cumps v. Kivo, 80 N. W. 937; Minnesota Stone Co. v. McCrossen, 85 N. W. 1019.

A contract to convey homestead, wife not joining, will not uphold an action for damages. Cowgell v. Warrington, 24 N. W. 266; Barnett v. Mendenhall, 42 Iowa, 296; Donner v. Redenbaugh, 16 N. W. 127; Yost v. Devault, 9 Iowa, 60; Meek v. Lange, 91 N.

W. 695; Prout v. Burke, 70 N. W. 512; Horbach v. Tyrrell, 67 N. W. 475; Waples on Homestead, 384, 394; 15 Am. & Eng. Enc. Law (2nd Ed.) 670; Weitzner v. Thingstad, 56 N. W. 817; Hodges v. Farnham, 31 Pac. 606; Thimes v. Stumpff, 5 Pac. 431.

Action for specific performance will not lie on a void contract. Rogers v. Dey, 74 N. W. 190; Bolton v. Oberne, 44 N. W. 547.

MORGAN, C. J. The complaint in this action states the following facts: On the 15th day of October, 1901, one John J. Robinson entered into a contract in writing with the plaintiff, wherein he agreed to convey to the plaintiff 960 acres of land, which was described in said contract. The price agreed upon was the sum of $8.50 per acre. The sum of $50 was paid by the plaintiff to Robinson at the time of the making of the contract. The contract provided for the payment of the balance of the purchase price in installments at specified dates. The 960 acres of land embraced 160 acres occupied by Robinson and his family as a home on the dav the contract was signed. The homestead had not been selected or its limits provided for in any manner. The contract further provided that Robinson should furnish an abstract showing a marketable title to the land within 60 days from said October 15, 1901, and, upon the furnishing of said abstract, the sum of $2,720 was to be paid by Knudtson to Robinson. Before the abstract was furnished, and before any of the provisions of the contract were carried out, except the payment of the $50, Robinson repudiated the contract, and refused further to be bound thereby. On March 31, 1902, this action was commenced. On October 19, 1902, Robinson died. Upon his death, his heirs and legal representatives were substituted as parties defendant, and the action came to trial in June 1905. The complaint further alleges that the plaintiff was at all times able, ready and willing to comply with all the terms of the contract on his part to be performed. The prayer for relief is for the specific performance of the contract as to all of the land, and, in case specific performance cannot be decreed as to the homestead, that the value of the homestead be thereafter ascertained and deducted from the purchase price. The answer sets up the failure of the plaintiff to file a claim for damages against the estate of Robinson, and that the said estate has been finally distributed by the county court; a life interest in said estate vesting thereby in the widow of said Robinson. It further alleges that the contract was not enforceable for the alleged reason that Robinson was incompetent to make said contract

on account of the long-continued and excessive use of intoxicating liquors and drugs, and that the contract was entered into by said Robinson under the influence of, and by and through the unfair practices and acts of, plaintiff. On the trial the plaintiff tendered the sum of $6,000 into court as the balance due upon the contract, after deducting the value of the homestead and the 160 acres which was owned by the wife of Robinson. The trial court made findings of fact and conclusions of law in favor of the defendants, and judgment was entered thereon dismissing the action. The plaintiff appealed from said judgment, and demands a trial anew under the provisions of section 7229, Rev. Codes 1905. A rehearing was granted in this case, and, after a reargument, we are satisfied that the conclusion formerly reached was erroneous, and failed to give effect to section 6610, Rev. Codes 1905.

Appellant contends that specific performance of the contract should be ordered under the facts of the case as far as it was within the power of Robinson to comply with the contract, and that plaintiff should be awarded an abatement of the total purchase price to the extent of the value of the homestead and the 160 acres separately owned by the wife. The fact that 320 acres of the land embraced in the contract was not subject to conveyance by Robinson destroyed the mutuality of the contract, so far as the remedy is concerned. Robinson could not have compelled Knudtson to accept a conveyance of the land embraced in the contract less the 320 acres, even with compensation for the deficiency. If the deficiency had been an immaterial quantity, specific performance with an abatement of the price would lie, but the principle of specific performance with abatement for the deficiency is not to be applied where the deficiency is so great as in this case, amounting to one-third of the number of acres involved. Since Robinson could not enforce specific performance against Knudtson under the facts of this case, specific performace could not be enforced by Knudtson against Robinson. There must be mutuality of obligation and remedy between the parties before specific performance is enforceable against either, except in cases where there has been performance by the party seeking to enforce specific performance. This is a statutory principle in this state, as laid down in section 6610, Rev. Codes 1905, which reads as follows: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform everything to which the

former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." The remedy must be reciprocal. Performance by the party seeking to enforce performance under this section of the Code entitles such party to have the contract specifically enforced, although there was no mutuality of remedy when the contract was entered into. So far as the enforcement of contracts that are not mutual, as to obligation or remedy, this section is only a declaration of the common-law rule on this subject. Pederson v. Dibble, 12 N. D. 572, 98 N. W. 411.

The appellant contends that an offer of performance satisfies the requirement of the statute, and that, by tendering and bringing into court the sum claimed to be actually due under the contract, the non-mutuality of the contract is rendered immaterial. The language of the section is explicit that performance or the right to compel substantial performance of the contract must be shown before contracts that are not mutual can be specifically enforced. "Performance" is a word of settled meaning, and means the doing or completing of an act. "An offer to perform" and "performance" are not synonymous in meaning. Without performance the party seeking enforcement of the contract is not within the provisions of the statute when he has tendered performance or simply shown a willingness to perform. Crumbly v. Bardon, 70 Wis. 385, 36 N. W. 19; Lattin v. Hazard, 91 Cal. 87, 27 Pac. 515.

Having reached this conclusion, which is inevitable under the language of the statute, it is unnecessary to consider whether an abatement from the purchase price may be given to the plaintiff on account of the deficiency in the number of acres that can be conveyed from the number embraced in the contract. Compensation for deficiencies or abatement from the price are incidents of the action for specific performance. Specific performance is granted so far as the party is compellable to perform, and abatement of price is allowed as an incident to the action in order to do substantial justice between the parties. Unless specific performance is compellable in part, the principle of compensation for deficiency or abatement of price has no application.

We are asked to retain jurisdiction of the action, and to remand it to the district court for the purpose of having that court assess damages for a breach of the contract to convey. Under the present Code of Civil Procedure, this practice is sometimes followed to

avoid delay and the bringing of another action. In the present state of the record we do not think that damages should be assessed. So far as the homestead is concerned, the plaintiff was aware before this action was commenced, that specific performance of the contract could not be enforced, and that damages could not be recovered against Robinson for his refusal or inability to convey the homestead. Silander v. Gronna, 15 N. D. 552, 108 N. W. 544. Whether an action for damages would lie in this case for failure to comply with the contract so far as it embraced other lands than the homestead we need not determine. The estate of Robinson has been finally settled and distributed by the county court. The heirs at law and devisees who are made defendants are not to be held for any damage, even if Robinson could be held by reason of his breach of contract, and, if damages should be assessable, the estate has been distributed, and nothing remains in the hands of the executors out of which a judgment for damages could be satisfied. Under such circumstances, it would avail nothing to the plaintiff to remand the case for the assessment of damages, if damages would lie. Knowledge by plaintiffs of facts which render specific performance impossible is often held ground for refusing to retain jurisdiction for the purpose of awarding damages. If the original defendant Robinson was still living, there would be more force in the contention that jurisdiction should be retained for the consideration of the question or damages, although the relief of specific performance be unavailable. Pomeroy on Specific Performance, 481. But in the state of the record, so far as the parties defendant are concerned, we think that the action was properly dismissed.

The judgment is affirmed. All concur.

(118 N. W. 1051.)

E. J. D. MILLER v. THE NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed May 4, 1908.

Rehearing November 23, 1908.

Evidence — Records of Sister State.

1. A public record kept pursuant to the law of a sister state, when properly proved, is admissible in evidence in the courts of this state as prima facie proof of the facts therein recorded.

Same — Appeal and Error — Harmless Error — Exclusion of Evidence.

2. Although proof of such foreign record was erroneously rejected by the trial court, such ruling was without prejudice to plaintiff, for the reason that, even if such record proof had been received, he would have failed to substantiate his cause of action by a fair preponderance of the evidence.

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

Action by E. J. D. Miller against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

S. E. Ellsworth, for appellant.

An official record, made by a public officer in the discharge of an official duty under obligation of his oath of office and of a penalty imposed by statute, is admissible as competent evidence of the facts required by law to be shown by it. 1 Gr. on Ev. (14th Ed.) Secs. 483, 484, and 493; 9 Am. & Eng. Enc. Law (2nd Ed.) 882, 883.

A record made by a deputy legally authorized is of equal force as that of his chief. 111 Wig on Ev. Sec. 1633, par. 8, and 1635, par. 2.

Official entries are prima facie evidence of the facts therein stated. Rev. Codes, 1899, Secs. 5697-5698.

Records of a foreign office are equally competent with those of a domestic officer. III Wig. on Ev. 1652, Sec. 1633, Par. 3.

Foreign records may be proved by a copy sworn to by a witness that it is a true transcript of the original. Enc. of Ev. 828; 1 Gr. on Ev. (14th Ed.) 581; III Wig. on Ev. Sec. 1679, par. 2.

Ball, Watson & Maclay, for respondent.

Records to be admissible must be of public concern, otherwise they might be inadmissible in the state of their origin, and inadmissible abroad. Gordon v. Bucknell, 38 Ia. 438; Buffalo v. Aid Ass'n.,

27 N. E. 942; Kerr v. Railway, 57 N. Y. Supp., 794; Insurance Co. v. Kielgast, 22 N. E. 467; Wasey v. Ins. Co., 85 N. W. 459; Beglin v. Ins. Co., 66 N. E. 102; Ohmeyer v. Woodman, 91 Mo. App. 189; Woodmen v. Grandon, 89 N. W. 446; Hennessy v. Ins. Co., 52 Atl. 490.

Mere difference in weights, in the absence of proof of the correctness of the two weights, is not sufficient to establish a liability. Eaton v. Newmark, 33 Fed. 891; 37 Fed. 375.

Error in the exclusion of evidence is harmless, if it would not affect the result if received. 2 Enc. Pl. & Pr. 563, 499; Brundage v. Mellon, 5. N. D. 72, 63 N. W. 209.

S. E. Ellsworth, for appellant, in reply.

A common carrier is an insurer, except against loss by inherent defect in the goods, act of God, the owner or public enemy, and such loss must be proved by him. Cownie Glove Co. v. Merchants Dispatch Trans. Co., 106 N. W. 749; Wabash Ry. Co. v. Sharpe, 107 N. W. 758; Hill v. Sturgeon, 28 Mo. 323; Heck v. Mis. P. Ry. Co. 51 Mo. App. 532.

He must show that the loss or injury is from a cause that he is not responsible for. Nashville Ry. Co. v. Stone, 79 S. W. 1031; Hull v. Chicago Ry. Co. 43 N. W. 391.

His default in delivering goods as per contract, is presumptive evidence of negligence. Glack v. Goodrich Transp. Co. 13 N. W. 244; Phoenix v. Ry. Co. 20 Atl. 1058; The Warren Adams, 74 Fed. 413; Georgia Ry. Co. v. Keener, 21 S. E. 287; 6 Enc. Law and Proc., 519; III Wigmore on Ev. Sec. 2508; Adams Express Co. v. Holmes, 9 Atl. 166; The E. M. Norton, 15 Fed. 686; Penn. Ry. Co. v. Liveright, 43 N. E. 162; Cleveland Ry. Co. v. Tyler, 35 N. E. 523; Grogan v. Adams Express Co., 7 Atl. 134.

Prima facie case is shown by delivery and failure to re-deliver. Gulf Ry. Co. v. Roberts, 85 S. W. 479; Grier v. St. Louis Ry. Co., 84 S. W. 158.

Mode of authenticating documents prescribed by Sec. 906 Rev. Codes of U. S. does not exclude others. Gribble v. Pioneer Press Co., 15 Fed. Rep. 689.

FISK, J. This is an appeal from a judgment of the district court of Eddy county in defendant's favor rendered pursuant to a verdict directed by the court.

The action was brought to recover damages from defendant, as a common carrier of freight, for alleged negligence in transporting a certain car of flax belonging to plaintiff from Barlow, in this

state, to Duluth, Minn., whereby it is claimed that a certain quantity of such flax was lost in transit. The car was consigned to Crumpton & Crumpton, commission brokers at West Superior, Wis., and in due course the same was sold by them at Duluth and a return of the proceeds made to plaintiff, which returns were based upon weights taken by the state weighmaster's department of the state of Minnenosa at Duluth. Plaintiff, to prove his cause of action, relied solely upon the discrepancy between the weights taken at Barlow at the time the flax was loaded into the car and the weights as shown by the records in the office of the state weighmaster aforesaid; no evidence being offered to show leakages in the car or that it had been tampered with while in transit. Appellant relies for a reversal of the judgment upon alleged errors of the trial court in rejecting testimony offered by him to show the records made in the office of the state weighmaster pertaining to the car of flax in question. This testimony consisted of a deposition of one J. B. Sutphin, state weighmaster at Duluth, who testified that, according to his records, the car was weighed by one Bagley at the time of its arrival, who was at that time a properly qualified assistant weigher in his department, and that such assistant made a record in writing of the date, description, and weight of the car and turned the same into his office in regular course of business pursuant to his official duty, where it had been at all times since. The witness had no personal knowledge of such weighing and did not know of his own knowledge whether it was correctly weighed or not. All he knew about it was that it was weighed in accordance with the system in vogue in his department and in accordance with the statutes of Minnesota in force at that time applicable thereto.

The court was asked to take judicial notice of the 1894 General Statutes of the state of Minnesota, creating the department of state weighmaster at Duluth, and especially to section 7705 thereof, pertaining to the records to be kept by that department, which law requires the state weighmaster and his assistants to make true weights and to keep true records of all grain weighed by them. Plaintiff at the taking of the deposition, offered in evidence the original record of the date, description, and weight of the car as shown by the entries made by Bagley, the assistant weighmaster; but defendant objected thereto, which objection was sustained by the trial court and the testimony excluded. Plaintiff then offered a copy of such record duly proved by the witness to be correct, which offer was rejected

upon the same grounds urged against the introduction of the original record. These rulings constitute the grounds upon which appellant's assignments of error are predicated. It is appellant's contention that the record, being a public record kept pursuant to law, was admissible in evidence and was at least prima facie proof of the facts therein stated, and that with such record in evidence he would have made out his cause of action, as, according to the facts stated and shown by such records, defendant delivered to the consignee about 90 bushels of flax less than it received from plaintiff at Barlow. If this testimony was properly rejected, this ends plaintiff's case; but, if it was improperly rejected, a new trial must be ordered, provided such record would, with other evidence in the case, have made out a prima facie cause of action as alleged. The question is therefore squarely before us as to whether or not a record, such as the one in question, made by a public officer in a sister state, is any evidence per se in the courts of this state of the facts recited in such record as against a third person, a stranger thereto.

Under the provisions of the Minnesota law in question, we find nothing in express terms making such record prima facie evidence of the truth of the matters therein set forth in the courts of Minnesota; but this law does provide that such weighmaster and his assistants shall, upon demand, give to any person or persons having weighing done a certificate under his hand and seal showing the amount of each weight, number of car, etc., and that such certificate shall be admitted in all actions, etc., as prima facie evidence of the facts therein contained. The Code of this state (section 7298, Rev. Codes 1905) provides that: "Entries in public or other official books or records made in the performance of his duty, by an officer or board of officers, or under the direction and in the presence of either in the course of official duty is prima facie evidence of the facts stated therein." And section 7299 of the same Code provides that: "An entry made by an officer, or board of officers, or under the direction and in the presence of either in the course of official duty is prima facie evidence of the facts stated in such entry." It is contended by counsel for appellant that the latter section refers to official records generally, and is not confined to those made by officers in this state. In this we think he is in error. It is apparent to our minds that it was the legislative intent that these sections should apply only to domestic records. There is therefore no express statute in force in this state making foreign records, such as the one in question, prima facie or any evidence per se of the

facts therein stated; but the sections above quoted, in our opinion, are not exclusive in their provisions, and, as we construe them, there is nothing therein contained which restricts or limits the courts to domestic records in giving effect to them, when properly proved as prima facie evidence. While the question is not free from doubt, and while there seems to be a dearth of authorities upon the precise point here involved, we are of the opinion that the testimony was admissible and should have been received. We think it comes within the well-recognized exception to the rule excluding hearsay testimony in cases of public records made by public officers in the discharge of their official duties. We know of no good reason why this exception should be limited to public records in the state where kept, and no such restriction of the rule seems to have been recognized by the authorities. The ground upon which this exception rests is well stated in Wigmore on Ev. vol. 3, §§ 1630-1683; I Greenleaf on Ev. (16th Ed.) vol. 1, §§ 483, 484, 493; I Whart. Ev. §§ 639, 347; 9 Am. & Eng. Enc. Law (2d Ed.) 882-883; 17 Cyc. 306, and cases cited. In par. 2, § 1633, of Prof. Wigmore's valuable work on Evidence, it is stated: "The subjective influence of the official duty being the essential justifying circumstance, it follows that an official statement by a foreign officer is equally admissible with one made by a domestic officer. That the duty is not recognized by the domestic law is immaterial; it exists for the foreign officer; and so far as it exists, if affords an equally official sanction. This application of the principle, though plain, has rarely been drawn in question." And again, in section 1652, the same author states: "That an official statement authorized to be made as the statement of a foreign officer does not make it any the less admissible. The essential thing is the authority of the officer, and a foreign authority equally satisfies the principle. There is, in the United States, the additional consideration that, under the federal Constitution (article 4, § 1) and the federal Revised Statutes (section 906 U. S. Comp. St. 1901, p. 677), the courts of each state are required to give full faith and credit to the records of other states, and this may well be held to imply that recognition should be given (not merely as a matter of comity, but as a matter of legal right) to an official authority created by the laws of another state for its domestic recording officers."

Having reached the conclusion that the proof offered should have been received, we will next consider the question as to the sufficiency of the evidence including the record evidence which

was rejected, to have required the trial court to submit the case to the jury, for, of course, the error in rejecting the offered proof was without prejudice, if it would have been the duty of the court, with such record evidence in the case, to have directed a verdict as it did. As the proof would have stood had such record been received, we think plaintiff would have failed to establish his cause of action. The prima facie proof furnished by the records as to the weight of the flax, when delivered at its destination by defendant, was, we think, entirely overcome by the other evidence contained in the deposition of the witness Sutphin, the state weighmaster at Duluth, wherein he testified, in substance, that the assistant weighers, under a rule in force in his department at the time the car in question was weighed, were required to make a careful examination to see if there was any leak or defect in the car by which grain might escape, and to make a notation on the records in case any such leak or defect is discovered, and that no such notation appears on his records, and that so far as his records indicate, this car was in perfect condition when it came to his department. He also testified that the men under him are supposed to carry out his instructions, and that he is very careful to see that they do. It is presumed that these instructions and rules were observed, and hence there is prima facie evidence in this deposition that the car was in perfect condition, and that there were no leaks. This testimony is corroborated by that of the plaintiff himself that he examined the car before and after loading it, and that it was a good car. He testified: "It was not a new car, but it was a good car. It seemed to me to be all right. Although it wasn't a grain car, I had no hesitancy in loading my flax into it. I did not have any anxiety after I found out that the car was overloaded that some of the flax would leak out. I felt that the car was a good one any way. I examined it previously and was satisfied that it was good." Plaintiff knew when he accepted the car that it was not a grain car and was not provided with a grain door, and he accepted the same and prepared it himself for the shipment of the flax by placing boards across the doorways in place of the usual grain doors. There is no evidence of an actual loss of any of this grain through defects in the car causing leakages, but on the other hand, the proof tends to show the contrary. The only evidence of a loss at all, as we said before, is the discrepancy between the weights at Barlow and the prima facie weights at Duluth as disclosed by the state weighmaster's records. Plaintiff's testimony therefore consists of a mere

conclusion deduced from two facts, one of which rests wholly upon a prima facie presumption, and the other is by no means conclusively established. The flax was weighed by three different persons at Barlow, none of whom, so far as the evidence discloses, was familiar with the scales or with such work, and furthermore no proof was offered showing the correctness of such scales, except the testimony of the witness Peterson, to the effect that they were in good order at the time, and the testimony of the witness College, who said: "All I know about the scales upon which I weighed this flax is that they were balanced right. I took it for granted that they weighed correctly. We conclude therefore that it would have been mere guesswork on the part of the jury as to whether or not any of this flax, and, if any, how much, was in fact lost in transit, as claimed by plaintiff, and hence the plaintiff conceding the record to have been admitted, wholly failed to prove his cause of action by a fair preponderance of the evidence. It is at least just as probable, if not more probable, under the evidence, that all the flax placed in the car was delivered by defendant, as that a portion thereof was lost in transit.

In conclusion, we hold that, while it was error for the trial court to exclude the record testimony offered as to the weight of the flax at Duluth, the ruling excluding the same in no manner prejudiced the plaintiff, and hence, under the rule adopted by this court to the effect that a reversal will not be ordered for error in excluding testimony when the plaintiff, even assuming that the excluded evidence is in the case, has failed to make out his cause of action, the judgment should be affirmed. Brundage v. Mellon, 5 N. D. 74, 63 N. W. 209. See, also, 2 Enc. Pl. & Pr. 563, 499.

Judgment affirmed. All concur.

ON REHEARING.

A rehearing having been granted in this case, we have again considered the questions presented, and after mature delibration e are forced to adhere to the views expressed in the foregoing opinion.

Counsel for appellant strenuously contends that there was sufficient evidence, when the record proof of terminal weight is considered, to require a submission of the case to the jury. He also contends, in any event, that the ruling of the trial court in excluding

the record proof offered to show the terminal weight of the grain was prejudicial error. Both of these questions were raised and squarely passed upon at the prior hearing; but, in view of the earnestness and zeal of appellant's counsel in pressing these questions again to our attention, we will once more briefly consider his contentions. As stated by him, it is entirely true that, in an action against a common carrier for loss of goods in transit, a prima facie case is established by proof that the carrier received the goods for transportation and failed to deliver them safely. Conversely stated, the rule is that, in order to make out a prima facie case, plaintiff must prove that the goods received by the common carrier were not all safely delivered. How stands the proof, assuming that the record evidence of terminal weights was admitted? The most that can be claimed is that, according to the private scales at Barlow, upon which the grain was weighed, there were delivered to defendant 1,328 bushels of flax, and that, according to the records in the office of the state weighmaster at Duluth, which are prima facie correct, there were delivered to the consignees only about 1,237 bushels. From such mere prima facie discrepancy in the weights as recorded on these two scales the inference or conclusion is deduced that 90 bushels of flax were lost or taken from the car while in transit. Not a scintilla of evidence was offered aside from the above to prove that any flax was in fact lost or removed from the car; plaintiff's entire case resting upon the mere inference aforesaid. Thus it is seen that plaintiff's entire case rests upon a mere inference or presumption based, not upon facts, but merely upon other presumptions, to wit, that the Barlow scales were accurate, and that the public record in the state weighmaster's office speaks the truth. Presumptions or inferences cannot be based upon other presumptions, but must be based upon proven facts. Not only this, but a presumption ordinarily has no probative force, and, when contrary evidence is adduced, the presumption disappears. 9 Enc. of Ev. 885, and cases cited; 16 Cyc. 1051-1087; 22 Am. & Eng. Enc. of L. (2d Ed.) 1236, and cases cited. The reason for the rule is well stated in Diel v. Mo. Pac. Ry. Co., 37 Mo. App. 454, as follows: "Presumptions and inferences are logically the same. From one fact proven, another may be inferred or presumed, if the inference or presumption is a logical result, and as such legally admissible; but to hold that the fact thus inferred or presumed at once becomes an established fact

for the purpose of serving as a base for a further inference or presumption would be to spin out the chain of presumptions into the regions of the barest conjecture." See also, Chicago, R. I. & Pac. Ry Co., v. Rhoades, 64 Kan, 553, 68 Pac. 58, and cases cited. Is it a fair and logical inference or presumption that 90 bushels of the flax were lost in transit merely because of the prima facie discrepancy in the two scales of that amount? We think not, nor do we think the jury should be permitted by mere guesswork or conjecture to draw any such inference. It would be just as reasonable to account for such prima facie discrepancy in other ways. The scales at Barlow may not have weighed accurately, or some of the persons who weighed the grain may have made a mistake or have been careless in recording such weights. This is true also with reference to the deputy weighmaster at Duluth. Again, it may be that the entire 17 loads claimed to have been weighed at Barlow were not put into the car or that during the two days plaintiff and his men were engaged in loading the car some of the flax was taken therefrom. Defendant's liability as such common carrier did not arise until the car was loaded and ready for shipment. Until such time the grain was wholly at plaintiff's risk. There is no testimony tending to show that some of the flax was not removed or could not have been taken from the car during the two days required in loading it. Jurors will not be permitted to guess or speculate what the facts are and base a verdict on mere inferences or presumptions. Union Pac. R. R. Co. v. Bullis, 6 Colo. App. 64, 39 Pac. 897. This they would have had to do under the state of the proof in the case at bar, had the case been submitted to them.

Thus far we have assumed that plaintiff sufficiently proved the fact that he delivered to the defendant, by placing in said car, the amount of flax claimed by him to have been thus delivered. An examination of the testimony serves to convince us that his proof in this regard is by no means satisfactory. Plaintiff testified. "My flax was loaded in this car. I helped to load it. I couldn't say that I was there during the entire loading. There might have been some work while I was away. There might have been some put in there before I was there to put it in. I helped do the hauling. I hauled some loads. Quite a number of different men assisted me doing that hauling. I knew their names, but I might miss some of them. I did not do the weighing. The weighing of the flax

placed in the car was done by Jesse College, I. E. Sutherland, and Glenn Sutherland. These three men weighed all the flax placed in the car. They brought in loads the same as the rest of the haulers. I think there were 17 loads went into the car. I wouldn't be positive, but I think that was it. I had this flax in my granary before I loaded it into the car. I would judge seven or eight, maybe nine people hauled to the car. I could not say, in there somewhere. My granary is 10 miles from the railroad depot where this car was standing. I think there were about 17 loads as near as I could say. I took some of these loads myself. I know I took 2, and possibly 3. I think I had enough teams to put it in. I used two days, the fourth and fifth. I saw it all loaded at my granary and started it. Some got there before I did, and I never heard anything to the contrary but that it went into the car; but I couldn't say how many I saw go direct into the car. I didn't see all of it go into the car. I suppose there were several loads at least which I didn't see put into the car. The flax was weighed at the time of the proceeding when each load got to the car. Three different men weighed it. I know nothing about the weights, except as they told me. I assisted some, but I wasn't there all the time, because my end was at the granary. I was there until the last wagon left. I counted the loads that were taken away from my granary to be put in this car. At this time, as near as I can tell, there were about 17 loads; but I might be mistaken. Seventeen loads is my best remembrance now. None of it was returned by any of these parties, who took it away. This flax was weighed on Mr. Peterson's scales at Barlow. The scales I would judge were 35 yards from the car. I couldn't say how many loads I put into the car after they were weighed." Jesse College testified that he weighed 11 loads of this flax, and knows that the 11 loads went into the car; but he testified that all he knows about the scales upon which he weighed said loads is that they were balanced right, and he took it for granted that they weighed correctly. The witness Glenn Sutherland testified that he assisted in hauling and weighing some of this flax. He hauled two loads and weighed four loads. He says the scales were farm scales, and thinks they were of standard make and in apparently good condition at that time. He says he took the correct weights of the four loads which he weighed and gives the net weight thereof. He also testified that these four loads went into the car. Witness does not know how many loads were put into the car. Witness I. E. Sutherland

testified that he hauled and weighed two loads of the flax and put it in the car, and says he knows the weights to be correct, if the scales were correct. Witness Peterson, the owner of the scales, testified that they were in good order at the time the weights were taken.

Whether plaintiff delivered to the defendant the number of bushels claimed by him to have been delivered depends upon the assumption that these private scales at Barlow were accurate, and that these persons who did the weighing weighed the grain correctly, and, also, that all the grain so weighed was placed in the car, as well as the further fact that none of such grain during said two days was taken therefrom. The amount of grain delivered by defendant to the consignees, as claimed, rests upon the assumption that the scales at Duluth were accurate, and that the deputy weighmaster correctly weighed said car. Is not the inference to be deduced from the mere discrepancy in these weights just as reasonable that one of these scales was inaccurate, or that one of these persons incorrectly, through mistake or otherwise, weighed said grain, as that some of it was lost in transit, especially in view of the testimony that said car was a good car and in good condition, and there being no evidence of any leakage? If the seal was not intact when the car arrived at its destination, such fact could have been shown by plaintiff by the testimony of the inspector at Duluth. The burden was on plaintiff to establish his claim that grain was lost or taken from the car while in transit, and not on defendant to establish the contrary, and plaintiff was not relieved of this duty because of the difficulty in furnishing such proof.

Appellant's next contention, that the ruling of the trial court in excluding the record evidence of the terminal weight was prejudicial error under the rule announced in Brundage v. Mellon, 5 N. D. 72, 63 N. W. 209, is clearly untenable. The case at bar is clearly distinguishable from the Brundage case. The ruling in that case made it impossible for plaintiff to prove his cause of action. As stated in the opinion: "The attitude of the court in such case is that * * * the plaintiff, as a matter of law, cannot recover on the theory of the case on which he is seeking to recover at the trial." In the case at bar the attitude of the court by its ruling was that plaintiff could not prove one feature of his case by the method attempted, not that no recovery could be had if plaintiff proved the fact sought to be proved, to wit, the weight of the

grain at Duluth, together with the other facts alleged by him as constituting his cause of action. In other words, by such ruling plaintiff was not, in effect, told that evidence tending to show loss of the grain in transit would have been rejected if offered. It is apparent that plaintiff relied solely upon the discrepancy in the weights to prove the main fact in his case, and that he had no other evidence to offer on that issue. Therefore the general rule, which is recognized by the court in the Brundage case, that a reversal will not be ordered for error in excluding testimony when the plaintiff, assuming that the excluded evidence was admitted, has failed to prove his cause of action, applies.

Judgment affirmed.

MORGAN, C. J., concurs.

SPALDING, J. (dissenting). I concur in the holding that the record of the weighmaster's office at Duluth should have been admitted, but cannot concur in the conclusion that a new trial should be denied.

It is clear to me that the exclusion of the record referred to may have been highly prejudicial to appellant. He may thereby have been prevented from furnishing the very proof that in effect is held by my associates was necessary to have made his case. He had shown the quantity of flax delivered the defendant at Barlow, and had attempted to prove a smaller quantity delivered at Duluth; but the trial court rejected the evidence of the latter. The opinion holds that such evidence should have been received; but that, if it had been admitted, defendant would not have made a prima facie case, because there was no proof of actual leakage. After the denial of the plaintiff's right to show the difference in weights, it would have been an idle ceremony for him to have offered proof of actual leakage from the car. This court, in the absence of any showing in the record, cannot assume that plaintiff might not have been able to show the very facts held to be essential to make his case. He should have the opportunity to make proof of such facts if he can do so. The record does not present the question that would be presented if plaintiff had furnished his proofs in other respects before the record evidence was excluded. As to whether, with the record evidence in the case, appellant would have made a prima facie case, I express no opinion.

(118 N. W. 344.)

STATE OF NORTH DAKOTA, EX REL. T. F. McCUE, ATTORNEY GENERAL, v. ALFRED BLAISDELL, AS SECRETARY OF STATE OF THE STATE OF NORTH DAKOTA, AND J. W. FABRICK, AS COUNTY AUDITOR OF WARD COUNTY.

Opinion filed January 16, 1909.

Counties — Elections — Change in Boundaries — Election — "Electors" — "Shall be Submitted to the Electors" — "Vote" — "Votes Cast."

1. Section 168 of the Constitution reads: "All changes in the boundaries of organized counties, before taking effect, shall be submitted to the electors of the county or counties to be affected thereby at a general election and be adopted by a majority of all the legal votes cast in each county at such election."

Held:

(a) That the word "electors" as used in said section means all persons possessing the qualifications as to residence, age and citizenship prescribed by section 121 of the constitution as necessary to entitle them to vote.

(b) "Shall be submitted to the electors" means that all persons who are qualified to vote in the given county, or counties, shall, in a legal manner, be given an opportunity to vote on the question of a change in the boundaries.

(c) That a "vote" is the registration in accordance with law of the preference or choice of an elector on a given subject.

(d) That "votes cast" are the totals of the separate votes or expressions of voters' preferences for or against a change in boundaries.

Elections — "Voter" Distinguished from Elector.

2. A "voter" as distinguished from an elector, is an elector who actually votes.

Elections — "Ballot" Distinguished from Vote.

3. A "ballot" as distinguished from a vote, is the sheet of paper on which the voter expresses his choice of candidates, or for or against a proposition, or both.

Elections — Number of Votes Necessary — Majority.

4. A majority of the votes cast upon a question submitted to a vote, if in the affirmative, carries it, unless the legislative will to the contrary is clearly expressed in the constitution or the law.

Counties — Change in Boundaries — Election — "Separate Election."

5. In a strict legal sense, although the vote on a change in county boundaries is cast at a general election, it is the holding of a "separate election," but held in connection with the general election for convenience, to save expense, and because of the numerous subjects then voted upon, a more complete expression of the preferences of the electors is obtained.

Constitutional Law — Construction — Legislative.

6. Legislative construction, when followed by years of harmonious subsequent legislation, is entitled to great weight in determining the construction of constitutional provisions.

Counties — Change of Boundaries — Election — Majority — What Constitutes.

7. The elector who does not participate in an election acquiesces in the result of the votes cast by those who do participate, and to hold that the language of section 168 of the constitution requires more than half as many affirmative votes to be cast in favor of a change in boundaries as are cast on any other subject at the same election would be to give as much effect to the act of an elector who did not vote on such change as to that of one who voted in the negative, and render the statutory provision for negative votes useless.

Counties — Change of Boundaries — Election — "Votes Cast."

8. The meaning of words in a statute must often be determined by the subject-matter in relation to which they are used; and, as section 168 relates only to the change of county boundaries, the words "votes cast" should be limited to that subject.

Statutes — Construction of Statutes Adopted from Another State.

9. A legislative body, in adopting a foreign statute which has been construed by the courts of the state from which it comes, is presumed to have adopted the construction there given it.

Counties — Change in Boundaries — Election — Majority — What Constitutes.

10. The question of a change in the boundaries of Ward county, and the erection of the new county of Mountraille from a portion of Ward county, was duly submitted to the electors of that county at the general election of 1908. Four thousand two hundred and seven votes were cast in favor of the proposition, and four thousand twenty-four in opposition, while in that county at such election there were cast nine thousand two hundred fifty-nine votes for the different candidates for governor. *Held,* that the change voted upon was thereby effected.

Application by the state, on relation of T. F. McCue, Attorney General, for a writ of certiorari to be directed to Alfred Blaisdell, as Secretary of State, and J. W. Fabrick, as County Auditor of Ward county. Application denied, and temporary writ quashed.

T. F. McCue, Atty. Gen., and *John E. Greene*, for relator. *Geo. A. Bangs*, for respondents.

SPALDING, J. Section 168 of the Constitution of this state, as far as pertinent to the present controversy, reads as follows: "All changes in the boundaries of organized counties, before taking effect, shall be submitted to the electors of the county or counties to be affected thereby at a general election and be adopted by a majority of all the legal votes cast in each county at such election." At the general election in 1908 several propositions for the division of, and the creation of, new counties from the present county of Ward were duly submitted to the electors of that county. None of the propositions received a majority of the votes cast thereon, except the one relating to the creation of the county of Mountraille. This question received 4,207 affirmative votes, and 4,024 negative votes.

It is shown that the various candidates for governor of the state received at that election in Ward county the aggregate number of 9,259 votes. It is apparent from these figures that the proposition to create the new county of Mountraille, while receiving a majority of the votes cast on that proposition, did not receive more than half as many favorable votes as the total vote for governor. On application of the Attorney General the alternative writ of this court was issued, directed to the Secretary of State and the county auditor of Ward county, requiring them to certify and return a transcript of the records, certificates, and returns in their custody, etc., to this court, and these officers were by the writ commanded to desist from proceeding in the premises until the further order of this court. Return was duly made by the respondent Blaisdell, as Secretary of State, showing the number of votes cast on the question, and the total number of votes cast for governor, as above set forth, and both parties appeared by counsel and submitted their arguments.

The sole question for determination is the proper construction of section 168, supra, as applied to the facts disclosed by these returns. The relator contends that the section referred to, properly construed, requires an affirmative vote equal in number to a majority of the total votes cast for the different candidates for governor, or more than half the highest number of votes cast in Ward county for candidates for any one office, or on any one question,

voted upon at such general election. On the other hand, the respondent contends that when properly construed, the constitutional provision mentioned requires only a majority of the votes cast, upon the creation of the county named, to be favorable to create the new county. At the outset the relator concedes the correctness of this principle and rests his whole contention upon it, namely, that where there is submitted to a vote of the electors of a given county, or other district, a special question, whether so submitted at a general or special election, a majority of the votes cast upon that question only will be sufficient to carry the question or adopt the proposition, unless the legislative will to the contrary is clearly expressed in the law or the Constitution, as the case may be. We may concede that this is a correct statement of the legal principle involved, both on theory and authority. In the present instance he contends that the language of section 168 clearly expresses the meaning of the framers of the Constitution as being that the special question so submitted is lost, unless it receives more than half as many votes as are cast for any office or on any question to be filled or submitted at the same election. Seldom is a question presented on which there is a greater apparent conflict of authority than on the construction of this and similar language contained in statutes and Constitutions of the different states. Matters of importance are pending and held in abeyance in Ward county until this proceeding is decided. The same question is awaiting our decision in other counties, and the exigency requires speedy action on the part of this court. We have given it careful consideration, and have no doubt of the correctness of the conclusions at which we have arrived, both on principle and authority, but to present the reasons for our conclusions logically, with a careful analysis of the different, and oftentimes conflicting, authorities, would require more time than we feel justified in taking, in view of the reasonable demand for speedy action. We shall therefore content ourselves with stating more briefly our reasons, and referring less fully to authorities than we should otherwise like to do.

We deem it advisable to first consider and determine the meaning of certain words contained in the constitutional provision quoted. Stripped of meaningless words, as applied to the present controversy, and to simplify matters, we may read that portion of section 168 quoted as follows: "All changes in the boundaries of organized counties shall be submitted to the electors at a general election and

be adopted by a majority of the votes cast at such election." The word "electors" may be used to apply to different classes or bodies of people. It is sometimes applied to all persons who are qualified to vote within their respective political subdivisions. At other times it is used as synonymous with "voters," and in many instances has been used indiscriminately and interchangeably with the word "voters." But its meaning in the section in question is not left in doubt, because it is defined by the Constitution itself. Section 121, as amended, reads: "Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state one year and in the county six months and in the precinct ninety days next preceding any election, shall be a qualified elector at such election. 1st. Citizens of the United States. 2nd. Civilized persons of Indian descent who shall have severed their tribal relations two years next preceding such election." The word "qualified" neither adds to nor detracts from the meaning of the word as there used, or, stating it in another form, the word "electors," in section 168 has precisely the same meaning as though it was preceded by the adjective "qualified." We therefore, conclude that the word "electors" as used in section 168 means all persons who, by the terms of the Constitution, have the qualifications necessary to entitle them to vote. Persons qualified to vote, but who do not vote, are still electors. Proceeding, the phrase "shall be submitted to the electors" must mean that the question of the creation of the new county of Mountraille must be submitted to the electors of the present county of Ward; that is, that all persons who are qualified to vote in said county shall be given an opportunity to vote on the creation of Mountraille county. Whether they exercise their rights of suffrage on this question, or neglect to do so, in no way affects the fact of its submission. If the proper authorities, in a proper manner (which is not controverted in this proceeding), gave them an opportunity to vote on it at the general election last held, it was then submitted to them. These propositions are so plain that they hardly seem to require a citation of authorities. Yet we find the same principle enunciated in Sanford v. Prentice, 28 Wis. 358; Beardstown v. Virginia, 76 Ill. 34. See also United States v. Badinelli (C. C.) 37 Fed. 143; O'Flaherty v. City of Bridgeport, 64 Conn. 159, 26 Atl. 466.

We next come to the interpretation of the words "votes cast," and to aid us in this we may seek a definition of the word "voter."

This word, like the word "elector," is used in various senses, but when used in apposition to, or in contrast with, the word "elector," it has but one meaning. A voter in this sense is an elector who exercises the privilege, conferred upon him by the Constitution and the laws, of voting. He is an elector who does vote, and in the present instance a voter is one who voted at the last November general election, and on the question in controversy is one who actually voted, either for or against the creation of the new county. Am. &. Eng. Enc. of Law, at page 1075, says: "The word 'voters' has two meanings—persons who perform the act of voting, and persons who have the qualifications entitling them to vote." And in Sanford v. Prentice, supra, the term "legal voter" is defined, and we think properly so, as meaning, unless a different meaning appears from other language in the act, a qualified voter who does in fact vote, as the elector in the exercise of his franchise or privilege of voting. An elector is not a voter unless he votes, yet he still retains his qualifications as an elector.

The word "vote," used as a noun, is the expression of the choice or preference of the voter. The choice may be exercised in several different manners; viva voce, by the use of a ballot; by show of hands; by a division of the house or meeting and possibly by other methods. Before the public recognized the wisdom of a secret ballot electors in many places exercised their right to cast their votes by the viva voce method or by a show of hands. When those methods were in vogue, and of necessity as a general rule, each question was submitted separately, and when not so submitted, any person desiring to vote had a right to demand a division of the question. In other communities a ballot was used, and a separate ballot cast for each officer or on each question. Sometimes separate ballot boxes were used—one for each office to be filled, or for each group of offices, like state, county, township, etc. In states or communities where either of these methods was employed, the elector desiring to exercise his right to vote was frequently compelled to remain during the entire day of election at the polling place, and in readiness to vote on any proposition which might lawfully be submitted during the day. To obviate this inconvenience; to facilitate the proceedings; to enable the elector to cast a secret ballot, and to guard against mistakes and fraud; and with the advance of intelligence on questions relating to the privileges and duties of electors—some system of balloting has been almost universally

provided. In many states, including North Dakota, the Australian ballot has been adopted. This enables the elector to vote for all candidates for offices for whom he cares to express a preference in secret, and in the space of a few minutes. The purpose of calling attention to these facts is to more clearly see and define what is meant by the words "votes cast." Under the old system it seems quite clear that it could not reasonably be contended that, when a question was submitted to the electors gathered in a body at a voting place where either a plurality or a majority was required to elect, that if the words "votes cast" were used in the law or Constitution, it should apply to anything except votes cast when the electors voted for the filling of the particular office being voted upon, or for or against the specific question then in issue. In such instances it would be absurd and ridiculous, and a false and un-American standard, to require a candidate for an office to have a majority—not of the votes cast for the office for which he was a candidate, but a majority of the total number cast to fill some other office, or on some other question at the same meeting. The result of the submission of each proposition was announced when completed, and no one ever thought of delaying the announcement of the vote for one officer, or one question, until it was known whether on some other question a greater number of votes was cast. A ballot, as distinguished from a vote in the legal sense, and in a general way, is the piece of paper upon which the voter expresses his choice. Under the Australian system, for the reasons above enumerated and many others, the voter is permitted to express his choice or vote upon many offices, and perhaps many questions on the same ballot. It is but an application of the same principle that prevailed when the choice of the voters was expressed viva voce or by any of the old methods. In other words, notwithstanding he may use but one ballot, the voter casts as many separate votes or expresses his choice as many times, as there are candidates or questions for or against which he votes. To illustrate: He casts a vote for presidential electors, another vote for governor, another vote for member of Congress, and so on through the list of offices to be filled or questions to be voted upon.

In the case at bar the statutes of this state require the submission of amendments to the Constitution, creation of new counties, and other similar questions to the voters on a ballot separate and distinct from the ballot used in voting for the various officers, and

that it be deposited in a separate box. And it is clear to us that the words "votes cast" as used in section 168 mean the total of the separate votes of the voters for and against the question submitted. The votes cast for presidential electors have no relation, in the matter of determining who are elected or which party prevails, to the votes cast for governor and vice versa. There is no more reason why the votes cast on the question of creating a new county should have any relation to the votes cast for governor than the votes cast for presidential electors should have. Nor is there any logical reason why the votes cast for governor should have any relation to those cast on the question of the creation of a new county. We held in the case of State ex rel. McCue v. Blaisdell (N. D.) 118 N. W. 141, that the provision in the primary election law, providing that the electors might express their final choice for United States senator at the general election was but a continuation of the June primary election, or was a second primary on that subject; that, as a matter of convenience and to save expense, it was held at the same time and place, and conducted by the same officers as the general election. That principle is analogous to the principle involved in this controversy. The question of the creation of a new county is submitted to the electors upon a ballot separate and apart from the one used for the election of officials. In a strict legal sense it is a separate election. (Howland v. Board, 109 Cal. 152, 41 Pac. 864), but held in connection with the general election, and as a part of it, to save the trouble, expense, and time which would be wasted in holding a special election, and for the further reason that there is a more general attendance of voters at general elections than at most special elections, and therefore likely to be a much more complete expression of the preferences of the electors. It is true that when our Constitution was adopted, the Australian ballot system had not been provided for in this state, but it was almost immediately authorized after the adoption of the Constitution, and the provision for a separate ballot on the different questions submitted has much weight as indicative of the legislative construction of the provision in question. The same may be said of many other provisions of our Code regarding elections. While the legislative construction is not necessarily binding on the courts, yet when it has been followed by a harmonious and constant course of subsequent legislation which has been in effect and acted upon for a period of

years, as in the present instance, it is entitled to great weight in determining the real intent and purpose of constitutional provisions and requirements. 1 Kent's Commentaries, 465; Cooley's Const. Lim. 81; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; B. C. Water Co. v. Baker, 196 U. S. 119, 25 Sup Ct. 211, 49 L. Ed. 409; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; People v. Supervisors, 100 Ill. 495; In re Washington St. Ry., 115 N. Y., 442, 22 N. E. 356; Atty. Gen. v. Preston, 56 Mich. 177, 22 N. W. 261; Scanlan v. Childs. 33 Wis. 663 Lick v. Faulkner, 25 Cal. 405.

According to the American doctrine the majority is entitled to rule—the preference of a majority on any question is expressed by the vote of those who actually vote, unless a different intention is clearly expressed. The choice of the voter is expressed by the vote he actually casts for or against a proposition. To adopt the relator's theory in this proceeding would be to give as great weight to a vote which was not cast as to one which was cast, and in effect would be to count the electors who voted for governor, and did not vote on the county division question, as voting against the division. It ought to require the plainest language, and that it be so expressed as to leave absolutely no doubt in the mind of the intelligent reader of its meaning to justify a court in holding that no vote counts precisely the same as though the vote had been cast against the proposition. The correct principle applicable in cases where the meaning is ambiguous, or is not so expressed as to clearly indicate that an elector who does not vote shall be held as voting "No," is that electors who do not participate in an election, or are not interested enough in public affairs to attend the polls and cast their vote and express a choice, acquiesce in the result of the votes cast by those who do vote, whatever such result may be. It is equally plain that if an elector enters the booth and votes for some candidates and not for others, or votes for all candidates, but fails to express his choice on a question submitted the delegates to those who do vote his rights as an elector and acquiesces in the result, be it one way or the other. See Marion v. Winkley, 29 Kan. 36; Walker v. Oswald, 68 Md. 146, 11 Atl. 711; Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859; Miller v. School Dist., 5 Wyo. 217, 39 Pac. 879; People v. Chute, 50 N. Y. 451, 10 Am. Rep. 508; Montgomery Co. Fiscal Court v. Trimble, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738; Cass County v. Johnston, 95 U. S.

360, 24 L. Ed. 416. Also 9 Notes on United States Reports, page 269, and cases there cited.

In the case at bar it happened that the candidates for governor received more votes than the candidates for any other office in Ward county, but the court has no knowledge and no method is provided by law for advising the court officially how many ballots were actually cast in Ward county at the last election. It is a fact of universal knowledge that in an election in which any considerable number of electors participate, some voters fail to vote for any candidate for one office, and others for any candidate for some other office, and that the candidates for no office ever receive at a general election votes equalling the total number of ballots used or electors participating on some question. From this it is self-evident that if the principle contended for by the relator is correct that the standard to be employed or the means to be used in determining whether the division proposition carried should be the number of ballots used, because they indicate the number of electors who actually participated in the election, and they furnish the only means for acquiring this knowledge. Yet the law makes no provision whereby any state official can determine how many electors actually participated in the Ward county election. It is obvious that had the Legislature adopted the construction placed upon section 168 of the Constitution by the relator, it would long since have provided these means.

It is contended that the words "at such election" enlarge the application of the words "votes cast," and clearly indicate that the highest vote cast on any question at the general election is the criterion by which a majority must be arrived at. But, from the suggestions and reasons we have stated above, and particularly from a consideration of the meaning of the words "votes cast," it is clear to us that this contention is erroneous. It certainly leaves the meaning ambiguous, and in that event it is conceded that a majority of the votes cast on the question at issue controls. It is argued that to give it this effect we must add to the sentence the words "on such question," or their equivalent; that without such addition the meaning is as contended for by the relator. We, however, think that to give the provision the interpretation which the relator favors, it would be necessary to read into the sentence "on any question or for any candidate." It is a well-established rule of statutory construction, and in accord with common sense, that

the meaning of words must often be determined by the subject-matter in relation to which they are used. Section 168 relates only to the creation of new counties or the change in boundaries of counties; and, in accord with the above rule of construction, the words "votes cast" should be limited to the subject dealt with in that section.

It is also urged that the fact that in different sections of the Constitution, relating to different subjects which are to be submitted to a vote, the language is not uniform, and in some of them it is specified explicitly that the vote referred to is the vote cast upon the question in hand; that therefore section 168, not being so specific, must have been intended to operate in accord with relator's contention. It is well known that in the constitutional convention various committees were appointed, each having jurisdiction over a subject differing from those being considered by the other committees. They did not act in concert on questions of this character. One might copy a provision from the Constitution of one state, and another from some other state. This undoubtedly accounts for the varying phraseology of the different provisions for submitting questions to a vote, and necessitates considering each one independently of the others. We, however, may mention one other provision, namely, that relating to amendments to the Constitution. Section 202 requires proposed amendments to be submitted to the people, and if they approve and ratify "by a majority of the electors * * * voting thereon," the amendment becomes a part of the Constitution. This section permits the amendment of the Constitution by only a majority of the electors voting on the proposed amendment. The amendment of the Constitution is the most important political function which the people can perform. The change of county boundaries and the erection of new counties is of minor importance as compared with a change in the organic law. It seems very unlikely that the framers of the Constitution should have contemplated that a mere change in county boundaries, or the question of forming a new county, should require the assent of a larger proportion of the electors than is necessary to change the fundamental law. Aside from the considerations which we have set forth, leading to the conclusion at which we have arrived, nearly every authority which we have been able to find after a careful search, construing provisions like those of section 168, or in effect the same, sustains our view.

Courts in construing constitutional or statutory provisions which have been taken from another state almost invariably hold that the Legislature or the Constitution makers are presumed to have adopted it with knowledge of the construction or interpretation given it by the courts of the state whence it comes, and therefore to have adopted such construction or interpretation. 2 Lewis Suth. Stat. Const. 404; White v. Chicago, etc., Ry Co., 5 Dak. 508. 41 N. W. 730; Sanford v. Duluth & D. Elevator Co., 2 N. D. 6, 48 N. W. 434; Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; Cass County v. Imp. Co., 7 N. D. 528, 75 N. W. 775; Oswald v. Moran, 8 N. D. 114, 77 N. W. 281; Bank v. Gutterson, 15 S. D. 486, 90 N. W. 144. As far as we have been able to ascertain, but one Constitution contains a provision clearly identical with section 168. The presumption to which we have referred applies with great force in this instance for the reason that the wording is so peculiar that the Constitution adopted by two states, more than 40 years intervening between them, would not be likely to contain the same language unless one was copied from the other. The 1848 Constitution of the state of Wisconsin contains the following provision: "Article 3, § 1. Every male person, etc., belonging to either of the following classes, etc., shall be deemed a qualified elector: * * * Provided that the Legislature may, at any time, extend by law the right of suffrage to persons not here enumerated: but no law shall be in force until the same shall have been submitted to the vote of the people at a general election and approved by a majority of all the votes cast at such election." We may note that the only difference in the phraseology of the two sections is that in Wisconsin it is submitted to the vote of the people, while in this state the question is submitted to the electors, and we have substituted the word "adopted" for the word "approved," and have preceded the word "votes" with "legal," a meaningless adjective in that connection, and the other variations make no change in the meaning. This provision of the Wisconsin Constitution was before the Supreme Court of that state in 1866 in Gillespie v. Palmer, 20 Wis. 544, and it was held that the language of the section only required a majority of the votes cast upon the question which was in the mind of the Constitution makers in framing that section. This case was followed and approved in Sanford v. Prentice, 28 Wis. 358. In the light of the circumstances we must presume that section 168 was adopted advisedly, and with it the construction placed upon

the same language by the appellate court of Wisconsin. It is but fair to add that in some subsequent opinions by the Wisconsin court the decision of Gillespie v. Palmer, supra, was severely criticised, but it was never overruled, and is cited as authority as late as 71 Wis. 252, 3 N. W. 242, in Brown v. Phillips, and it has been referred to and cited as authority by the courts of many other states.

The conflict in authorities, to which we referred in the beginning, is more apparent than real. In many states the courts have held the peculiar provisions they were considering as requiring the assent of a majority or other percentage of the electors; the word "electors" being employed in some instances, and in others the words "voters" or "qualified voters," in such connection as to indicate that electors were meant. Several of these cases distinguish clearly between the language of section 168 and that construed. Among the authorities which have passed upon the proper interpretation of "votes cast," and provisions in effect like those of section 168, and where such language has been held to only require a majority of the votes cast upon the question at issue, are Gillespie v. Palmer, supra; Sanford v. Prentice, supra; Board v. Winkley, 29 Kan. 36; State v. Echols, 41 Kan. 1, 20 Pac. 523; State v. Grace, 20 Or. 154, 25 Pac. 382; Territory ex rel. McGuire v. Board of Trustees, 13 Okl. 605, 76 Pac. 165; Chamlee v. Davis, 115 Ga. 266, 41 S. E. 691; Dunnovan v. Green, 57 Ill. 63. Others construing somewhat similar provisions, many of them going much farther than is necessary in the case at bar to sustain a vote of a majority only of those voting upon the question, or distinguishing the language they were considering from that employed in section 168, are as follows: South Bend v. Lewis, 138 Ind. 516, 37 N. E. 986; Dayton v. St. Paul, 22 Minn. 400; Howland v. Board, 109 Cal. 152, 41 Pac. 864; Fritz v. City, 132 Cal. 373, 64 Pac. 566; Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070; Day v. City of Austin (Tex. Civ. App.) 22 S. W. 757; Green v. Board, 5 Idaho, 130, 47 Pac. 259, 95 Am. St. Rep, 169; Yesler v. Seattle, 1 Wash. 308, 25 Pac. 1014; Strain v. Young, 25 Wash. 578, 66 Pac. 64; Fox v. Seattle, 43 Wash. 74, 86 Pac. 379; Walker v. Oswald, 68 Md. 146, 11 Atl. 711; Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859; Miller v. School Dist., 5 Wyo. 217, 39 Pac. 876; State v. Rhue, 24 Nev. 251, 52 Pac. 274. Several courts have held that the question to be determined was the method or means by which the number of electors of the district was to be ascertained officially; and in some such cases, where the

ascertainment of the number of electors was required, it has been held that a court taking judicial notice of the votes cast at a general election would adopt the highest vote at such election as showing the number of electors in the given district. This is the holding of South Dakota in a recent case, which we shall not allude to at length, especially in view of a previous decision of this court. We have cited the foregoing authorities in support of the conclusion which we have arrived at without reference to previous decisions of this court, which are all in accord with its conclusions as now constituted. It is only necessary to refer to State v. Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723, which is directly in point. The question in that case was one of removing the county seat of Traill county. The law construed provided for ordering an election on the relocation of county seats, and for notices thereof for the next general election, and required that some one place should have two-thirds of the votes polled. The city of Hillsboro received two-thirds of the votes polled on the question of relocating the county seat, but not two-thirds of the votes polled for one office at the same election, and it was held that it was only necessary to receive two-thirds of the votes polled on the question of relocation, to change the county seat. The only distinction between the language in that case and in the present is that the word "polled" was used in the place of "votes cast." It is beyond question that the meaning is identical. In that case the court said: "When a majority of the electors is spoken of, the highest number of votes cast at the election must furnish the standard for determining whether the particular measure which must have such a majority has been carried"—and held that the vote polled was the vote polled upon that question alone, as it was the only matter the statute was dealing with.

The application is denied, and the temporary writ quashed. All concur.

(119 N. W. 360.)

A. N. WALTERS v. JACOB ROCK.

Opinion filed February 21, 1908.

Bills of Notes — Fraud — Burden of Proof.

1. Where fraud in the inception of a promissory note is alleged and established, the burden falls upon the indorsee to show that he is a purchaser in good faith for value and before maturity.

Same.

2. A promise made by the payee of a note in reference to the consideration for giving the same that he does not intend to fulfill constitutes a fraud that will defeat the note except in the hands of an innocent holder.

Same — Bona Fide Purchaser — Necessity for Inquiry.

3. If a purchaser of a note for value before maturity has notice of facts tending to show defenses to the same, he cannot purposely refrain from making inquiries as to the inception of the paper, and at the same time claim to be a bona fide purchaser.

Same.

4. Payment of value on a purchase of negotiable paper before maturity constitutes prima facie a bona fide purchase but no more.

Same.

5. Circumstances may rebut such prima facie presumption, and good faith in the purchase may be wanting, although the purchase was made before maturity and for value.

Same — Evidence — Absence of Good Faith.

6. The fact that the purchaser does not expressly state that he purchased in good faith is not necessarily fatal to a showing of good faith, but the omission to so state is a fact which may be considered in connection with other facts to show the absence of good faith in the purchase.

Same — Question for Jury — Verdict Sustained.

7. Whether the purchase was made in good faith is ordinarily a question for the jury, and it is *held* in this case that the verdict was sustained by evidence bearing on the question of bad faith.

Same.

8. If a purchaser of negotiable paper has knowledge of defenses before he pays for it, he is not a bona fide purchaser, although the note may have been indorsed and delivered to him before such knowledge.

Practice — Motion to Suppress Deposition.

9. A written motion to suppress a deposition as a whole is too late when filed with the clerk after the trial court has ordered a jury called, although the clerk has not drawn or called the name of a juror.

Same — Time to Object to Deposition — When Trial is Commenced.

10. The statute requires such motions or objections to be made before the commencement of the trial, and as the requirement is intended to facilitate the despatch of business, and to give an opportunity for retaking the deposition if suppressed, a construction of the statute that the trial has commenced when a jury is called is reasonable, and gives effect to such intention.

Names — Initials — Identity of Witness.

11. The fact that the notice to take depositions gave the initials of the Christian names only, and the name was given in the deposition and subscribed by the witness by his Christian name, the first letters of which were the same as the initials given in the notice, does not make extrinsic proof necessary to show that the witness testifying is the same as the one described in the notice, especially where the officer taking the deposition indorses the same name on the envelope in which the deposition is inclosed as the one given in the notice.

Evidence — Expert Testimony.

12. An expert witness may give an opinion based in part on what was stated to him by the patient.

Same.

13. An expert may give an opinion based on the testimony of other witnesses that he has heard, or that has been read to him, in case there is no conflict in the facts testified to by such other witnesses.

Pleading — Objections — Construction.

14. More liberality is allowed in favor of the allegations of a pleading where objected to for the first time at the trial than when attacked by demurrer.

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

Action by A. N. Walters against Jacob Rock. Judgment for defendant, and plaintiff appeals.

Affirmed.

Styles & *Koffel* for appellant.

Exceptions to a deposition filed before commencement of trial are in time. State v. Kent, 5 N. D. 516, 67 N. W. 1052; State v. Hasledahl, 2 N. D. 521, 52 N. W. 315; Hunnell v. State, 86 Ind. 431; Wagner v. State, 42 Ohio St. 537; Cregier v. Bunton, 2 Strobh, 503; Ueland v. Dealy, 11 N. D. 530.

Evidence is necessary to identify D. E. Rogers with Daniel Eastman Rogers. Vickery v. Burton, 6 N. D. 245. 69 N. W. 193; Andrews v. Winn, 54 N. W. 1047; Morris v. McKnight, 1 N. D. 266, 47 N. W. 375; Bem v. Bem, 55 N. W. 1102; Buckoven v. Lincoln Township, 83 N. W. 335.

When plaintiff shows purchase in good faith, for value, and no knowledge of circumstances surrounding the inception he is entitled to a directed verdict. 14 Enc. Pl. & Pr. 641-681; Mumford v. Weaver, 31 Atl. 1; Second Nat. Bank v. Morgan, 30 Atl. 957; Newbolt v. Pennock, 26 Atl. 607.

The circumstances surrounding the transaction determine plaintiff's good faith. Williams v. Huntington, 13 Atl. 339; 4 Enc. Law (2nd Ed.) 323; Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550; Farrell v. Lovett, 68 Me, 326; Kellog v. Curtis, 69 Me. 213; Bank v. Sargent, 27 Atl. 193; Cheney v. Janssen, 29 N. W. 289; Crampton v. Perkins, 3 Atl. 301; Martin v. Johnston, 52 N. W. 819; Rosemond v. Graham, 56 N. W. 38; Williams v. Huntington, 13 Atl. Rep. 339; Sec. 6358 Rev. Codes N. D. 1905; 4 Enc. Law (2nd Ed.) 300; Richards v. Monroe, 52 N. W. 339; Davis v. Seeley, 38 N. W. 901; Natl. Bank v. Young, 7 Atl. 490; Clarion Bank v. Morgan, 30 Atl. 958; Credit Co. v. Howe Co. 8 Atl. 476; Bank v. Pennington, 77 N. W. 1084; Cook v. Wierman, 2 N. W. 338; Bank v. McNeir, 53 N. W. 178; Tied Com. Paper, Sec. 289; 2 Rand. Com. Paper, Sec. 998, 1001; 1 Daniel, Neg. Inst. 767, 773; Tourtelot v. Reed, 64 N. W. 928.

Though the taker of negotiable paper be negligent, unless he acted in bad faith, his title will prevail. Crawford's Annotated Neg. Inst. Law (2nd Ed.) 54; Cheever v. Pittsburg Co. 44 N. E. 701; Amer. Ex. Nat. Bank v. New York Belting Co. 43 N. E. 168; Knox v. Eden Musee Am. Co. 42 N. E. 988; Canajoharie Nat. Bank v. Diefendorf, 25 N. E. 403; Vosburgh v. Diefendorf, 23 N. E. 811; Jarvis v. Manhattan Beach Co. 43 N. E. 68; Murray v. Lardner, 2 Wall. 110; Swift v. Smith 102, U. S. 442, 26 L. Ed. 193; Belmont v. Hoge, 35 N. Y. 65; Welsh v. Sage, 47 N. Y. 143; Nat. Bank v. Young, 41 N. J. Eq. 531; Fifth Ward Bank v. First Nat. Bank, 48

N. J. Law, 513; Credit Co. v. Howe Machine Co. 54 Conn. 357; Ladd v. Franklin, 37 Conn. 64; Croft's Appeal, 42 Conn. 154.

The facts not being in evidence, expert's opinion is inadmissible. Kinney v. Brotherhood, 15 N. D. 21, 106 N. W. 44; 17 Cyc. 242.

He cannot predicate upon hearsay. Heald v. Thing, 45 Me. 392; Barber's Appeal, 22 L. R. A. 90; Wright v. Wright, 50 Pac. 444; Baltimore Safe Deposit Co. v. Berry, 49 Atl. 401; Bradford v. Cunard Steamship Co., 16 N. E. 719; Lane v. Bryant, 69 Am. Dec. 282; Lund v. Tyngsborough, 9 Cush. 36; Tibbits v. Phipps, 57 N. E. 1126; Foster v. New York Fidelity Co. 75 N. W. 69, 40 L. R. A. 833; Wright v. Tatham, 5 Cl. & F. 670, 2 Jur. 461; Rupe v. State, 61 S. W. 929; 17 Cyc. 242; Jones v. Portland, 50 N. W. 731, 16 L. R. A. 437; 17 Cyc. 243.

John Carmody, for respondent.

When fraud is shown in the inception of a negotiable instrument, indorsee must show his purchase in good faith, for value, without notice. Vickery v. Burton, 6 N. D. 249, 69 N. W. 193; Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550; Dunn v. National Bank, 77 N. W. 111; Kirby v. Berguian, 90 N. W. 856; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081.

Evidence was sufficient to sustain the verdict. (See cases last above cited.)

Medical expert testimony may rest in part on patient's statements to him. Jones v. Chicago, St. P. M. & O. R. Co., 45 N. W. 444; Hand v. Brookline, 126 Mass, 324; Armendy v. Stillman, 3 S. W. 678; Ft. Worth v. Thompson, 76 Tex. 501; Wright v. Hardy, 22 Wis. 348; State v. Klinger, 46 Mo. 224; Matteson v. N. Y. Cent. Co. 35 N. Y. 487; Gilman v. Stratford, 50 Vt. 723.

MORGAN, C. J. Action on a promissory note by an indorsee claiming to be a purchaser in due course. The answer alleges that the note was procured through fraudulent representations on the part of the payee, and that the plaintiff took said note with knowledge of the fraud by which it was executed and delivered. The jury found in favor of the defendant. A motion for a new trial was made and denied. Plaintiff appeals from the order denying a new trial. The assignments are numerous; but the one principally relied on is that the evidence is insufficient to justify the verdict.

The original payee of the note was one Dr. Rea, of Minneapolis, who traveled as a specialist in curing various diseases. The de-

fendant consulted him at Moorhead, Minn., and was informed that he was afflicted with a cancer, and the doctor agreed to cure him for $250. The defendant had only $25 in money, but gave his note for $250, and paid him $25 in cash, which was immediately indorsed as a payment on the note. The doctor then treated him by injecting some preparation into the alleged cancerous growth, and agreed to send him some more medicine by express. In a very few days the medicine came by express, but the defendant refused to accept it for the reason that it had been consigned C. O. D., and required a payment of $101.50 before the express company could deliver it to him. The defendant then consulted a local physician, who cured him in about one week. These are the facts as related by the defendant, and must have been found to be true by the jury in view of the verdict in his favor. Accepting the same as true, we think that the allegation of fraud in the inception of the note was sustained. The promise as made to the defendant must have been made without any intention of performing it. Under our statute the making of such a promise constitutes fraud. Section 5293, Rev. Codes 1905; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081.

The evidence also amply sustains the fact that the doctor was not acting in good faith in his representations. He did not send the medicines in accordance with his agreement, but sent them by express with intent to force a payment of $100 not due before the medicines could be used. He sold the note very soon after the refusal to pay the $100 to the plaintiff. Whether the plaintiff is an indorsee in due course is a question in dispute between the parties. The plaintiff claims that the note duly indorsed was delivered to him on June 6th, and that he thereafter paid $202.50 therefor, having purchased on a 10 per cent. discount. He does not claim to have paid for it on that day, and first says that he does not know the day when he paid for it. He states that he paid for it later, when he made a "settlement" with the doctor for some other notes. The evidence shows that the plaintiff was accustomed to buy notes from the doctor regularly, and had been accustomed to do so for three years, and that he had some trouble in collecting some of them because the parties "did not want to pay them." He does not specifically remember the reasons why the makers refused to pay the notes, but knows that he has a considerable number of

these notes now on hand, past due and uncollected. He made no inquiry concerning the financial responsibility of the defendant before purchasing the note, unless from the doctor. The defendant was a stranger to him. He immediately placed the note in the hands of an agency for collection, although it was not yet due. He knew that the doctor was accustomed to travel throughout the country in his professional capacity, and took notes in payment of services performed. He says further: "I did not know of any dispute or defense of the note at the time I purchased it. I did not inquire." He nowhere states that he bought the note in good faith. He does not state that he had no notice of defenses at the time he paid for the note. It will be noted that it was bought and delivered to him on June 6th. He claims that he paid for it later when a "settlement" was made for this note and others. On this question he testifies: "Q. At the time that you bought this note in suit from Dr. Rea, did you buy any others from him? A. I don't remember. Q. But at the time you settled with him for this note you settled for several others at the same time, did you? A. Very likely so. Q. Do you remember when you paid for the note? A. I do not." On redirect examination, in response to leading questions, he says that he is positive that the "settlement" was made prior to July 15th, which would be about three weeks before the note became due. Dr. Rea was also a witness, and on the question of the negotiation of the note testified simply that the "note was sold before maturity on June 6th." Nothing was stated by him about the time of payment nor how paid. On this testimony we are urged to declare that the verdict is not sustained by the evidence, and that it is uncontradicted that the plaintiff was an innocent purchaser. After carefully reading all of the testimony of the plaintiff, we find it evasive, contradictory, and of an unsatisfactory character to prove facts entirely within the knowledge of himself and Dr. Rea. There is not even an attempt to show that there was no notice of defenses on the day that he claims to have paid for the note. If he then had notice of defenses to the note, he would not be an innocent purchaser. Joyce on Defenses to Commercial Paper, § 240.

The plaintiff's contention, therefore, is that he is a bona fide holder by virtue of purchase and payment before day of maturity. Payment of value on a purchase before maturity is prima facie evidence that the purchase is in due course. Bank v. Flath, 10 N.

D. 281, 86 N. W. 864. We think that the record shows facts sufficient to sustain the verdict that plaintiff did not purchase in good faith. Conceding that payment was made before maturity, we are convinced that the jury had sufficient facts before them to warrant the inference therefrom that plaintiff did not buy the note in good faith as contemplated by the statute and the law merchant. A purchase in due course means a purchase before maturity for value without notice and in good faith. Plaintiff had handled Dr. Rea's notes before as an employe of a collection firm, and had purchased a large number of his notes before. Many of these notes were still uncollected and past due. As to some of these notes payment had been refused. He immediately placed the notes in other hands for collection after their purchase. He had no knowledge, and is not certain whether he made any inquiry, as to the financial responsibility of the maker. He and Dr. Rea were well acquainted and intimate in business relations. Litigation had grown out of some of these purchases of notes from Dr. Rea. In Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550, Judge Corliss said: "It may be true in this case that the plaintiff bought before maturity for value, and without notice of any defense; and yet he may not be a purchaser in good faith. He may, when he bought, have had knowledge of facts which excited in his mind such suspicions as to the paper that he feared to make an investigation lest it would disclose a defense, and therefore he carefully shut his eyes and bought in the dark. In such a case he would not be a purchaser in good faith"—citing cases. "In this case the plaintiff is careful not to state that he bought in good faith, nor does he offer any explanation of the circumstances surrounding the purchase. * * * The plaintiff, having the burden of proof, has failed to sustain it by positive evidence. The inference of his good faith to be drawn from the other facts sworn to by him is by no means strong, and the case discloses several circumstances which cast grave doubt upon the fact of his good faith in the transaction." In the case at bar we find the same circumstances practically as in that case and others that tend to show bad faith in not making inquiry concerning the title to the note in question. The evidence of want of notice of defective title at the time the money is claimed to have been paid is very unsatisfactory.

Plaintiff had notice through the answer that fraud in the inception of the note was claimed, and there is no reason why positive

proof should not have been produced as to the time of payment. We do not wish to intimate that good faith may not be shown in some cases by inferences from shown facts. But failure to state that the purchase was in good faith is a strong circumstance in this case to negative good faith. The plaintiff also had positive knowledge of the fact that payment was refused on many of Dr. Rea's notes. It savors of a purpose to avoid inquiry amounting in law to bad faith. The rule is stated by Joyce on Defenses to Commercial Paper as follows in section 475: "But if the acts of the holder of the paper in obtaining the paper constitute bad faith, he will not be entitled to protection as a bona fide holder. It may, therefore, be stated as a rule that suspicious circumstances alone, even though sufficient to put an ordinarily prudent person on inquiry, will not, in the absence of bad faith or a willful disregard of the facts showing an infirmity of the paper, destroy the title of a taker of negotiable paper as that of a bona fide holder." See, also, Bank v. Flath, 10 N. D. 281, 86 N. W. 864; Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024; Mass. Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959; Robbins v. Swinbourne Print Co., 91 Minn. 491, 98 N. W. 331, 867; Second Nat. Bank v. Morgan, 165 Pa. 199, 30 Atl. 957, 44 Am. St. Rep. 652; Smith v. Livingston, 111 Mass 342; Goetting v. Day (Sup.) 87 N. Y. Supp. 510; Kirby v. Berguin, 15 S. D. 444, 90 N. W. 856; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081. The circumstances shown by the record, taken altogether, are sufficient to overcome the prima facie presumption of good faith raised by proof of purchase for value before maturity if it was paid before maturity. It is well settled in this state that, when it is shown that there was a fraud in the inception of a note, the burden rests upon the purchaser to establish that he purchased the same in due course and in good faith. Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081; Vickery v. Burton 6 N. D. 245, 69 N. W. 193; Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550; Bank v. Flath, 10 N. D. 281, 86 N. W. 867.

The deposition of Dr. D. E. Rogers was read at the trial. Objection was made thereto on the ground that the notice to take the deposition gave the name of the witness as D. E. Rogers. The deposition was subscribed by "Daniel Eastman Rogers," and he was not referred to in the deposition or certificate as "D. E. Rogers." The officer who took the deposition indorsed on the envelope that the same contained the deposition of Dr. D. E. Rogers, and gave the

title of the action in which it was to be used. Where the notice gives the name of the witness by initials, and a witness appears at the time and place designated, and gives material testimony in the action, we do not think that the fact that he subscribes the same by his full Christian names, the first letters thereof being the same as the initials given in the notice that extrinsic evidence is required to show that the witness testifying is the same person as the witness named in the notice. The indorsement on the envelope, however, would be sufficient to identify the party if additional identification were necessary.

Objection was made at the trial to the giving of any evidence on the part of the defendant, for the alleged reason that the answer did not state facts sufficient to constitute a defense. The point is that the facts constituting the fraud and fraudulent representations are not sufficiently alleged. We think the allegations are sufficiently full and specific, as against an objection made at the trial. Much more liberality is permitted in construing allegations of complaints or answers when made at the trial by objection than when attacked on demurrer. Waldner v. State Bank of Bowden, 13 N. D. 604, 102 N. W. 169. Plaintiff filed objections to the deposition of Dr. Rogers, and asked to have it suppressed. The written objections were handed to the clerk after the court had directed him to call a jury, but before the name of any juror was called. The court refused to hear the objections on the express ground that the objections had not been filed "before the commencement of the trial." The statute requires objections to depositions on grounds other than those relating to irrelevancy or incompetency to be filed before the commencement of the trial (section 7288, Rev. Codes 1905), "and the court shall on motion of either party hear and decide questions on exceptions to depositions before the commencement of the trial" (section 7289, Rev. Codes 1905). The time when a trial commences may be at a different stage as to one question than as to another question. No general rule can be laid down that will govern as to all questions. As to some questions, courts have held that the trial does not commence until the jury is impaneled and sworn. Hunnell v. State, 86 Ind. 431. We think the construction given this statute by the trial court a reasonable one. The object of providing for filing such objections before the trial commences is to enable the party to secure another deposition if the one on file is suppressed. It also serves to expedite court proceedings.

No harm can follow a strict enforcement of the rule announced by the trial court, and it is certainly proper to dispose of such preliminary questions before any time is taken up in securing a jury. This rule has the sanction of authority. Weeks on Depositions, §§ 365-378; Hill v. Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; Ueland v. Dealy, 11 N\ D. 530, 89 N. W. 325.

Objections were also made to certain evidence contained in Dr. Rogers' deposition. He was qualified to give expert testimony, shown by the fact that he was a graduate of the Harvard Medical School and had practiced medicine since 1900. He treated the defendant for the trouble with which he was suffering, and it was competent for him to state from his personal examination and treatment that he saw no appearances or signs of a cancerous growth. Rogers on Ex. Ev. § 50. This question was objected to: "What, if any, symptoms of cancerous growth did you find there?" The objection is based upon the fact that the witness did not describe or state all the matters that he saw when he examined the defendant about two years after a cure had been effected, and that his conclusions were therefore inadmissible as too remote and the evidence not showing all the facts on which the opinion was based. We think sufficient facts were shown in his testimony upon which an opinion was properly given. The objection as to the remoteness in time of the examination went to the weight of the evidence, and not to its competency. This question was also objected to when asked of the same witness: "You read the testimony of Dr. Rea, and you heard the testimony of Dr. Rogers read, you heard the testimony of Mr. Rock in regard to the condition of his lip. Now, from the testimony of Dr. Rea, Dr. Rogers and Mr. Rock, state whether or not in your opinion Mr. Rock was suffering from a cancerous growth on his upper lip at the time he was treated by Dr. Rea in May. 1904." The objection to this question was that it called upon the witness to pass upon the credibility of the witness in case of conflict. On examination of the evidence given by these witnesses, we find no conflict as to the facts stated by them. The conclusion or opinion of Dr. Rea as to what defendant was suffering from differed from that of the other medical witnesses, but as to the facts and conditions of the ailment there was no difference. For this reason, the evidence was not objectionable, and did not call upon the witness to decide facts properly for the jury. The form of the question is not to be commended. It is the safer practice to incorporate all the facts relied on in a

hypothetical question. It then becomes easy to determine what facts the opinion is based on. One of the medical experts testified that his opinion was based partly on what the defendant had told him as to the symptoms of the ailment. This was objected to. A physician may give his opinion based on such statements in connection with an examination. In Barbour v. Merriam, 11 Allen (Mass.) 322, it was said: "The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form a part of the facts on which the opinion of an expert as to the condition of health or disease is founded." Rogers on Expert Ev. § 47; Quaife v. C. & N. W. Ry. Co., 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821; Jones v. Chicago, St. P. M. & O. Ry., 43 Minn. 279, 45 N. W. 444.

There are other assignments of error mentioned in the brief, but they are so closely related to those already disposed of that further statement of them would be without any benefit. We have carefully considered them in detail and find them devoid of merit.

The order appealed from is affirmed. All concur.

(115 N. W. 511.)

STATE OF NORTH DAKOTA, EX REL. T. F. McCUE, ATTORNEY GENERAL, AND HERSCHEL JAMES, RELATOR, v. ALFRED BLAISDELL, AS SECRETARY OF THE STATE OF NORTH DAKOTA.

Opinion filed October 29, 1908.

Elections — Statutes — Legislature — Qualification of Members — Constitutional Provisions — Additional Test — Primary Election Law — Effect of Partial Invalidity.

1. This is an application in the name of the state, by one Herschel James, as relator for an original writ to enjoin defendant, as secretary of state, from certifying to the various county auditors the names of the two republican candidates for the office of United States senator from this state, and to restrain him from placing upon the official ballot to be voted at such general election the names of said candidates. By such application the validity of chapter 109, page 151, Laws 1907, known as the "Primary Election Law," is challenged in so far as it relates to the nomination and election of a candidate for the office of United States Senator, which act, among other things,

provides that at the primary to be held in June prior to each general election, for the nomination of state, district and county officers, the electors of each political party may designate their choice, between the candidates of their party for United States Senator, and that, if no candidate receives 40 per cent of his party vote, the two candidates receiving the highest number of votes shall be placed on a separate ballot, under their proper party heading, to be voted on at the ensuing general election, and that the candidate receiving a majority of the votes cast shall be the nominee of his party for such office. Said act also provides that candidates for members of the legislature shall take and subscribe a certain oath, to the effect, among other things, that they are candidates for nomination to such office, and designating the political party with which they affiliate. And the act also provides that the petitions of all such candidates for members of the legislative assembly shall contain a pledge to the people that they will support and vote for that candidate of their party, for United States Senator, who has received a majority of such party votes for that position at the primary election, or at the succeeding general election. Relator contends that the provision of said act requiring legislative candidates to take and subscribe the oath therein prescribed, and the pledge aforesaid, violates section 211 of our state constitution, in that it adds another oath, declaration and test, as a qualification for office. *Held,* that such contention is correct, but, ***held,*** further, that those provisions of the act providing a method for permitting the electors to designate their choice of a candidate for the United States Senate are not dependent for their validity upon such other provisions requiring the oath and pledge, and may be sustained regardless of the invalidity of such other provisions.

United States — Congress — Regulation of Election of Senators.

2. The provisions of said act, in so far as they permit the electors to designate their choice of a candidate for the office of United States Senator, are not vulnerable to attack upon any of the grounds urged by relator. The provisions of the act permitting the electors to designate their choice do not amount to an election by the people of a United States senator. Hence they do not contravene the provision of the federal constitution (section 3, article 1), providing for the election of United States senators by the state legislature; but, if they do violate such constitutional provision, relator is powerless to complain. No constitutional right of the citizen is thereby violated. It is not a judicial question; the senate of the United States being the tribunal to determine the same.

Statutes —Expression of Subject in Title.

3. All the provisions of the act relating to the nomination and election of United States senators are germane to the subject embraced within the title of the act.

Elections — Nomination by Primary Election — Ballots — United States Senator — Form.

4. Certain provisions found in section 13 of the act (Laws 1907, page 157, chapter 109), relating to the ballots to be used at the general election for determining the choice between the candidates for the office of United States senator construed, and *held* to require that the candidate of each political party shall be placed on a ballot separate and apart from the candidates of other political parties. *Held,* further, that the general election, in so far as it relates to the choice between the candidates for the office of United States senator, is a mere continuation of the primary election, and that the provisions of chapter 109 aforesaid, which are designed to safeguard the rights of party organization, and to prevent members of one party from participating in the nominations by another party, apply. Hence, the provisions of the law, requiring judges and inspectors, when handing a ballot to a voter, to inform him that he must vote for the candidate of the political party such ballot represents only, and the voter shall call for his party ballot only, and the provisions making it unlawful to call for or vote a ballot not representing the party or principle with which he affiliates, and permitting challenges to be interposed, and the test oath to be required as to party affiliation, also apply.

Elections — Secret Ballot — Primary Election Law.

5. Section 129 of the constitution of this state, guaranteeing a secret ballot, is not infringed by the act in question.

Constitutional Law — Delegation of Legislative Powers — Election of Senators.

6. Said act is not vulnerable to attack upon the ground that it is an unlawful delegation of power granted to the legislature by the federal constitution.

Statutes — Binding Successive Legislatures — Nomination by Primary Election — United States Senators.

7. The contention that said act unlawfully attempts to bind successive legislatures is, for reasons stated in the opinion, not tenable.

Courts — Grounds of Jurisdiction — Supervisory Jurisdiction.

8. Certain preliminary questions of practice, urged by defendant pertaining to relator's right to make the application, considered, and disposed of adversely to his contention.

Original application by the state, on relation of T. F. McCue, Attorney General, and another, for the issuance of a prerogative writ to enjoin Alfred Blaisdell, as Secretary of State, from certifying to the various county auditors the names of certain persons as candidates for the office of United States Senator. Writ denied.

Ball, Watson, Young & Lawrence, for plaintiff, *T. F. McCue, Attorney General* (*S. E. Ellsworth, A. G. Divet,* and *Guy C. H. Corliss,* of counsel), for defendant.

FISK, J. The relator, who is a qualified elector of Hettinger county, makes application to this court, in the name of the state, for the issuance of a prerogative writ to enjoin the defendant, as Secretary of State, from certifying to the various county auditors the names of certain persons as candidates for the office of United States Senator from this state, for the purpose of having such names printed on ballots to be used at the ensuing general election, to determine the choice of the Republican electors as between such candidates. Relator prays that, if such names have already been thus certified by defendant, he be required and commanded to cancel such certificate. In his affidavit, upon which the application is based, relator avers that he requested the Attorney General to make application for such writ, but he refused. Upon the filing of relator's said affidavit an order to show cause was issued, requiring defendant to show cause, if any there be, on October 23, 1908, why the writ prayed for should not issue. Upon the return day of such order to show cause defendant filed a motion to quash such order, and to dismiss the proceedings on specified grounds, only three of which it will be necessary to notice. First, it is defendant's contention that "no question of public right, or one affecting the sovereignty of the state, its franchises, or prerogatives, or the liberty of the people" is presented or involved by relator's application; second, that the affidavit upon which said order to show cause was issued affirmatively discloses that the relator has not sufficient interest in the subject-matter of the proceeding, or the determination of the questions sought to be adjudicated, to enable him to institute or carry on same as plaintiff; and third, that it affirmatively appears from said affidavit that plaintiff has been guilty of laches in making the application, and hence is not entitled to the equitable relief prayed for. Answering briefly these contentions, we decide that the first and second points are not tenable. The questions involved clearly are publici juris, and some of them at least pertain directly to the sovereignty of the state, its franchises and prerogatives, and the liberty of its people, and the relator, being a citizen and elector, may institute and prosecute the proceedings when, as in this case, he has requested such proceedings to be instituted by the Attorney

General, and the latter has refused such request. The third ground of the motion to quash the order to show cause pertains more properly to the merits, but, however this may be, we are clear that relator is guilty of gross laches in making his application, and we might well refuse the writ solely upon this ground. However, on account of the great importance of the public questions involved, we have concluded to ignore or overlook plaintiff's laches, and to rest our decision upon the more vital questions pertaining directly to the merits. Relator relies, for his right to the equitable relief sought by him, upon the following three propositions: "(1) The law in question (chapter 109, p. 151, Laws 1907), and all parts thereof dealing, or attempting to deal, with the selection of a party candidate for the office of United States Senator, is void and unconstitutional, in that it requires of each candidate for the legislative assembly that he shall take and subscribe an oath and pledge, which add to the qualifications of a candidate and of an elector, other than those required by the Constitution of the state. (2) The act in question deals with the general election laws, providing for the submission of a certain form of ballot at such general elections, and contains a subject not included within the title to the act, and one which cannot be included within the title to said act, nor considered in connection with the real object of the act. (3) The Legislature cannot provide for any action by the electors or the people of the state, upon the subject of nomination or selection of members of the United States Senate." We shall assume for the purpose of this case that, if these contentions are sound, the writ should issue, although we confess our inability to understand just how the writ prayed for can, if issued, operate to undo what has already been done by defendant pursuant to this law. The candidates for the Legislature have long since taken the oath, and made or given the pledge exacted of them by sections 3 and 4 of the act. Such pledge, at the most, merely created a moral obligation to fulfill the same. If the law under which the pledge was exacted is held void, the moral obligation will still continue, and no judgment of a court can obliterate it. It would seem that courts do not and cannot deal with mere moral obligations as distinguished from legal obligations. Their functions are restricted to the latter. But, however this may be, we shall assume for the purposes of this case that relator's counsel are correct as to the remedy invoked, and we will proceed to consider the correctness of

the contentions upon which relator bases his right to such remedy. It is broadly asserted that chapter 109, p. 151 aforesaid, which is known as the "Primary Election Law," is unconstitutional and void, in so far as it relates to the nomination of, or permits an expression by the people of their choice of, a candidate for United States Senator. To this extent only is the validity of the law challenged. It is urged, first, that the law is invalid and unconstitutional in that it requires of legislative members an additional oath, test, and declaration to that fixed by the Constitution of the state, Section 211. Said section is as follows: "Members of the legislative assembly and judicial departments, except such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm as the case may be) that I will support the Constitution of the United States and the Constitution of the state of North Dakota; and that I will faithfully discharge the duties of the office of ——— according to the best of my ability, so help me God' (if an oath)—under pain and penalty of perjury (if an affirmation)—and no other oath, declaration or test shall be required as a qualification for any office or public trust." Section 3 of the act in question requires the candidate for the office of member of the Legislature to file a petition, to which shall be attached the following oath: "I ———, being duly sworn, depose and say that I reside in the county of——— and state of North Dakota; that I am a qualified voter therein and a ———; that I am a candidate for nomination to the office of ——— to be chosen at the primary election to be held on ——— 190—, and I do hereby request that my name be printed upon the primary election ballot as provided by law as a candidate of the ——— party for said office." Section 4 of said act also requires such candidate to give the following pledge: "I, the undersigned, a candidate for the office of member of the legislative assembly of the state of North Dakota, do obligate myself to the people of the state of North Dakota and to the people of my legislative district that during my term of office I will support and vote for that candidate for United States Senator in Congress of the party of which I am a member who has received a majority of such party votes for that position at the primary election next preceding the election of the United States Senator in Congress; provided, that in case no candidate of my party receives forty per cent. of

all the votes cast for the office of United States Senator of my party, then and in that case I pledge myself to vote for the candidate of my party who receives the highest number of votes of my party at the general election succeeding such primary election." If the provisions of said act requiring said oath and pledge conflict with section 211 of the Constitution of this state, then, of course, those portions of the act are null and void. We think it plain that they do thus conflict, as they add another oath, declaration, and test as a qualification for the office. The tendency of such provisions is to deter, hamper, and interfere with, not only persons in becoming candidates for members of the Legislature, but with the electors in nominating such candidates, and to this extent said provisions interfere with the free exercise of the elective franchise of the citizens.

The constitution of the state of Michigan contains an oath in substance the same as that required by section 211 of our Constitution, and provides, as does our Constitution that, "no other oath, declaration or test shall be required as a qualification for any office or public trust." And in the case of Dapper v. Smith, 138 Mich. 104, 101 N. W. 60, the court said: "Kent county primary election law (section 3), requiring that before the name of a candidate shall be placed on the ballot at a primary election, such candidate shall on oath declare his purpose to become such, is a violation of the Constitution (article 18 § 1), prescribing the oath which shall be required of public officers, and providing that no other oath shall be required as a qualification for any public office, since thereby the voters are precluded from choosing as a candidate one who declines himself to seek the office." Later on in the opinion it is said: "This provision is not one designed for the benefit of the aspirant for public station alone. It is in the interests of the electorate as well. The provisions of this law which requires that, before the name of any candidate shall be placed on the ballot at the primary election, such candidate shall on oath declare his purpose to become such, excludes the right of the electorate of the party to vote for the nomination of any man who is not sufficiently anxious to fill public station to make such a declaration. The man who may be willing to consent to serve his state or his community in answer to the call of duty, when chosen by his fellow citizens to do so, is excluded, and the electorate has no opportunity to cast their votes for him. It is not an answer to this reasoning to say that the electors may still vote for such a man by

using pasters. We cannot ignore the fact that parties have become an important and well-recognized factor in government. Certain it is that this law fully recognizes the potency of parties, and provides for party action as a foundation toward the choice of an office at the election. The authority of the Legislature to enact laws for the purpose of securing purity in elections does not include the right to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. We cannot escape the conclusion that the provision in question does most seriously impede the elector in the choice of candidates for office, and that it is in conflict with the provisions of section 1, art. 18, of the Constitution."

It is, of course, plain that the provision of our statute exacting the pledge aforesaid is much more vicious than the Michigan provision, which was condemned in the foregoing case. The candidate is required by such pledge to obligate himself to discharge certain of his public duties, if elected, in a certain way. He by such pledge divests himself of all discretion and freedom of action in the discharge of a portion of his official duties, if elected. This necessarily operates to hamper and restrict persons in becoming candidates for such office, and is therefore void. It is no answer to this to say that the statute merely forces upon him a moral obligation in respect to the matters covered by the pledge, and that such an obligation would rest upon him in the absence of such statute. This would not necessarily be true where the candidate had not seen fit to voluntarily make such a pledge to his constituents. We conclude that the requirement of such a pledge violates section 211 of our Constitution, in that it exacts an additional test in contravention thereof. But does it necessarily follow from this that all other portions of chapter 109, relating to the election of United States Senators, and giving the electors of each party an opportunity to express their choice for the candidates for such office, are void also? We think not. The pledge requirement is but one step to effectuate the main object sought to be accomplished, to wit, the selection of a United States Senator in accordance with the choice of a majority of the members of the political party with which he affiliates. Another and entirely independent step or method looking to the accomplishment of this object is the provision permitting the voters of each party to record their choice at the primary, and, in certain cases, at the general election. The

fact that the legislative object sought to be accomplished is, or may be to a certain extent, interfered with by reason of the fact that one provision or measure looking to such end is ineffective on account of the invalidity of the law is, to our minds, no reason why the main object must fail when other independent provisions of the law, designed to aid in effecting such object, are not vulnerable to attack. In other words, the provisions of this law, permitting an expression of the party will as to United States Senators, if constitutional, must stand, even though the provisions requiring a pledge from the legislative candidate that he will abide by such expressed will cannot stand because unconstitutional. The main object of the law will ordinarily be accomplished about as effectually without the statutory pledge as with it. As before stated, the statutory pledge, if valid, would create no more than a mere moral obligation. Therefore it cannot be successfully contended that the legislative intent will be frustrated if one provision of the statute is upheld and the other nullified. Each are separate and independent provisions, although designed to effectuate the same main object or purpose. Furthermore, section 36 expressly provides: "In case any of the provisions of this act should be declared unconstitutional, that shall not affect the validity of any of the other provisions of this act."

This logically brings us to a consideration of relator's third proposition, which is that the entire act, so far as it relates to candidates for United States Senator, is void under the Constitution of the United States. Much of the argument of relator's counsel upon this branch of the case is based upon the assumption that the pledge feature of the law, when considered in connection with the provisions permitting the members of each political party to designate their choice as to senatorial candidates, in effect operates as an election of United States Senators by popular vote, instead of by the Legislature, as the federal Constitution requires. If, therefore, the pledge feature of the statute is eliminated because unconstitutional, much of counsel's argument ceases to have any force. It certainly cannot be contended that the provisions permitting the voters of each political party merely to designate their choice for senator amounts to an election of such senator, as it amounts to nothing more than the right of petition, a right of which they cannot be deprived. The legislative member is in no manner obligated or required, except perhaps morally, by reason of party

support and fealty, to vote and support the candidate of his party's choice as thus expressed.

But, conceding, for the sake of argument, that the provisions of this primary law contravene the provisions of the federal Constitution relating to the election of United States Senators, it by no means follows that this relator can raise the question, or that this court has jurisdiction to pass upon it. The federal Constitution provides by section 5, art. 1, that: "Each house shall be the judge of the elections, returns and qualifications of its own members. * *" Manifestly, therefore, the question whether a senator has been elected in the constitutional way is not a judicial question for the courts to determine, but rests entirely with the United States Senate. If this court should decide that the provisions of the statute in question are constitutional, such decision would in no manner be controlling, and the senate could say that a person elected by our Legislature at the coming session was not legally elected, and could refuse him a seat. The question is a federal one exclusively, and the tribunal to determine the same is designated in the federal Constitution to be the United States Senate. This identical question was before the Supreme Court of Louisiana in the recent case of State v. Michel, 46 South, 430; and the court very summarily disposed of the question as follows. "The next objection has reference to the promise which the voters at the primary are required to make that they will support the nominee. It is said that by this promise the nominees at said primary and members of the Legislature find themselves pledged to vote for the nominee of the same primary for United States Senator, and that that is contrary to the duty imposed upon them by the Constitution of the United States in voting for United States Senators. Suffice it to say on this ground that the engagement in question is precisely the same as that which the member of a political caucus enters into, and that no member of any legislative caucus has ever thought that he violated his duties, under the said provision of the Constitution, by becoming a member of the caucus and binding himself to abide by the result." No right is guaranteed to the citizen by the federal Constitution pertaining to the election of United States Senators. Hence relator has no standing in this court to complain that the provisions of the primary law relating to the election of United States Senators is obnoxious to the federal Constitution.

It is next contended that the law in question includes subjects not included within the title, as it amends the general election laws of the state. We are satisfied that this contention is wholly without merit. The feature of the law, in so far as it relates to what shall be done at the general election, is clearly germane to the subject embraced in the title of the act. In fact what takes place at the general election is merely a continuation of the party caucus or primary for the purpose of determining the choice of the two candidates receiving the highest vote at the June primary. The fact that it is conducted at the same time, and through the same election machinery, as the general election is conducted does not make it a part of the general election. This was done for convenience and to save expense. It is merely the consummation of an incomplete party nomination. It is therefore strictly germane to the subject expressed in the title. The case of state v. Drexel, 74 Neb. 776, 105 N. W. 174, is cited as an authority in support of counsel's contention upon this point, but as we read the opinion it is not in point at all. The court was there dealing with a section of the primary law, which read: "In no case shall the candidate of any political party be entitled to be designated upon the official election ballot as a candidate of more than one political party, and shall be designated upon the official ballot as the nominee of the party in whose nomination his name appears as the political party with which he affiliates." This section, as the court held, did not deal with the questions of a primary election at all, but with the make-up of the official ballot to be used at the general election, and hence was not germane to the title of the act. The question in the case at bar is widely different. But it is asserted by relator's counsel that the provisions of the act, in so far as they relate to the general election, tend to destroy the secrecy of the ballot, and hence are void. If their premise is correct their conclusion would be sound, but to our minds their argument is based wholly upon an erroneous interpretation of the law in question.

Counsel say in their printed brief: "All tests are required under the theory that party preservation justifies such tests as may be necessary to prevent members of other political parties from participating in the primaries of parties of which they are not members, and yet this section provides for the determination of the republican candidacy for United States Senator by the act and vote

of every elector of the state, whether Republican, Democrat, Socialist, Prohibition or Independent." They then quote the following portion of the statute: "The names of each candidate shall be placed on such ballot in the same manner as the candidate for state offices and shall be voted for in the same manner." Counsel then say: "Every elector, when he presents himself to exercise his right of suffrage, must be tendered the separate ballot containing the names of the Republican candidates for United States Senator, whether such voter be a Republican or a member of any of the other parties. To pursue any other method would be wholly void and unconstitutional. Section 129 of the Constitution of the state provides: 'That all elections by the people shall be by secret ballot subject to such regulations as shall be provided by law.' Such regulations would of necessity be only regulations consistent with the subject expressed, namely secrecy. At the general election no voter could be questioned as to his intentions or as to whom he voted for, or as to what his party politics were; for this is not a primary election. The primary election is based upon the theory that publicity is essential in order to preserve the party organizations, while the entire Australian ballot system, used at general elections, and the Constitution of the state also require that the general election shall be proceeded with under the theory that all ballots shall be secret." The language above quoted serves clearly to demonstrate that relator's counsel are laboring under a misconception as to the correct construction of the statute. As before stated, the provisions of the act relating to matters which shall take place at the general election with reference to determining the party choice as between the respective candidates for the United States Senate are as entirely separate and distinct from the general election as though they were to take place upon the following day after the June primary. And to say that the legislative intent was to place all candidates of all the parties upon one ballot is to impute to the Legislature a purpose to obliterate party lines, and to ignore party organizations, which they theretofore had so carefully safeguarded and preserved. When this statute as a whole is considered, it is entirely clear what the legislative intent was, namely, that a separate ballot should be used for the candidates of each political party where such candidates failed to receive 40 per cent. of their party vote at the June primary. The wording of the statute is possibly susceptible of the construction assumed by counsel, but, where

reasonably permissible, we must give the language a construction which will effectuate, rather than nullify the apparent legislative will, and the whole act must be construed together in order to arrive at a proper interpretation. In the same section we find the following clause: "That in case no candidate receives 40 per cent. of all the votes of his party * * * then the two candidates of each party who receive the highest number of votes cast at such primary election shall be placed on a separate ballot to be voted for at the general election following." The word "separate" as there used does not mean separate from the general ballot, but it means separate as to each political party and the sentence quoted by counsel should be read as follows: "The candidates of each party are to be placed on such separate party ballot under their proper party heading." This construction harmonizes with the balance of the act. This effectually disposes of counsel's contention upon this point.

But a word with reference to the secrecy of the ballot at the general election. As we have said, what takes place at the general election with reference to recording the voter's choice as to his party's candidates for the United States Senate is a mere continuation of the June primary, and may be correctly said to be a part of the primary. This being true, the following provisions of the act are as applicable to such primaries held at the time of the general election as to the primary held in June: "The judges and inspectors of election when handing a ballot to a voter shall inform him that he must vote for the candidates of the political party such ballot represents only, and the voter shall call for the ballot representing the party or principles with which he affiliates and he shall receive such ballot and no other." Also: "It shall be unlawful for any person to call for or vote a ballot at the primary election herein provided for except a ballot representing the party or principle with which he affiliates, and any person who has reason to believe that the ballot called for by the voter does not represent the party or principle with which said voter affiliates, may challenge such voter and he shall not be entitled to cast his ballot unless he makes and files with the inspector of such primary election an affidavit to the effect that such ballot represents the political party with which he affiliates." The words "primary election herein provided for" refer, not only to the June primary, but the continuation thereof held at the general election. If the

above construction of the statute is sound, and we believe it is, then there is no room for the contention that the constitutional provision with reference to secrecy of the ballot will be infringed. Such a test, applied to voters at a primary election, is imperatively necessary to preserve the party organizations, and is everywhere upheld. The secrecy of the ballot to be voted at the general election is preserved just as effectually as though this caucus or primary was held on the day before, instead of on the day of, the general election. With reference to the meaning of the constitutional provision as to a secret ballot, the Supreme Court of California in a very recent case said: "It is the secrecy of the ballot which the law protects, and not secrecy as to the political party with which the voters desire to act. The primary law does not prevent him from voting secretly. We cannot preceive where this law exposes any person advocating doctrines distasteful to any section of the community to its enmity any more than such a person would be exposed if he cast his ballot at a primary election held under the direction of the party managers without control of the law." Katz v. Fitzgerald (Cal.) 93 Pac. 112.

Another point urged by relator's counsel is that the act is a delegation of power expressly granted to the Legislature. This contention is devoid of merit. In the first place it does not amount to a delegation of power. The Legislature still elects the senator, and the act merely gives the voters of each party an opportunity to express their choice of candidates, as we have heretofore observed. Furthermore, if it does, in effect, delegate such power, this relator is not the one to complain. As before stated, that is a federal question, with which this court has nothing to do. Again, conceding that it is a delegation of power, it is not a delegation of legislative power, as the Legislature, in electing a United States Senator, does not act in a legislative way at all. It merely acts as an elective body, and we know of no provision of our state Constitution which thus limits the Legislature.

Lastly, it is said that the act attempts to bind successive Legislatures. Our answer to this is that each Legislature has plenary power when not restricted by the state or federal Constitutions, and hence may repeal the entire primary law at any time it chooses to do so. Furthermore, it is not true, as stated, that the act thus operates. It does not bind the Legislature to do anything. It merely permits an expression of choice by the voters, and by its

provisions, in effect, provides a convenient method of exercising the constitutional right of petition. In section 165, Black's Const. Law, in speaking of the right of assembly and petition, as conferred by the first amendment to the federal Constitution, the author says: "The right secured by the Constitution extends only to petitions 'for redress of grievances.' In respect, however, to the privilege which attends petitions made in good faith and in a proper manner the term is one of wide import. It includes, not only requests for the passage or repeal of laws, and for the removal of officers who have abused their authority, but also recommendations to office, remonstrances against proposed appointments or the grant of licenses and privileges, and demands for any sort of official action or forbearance."

Entertaining the foregoing views, it follows that the writ prayed for must be denied, and it is so ordered.

MORGAN, C. J., concurs.

SPALDING, J. (dissenting in part). With much of the opinion of my associates I agree. If, however, I were acting alone, I should not entertain the application in this proceeding at this late date. It is an application to this court on its equity side, and the relator does not come before us with the clean hands which should be presented when seeking equitable relief. I do not mean that he is guilty of fraud, but that he has been guilty of gross laches, which should deprive him of standing in a court of equity. Under the primary law (Laws 1907, p. 151, c. 109) petitions of candidates, who desired their names placed upon the primary ballot, were required to be filed with the Secretary of State by the 25th day of last May. On that day this relator knew that six persons were candidates for nomination to the office of United States Senator in this state. He could have then taken steps to test the validity of the senatorial provisions of the statute, and, had they been held void, much waste of effort would have been prevented. Again, when the vote was canvassed, and he ascertained that his favorite, whoever it may have been, was unsuccessful, an opportunity was open for application for the relief which he demands, without putting the candidates who had the highest number of votes to the expense, and the people to the inconvenience, of preparing for again submitting the question at the November election. Not doing so, the two candidates have been permitted to continue the campaign

for some months, undoubtedly and naturally at great expense both in time, effort, and money, until the 17th day of October, when application was made for the issuance of the writ. Notice of such application was not served on the candidates until Tuesday, the 20th inst. It was argued on Friday and Saturday, the 23rd and 24th insts. The court has had three days in which to consider the many very important and new constitutional questions involved. Counsel for the relator were prepared with an elaborate brief in support of their contentions, but counsel for the respondent, and for the candidates, had not to exceed three days in which to prepare for argument, and were unable to submit briefs. Under these circumstances this court would be justified in refusing to give the matter consideration, and I am of the opinion that it is not justified in considering and attempting to decide such questions with so little opportunity for consideration and reflection. I would not, however, in view of the attitude of my associates, suggest these reasons were we able to agree on all other questions. The fact that we are not emphasizes the undesirability of considering and attempting to pass judgment upon such questions when at best, in my opinion, any conclusion at which the court arrives must be largely a guess.

On the merits of the proposition I can concur with most that is said in the majority opinion. No doubt can exist that the Senate of the United States is the final judge of the election of its own members, and that any decision which we reach in the premises will not control or influence that body, yet this fact, as it appears to me, should not, and does not, prevent or excuse the courts of a state from passing upon the validity of state laws which involve directly or indirectly the election of senators. The state courts are not courts of last resort on federal questions in any instance. My associates have arrived at a conclusion, however, upon one question, which, with my present light on the subject, I am unable to concur in. And it is a very important question in this election. Not important as to future elections, because it can readily be amended by the Legislature. I refer to their construction of section 13, p. 157, Primary Election Law 1907. That section in part reads as follows: "The candidate receiving the highest number of votes at such primary election shall be the nominee of his party for the office of United States Senator at the succeeding session of the legislative assembly which is to elect a United States Senator: provided, however, that in case no candidate receives forty per

cent. of all the votes of his party cast for the office of United States Senator, then the two candidates of each party who receive the highest number of votes cast at such primary election shall be placed upon a separate ballot to be voted for at the general election following. Such ballot shall be prepared in the same manner as the general election ballot commonly known as the 'Australian Ballot,' is prepared. The candidates of each party are to be placed upon such ballot under their proper party heading. The names of each candidate shall be placed upon such ballot in the same manner as the candidate for state officers and shall be voted for in the same manner." The language in question refers to the general election, and to the Australian ballot used thereat. It is clear to me that in using the words "upon a separate ballot" the legislative mind was directed toward the Australian ballot, and that its intention was that the ballot for the nomination of United States Senators should be separate and apart from the Australian ballot, on which are placed the names of the candidates for congressional and state offices to be elected, and that it does not mean, as held by a majority of this court, a separate ballot for each party which had failed to make nominations at the June primary for senator.

This construction is fortified by further consideration of the section. It continues, "such ballot shall be prepared in the same manner as the general election ballot is prepared. It does not read "such ballots," as it undoubtedly would have been made to read had the Legislature contemplated a separate ballot for the senatorial candidates of each party which had failed to nominate at the June primary. And it continues, "The candidates of each party are to be placed upon such ballot under their proper party heading." It does not read, as it otherwise would have read, "upon such ballots." In each place the plural should have been used rather than the singular. "Under their proper party heading," refers to the headings of the columns devoted to the different parties, clearly contemplating that, in case two or more parties failed to nominate a candidate for senator in June, there should be one senatorial ballot containing a separate column, with a party heading, like the party heading in the Australian ballot, for each party. In other words, it appears clear to me that the meaning of this provision is that, when the candidates of one or more parties fail to receive 40 per cent. of the vote in June, the names of the two highest candidates of each of such parties go upon one ballot, known as the "senatorial

ballot" at the November election, the Republican candidates in one column, headed "Republican" and the names of the other candidates in other columns, headed, "Democratic," and so on, and that this ballot is to be handed to each voter at the general election. It is true that courts should, where two constructions are possible, give to a statute that construction which will sustain its validity, but in doing so they are not required to give a strained construction, or to give to the language a meaning different from that in which it is ordinarily used, or read into the statute something which is not clear should be meant by the language which it does contain. I venture the assertion that of the several thousand election officers who will serve on the third proximo, not 1 per cent. would on reading this act think of its bearing the construction given it in the majority opinion. Neither will it occur to them that they should challenge votes, or take any steps to see that only Republicans vote the senatorial ticket. I am fortified in this belief by the fact that on the argument, where the relator, the Secretary of State, and each of the contesting candidates were represented, all by able counsel, it was conceded by counsel for the relator, and for the Secretary of State, and at least for one of the candidates that this provision only required or permitted one senatorial ballot for all parties which failed to make nominations at the June primary. This was the one point on which counsel for the different parties were unanimous. The provisions in other parts of the law for challenging voters as to their party affiliations clearly refer only to the June primary. Now the importance of this point consists in this: Courts, so far as I have been able to learn, while uniformly holding that primary elections are so far matters of public concern as to be proper subjects of legislative oversight and of reasonable regulation, at the same time hold that, when the Legislature undertakes to regulate them, it must do so in such a manner as to protect each party from having its affairs managed, or its nominations made by members of other parties, or by persons who belong to no party.

Primary election laws have several objects. Among them are the protection of the public against the corruption of the ballot, and the nominations of candidates by small fractions of the party, and the preservation of party organization. If a law permits people to vote indiscriminately, without reference to their party affiliation, for candidates representing a party to which they do not belong, the whole purpose of a primary law is subverted. Instead

of preventing corruption, it would furnish the widest opportunity for it, by permitting the turning of the management of a party over to its enemies; and the courts, so far as they have passed upon this question, invariably hold that primary laws which permit this to be done are invalid. The Legislature is not compelled to legislate on the subject of party nominations, but when it assumes and attempts to do so, it is in recognition of the fact that parties exist, and are necessary to the promotion of the public welfare, and any law which permits the destruction of parties by these means fails of its purpose and is invalid. If my interpretation of section 13 is correct, it means that in the present instance the Democrats having nominated their candidate for senator at the June primary, may take part in the nomination of a Republican candidate for senator at the November primary, thus not only nominating their own candidate, but possibly exerting a controlling influence in the nomination of the Republican candidate. The injustice of this cannot be denied. The Legislature is not required to legislate regarding the organization of churches or secret societies, or to provide for their incorporation or management, but when it does so, it cannot provide that the members of the Lutheran Church shall or may control the management of the Catholic Church, nor would a law permitting the Odd Fellows to control the affairs of the Free Masons be sustained.

This question was passed upon by the Supreme Court of California, in Britton v. Board of Election Com'rs, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115. It says: "Active political parties —parties in opposition to the dominant political party—are, as has been said, essential to the very existence of our government. The right of any number of men holding common political beliefs or governmental principles to advocate their views through party organization cannot be denied. As has been said, 'Self-preservation is an inherent right of political parties, as well as of indivduals.' Whipple v. Broad, 25 Colo. 407, 55 Pac. 172. A law which will destroy such party organization, or permit it fraudulently to pass into the hands of its political enemies, cannot be upheld. The procedure of political parties may be regulated, and the wisdom of the Legislature may well be exercised, in devising methods to check political corruption and fraud; but the Legislature itself, under the guise of regulation, cannot be permitted to throw open the doors to these very abuses. A law authorizing, or even permitting, the

opponents of an organized political party to name the delegates to the nominating convention of that party would not for a moment be countenanced. Yet that, in effect, is precisely what the act under consideration does permit. It provides that the primary election of all political parties shall be held at the same time. To the intending voter at such primary one ticket is given. No question may be permitted touching his political affiliations, past, present, or future. The voter takes the ticket, retires into the privacy of the booth, and there, secretly, and not in violation of any law, but in strict accordance with the law, names such delegates as he desires to the political convention of one or another of the parties, whether he is a member of that party or not, whether he ever intends to become such a member or not. The result is apparent. The control of the party and of its affairs, the promulgation and advocacy of its principles, are taken from the hands of its honest members, and turned over to the venal and corrupt of other political parties, or of none at all. Masquerading thus under the name of one of the great political parties might be a convention of men, authorized by this law to represent it, and place upon the general election ballot, as its candidates, those whom they might select—a body of men whose sole purpose might be the disruption and destruction of the party whose representatives this law declared them to be. It is expressly declared in the Declaration of Rights that the enumeration therein contained shall not be construed to impair or deny others retained by the people. A law which thus permits the disruption and misrepresentation of a political party is an innovation of these reserved rights." This construction has been approved in Morrow v. Wipf (S. D.) 115 N. W. 1124, and Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109, and I think by other courts.

Of course, if the law contemplated the nomination of United States Senators or the expression of a preference by the people as between the different candidates by voters of all parties, it would present a different question, but that is not the purpose of this law, its purpose being to provide for party nominations, and if my construction of this section is correct, the vice of the law lies in that it permits the voters of a party which succeeds in making a nomination in June to participate in the nomination of a candidate representing a party to which they do not belong, or with which they do not affiliate in November, for the same position. Even if section

13 does admit of the construction given it by my associates, the meaning is so obscure as to defeat the purpose of the provision and thereby render it invalid.

In brief, my opinion is that, because the Legislature has attempted to regulate party primaries and nominations, it must do it in a manner which, with reasonable certainty, prevents the participation of any but members of a party in its management or nominations; that if it has failed to do so, or if the language of the act is so involved, or its meaning so obscure, that most men of fair intelligence would, on reading its provisions, fail to find any method provided for party protection, it must fail. This in my judgment applies to that part of the law relating to the November nominations of senatorial candidates.

For these reasons, inadequately expressed, but as fully discussed as the brief time at my command, before the opinion must be filed to render it of any effect in the coming election, will permit, I conclude that the provisions of chapter 109, p. 151 of the Laws of 1907, relating to the vote for the nomination of a candidate for United States Senator at the same time and place as the general election is held, are invalid, and, to that extent, I dissent.

(118 N. W. 141.)

STATE OF NORTH DAKOTA, EX REL. T. F. MCCUE, ATTORNEY GENERAL, AND HERSCHEL JAMES, RELATOR v. ROBERT D. BEERY, COUNTY AUDITOR OF HETTINGER COUNTY, NORTH DAKOTA.

Opinion filed October 29, 1908.

Application by Herschel James in the name of the state against Robert D. Beery, as Auditor of Hettinger County, for an original writ.

Denied.

Ball, Watson, Young & Lawrence, for plaintiff.

T. F. McCue, Attorney General, S. E. Ellsworth, A. G. Divet, and *Guy C. H. Corliss* (of counsel,) for defendant.

PER CURIAM. Following the case of State, ex rel. v. Blaisdell, 18 N. D. 55, 118 N. W. 141, this day decided, the writ herein prayed for is denied.

(118 N. W. 149.)

THE STATE OF NORTH DAKOTA, EX REL. THE CITY OF MINOT, A MUNICIPAL CORPORATION; SAM CLARK AND GEORGE L. MORROW, RESIDENTS AND TAXPAYERS OF THE CITY OF MINOT, v. C. C. C. WILLIS, A. J. DELANCE, RALPH ABBOTT, S. H. ELLIOTT, R. H. EMERSON, AS THE BOARD OF COUNTY COMMISSIONERS WITHIN AND FOR WARD COUNTY, NORTH DAKOTA.

Opinion filed November 19, 1908.

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

Action by the State, on the relation of City of Minot and others. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Robert H. Bosard, for appellants. *George A. McGee* and *James Johnson*, for respondents.

PER CURIAM. Following the case of State ex rel. City of Minot v. Willis, 18 N. D. 77, 118 N. W. 820, (decided this day), the judgment appealed from is affirmed.

(118 N. W. 823.)

THE STATE OF NORTH DAKOTA, EX REL. THE CITY OF MINOT, A MUNICIPAL CORPORATION; SAM CLARK AND GEORGE L. MORROW, RESIDENTS AND TAXPAYERS OF THE CITY OF MINOT v. C. C. C. WILLIS, A. J. DELANCE, RALPH ABBOTT, S. H. ELLIOTT, R. H. EMERSON, AS THE BOARD OF COUNTY COMMISSIONERS WITHIN AND FOR WARD COUNTY, NORTH DAKOTA.

Opinion filed November 19, 1908.

Municipal Corporations — Segregation of Territory — Estoppel — Acquiescence.

Under the facts stated in the opinion, *held*, that the city of Minot is estopped by its long acquiescence from questioning the validity of the method adopted by the council in attempting to segregate certain territory from its corporate limits.

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

Action by the State, on the relation of the City of Minot and others, against C. C. C. Willis and others, county commissioners. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Robert H. Bosard, for appellants. *George A. McGee* and *James Johnson,* for respondents.

FISK, J. This is an appeal from a judgment of the district court of Ward county quashing and dismissing an alternative writ of mandamus theretofore issued on application of appellants. It was sought by the writ to compel defendants, as members of the board of county commissioners of Ward county, to reconvene as a board of equalization, and to equalize the assessments of certain real and personal property claimed to be included within the corporate limits of the city of Minot. Whether such property is thus included within such corporate limits is the real controversy between the parties. It seems to be conceded by counsel that the remedy adopted is a proper one. As to this we entertain grave doubts. The territory in dispute having, at least by color of authority, been segregated from the city limits, it would seem that the validity of such act of segregation could be questioned only by a direct attack, and not collaterally, as is attempted to be done in this proceeding. 20 Am. & Eng. Encyc. of Law (2d Ed.) 1155, and cases cited. Furthermore, the writ of mandamus will not issue unless the relator has a clear legal right to the performance of the particular act of which performance is sought to be compelled. A right which is in substantial dispute or regarding which a substantial doubt exists will not be enforced by mandamus. 25 Cyc. 151-153, and cases cited. But, if we disregard these questions of practice, and consider only the merits, we are entirely clear that the conclusion reached by the trial court is sound and hence the judgment must be affirmed.

The facts which are undisputed, and which were found by the trial court, are as follows:

(1) That the city of Minot, as originally incorporated, consisted of all of sections 13, 14, 23 and 24.

(2) That thereafter, and on or about the 15th day of April, 1890, pursuant to the provisions of sections 1115, 1116, Comp. Laws 1887 (Pol. Code), a petition signed by not less than three-fourths of the legal voters and by the owners of not less than three-fourths in value of the property was duly presented to the city council of the city of Minot, praying that the real estate hereinbefore described be set apart from the City of Minot, and a notice of the

presentment of such petition was duly given by the petitioners by publication once each week for two successive weeks in the official paper, and that thereafter, on the 5th day of May, 1890, at a meeting of the city council of the City of Minot, the following proceedings were had upon said petition, as appears in page 54 of Book A of the Council Proceedings: "On motion of Alderman Field, seconded by Alderman Seiver, C. E. Gregory was employed to give his advice in regard to letting section fourteen out of the city limits." That thereafter, and on the 10th day of May, 1890, the following proceedings were had upon said petition as appears on page 55 of Book A of the Council Proceedings: "On motion and upon the call of the yeas and nays, the petition of settlers of section 14, 155, range 83, to be set apart from the city of Minot, was granted, and the city auditor instructed to draw a plat of said section and township, and file the same with the register of deeds."

(3) That in the year 1903 Ehr's addition to the city of Minot, which is located on said section 14, was assessed by the city of Minot and the taxes were paid. That in the years 1904 and 1906 Ehr's addition to the city of Minot was assessed by the city of Minot, but was stricken off from the tax books of the city of Minot by the county commissioners. That in the years 1907 and 1908 all of said section 14 was assessed by the city of Minot, but said section 14 was stricken off from the assessment list of the city of Minot by the board of county commissioners.

(4) That the south half of said section 14 now consists of the platted additions of North Minot, West Minot and Ehr's addition.

From these facts the trial court found as conclusions of law that the territory in question was disconnected and excluded from the corporate limits of Minot on May 10, 1890, and ever since has remained disconnected therefrom; also, that from such date to 1907 the said city has asquiesced in such disconnection and exclusion, and is now estopped to question the validity thereof. Appellants' assignment of errors presents three questions for determination. It is contended "(1) that the city could not disconnect or exclude this territory except by ordinance; (2) that estoppel by reason of acquiescence is not available as a defense between the parties to this action; and (3) that a municipality cannot be estopped by acquiescence arising from mere nonaction on the part of its officers or agents in matters in which public interests are concerned."

Upon the first proposition but little need be said. The statute in force at the date of the attempted exclusion of the territory from the city limits (sections 1114 to 1119 of the Compiled Laws of the late territory of Dakota of 1887) no doubt contemplated that the act of segregating territory from a city should be by ordinance, and there is no doubt that such act was legislative in character. Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023. Whether it can be said that the motion which was carried by the city council was the equivalent of, and in effect, an ordinance within the meaning of said statute, we do not determine, as we choose to place our decision in this case upon the broad principle of acquiescence and estoppel resting upon the ground of public policy.

This brings us, therefore, to appellants' second and third contentions, which may be considered together. It is asserted by appellants' counsel that the doctrine of acquiescence and estoppel is not applicable to the facts, for the reason "that, in order for any litigant to be estopped, he must, either by act or silence, have done or omitted to do something in reliance upon which the party seeking to invoke the doctrine has changed his position"—citing 11 Am. & Eng. Encyc. of Law (2d Ed.) 387. Counsel then proceeds to argue that, under the facts, the county commissioners have not relied upon such alleged asquiescence by the city in the exclusion of said territory and have in no manner suffered any loss by reason thereof, and further that they have been responsible therefor; the contention being that any omissions of this property from the tax lists of the city were caused by the county auditor, and that each year, with the exception of 1903, in which this property was assessed by the city assessor, the county commissioners struck the same from the assessment books of the city. Granting the latter facts to be true, and they no doubt are true, does it necessarily follow that appellants' conclusion is sound? We think not. During all this time from May 10, 1890, until 1907, the city seemingly acquiesced in everything which was done, not only by the county, but by the township of Harrison, in recognition of the latter's claim to the territory in dispute, excepting the attempt in certain of the latter years to tax said property as a portion of the taxable property within the city. During all the years from 1893 to 1908, inclusive, said territory was assessed for taxation by Harrison township, and was in all respects treated as a portion of said township. For about 13 years after the city council attempted to

and supposed it had segregated said territory from the limits of the city no attempt was made by it to tax said property. It is apparent that for a period of 10 years after the attempted segregation of this territory every one assumed and acted on the assumption that the method pursued for the setting off of said property from the city limits was valid, and that said territory became and was a part of Harrison township. It is therefore fair to presume that during all such time the residents of this territory exercised no rights either as electors or otherwise of the city of Minot and took no part in its municipal affairs, but that they did, on the other hand, vote, and participate, in the affairs of the township. It is also fair to presume that public improvements have been or may have been made in such territory and paid for out of county or township funds. Children residing in this territory have no doubt been excluded from free access to the city schools, and no doubt other rights may have been lost either by the county or township or both, and by their inhabitants in reliance upon the assumption, acquiesced in by the city, that said territory was on May 10, 1890, segregated from the city and became annexed to Harrison township. Under this state of facts we are firmly convinced that the trial court did not err in its conclusion that the city of Minot by this long acquiesence is now estopped to claim that said territory was not legally segregated from its corporate limits. Indeed, it would be a reproach upon the law to hold, in view of these facts, that the city is not thus estopped. Public policy demands that the doctrine of estoppel should be invoked in such a case. In this conclusion we are amply supported by authority. 28 Cyc. 214, and cases cited. We quote from the text as follows: "Taxpayers or inhabitants may be estopped to question the validity of annexation or detachment of territory to or from a municipal corporation, as by acquiescence in the annexation or delay in attacking the same, or by failure to exercise the rights of contravention and appeal given them by statute. So also a municipality may be estopped." This identical question was before the Supreme Court of Illinois in People v. Maxon, 139 Ill. 306, 28 N. E. 1074, 16 L. R. A. 178. There certain lands were attempted to be disconnected from a village by ordinance, but the ordinance was invalid. For seven years the village exercised no jurisdiction over such land, and the voters residing on the land exercised no rights in the village government. After the attempted segregation from the city and the attachment

of the land to the adjoining township, certain public improvements were made thereon by the township. Under these facts it was held that the village was estopped from claiming the right to tax such land. A leading case upon the question here involved is that of State v. Des Moines, 96 Iowa, 521, 65 N. W. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381. In that case territory had been annexed to the city under an unconstitutional statute, but it was held that after four years relator was estopped to question the validity of such annexation. See to the same effect, 20 Am. & Eng. Encyc. of Law (2d Ed.) 1155, and the following cases cited therein: Logansport v. La Rose, 99 Ind. 117; Strosser v. Ft. Wayne, 100 Ind. 443 Sherry v. Gilmore, 58 Wis. 324, 17 N. W. 252.

But it is contended by appellants' counsel that nonaction by officers of a municipality in matters pertaining to its governmental, as contradistinguished from its private capacity, is insufficient upon which to predicate an estoppel. This statement may be conceded to be sound as an abstract proposition, but it is not applicable to the facts in the case at bar. Here there was something more than mere nonaction by officers of the municipality. In the first place, there was affirmative action by the legislative department of the city attempting in good faith to segregate said property from the corporate limits; and, in the second place, for over 10 years thereafter every one assumed that such action was valid and in reliance thereon the residents of said territory were in all respects treated as residents of Harrison township, and this, with the full acquiescence of the citizens and officers of said city. These and other facts heretofore mentioned serve to bring the case squarely within the rule recognized by the foregoing authorities, and at the same time differentiates it from the cases cited by appellants' counsel.

Judgment affirmed. All concur.

(118 N. W. 820.)

JAMES BARKER v. JOHN L. MORE AND A. Y. MORE, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF MORE BROTHERS.

Opinion filed November 20, 1908.

Pleading — Amendment of Answer.

1. An amendment to an answer to conform to the facts in an action for an accounting may be permitted by the trial court, although such amendment is not requested until after the evidence has all been taken.

Same.

2. An amendment to an answer may be made, during or at the close of a trial, to conform to the facts proven, unless the defense is thereby substantially changed.

Assignment — Equitable Mortgages — Subsequent Absolute Conveyance.

3. Parties to a written assignment of a contract for the sale of real estate, which was made for security purposes, can annul the same and make such assignment absolute by a subsequent contract or assignment.

Mortgages — Foreclosure — Redemption — Accounting.

4. An action for an accounting will not lie, in the absence of contract or fraud, to compel a redemptioner from a mortgage foreclosure sale, who thereafter obtained a sheriff's deed under his redemption, to account to the mortgagor for the difference between what was paid on the redemption and the value of the land.

Equitable Mortgages — Change to Absolute Title.

5. The evidence considered, and *held* to show that the parties agreed to change an assignment for security purposes to one absolute in form and effect.

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

Action by James Barker against John L. More and A. Y. More, Judgment for defendants, and plaintiff appeals.

Affirmed.

Lee Combs and *J. A. Coffey*, for appellant. *Parks & Olsberg*, for respondents.

MORGAN, C. J. This is an action for an accounting based on the alleged wrongful surrender and cancellation of a land contract. The action is based upon the following facts: In the year 1896,

the plaintiff, James Barker, and one Adams, entered into a written contract, under the terms of which Adams agreed to convey to the plaintiff 320 acres of land situated in section 9, township 144, range 62, Stutsman county, for the sum of $2,240, upon the crop payment plan. The plaintiff immediately went into possession of said land and caused 270 acres thereof to be broken and cultivated, and he cultivated the same until the year 1902, when he alleges that he was wrongfully dispossessed of said premises. The plaintiff has never resided upon the land in question, but resided on his homestead, situated in section 8 of said township. The plaintiff built a barn upon the land involved in this contract, and built fences upon the same. The barn was of the value of $600, and the total improvements, including the barn and breaking, amounted to about $1,500. The record does not show that the plaintiff has ever paid anything upon said contract by turning over any portion of the crops, as provided for in the contract. In August, 1901, the plaintiff was indebted to Larson & Cooper in the sum of $815.50, and at that time he assigned all his interest in the contract to that firm to secure the payment of that sum. Larson subsequently assigned his interest in the contract to Cooper, and Cooper thereafter assigned all his interest in the contract to More Bros., the defendants, for the sum of $450. At the time of the assignment to More Bros. by Cooper, he assigned to them also the debt due from plaintiff to Cooper & Larson, being the debt of $815.50. About that time the defendants also bought some notes from Cooper, which he held against the plaintiff. These were notes given by the plaintiff to the Minneapolis Thresher Company for a separator, and they amounted to about $775. The plaintiff was also indebted to the defendant at that time upon a book account. The assignment from the plaintiff to Larson & Cooper was not absolute, but was given as security for the payment of the debt due from the plaintiff to Larson & Cooper. Before the year 1902, Adams, the owner of the land when he made the contract with Barker, conveyed the land by deed to one Fiero, and said Fiero thereafter conveyed all of said land to one Bond. These defendants, More Bros., thereupon brought an action against said Adams, Bond and Fiero to set aside these deeds, and to compel Adams to convey the land to them, they alleging that Barker had fully complied with all the terms of the contract up to that time, and they offered to comply with the remaining unfulfilled terms thereof.

This action was settled by the parties by the payment to More Bros. of the sum of $1,000. The action was thereupon dismissed, and More Bros. released all their interest in the contract to Bond and Fiero. Under the terms of this settlement, More Bros. also reserved the right to remove the barn from the place, and they turned over and delivered the barn to the plaintiff, who took possession of the same. Before this time, it is claimed by the defendants, and denied by the plaintiff, that plaintiff gave defendants an absolute assignment of the contract for a valuable consideration. The consideration is claimed to have been the sum of $600, the value of the barn turned over, and $1 paid at that time. Prior to this time, plaintiff had mortgaged his homestead several times, and among the mortgages thereon was one to the Garr-Scott Company for $1,400, dated September 28, 1901. The defendants purchased this mortgage on December 30, 1901. One Fuller held a first mortgage on this homestead and foreclosed the same December 5, 1903. From this foreclosure there was a redemption by a subsequent mortgagee, and from the redemptioner of the Fuller foreclosure, the defendants redeemed by virute of the lien held by them as owners of the Garr-Scott mortgage. The defendants paid $2,826.60 to redeem from this prior foreclosure, and did not foreclose their own mortgage. In February, 1905, a sheriff's deed was issued to them by virtue of their redemption certificate. In the year 1896, the land involved in this contract was of the value of $7 per acre. It steadily increased in value, until at the time of the trial it was valued at $28 per acre. Upon these facts, the plaintiff demands an accounting from the defendants, and bases such claim or demand upon the fact that they wrongfully surrendered and asigned the land contract to said Fiero and Bond, by reason of which the land was conveyed to them as innocent purchasers, and that he thereby lost the land. The answer is, in effect, a general denial. The record shows that there was a misunderstanding at the trial as to whether an amended answer had been served. After such misunderstanding had developed, the defendants asked leave to interpose and file an amended answer, and leave was granted to file the same. This amendment was objected to, and the objection is still insisted on. The additional fact sought to be pleaded in the amended answer is that plaintiff assigned all his interest in the contract to them for a valuable consideration, on November 7, 1902, by an instrument absolute in

terms, and that it was expressly agreed and understood between the plaintiff and these defendants at that time that the assignment was absolute in terms, and not as security. After hearing the evidence in the case, the trial court made findings of fact and conclusions of law in favor of the defendants and dismissed the action. The plaintiffs have appealed from such judgment and demand a review of the entire case, under the provisions of section 7229, Rev. Codes 1905.

On the appeal, the plaintiff's contentions are: (1) That it was error to permit the defendants to interpose the amended answer. (2) That, without the amended answer, all evidence as to the assignment of November 7, 1902, was inadmissable. (3) Assuming that the amended answer was properly filed, still the plaintiff should recover judgment for the reason that the assignment of November 7, 1902, was nothing more than an assignment as security, for the reason that the original assignment was no more than an assignment for security purposes.

We will consider these contentions. In reference to the action of the trial court in permitting an amended answer to be served, we think there was no abuse of discretion, and that the plaintiff was in no way prejudiced by the amendment. The complaint alleged that the assignment to Cooper was for security purposes only. The original answer expressly denied that there was any trust relation created by that assignment, and under that allegation and denial it would not have been error to admit proof that the assignment of November 7, 1902, was not a conditional one. However, disregarding entirely the question of the sufficiency of the original answer, we discover no reason why it was prejudicial or erroneous to permit the amendment to be filed to conform to the proof. It was not a different or new defense from that which was foreshadowed by the general denial or answer, wherein there was an express denial of any trust relation growing out of the assignment. The amended answer alleged that fact in more specific terms. The plaintiff did not ask for time to present additional evidence by reason of the amendment, and there was no showing or claim of surprise. The amendment was permissible and directly within the provisions of section 6883, Rev. Codes 1905. The amendment did not substantially change the defense. A wide discretion is reposed in trial courts in allowing amendments.

The plaintiff contends that no new assignment was made by plaintiff on November 7, 1902. One of the defendants and one Bradley testified that there was such an assignment; that it was drawn by Bradley and signed by plaintiff in the presence of Bradley, A. Y. More, and two other persons. More and Bradley gave all the details of the conversation which led up to the assignment. It was based upon a consideration of $1, which was paid over, and upon a promise by More that if they succeeded, in the suit against Fiero, Adams, and Bond, in setting aside the deed from Adams to Fiero, and from Fiero to Bond, that More would turn over to plaintiff the barn, and after the settlement, the barn was actually turned over to the plaintiff. He thereafter accepted the barn pursuant to the contract which was made when the assignment was executed by him. When this assignment was signed by the plaintiff, and it became an unconditional assignment by express terms, the plaintiff was then of the opinion that he had lost the 320 acres of land, for the reason that Adams had conveyed to Fiero, and plaintiff was not then financially able to protect his rights by an action. The legal rights of the plaintiff were then fully explained to him by Bradley and More, and after such explanation he voluntarily executed the assignment, and thereby waived and conveyed away all his rights under the contract. We have no hesitation in saying that the defendants have clearly established that the assignment was made at that time, and that it was an unconditional one. It is true that there is a conflict on this question, but the force of plaintiff's denial of making the second assignment is weakened by his acceptance of the barn from defendants. There is no theory under which he would be entitled to it, unless through this special assignment. Although the written assignment was not produced in court because it could not be found, still secondary evidence of its contents was properly received, and it was based on a sufficient showing. The plaintiff has, therefore, failed to establish that the defendants wrongfully surrendered the assignment to Fiero and Bond, and he has no right to an accounting on that ground.

In reference to the mortgage on the homestead, it is plaintiff's contention that he is entitled to an accounting upon the ground that the defendant sold the land, soon after they redeemed from the Fuller mortgage foreclosure sale, for a sum largely in excess of the sum paid on the redemption added to the amount of the de-

fendant's mortgage. Conceding that the defendant's were benefited financially by the redemption, the plaintiff cannot claim any right or advantage on account of that fact. Up to the end of a year after the sale under the Fuller mortgage, he had a right to redeem therefrom, but he failed to avail himself of that right. After the defendants received a sheriff's deed, the title inured in them absolutely. After the deed issued, plaintiff had no more interest in these premises than he would have had in case he had voluntarily conveyed them to another for a consideration. The defendants did nothing more than to avail themselves of the rights granted by law, and have followed the statutory provisions relating to redemptions. The statute vested them with title to the premises under the deed, to which the plaintiff can claim no interest nor accounting, however large the profits that accrue to the defendants may be. Plaintiff claims that Work et al. v. Braum et al., 19 S. D. 437, 103 N. W. 764, and Sprague v. Martin, 29 Minn. 226, 13 N. W. 34, should be followed in the decision of this case, and he claims that they lay down the law applicable to statutory redemptions that should be applied. The cases are in no way in point. In those cases, the question decided was whether the mortgage or judgment under which the redemption was made was extinguished, or not, by the redemption. In this case, the plaintiff is endeavoring to compel the defendants to account to him for what they had gained through securing absolute title to the land by regular procedure under the redemption statute. The validity of the redemption is in no way questioned, and the present validity or status of the mortgage under which the redemption was made is not at issue. The profits which accrued to defendants are substantially the result of an advance in the values of the land, and are not the result of any wrong on defendant's part.

It is claimed by the plaintiff that he is entitled to an accounting, conceding that the second assignment to the defendants was an absolute assignment in terms and effect. The basis of this contention is that the relations of the contracting parties cannot be changed from what they were when the assignment was originally made. In other words, the contention is that an assignment having been made for security purposes at one time, the security relation cannot be subsequently changed by the agreement of the parties. There is no force in this contention, as applicable to the facts of

this case. It is based upon the erroneous conclusion that the parties to an unexecuted contract in writing cannot change their relations thereto by subsequent agreement in writing. In this case, the assignment was made absolute in terms and effect, by a written assignment based on a new consideration. That the parties had a right to so modify the original contract is too clear for discussion, and the fact that they did change the contract is well established. The assignment having been made absolute, we need not consider what the plaintiff's rights would have been, had the original assignment remained in force.

The judgment is affirmed. All concur.

(118 N. W. 823.)

STATE OF NORTH DAKOTA v. W. A. LAECHELT.

Opinion filed November 18, 1908.

Criminal Law — Embezzlement — Indictment and Information — Variance.

1. In a prosecution for embezzlment of a certain check, the information described the check as drawn by "Stromen Bros." to "Bovey-Shute Lumber Company," while the proof disclosed that the same was drawn by "Stromen Bros., by Ed. T. Stromen, by A. T. Stromen," to "Bove-Shaut Lumber Company." *Held*, that the variance was immaterial.

Embezzlement — Proof of Other Crimes.

2. The chief function of a criminal information is to fully and fairly impart knowledge to the accused of the nature of the charge against him, to the end that he may prepare his defense thereto. It is accordingly *held*, that, under an information charging embezzlement of a check, the state will not be permitted to show other embezzlements by the accused, and that he used the same to cover up prior embezzlements. Where proof of this character is relied upon for conviction, the defendant should be apprised thereof by the information.

Same.

3. Evidence examined, and *held* insufficient to support the judgment of conviction.

Appeal from District Court, Pierce county; *Burr*, J.

W. A. Laechelt was convicted of embezzlement, and appeals.

Reversed.

Tyler & Woodward, for appellant.

Where a name is material, evidence must follow the charge of the information. Roush v. State, 51 N. W. 755; 1 Bishop on Criminal Law, 485; Sykes v. People, 132 Ill. 32; State v. Woodrow, 42 Pac. 714.

When the accused is a witness he may be questioned to test his credibility, and matter as to his direct examination, but not as to matters foreign thereto. State v. Underwood, 44 La. Annual, 852; Sailor v. Commonwealth, 30 S. W. 390; State v. Chamberlain, 89 Mo. 129; Fossdahl v. State, 62 N. W. 185; People v. Thomas, 9 Mich, 321; State v. Saunders, 14 Ore. 300; People v. O'Brien, 6 Pac. 695; Gale v. People, 25 Mich. 156; Cliffton v. Granger, 53 N. W. 316; Re Lewis, 39 How. Pr. 155.

T. F. McCue, Attorney General, and *Albert E. Coger, State's Attorney,* for respondent.

Variance to be fatal must have been in a material matter, and calculated to mislead defendant to his prejudice. People v. Main, 46 Pac. 612; State v. Short, 6. N. W. 584; State v. Childers, 49 Pac. 801; State v. Crawford, 23 N. W. 684; State v. Blakeley, 86 N. W. 419; State v. Vincent, 91 N. W. 347; State v. Watson, 1 Pac. 770; People v. Smith, 44 Pac. 663; State v. Gordon, 42 Pac. 346; State v. Flack, 29 Pac. 571; Bish New Crim. Pro. 2, Sec. 731-732; Sanders v. State, 12 S. E. 1058; People v. Arras, 26 Pac. 766.

Evidence of other crimes to show motive, intent, absence of mistake, or common scheme or plan is admissible. Underhill on Crim. Ev. 111; 4 Elliott on Ev. Sec. 2721; 10 Am. & Eng. Enc. Law 1032-1033, Note 2; 62 L. R. A. 264-269.

Deposit of check to its owner's credit but to cover previous shortage of him depositing is a conversion. State v. Baumhager, 9 N. W. 704; State v. Hosher, 67 Pac. 386; Territory v. Meyer, 24 Pac. 183; State v. Palmer, 20 Pac. 270; Bowman v. Brown, 3 N. W. 612; Spalding v. People, 49 N. E. 993; Bonding Co. v. Milwaukee Co. 91 Md. 733, 48 Ill. 72.

FISK, J. Appellant appealed from a judgment of conviction of the crime of embezzlement. He was charged by the information

with having embezzled a certain bank check, dated December 12, 1906, for the sum of $355, drawn upon the Merchants' Bank, Rugby, N. D., by Stromen Bros., the said check being the property of the Bovey-Shute Lumber Company, appellant's employer, and received by appellant in the course of his employment by such firm. The evidence discloses that such check was received by defendant as employe of said firm, and was, pursuant to general instructions, deposited by him in the Merchants' Bank at Rugby, to the credit of said firm, although he made no entry in the books of the company of the receipt of such check, as was his duty to do. This evidence is not controverted by the state, but apparently the theory of the prosecution was that the defendant had theretofore committed other acts of embezzlement from his said employer, and that he used the check in question to cover up such other shortages or embezzlements. The accused was in no manner apprised, by the facts alleged in the information, that the state relied on any such theory for conviction. The proof of other embezzlements consisted chiefly of testimony elicited from defendant on cross-examination and over his objection. Four grounds are urged by appellant's counsel for a reversal of the judgment, as follows: (1) It is contended that it was reversible error to admit in evidence the check in question, for the reason that it is not the check described in the information, the information alleging that the check was drawn by "Stromen Bros." to "Bovey-Shute Lumber Company," while the check received in evidence shows on its face to have been drawn by "Ed. T. Stromen and A. T. Stromen" to "Bove-Shaut Lumber Company;" (2) it is contended that the trial court committed prejudicial error in permitting proof to be made of other embezzlements; (3) that it was error to compel defendant on cross-examination to give testimony relative to other defalcations; and (4) it is contended that the trial court erroneously imposed a fine in addition to imprisonment, as a part of the judgment.

We think the first contention without merit. There was no material variance between the information and the proof with reference to the description of the check claimed to have been embezzled by defendant. The alleged variance is that in the information the check is alleged to be the property of "Bovey-Shute Lumber Company," while the proof is that it was drawn to "Bove-Shaut Lumber Company;" also that the information alleges that it was drawn by "Stromen Bros.," whereas the proof discloses that it was signed

"Stromen Bros., by Ed. T. Stromen, by A. T. Stromen." The information does not allege the name of the payee of the check, but merely that it was the property of the Bovey-Shute Lumber Company, and the evidence fully sustains such allegation. An averment of the name of the payee was unnecessary, as the instrument was otherwise sufficiently described. State v. Rue, 72 Minn. 296, 75 N. W. 235. As to the variance with reference to the names of the makers, we think the same was not material, and it in no manner tended to prejudice defendant in his substantial rights. The authorities cited by appellant's counsel in support of their contention are not in point, as they are forgery cases. There is a wide difference between the rule of criminal pleading in cases of forgery and that in cases of larceny and embezzlement, as the following authorities will show: 2 Bish. New Crim. Pro. § 732; State v. Thompson, 28 Or. 296; 42 Pac. (Or.) 1002; People v. Arras, 89 Cal. 223, 26 Pac. 766. Section 9864, Rev. Codes 1905, provides: "In an information or indictment for larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities * * * it is sufficient to allege the larceny or embezzlement * * * to be of money, bank notes, certificates of stock or valuable securities, without specifying the coin, number, denomination, or kind thereof." In People v. Arras, supra, the Supreme Court of California, in disposing of the question of alleged variance where the information described the stolen check as drawn in favor of "one Pennington" instead of "A. G. Pennington or bearer," as the evidence disclosed, said: "If this be a variance, is it a material variance?" A material variance between the proof and the information arises when an acquittal of the defendant under the information would be no bar to a further prosecution for the same offense. People v. Hughes, 41 Cal. 234. In this case the check described in the information and the check introduced in evidence have so many earmarks in common as to establish the identity of the two instruments as being one and the same beyond all doubt, and indicate conclusively that the misdescription could not have misled the defendant to his prejudice, and that a conviction or acquittal of the offense charged in this information would forever bar any further prosecution for the larceny of the check. * * * Surely, then, no greatly detailed description of the bank check was necessary to be used in the information, especially when section 967 of the Penal Code 1905 provides: (Here is quoted the California

section, which is identical with section 9864, Rev. Codes 1905, supra.) * * * This information describes the check correctly in so many respects that a defect in description in the one respect urged could not have misled the defendant in his defense, and certainly rendered the variance immaterial.

Appellant's second contention, in substance, is that under the information which merely charges an embezzlement of the check it was not proper to permit proof of other embezzlements. In other words, that it was not permissible for the state to show under this information that defendant intended that the check should serve to cover up his prior defalcations. That if such was the manner of the commission of the crime, it should have been alleged in order to apprise defendant of what he had to meet. That appellant's contention in this respect is sound is, to our minds, too clear for serious debate. It is a fundamental principle of criminal pleading that the accused shall be fully and fairly apprised of the nature of the charge against him, to the end that he may prepare his defense thereto. Indeed the chief function of the information is to impart such knowledge to the accused. The rule above stated is embodied in statutory form in this state. Section 9849, Rev. Codes 1905, provides: "The allegations of the information or the indictment must be direct and certain as regards: (1) The party charged; (2) the offense charged; (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense." The evidence fairly discloses that the defendant deposited the check in the bank to the credit of his employer, in strict conformity with his duties, and that a duplicate deposit slip showing such deposit was sent to his employer at its home office in Minneapolis. How, in the light of these facts, it can be said that defendant embezzled the check we are at a loss to understand. But, even conceding for the sake of argument that the state might properly prove an embezzlement of the check in question by showing that defendant used the same to cover up other defalcations, the evidence is lacking in this respect. The testimony elicited on cross-examination of defendant as to other embezzlements was by the trial court expressly restricted to the questions of the credibility of the witness and criminal intent, the court admonishing the jury in the following language: "Gentlemen of the jury, this testimony is introduced for the simple and only purpose of affording you, if possible, means for testing the

credibility of the witness, and for the purpose of determining, if you can, whether or not there was any criminal intent, in case you find the charge proven; but you are not to consider it in any way as being before you for the purpose of determining whether this particular exhibit, or any item other than the one that he stands charged for, has been embezzled. In other words, he is not on trial for any of these items except the one charged in the information, but the testimony is permitted to go before you for the sole and only purpose of determining his credibility and determining his intent, * * * and I caution you to consider it only for that purpose." The testimony as to other offenses being thus restricted, there is no proof in the record to support the theory of the prosecution that the check in question was misappropriated by defendant to cover up other defalcations. The judgment of conviction is therefore without support in the evidence, and must be reversed.

The conclusion above reached renders a consideration of the remaining questions unnecessary, as it does not appear that they will arise upon another trial.

Judgment reversed, and cause remanded for further proceedings according to law. All concur.

(118 N. W. 240.)

A. J. McFADDEN v. THORPE ELEVATOR COMPANY.

Opinion filed October 30, 1908.

Landlord and Tenant — Crop Contract — Reservation of Chattel Mortgage.

1. Plaintiff, the owner of certain real property, entered into the usual farm contract with one A to farm the same for three years, A to receive a certain share of the crops each year upon division thereof, the contract containing the usual stipulation reserving title in plaintiff to all such crops until a division. In February, 1905, being the third year, and for the purpose of securing the payment of certain indebtedness then due from A to plaintiff, A executed and delivered to plaintiff a chattel mortgage upon his "undivided one-half interest in all crops * * * which have been or may be sown, grown, planted or harvested during the year 1905 * * * on the following described real estate" (describing the property included in the farm contract). *Held*, under the facts disclosed, that, by accepting such mortgage, plaintiff did not thereby waive or abandon stipulation in

the contract reserving title to the crops. The so-called chattel mortgage amounting merely to a contract for a lien when the mortgagor acquired title, and plaintiff's act in accepting the same was not necessarily inconsistent with his reservation of title under the farm contract.

Same — Waiver.

2. The question of waiver is largely one of intent, and, under the evidence, it is apparent that no such waiver was intended by the acceptance of the chattel mortgage.

Election of Remedy — What Constitutes — Mistake.

3. In plaintiff's original complaint, he based his right of recovery upon the chattel mortgage, claiming merely a special property in the grain. Subsequently he was permitted to amend his complaint by abandoning such theory, and alleging ownership of the grain by virtue of the farm contract. *Held,* that, by adopting the theory of recovery set forth in the original complaint, plaintiff did not thereby preclude himself from receding therefrom, nor did such act evince an intention on plaintiff's part to waive his legal title under the contract. He had no election of remedies, as his only cause of action was grounded upon his title under the farm contract; the chattel mortgage not having attached to the grain at the date of the conversion. Plaintiff was merely mistaken in attempting to pursue a remedy which he did not have, and this cannot be construed on as election to waive or abandon the only remedy which he possessed.

Chattel Mortgages—Reservation of Title in Farm Contract—Filing Same.

4. The stipulation in the farm contract reserving title to the crops in plaintiff did not constitute a chattel mortgage; hence the filing of such contract was unnecessary as against innocent purchasers of the grain, following Angell v. Egger, 6 N. D. 391, 71 N. W. 547.

Trover and Conversion — Demand.

5. Assuming, without deciding, that a demand upon defendant for the grain was necessary in order to show a conversion, it is *held* under the evidence that a sufficient demand was made.

Appeal from District Court, Pembina county; *Kneeshaw,* J.

Action by A. J. McFadden against Thorpe Elevator Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Guy C. H. Corliss, for appellant.

An election of remedy, with full knowledge of the facts, is binding. Birdsell Mfg. Co. v. Oglevee, 58 N. E. 231; Harding v. At-

lantic Trust Co., 67 Pac. 222; Thomas v. Watt, 62 N. W. 345; McDonald v. Bank, 70 N. W. 143; Wright & Co. v. Robinson, 82 N. W. 632; Terry v. Munger, 24 N. E. 272; Braithwaite v. Aikin, 3 N. D. 365, 56 N. W. 133.

Where, in a farm contract, title is held as security, the transaction is a chattel mortgage. McNeil v. Ryder, 81 N. W. 830; Agne v. Skewis-Moen Co., 107 N. W. 415.

Purchaser of property, if buyer is innocent, is not a conversion, and demand before suit is necessary. Plano Mfg. Co. v. N. P. El. Co. 53 N. W. 202; Hovey v. Bromley, 85 Hun. 540; Metcalfe v. Dickman, 43 Ill. App. 284; Valentine v. Duff, 7 Ind. App. 196; Dean v. Cushman, 94 Me. 454.

M. Brynjolfson and *Jeff M. Myers,* for repsondents.

Adopting by mistake a falacious or illusory remedy does not preclude following any other that is open. In Re. VanNorman, 43 N. W. 334; McLaughlin v. Austin, 62 N. W. 719; Smith v. Bricker, 53 N. W. 250; Bunch v. Grave, 12 N. E. 514; City of Omaha v. Redick, 85 N. W. 46; Fuller Co. v. Harter, 85 N. W. 698; Snow v. Alley, 30 N. E. 691; Agar v. Winslow, 56 Pac. 422.

Under the usual farm contract reserving title to secure performance, the renter acquires no title until the fulfilment of its conditions undertaken by him. Angell v. Egger, 6 N. D. 391, 71 N. W. 547; Bidgood v. Monarch El. Co. 9 N. D. 627, 84 N. W. 561; Hawk v. Konouzki, 10 N. D. 37, 84 N. W. 563; Consolidated Land Co. v. Hawley, 63 N. W. 904; Savings Bank v. Canfield, 81 N. W. 630.

Chattel mortgage does not attach to renter's interest until such fulfillment. Bidgood v. Monarch El. Co. supra; Hawk v. Konouzki, supra; Savings Bank v. Canfield, supra.

The demand was sufficient. 28 Am. & Eng. Enc. (2nd Ed.) 708.

Demand from a distance by letter unanswered, is sufficient. First National Bank of Fargo v. Minneapolis & N. El. Co. 11 N. D. 280, 91 N. W. 436.

FISK, J. This action was brought in the district court of Pembina county to recover damages for the alleged conversion of certain wheat. A jury was waived, and the plaintiff recovered judgment in the court below, from which judgment this appeal is prosecuted. The grain in question was raised by one Alke upon plain-

tiff's land during the season of 1905, under the ordinary farm contract entered into on March 17, 1903, and covering that and the two succeeding years. The usual provision is in said contract reserving title to all crops in the landlord until the division thereof, the tenant to receive one-half of such crops upon the faithful and diligent performance by him of all the stipulations of the contract. The record discloses that on February 28, 1905, Alke executed and delivered to plaintiff a chattel mortgage upon his "undivided one-half interest in all crops of every name, nature, and description, which have been or may be sown, grown, planted, cultivated, or harvested during the year 1905, and until said debt is paid on the following described real estate" (describing same) to secure the payment of a certain promisory note dated on said day for the sum of $1,143.35. In his original complaint plaintiff based his right of recovery upon this chattel mortgage, but subsequently, by leave of court and by consent of defendant's counsel, the complaint was amended so as to base the right of recovery under the farm contract upon which amended complaint the action was tried. The receipt by defendant of the wheat involved in this litigation is conceded, but whether defendant converted the same, and whether plaintiff can maintain the action under his amended complaint, are the controverted questions in the case.

It is appellant's contention that plaintiff, by taking and accepting the chattel mortgage from Alke, thereby necessarily waived his right under the farm contract to retain the legal title to all crops in him. In other words, it is contended that, by accepting such chattel mortgage, plaintiff definitely decided that he would treat the grain as the property of Alke, and rely wholly upon the chattel mortgage for his security. Appellant's counsel says: "It is not a question of contract or estoppel, but merely the question whether plaintiff, having the election to treat the grain as his under the contract, or to yield the legal title to Alke and fall back on his chattel mortgage, decided to rely upon the chattel mortgage. * * What the plaintiff had open to him was in the nature of an election of remedies. He could take the position that there had been no division, and therefore that he could claim the technical legal title under the contract in way of security for the amount specified in the note and secured by the chattel mortgage, or he could proceed on the theory that the legal title to this grain representing a part of Alke's one-half was in Alke, and he would em-

ploy the remedy given him by the chattel mortgage. Each avenue was open to him, and, having made his election with full knowledge of the facts, he is bound thereby." Appellant's contention, broadly stated, leads to the inevitable conclusion that a landlord cannot retain title to his tenant's part of the crops under a stipulation like the one in the contract in question, and at the same time or subsequently take security from his tenant by means of a chattel mortgage upon such property, and that his act in taking the chattel mortgage under such facts must be deemed conclusive evidence of a waiver by him of the legal title thus reserved. Our attention has been called to no adjudicated case supporting such contention, and we know of no such authority. As we view the question, there is no necessary inconsistency between the relations of the parties as created by the contract, and those created by the chattel mortgage. It is, of course, true that the title to the grain cannot rest in both the landlord and tenant at the same time. Under the contract the title, until a division, is retained by the landlord, but this is not an absolute unqualified title. On the contrary, the title, in so far as the tenant's undivided part of the crop is concerned, is in the nature of a security; the tenant having a contingent equitable interest therein which ultimately will ripen into a perfect title upon his compliance with the contract and a division of the grain. It is, of course, clear that, until he acquires the title under the contract, his mortgage cannot attach, and the same merely amounts to a contract for a lien, and we know of no reason why such a contract for a lien may not be given by the tenant and accepted by the landlord to take effect at such time in the future as the mortgagor may ultimately acquire title to his part of the crops under the terms of the contract. Such no doubt was the obvious intent of the parties, for the landlord continued thereafter to make advances to the tenant without any security other than that afforded him by the terms of the farm contract. It may be that the landlord, if he saw fit, could waive the provisions as to security which were contained in the contract, but there is no evidence that he intended to do so, and the court will not presume such intent, in the absence of any evidence aside from the mere accepting of the so-called chattel mortgage.

As before stated, in plaintiff's original complaint he sought to recover upon the ground of his special property by virtue of the chattel mortgage. Subsequently he was permitted to amend by

abandoning such theory, and in his amended complaint he alleges ownership of the grain by virtue of the farm contract, and it is appellant's contention that plaintiff, by his first complaint elected to rely upon the mortgage, instead of title under the farm contract, and is now precluded from changing his position. Counsel's contention, as we understand it, is, in effect, that the theory upon which he framed his original complaint furnishes conclusive evidence that plaintiff thereby waived his technical legal title under the contract. This for the reason that his attempt to assert rights under the chattel mortgage was inconsistent with his retention of his legal title under the contract. There would be some force to appellant's contention if at the date of the commencement of the action plaintiff had possessed the right of electing upon which theory to proceed, but we think the fallacy of his whole argument upon this point consists in his overlooking the fact that plaintiff's cause of action arose immediately after the conversion took place. If prior to such conversion plaintiff had by any act of his waived his rights under the farm contract, so that the chattel mortgage attached to the grain, then his cause of action would necessarily be grounded upon the mortgage, otherwise any cause of action which accrued to him would arise under the farm contract. No such waiver having taken place prior to the conversion, he acquired no cause of action under the chattel mortgage, and the fact that he attempted to recover thereunder could not operate as a bar to the only cause of action which he had, to wit, under the farm contract. At the time of the conversion the plaintiff had no lien under his mortgage, and, of course, none attached thereafter. We think the opinion of Mr. Justice Holmes in Bierce v. Hutchins, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828, furnishes a complete answer to the contention of appellant's counsel upon the question of plaintiff's waiver and election of remedies. Among other things, it is there stated: "It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title (Van Winkle v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18, 36 L. Ed. 880), and therefore if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the assertion of a lien by one who has title, so long as it is only an assertion, and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one, because the party has not right to choose. The claim in the lien suit, as was

said in a recent case, was not an election but a hypothesis. Northern Assur. Co. v. Grand View Bldg. Ass'n, 203 U. S. 106, 108, 27 Sup, Ct. 27, 51 L. Ed. 109. The fact that a party, through mistake, attempts to exercise a right to which he is not entitled, does not prevent his afterwards exercising one which he had and still has, unless barred by the previous attempt. Snow v. Alley, 156 Mass. 193, 195, 30 N. E. 691. * * * The contract says, in terms, that it is conditional, and that the goods are to remain the property of the seller until payment of the note given, for the price. This stipulation is perfectly lawful. Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285. So that the only question is whether any other provision of the contract is inconsistent with this one, or qualifies and explains it as intended to do less than it purports to do when taken alone. Chicago R. Equipment Co. v. Merchants' National Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349. The fact that possession was to be and was delivered, and that it must have been contemplated that the rails would be put down upon a roadway no doubt assumed, it seems wrongly, to belong to the Kona Company, had no such effect, as between vendor and vendee. Neither did the requirement of additional security in the form of first mortgage bonds of the company. It may have been expected that the mortgage would embrace a part or the whole of this property, but there is nothing more common than a provision in a mortgage that it shall apply to and embrace after-acquired property with sufficient description to extend the same and bring it within the mortgage when acquired. And, if the mortgage would have been operative at once by way of estoppel in favor of third persons, there was the more reason for exacting an interest under it to save the vendor's rights in that event."

Appellant's counsel next contends that, under the modern doctrine, the provision of the farm contract reserving title in plaintiff to Alke's share of the crops amounted merely to a chattel mortgage, and hence as against defendant, an innocent purchaser, the contract should have been filed in order to be effective. Counsel cites two Minnesota cases: McNeal v. Ryder, 79 Minn. 153, 81 N. W. 830, 79 Am. St. Rep. 437, and Agne v. Skewis-Moen Co., 98 Minn. 32, 107 N. W. 415. In the former certain prior decisions of that court were reviewed, and the members of the court did not agree as to the nature and extent of such prior adjudications. Not only this, but Collins, Judge, wrote a vigorous dissenting opinion

which was concurred in by the Chief Justice. This court in Angell v. Egger, 6 N. D. 391, 71 N. W. 547, settled the question in this jurisdiction contrary to the rule announced by the Minnesota court, and it is sufficient to say that we are entirely satisfied with the rule there established, and we believe it to be in accord with the weight of authority elsewhere. 8 Am. & Eng. Enc. of L. (2d Ed.) 323, 324, and cases cited. See, also, 12 Cyc. 976.

Appellant's last contention is that there was no sufficient demand made upon defendant for the possession of the grain in question prior to the commencement of the action, and hence a conversion was not proven. Such contention is necessarily based upon the premise that a mere purchase of property from a person having no title does not constitute a conversion if the purchaser acted in good faith, and without notice of the vendor's want of title or right to sell. The authorities upon this question are apparently in hopeless conflict. See 28 Am. & Eng. Enc. of Law (2d Ed.) 704, where the cases are collated, and where the author of the article there treated states the better doctrine to be contrary to appellant's contention. It is unnecessary for us to adopt either rule in this case. Assuming, without deciding, that a demand is necessary under the facts disclosed in the record in order to prove a conversion, we are agreed that such proof was sufficiently made. It appears that 30 days prior to the commencement of suit plaintiff made a special trip to Bathgate for the sole and only purpose of demanding this grain from defendant, and that he found defendant's agent Bauer at the hotel, where he informed him that he was there to demand the wheat that he Bauer, as such agent, had bought of Alke, and wanted it, and that defendant's said agent replied, in substance, that he did not know anything about it. It also appears that defendant at no time thereafter evinced any disposition to recognize in any manner plaintiff's claim to or demand for such grain. Whether plaintiff was prepared at the time of making the demand to accept the possession of the wheat does not appear, nor do we think this material in the light of defendant's attitude regarding plaintiff's claim of right thereto and his unequivocal demand therefor. In First National Bank v. Minneapolis & N. Elevator Co., 11 N. D. 280, 91 N. W. 436, this court held a demand from a distance, and by letter which was unanswered afforded a sufficient foundation for a conversion action upon return of the registry receipt showing the delivery of such letter. Surely, if such a

demand is sufficient to show a conversion, that in the case at bar should be so held.

Having disposed of each of appellant's points adversely to his contention, the judgment appealed from should be affirmed, and it is so ordered. All concur.

(118 N. W. 242.)

STATE OF NORTH DAKOTA, EX REL. THOMAS H. POOLE v. AMASA P. PEAKE.

Opinion filed March 6, 1909.

Statutes — Expression of Subject in Title.

1. Section 2, chapter 136, page 244, Laws 1905, providing that no appointment to any of the departmental offices of the state militia shall be for a longer period than two years, is germane to the subject and general purpose expressed in the title, "An act providing that all appointments to the various departments of the National Guard of the state of North Dakota shall be made from officers of the field and line," and does not contravene the provision of section 61, article 2, of the state constitution, requiring that the subject of an act shall be exprssed in the title. (Morgan, C. J., and Fisk, J., dissenting.)

Same.

2. In determining the constitutionality of a legislative act under section 61, article 2, of the state constitution, the title of the act is to be construed in the light of the general object and purpose of the act; and if, so construed, the provisions of the act appear to be in furtherance of the general purpose expressed in the title, the act will be upheld.

Original application by the State, on relation of Thomas H. Poole, for a writ of quo warranto to be directed to Amasa P. Peake. Application for writ denied, and alternative writ quashed.

Ball, Watson, Young & Lawrence, and *Engerud, Holt & Frame,* for relator. *Andrew Miller, Atty. Gen.,* and *M. A. Hildreth,* for respondent.

ELLSWORTH, J. This is an original proceeding, before this court, arising out of an information in the nature of quo warranto, presented by the State, on the relation of Thomas H. Poole, against Amasa P. Peake. Those allegations of the information that, in

the view of the majority of the court, are material and controlling, are to the effect that on January 7, 1907, E. Y. Sarles, then Governor of the state of North Dakota, appointed the relator to the office of Adjutant General of said state, and issued to him a commission wherein he was designated as Adjutant General of the state of North Dakota with the rank of brigadier general; that relator accepted said appointment and commission, and immediately thereafter, on the same day, qualified by taking the oath of office and giving the bond required by law, and at all times since has acted as the Adjutant General of the state of North Dakota, and has not been removed from such office by the sentence or judgment of a court martial.

The information then sets out, at length, certain orders made on January 7, 1909, by John Burke, the successor in office, as Governor of North Dakota, of E. Y. Sarles, by whom relator's appointment was made. The evident purpose and intent of these orders was to relieve relator from further service as Adjutant General, and from further active duty as an officer of the state militia, and to place him on the retired list of the North Dakota National Guard. Relator, so the information recites, protested against the authority of the Governor to make these orders, and refused to obey any of them or in any manner to recognize the validity thereof. Thereupon, on January 12, 1909, Governor Burke issued to the respondent, Amasa P. Peake, a commission as Adjutant General of the state of North Dakota, with the rank of brigadier general, such appointment to date from January 7, 1909; and said Peake claiming the right, pursuant to such appointment and commission, to exercise the functions and powers of the office of Adjutant General, has intruded into said office and is interfering with and to a great extent preventing relator from properly discharging the duties of said office, to the great detriment of the public service, the disturbance of peace and good order, and the great prejudice of military discipline.

Relator's information, with the consent of the Attorney General that he might initiate the proceeding in the name of the state, was filed in this court, and a writ issued and directed to the respondent, Peake, requiring him to appear before this court and answer the information and make full disclosure of his right to intrude into and exercise the powers and duties of Adjutant General of this state and to exclude the relator therefrom.

In response to the mandate of the writ, respondent appeared and presented an answer in which, at considerable length, he traverses some parts of relator's information and admits others. He alleges many facts in explanation and justification of the course of Governor Burke in making the orders dated January 7, 1909, but the only part of respondent's return that bears with material force on the points controlling the decision of the case are the allegations to the effect that on the 12th day of January, 1909, Governor Burke, pursuant to and by virtue of sections 1720 and 1721, Rev. Codes 1905, appointed and commissioned the respondent as Adjutant General of North Dakota for a term of two years, ending January 7, 1911; and that, "pursuant to the said appointment and commission, respondent accepted said appointment and commission, and has filed his bond and in all other respects qualified in the manner and form prescribed by law, and has entered upon and assumed the duties of said office by virtue of said appointment and commission, and now is the duly appointed, commissioned, qualified and acting Adjutant General of North Dakota."

Upon the information as presented and the return of respondent thereto, a hearing before this court was had, in which relator and respondent appeared by counsel, and an elaborate argument of the issues arising in the proceeding was had. No denial of the allegation last quoted from respondent's return was made by relator. It was, in fact, admitted that appointments had been made by Governor Sarles and Governor Burke at the times and in the manner alleged in the moving papers; and that the only material issue presented by the proceedings is that of the right to the office of Adjutant General under the respective claims of the relator, Poole, and respondent, Peake.

The jurisdiction acquired under information in the nature of quo warranto has been most frequently exercised by the courts of the United States for the purpose of determining disputed questions of title to public office, and for deciding upon the proper person to hold the office and exercise its functions. High's Extraordinary Remedies, § 623. The point being, therefore, fairly and definitely presented in a proper proceeding, it remains only for this court to determine which of the contending parties is entitled to the office, and, if it then appears that a usurper has intruded into and is holding the office, to exclude him therefrom.

The Adjutant General's department in the state militia, to consist of one Adjutant General with the rank of brigadier general, was first provided for by the territorial law of 1887. Chapter 100, p. 258, Laws 1887. This statute was re-enacted by the State Legislature in 1891, and the right of appointment of the Adjutant General vested in the Governor. Chapter 86, p. 229, Laws of 1891. The term of office is not fixed or defined by this act. In accordance with a limitation of the state Constitution, the act provides that "all commissions shall be issued by the Governor and no commissioned officer shall be removed from office except by sentence of a court-martial."

The law of 1891, so far as it related to the Adjutant General's department, remained unaltered until 1905, when the legislative act was pased, entitled "An act providing that all appointments to the various departments of the National Guard of the state of North Dakota shall be made from officers of the field or line." This act, so far as its provisions are material or in point, is in words as follows: "Whenever a vacancy shall occur in any of the departments of the National Guard of the state of North Dakota, to wit: the Adjutant General's department, the supply department, the engineer and ordnance department, or Judge Advocate and Inspector General's department, an officer shall be appointed and promoted thereto from the officers of the field or line of the National Guard of the state of North Dakota. No appointment to any department office shall be for a longer period than two years." Chapter 136, p. 244, Laws 1905.

This act, if constitutional and valid, was in full force on January 7, 1907, at the time of relator's appointment by Governor Sarles to the office of Adjutant General. The Legislative Assembly is expressly authorized by the Constitution to provide the manner of appointment or election of all militia officers, and there seems to be no question but that this includes the right to fix a stated term of office. As the act of 1905 prescribes a maximum term of two years for appointments to the office of Adjutant General, relator's term expired on January 7, 1909, and on the appointment and qualification of the respondent, Peake, as his successor on January 12, 1909, his right to exercise the functions of the office fully terminated. Even assuming that relator was a "commissioned officer" within the meaning of section 192 of the state Constitution, a point which it is unnecessary in our view of the case to decide,

the inhibition there set forth against removal from office can have no application to an officer who attempts to retain his office after the expiration of his term.

Relator strenuously contends, however, that that portion of chapter 136, p. 244, Laws 1905, which expresses a purpose to fix a term of office, is in conflict with section 61 of the state Constitution, in that the subject of term of office is not expressed in the title of the act, and is, therefore, invalid and void. If this contention is sound, it follows that there is no term fixed for the office of Adjutant General, and that the decision of this case depends upon other and different considerations. On the other hand, if it appears upon examination that the act is not vulnerable to the constitutional objection urged against it, it is very clear that relator's official term expired before respondent asserted his claim to the office, and that it is not necessary to look further in order to reach a determination of the only issue arising out of this proceeding.

The question of the unconstitutionality of legislative acts by reason of the fact that the purpose or subject of the act is not expressed in the title has been before this court in a number of cases. In 1907 certain rules or principles govering the construction of section 61 of the state Constitution were formulated by this court in the case of Powers Elevator Company v. Pottner, 16 N. D. 359, 113 N. W. 703. In the later case of State v. Burr, 16 N. D. 581, 113 N. W. 705, these principles were further elaborated, and, as announced in these cases, have become a rule of construction on which the bar and parties generally in any manner affected by the operation of this constitutional provision are entitled to rely. A rule of construction so announced, and acted upon for such length of time that it may be said to be fairly settled, should not now be altered or lightly considered unless, in the view of the court as at present constituted, it is opposed to sound principle or better reason. These rules, while a decided innovation upon the principles of construction followed in the earlier cases decided by this court, proceed upon a broad and liberal policy, and are supported by the great mass of later authority. They should, therefore, be applied to the determination of the point presented by this proceeding.

Accordingly, the principles that will be followed as guides in the construction of section 61 of the state Constitution are as follows: (1) The law will not be declared unconstitutional on account of the defect pointed out in the title, unless it is clearly so. (2) The title

will be liberally construed, and not in a strict or technical manner. (3) If the provisions of the act are germane to the expressions of the title, the law will be upheld. (4) Conflict with the constitutional provision must be clear and palpable, and, in case of doubt as to whether the subject is expressed in the title, the law will be upheld.

These rules of construction apply to all legislative acts without distinction. Relator contends that the title to chapter 136, p. 244, Laws 1905, is a restrictive title, in that by its terms it limits appointment to the various departmental offices of the state militia to officers from the field and line, and that, when a purpose to limit or restrict is thus expressed in the title, the rule requiring liberal construction does not apply. It is true that when the evident purpose of a legislative act is restrictive its provisions are, as a rule, strictly construed. To extend this rule of construction from the body to the title of the act is, however, an apparent misapplication of a proper rule. For the purpose of determining the constitutionality of an act under section 61, no classification of titles has the countenance of any standard authority; and all titles, whether provisions of the act are general, specific, remedial, or restrictive, are alike to be liberally and not technically construed.

Under a broad and liberal construction, the words of the title, "appointments to the various departments of the National Guard of the state of North Dakota," express a purpose to prescribe a term of official service. The context indicates that the word "appointments" is used in the sense of designation to or selection for public office. With this signification the word is used not only as meaning the office or service to which one is appointed, but "as denoting the right or privilege conferred by an appointment." Bouvier's Law Dict. As the very essence of the right and privilege conferred by an appointment to public office consists in its duration, or, in other words, its term or tenure, it follows that the subject of term of office is fairly included in a broad signification of the word "appointment." A person reading a title in which the words, "appointment to public office," are used, will be apprised of and will naturally look for provisions of the act defining and regulating the term of office.

Further than this, the subject, term of office, is not, in any sense, foreign to or independent of the purpose expressed by the title of the act. On the other hand, the subjects, appointment and term,

when both considered in connection with public office, are so intimately related that the mind automatically reverts from one to the other. Therefore, those provisions of the act having reference to the term of office, whether or not arising by necessary implication from the expressions of the title, are so closely related or germane to it as to fall within the third principle of our rule of construction.

The title should be construed in the light of the evident object and purpose of the act. Any provision of the act which operates to further the general purpose expressed in the title will be held to be germane to it. There is an apparent general purpose throughout this act to limit the extent of the Governor's right of appointment to the departmental offices of the state militia. Prior to the passage of this act, he had full power of appointment, and might select his appointees from any department of the North Dakota National Guard; and the term of office was indefinite, and might extend over a period of many years. By the terms of the act, his range of selection is restricted to officers of the field and line, and, in furtherance of the same general purpose, it is provided that no appointment to any departmental office shall be for a longer period than two years. If the act, instead of being divided into two or three sections, had been expressed in a single paragraph, with section 2 attached as a proviso, in the words, "provided, however, that no appointment to any departmental office shall be for a longer period than two years," it is improbable that any serious question would be raised that the subject of term of office is not germane to the expressions of the title. The provision of section 2 of the act would then appear in its true relation to the other parts; that is, as a further limitation upon the Governor's power of appointment. Yet the meaning of section 2 is unaltered, and its legal effect wholly unchanged, by attaching it as a proviso to section 1 in the construction suggested.

The object and purpose of a provision such as that contained in section 61, art. 2, of our Constitution, is to advise the Legislature and public of the substance of proposed laws in advance of their passage, and thus prevent surprise, fraud, and the enactment of ill-considered legislation such as might result from grouping incongruous, foreign, and independent matters under one title. The purpose of such a provision is salutary; but we agree that that section of chapter 136, Laws 1905, prescribing a term of office, is

not violative of or in palpable conflict with the terms or purpose of the provision. It is sufficient if the title, either by express words or by necessary or reasonable implication from the meaning of its terms, includes the subject and purposes of the act, and this, under the rule of construction adopted for our guidance, we believe it does. That such construction is not forced, strained, or in any sense peculiar to this court appears by reference to the following citations: State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765; Boyle v. Vanderhoof, 45 Minn. 31, 47 N. W. 396; Gaines v. Williams, 146 Ill. 450, 34 N. E. 934; Diana Shooting Club v. Lamoreaux, 114 Wis, 44, 89 N. W. 880, 91 Am. St. Rep. 898.

As it appears upon a full showing that the respondent, Amasa P. Peake, is not only entitled to the office of Adjutant General, but is in full possession thereof, an order will be made denying the application of relator for a writ of quo warranto excluding respondent therefrom.

Writ denied.

CARMODY, J. concurs.

SPALDING, J. (concurring). While I concur with my associates, Judges ELLSWORTH and CARMODY, in holding the second section of chapter 136, p. 244, Laws 1905, not invalidated by any defect in the title of such act, I am of the opinion that other grounds should be given for denying the writ.

It is a well-established rule that courts will not pass upon the constitutionality of a statute when not necessary to the decision of the question under consideration. If my view of the law is correct, there is ample ground for denying the writ for other reasons than those given by my associates, and I shall as briefly as possible state such grounds and my views regarding the same.

Section 192 of the Constitution reads: "The commissioned officers of the militia shall be commisisoned by the Governor, and no commisisoned officer shall be removed from office except by sentence of court-martial pursuant to law." Our Constitution, including this section, was adopted and has been in force since 1889. In 1866 Congress enacted a law providing that: "No officer in the military or naval service shall, in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." Act July 13, 1866, c. 176,

§ 5, 14 Stat. 92. In my opinion there is no doubt that the convention which framed the Constitution of this state copied section 192 from the federal statute referred to, which had then been construed by the Supreme Court of the United States. It is to be presumed that in doing so the convention adopted the construction placed upon the statute by that court. But even if adopted in ignorance of that construction, or in disregard of it, it should still have very great weight with this court in determining the effect of section 192.

The statute in question was before the Supreme Court of the United States in 1881, and that court, by unanimous opinion announced by Judge Harlan, held that the appointing power still retained the right and power to remove a post chaplain in the army of the United States, and that the only effect of the statute quoted was to change the power of removal, which prior to its enactment had been exercised by the President alone, to the President and the Senate, and that it was not intended to abrogate the well-established and uniform rule that the power to remove is incident to the power to appoint. One Gilmore had been appointed by the President to the office held by Blake as post chaplain, and the appointment confirmed by the Senate, thus superseding Blake, and it was held that the latter ceased to be an officer in the army from and after the date at which that appointment took effect. This case was followed by Keyes v. United States, 109, U. S. 336, 3 Sup. Ct. 202, 27 L. Ed. 954, wherein it was held that the appointment, by and with the advice and consent of the Senate, of one Goldman in the place of Keyes, as second lieutenant in the army, was not prohibited by the statute referred to, and that it did not restrict the power of the President, by and with the advice and consent of the Senate—in other words, the appointing power—to displace officers of the army and navy by the appointment of others in their places. The latter decision was rendered in 1883. These two cases have been recognized as authorities on this question by that high tribunal repeatedly since 1880. The same construction of the statute was followed in Crenshaw v. United States, 134 U. S. 99, 10 Sup. Ct. 431, 33 L. Ed. 825. wherein it was held that an officer of the navy appointed for a definite term, or during good behavior, has no vested interest or contract right of which Congress cannot deprive him; that an officer, whatever the form of the statute, does not hold by contract, but enjoys a privilege revocable by the sovereignty at will. And

in Mullan v. United States, 140 U. S. 240, 11 Sup. Ct. 788, 35 L. Ed. 489, it was held that, notwithstanding the same statute, the President, with the advice and consent of the Senate, could supersede an officer in the military or naval service by the appointment of some one in his place. The office under consideration in that case was commander in the United States navy. These authorities were followed in Quackenbush v. United States, 177 U. S. 20, 20 Sup. Ct. 536, 44 L. Ed. 654, and it is held with practical uniformity that it requires the plainest language in the statute or the Constitution to fix a life tenure of office.

We have in this country no orders of nobility, and life tenure is repugnant to the spirit of our institutions. It matters not whether the office is civil or military, and no construction should be given section 192 of the Constitution which will effect a life tenure in any office, if it can be avoided on any reasonable grounds. It is conceded that the Legislature may limit the term of the office of Adjutant General, but would not the Legislature, in doing so, be providing for the removal of any incumbent quite as effectively as I contend can now be done by the Governor, who in this state is the sole appointing power? If section 192 is intended to be universal in its application, it must apply with as great force to the Legislature, which has no part of the appointing power incident to this office, as it does to the Governor. Is it not much more reasonable to assume that the section referred to was intended to prohibit only the removal of such officers by any power outside the appointing power, namely, by the Legislature or by the courts, than to contend that by the terms of the Constitution a departure was intended, and that a very radical one, from the whole tenor of our system of government and the spirit of republican institutions?

The Supreme Court of the United States has passed upon many analogous questions. In Shurtleff v. United States, 189 U. S. 311 23 Sup. Ct. 535, 47 L. Ed. 828, it made some observations pertinent to this subject. A federal statute provided for the appointment by the President, by and with the advice and consent of the Senate, of general appraisers of merchandise, and that they could be removed from office for certain causes. President McKinley removed one of the appraisers without assigning any cause, and without notice, as required by the statute. In holding that the President had this power of removal, the Supreme Court said: "It cannot

be doubted that, in the absence of constitutional or statutory provision, the President can, by virtue of his general power of appointment, remove an officer, even though appointed by and with the advice and consent of the Senate." Ex parte Hennen, 13 Pet. 230, 10 L. Ed. 138; Parsons v. United States, 167 U. S. 324, 17 Sup. Ct. 880, 42 L. Ed. 185, and cases cited. To take away this power of removal, in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication. Congress had regarded the office as of sufficient importance to make it proper to fill it by an appointment to be made by the President and confirmed by the Senate. It has therefore classed it as appropriately coming under the direct supervision of the President, and to be administered by officers appointed by him (and confirmed by the Senate), with reference to his constitutional responsibility to see that the laws are faithfully executed. Artcle 2, § 3.

In Blake v. United States, 103 U. S. 227, 26 L. Ed. 462, there were two constructions that might have been placed upon the act there under consideration, determining the tenure by which army and naval officers hold their commissions in time of peace, and the construction was placed on the fifth section of the act of July 13, 1866, c. 176 (14 Stat. 92) which left with the President his power to remove an officer of the army or navy by the appointment of his successor, by and with the advice and consent of the senate. Although this question was regarded as not free from difficulty, it was held that there was no intention on the part of Congress to deny or restrict the power of the President, with the consent of the Senate, to displace army and naval officers in time of peace by the appointment of others in their places. This indicates the tendency of the court to require explicit language to that effect before holding the power of the President to have been taken away by an act of Congress. The right to remove would exist if the statute had not contained a word on the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by Constitution or statute. It requires plain language to take it away. Did Congress, by the use of language providing for removal for certain causes, thereby provide that the right could only be exercised in the specified causes? If so, see what a difference in the

tenure of office is effected as to this office from that existing generally in this country. The tenure of the judicial officers of the United States is provided for by the Constitution; but with that exception, no civil officer has ever held office by a life tenure since the foundation of the government. Even judges of the territorial courts may be removed by the President. McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693. To construe the statute as contended for by the appellant is to give an appraiser of merchandise the right to hold that office during life, or until he can be found guilty of some act specified in the statute. If this be true, a complete revolution in the tenure of office is effected, by implication, with regard to this particular office. We think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences.

Fed. St. § 796, reads as follows: "District attorneys shall be appointed for the term of four years, and their commissions shall cease and expire at the expiration of four years from their respective dates, and every district attorney entering upon his office shall be sworn to the faithful execution thereof." In May, 1893, President Cleveland issued an order removing from office the attorney of the United States for the Northern and Middle Districts of Alabama, who had then served less than four years. That officer refused to surrender that office or the records thereof, or to recognize the power of the President to remove during the term of four years; and in Parsons v. United States, 167 U. S. 324, 17 Sup. Ct. 880, 42 L. Ed. 185, the Supreme Court, through Mr. Justice Peckham, passed upon the power of the President to remove, in the face of such statute and without assigning any cause, a district attorney from office before he had served four years, and held that he possessed such power.

The Militia Code makes the Adjutant General a member of the militia. I find no provision for the appointment of any military officer outside of the militia, hence I cannot agree with the very ingenious opinion of my Brother FISK, but I can see that there are many reasons of great force why the Adjutant General should not have a life tenure which do not apply with equal weight to many other officers of the National Guard, and why the Governor should

have the power to remove him or to supersede him at pleasure. The duties of the Adjutant General are peculiar, and he in a sense bears a confidential relation to the Commander in Chief. It is through him that all orders are promulgated relating to the military service. He is presumed to be familiar with military law, usages, and regulations. Of necessity, the Governor must rely largely upon him for advice and support in the performance of his duty as Commander in Chief. It is essential that the incumbent be one who is willing to, and who does, act in harmony with the policies of his superior. Great confusion and disorganization would necessarily follow a lack of harmony between the two. With the power of appointment at all times in the hands of the executive, he is assured of the service of an officer upon whom he can rely. Without such power there is no such safeguard. The Commander in Chief may adopt policies not in conformity with the judgment of the Adjutant General. The latter may evade or disobey the requirements of his superior. He may do so in a manner which does not render him subject to court-martial, yet his acts, or his failure to act, may be wholly subversive of discipline in the service, and the Governor, on the theory of the relator, have no remedy and be compelled to submit to the dictates of a subordinate. The Legislature has recognized this situation by providing that the Governor shall have full power to appoint the Adjutant General. It is clear that it was meant by this that it should be unnecessary for the Senate to confirm the appointment, and that he can make the appointment whenever, in his judgment, the necessity or the good of the service requires it; and the power to make the appointment, as before indicated, carries with it, and cannot be fully exercised without, the power to supercede the incumbent. In addition to the authorities above indicated, some of which touch upon this point, see Keenan v. Perry, 24 Tex. 253; Throop on Public Officers, § 304; Mechem on Public Officers, § 445; Lewis et al. v. Lewelling, 53 Kan. 201, 36 Pac. 351, 23 L. R. A. 510.

These reasons seem to me sufficient to warrant this court in denying the writ without reference to the sufficiency of the title of the chapter cited. But in addition to these, I find another that seems worthy of consideration. If, as conceded by relator, it is competent for the Legislature to fix the term of office, and by so doing remove an incumbent, it must certainly be competent for the Governor to do so, he being the appointing power, rather than the

Legislature. Either of these contentions may be sustained by considering section 192 as though reading: "No commissioned officer shall be removed from office during his term except by sentence of court-martial pursuant to law." I am persuaded that, in the light of circumstances, usage, and all the other considerations referred to, it may bear such construction, and that, the Legislature not having fixed a definite term to the office, the incumbent holds at the pleasure of the appointing power. This construction, in the absence of legislative provision, in effect gives the Governor the power to fix the tenure of the office quite as fully and effectively as the Legislature may by an act providing a definite term. It also gives the effect to section 192 which may have been intended by its framers, namely, that if the Legislature does fix a term, and, in the absence of any act of the Governor superseding him when no term has been fixed by the Legislature, he may be removed from office in no other manner than by sentence of court-martial. In my judgment this latter construction is more consonant with the spirit of our institutions, with history, the usage of the service, the necessities which may often arrive, and with other considerations which apply more especially to this office than any other, and at the same time harmonizes with the construction of the federal statute given it by the federal authorities. Neither does it work any hardship to the officer, and promotes the efficiency of the service, and enables the Commander in Chief to maintain a staff in harmony with the policy of his administration of the military department.

FISK, J. (concurring specially). I concur in the conclusion that the writ should be denied, but am unable to assent to the reasons given by my associates for so holding, and will briefly state my views.

I am firmly convinced that sections 2 and 3, c. 136, p. 244, Laws 1905, are unconstitutional and void because not expressed in the title of the act. The title of the act is as follows: "An act providing that all appointments to the various departments of the National Guard of the state of North Dakota shall be made from officers of the field or line." By its restrictive language the subject-matter embraced in sections 2 and 3 cannot, under the most liberal construction, be said to be expressed in such title. Section 2 of the act prescribes a maximum period of two years for which appointments may be made, and section 3 provides for placing the

officers mentioned in section 1 upon the retired list at the end of their term of duty. These subjects are entirely foreign to the purpose of the act as expressed in the title, which is merely to restrict appointments to these various departments so that no one may be appointed except an officer of the field or line; in other words, it deals and purports to deal only with the question as to who may fill the various departments, and, as I construe the various decisions of this and other courts cited by my Brother ELLSWORTH, they come far short of sustaining his views.

The sections aforesaid being unconstitutional, there is no law prescribing the term of Adjutant General; but it by no means follows from this that his term is for life. On the contrary, it is clear to my mind, that his term of service is merely during the pleasure of the appointing power. There is good reason why this should be so, for the Adjutant General is a staff officer; he is a member of the official family of the Commander in Chief, and is referred to frequently as, and is by law in some states, Chief of Staff. He is, in a sense, the military secretary to the Commander in Chief. Under section 1719, Rev. Codes 1905, the Governor, as Commander in Chief, is given "full power to appoint the Adjutant General" and other departmental officers, and I think this fairly implies that he may do so at any time or at pleasure. If it was the intention that he should be empowered to make such appointments only when, by reason of removal through court-martial or by death a vacancy is created, different language would have been employed. It was no doubt the legislative understanding that appointments to these various departments were left entirely with the Governor as Commander in Chief. In other words, that he should have an absolutely free hand to remove and appoint at will any of such officers, as, in his judgment, the good of the militia demanded. This is in full accord with the general and well-established rule that the appointing power in the absence of express statute to the contrary fixing the term, may appoint and reappoint at will.

It is contended, however, by relator's counsel, in effect, that this general rule can have no application because of the provisions of section 192 of our state Constitution that "no commissioned officer shall be removed from office except by sentence of court-martial, pursuant to law." In my opinion, the fallacy of this argument consists in the unwarranted assumption that the persons appointed to these various departments become by virtue of such appointments "commissioned officers" within the meaning of such

constitutional provisions, and hence can be removed or retired only by court-martial. It is clear that such could not have been the intention of the framers of the Constitution. To attribute to them such purpose is to attribute to them a purpose to depart from the almost universally recognized custom, usage, and regulations pertaining to the militia in this country. By statute in Alabama, Arizona, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Montana, Missouri, Nebraska, Nevada, New York, North Carolina, Oregon, Utah and West Virginia, the Adjutant General is appointed by the Governor as Commander in Chief, and is a member of his staff, and holds his office during the pleasure of the Commander in Chief. In many of said states he is Chief of Staff. In some of them it is expressly provided that he cannot hold his office longer than the term of the Governor as Commander in Chief, or until his successor is appointed and qualified. In Arkansas the office of Adjutant General was abolished by act of March 11, 1879, and the duties formerly belonging to such office are given to the Governor's private secretary. In Florida he is Chief of Staff, and his term is four years, but he may be removed for certain causes. In Indiana he is a staff officer, and by statute it is provided that "no commissioned officer, except staff officer, shall be dismissed from the service except by the sentence of a legally constituted court-martial." In Michigan he is made a staff officer, and is appointed by the Governor, by and with the advice and consent of the Senate, for the period of two years, or until his successor is appointed and qualified. In Minnesota he is a member of the Governor's staff, and his term is not prescribed. In New Jersey he is appointed by the Governor, with the advice and consent of the Senate—no term fixed. In Rhode Island he is made Chief of Staff, and elected for a term of five years. In South Carolina he is a member of the Governor's staff, but elected by the people for the same term as other state officers are elected. In Texas he is a member of the Governor's staff, and is appointed by him as Commander in Chief, by and with the advice and consent of the Senate, if in session, for a term of two years. In Vermont he is elected by the General Assembly. In Washington he is elected by the field and line officers for a term of four years, and in Wisconsin he is made the chief of the Governor's staff, and no term is prescribed.

It will be seen that, if the contention of relator that his term continues for life or until removed by court-martial be sound, a most radical departure is made in North Dakota from the statutory regulations in the other states and territories. I cannot believe that the Constitution and laws of this state are susceptible of any such construction as that contended for by relator's counsel. Section 192, supra, has reference clearly to those officers of the militia only who belong to the field or line, or, in other words, who are known as field or line officers, and to whom commissions have been issued conferring a certain rank upon them, as, for instance, brigadier general, colonel, lieutenant colonel, major, or captain. These ranks are their offices to which they have been commissioned, and from which they cannot be removed except by court-martial. The Adjutant General, as such, is not a commissioned officer within the meaning of those words as used in the Constitution. He is merely a staff officer. It is true he must me selected, appointed, or detailed from the officers of the field or line, i. e., from the commissioned officers. It is true that the person who is detailed or appointed as Adjutant General is, while in such department, clothed with the rank of brigadier general, but this does not mean that the Adjutant General, as such, is a commissioned officer. Can it be possible that the framers of the Constitution intended that staff officers should have a life tenure? In other words, that each Governor cannot, as Commander in Chief, select his own staff officers? Most clearly not. Staff officers are appointed or detailed for duty by the commanding officer, and it is, to my mind, perfectly apparent that, when there is a change in the commanding officer, the new commanding officer may select and detail his staff officers. Section 1747, Rev. Codes 1905, provides: "Commanding officers of regiments or battalions shall detail their staff officers from the officers or enlisted men of their command, and appoint the non-commissioned officers of the organization by warrants. Staff officers so detailed (not commissioned) will be dropped from the company rolls and the vacancy filled by promotion or appointment." A commissioned officer who has been appointed or detailed to one of these departments may be removed or retired therefrom at the pleasure of the Commander in Chief, the same as such an officer may be removed or retired from his command; and such removal or retirement is not a removal from office within the meaning of section 192 of the Constitution aforesaid. He retains his rank on

which he is retired, and this is the office to which he is commissioned, and from which he cannot be removed except by court-martial.

As said by the New Jersey court in Grove v. Mott, 46 N. J. Law, 328, 50 Am. Rep. 424: "The argument that the section of the act under which Major General Mott placed the officers of the disbanded company on the retired list is in conflict with the Constitution of the state is fallacious. It is contended that it violates article 7, § 1, par. 6, which forbids the removal from office of commissioned officers of the militia, except through sentence of a court-martial. The answer is that the officers of the disbanded company have not been removed from office. The framers of the national guard act knew the difference between taking away an officer's commission and placing him on the retired list. By placing Capt. Grove and the other officers of the company on the retired list, the division commander kept within constitutional requirement, and did not only what the Constitution permitted and the law authorized, but pursued a course sanctioned by long military usage." At another place in the opinion it is said: "The officers placed on the retired list still hold their commissions, and may be assigned to military duty by their superior officer. They are still carried on the register, hold the rank upon which they were retired, and are entitled to wear the uniform of said rank. In fact, none of their personal rights or property interests have been invaded." In this connection see section 1797, Rev. Codes 1905.

In People v. Ewen, 17 How. Prac. (N. Y.) 375, the same doctrine is announced. The court there held that an order disbanding or consolidating corps does not deprive an officer belonging to a disbanded company of his commission, nor take from him any privilege contrary to the Constitution. We quote: "Section 5 provides that 'no commissioned officer shall be removed from office unless by * * * the decision of a court-martial pursuant to law.' By the consolidation of the regiments in question the relator is not deprived of office. * * * To be sure, the relator will become a supernumerary lieutenant-colonel, but that only deprives him of present command; it does not deprive him of office; and this is all that is prohibited by the Constitution." To the same effect, see People v. Hill, 126 N. Y. 497, 27 N.E. 789; State v. Jelks, 138 Ala. 115, 35 South, 60, and 1 Winthrop Military Law, p. 607.

To make my views clearly understood, section 192 should receive the same construction as though it read, "No line or field officer of the grade of brigadier-general, colonel, lieutenant-colonel, major, captain, etc. (being the commissioned officers), shall be deprived of the title or grade to which he has been commissioned, except by court-martial, pursuant to law."

If the foregoing views are sound, and I think they are, then the Governor, as Commander in Chief, had a legal right to remove the relator at will and appoint another person in his place. This was done, and hence relator has no legal claim to the office, and the writ should be denied.

MORGAN, C. J. (dissenting). I am unable to agree with the conclusion reached by my associates that the writ should not be issued in this case. I agree with Judge FISK that sections 2 and 3 of chapter 136, page 244, Laws of 1905, are unconstitutional as not in compliance with the provisions of section 61 of the Constitution. The title of that act does not relate in a general way to appointments to offices, and it expresses only from what source particular appointments are to be made. The title does not express anything in regard to the tenure of the appointments, nor is the tenure of such appointments germane to the restricted subject expressed in the title. No one could infer from the reading of this title that the tenure of the appointments mentioned therein was limited in the body of the act, nor that it provides for the promotion or retirement of officers of the militia or National Guard.

The ground upon which I am forced to disagree with my associates is that section 192 of the Constitution is not given effect by them, nor do they suggest any sound reason for sustaining their conclusion that it has no application. My opinion is that section 192 applies to all commissioned officers of the militia or national guard of this state, and that the relator is a commissioned officer thereof, and holds that office during good behavior, or until removed by court-martial, or until he resigns, or the Legislature, by a valid act, limits the term of his incumbency of office. If it is against the principles of republican governments to tolerate life tenures in office, civil or military, the Legislature is the proper body to remedy or change what has been an accepted construction of the law and Constitution as to the tenure of the office, to wit, that it is to be held during good behavior. In other words, this office is held under the same tenure that all commissioned officers of the militia

of a strictly military character are held. I have no quarrel with the doctrine announced in some of the concurring opinions of my associates that appointees to offices not having a fixed tenure are removable at the pleasure of the Governor or Commander in Chief. But I do most emphatically disagree with the doctrine that such is the case as to officers included within section 192 of the Constitution, which says that: "The commissioned officers of the militia shall be commissioned by the Governor, and no commissioned officer shall be removed from office except by sentence of court-martial, pursuant to law." I agree with the principles laid down in the cases cited in the concurring opinions (Grove v. Mott, 46 N. J. Law, 328, 50 Am. Rep. 424; People v. Hill, 126 N. Y. 497, 27 N. E. 789; People v. Ewen, 17 How. Prac. [N. Y.] 375), and other cases of similar import. But in my opinion they have no pertinency here, and some of them are expressly based on local statutes. These cases simply hold that no removals were made of the officers complaining, but that they were removed from command merely. In other words, they became supernumeraries as defined by the New York statute, and had no command thereafter. People v. Scrugham, 25 Barb. 216. If it could be shown in this case that the relator has not been removed from the office of Adjutant General of this state, I would concur in denying the use of the writ of quo warranto. But I do not think it is any answer to the contention that he has not been removed to say that he still holds some other military office or title. The fallacy in the contention that he has not been removed lies in attempting to maintain that the Adjutant General is not a commissioned officer. The statute, both state and federal, provides for the appointment of an Adjutant General. The state and federal statutes provide what his duties shall be in reference to the state militia or national guard. We thus have an appointee whose appointment is made obligatory by state and federal law, and his duties are laid down unequivocally by state and federal law. These duties pertain almost exclusively to the state militia and national guard. The state law which provides for the organization of the state militia makes him a component part of the state militia, and provides for his salary and duties. The Governor of the state must appoint some one to that office, and the Constitution provides that all officers of the militia shall be commissioned by the Governor, and the relator was commissioned by the Governor of the state. Under these circumstances, I do not understand how it can be suc-

cessfully maintained that he is not a commissioned officer of the militia within the meaning of section 192. An office is generally defined as a public charge or employment through which the incumbent discharges a part of the functions of government for the benefit of the public. I fail to find any statute or practice or custom in this state authorizing or providing that the Adjutant General shall be a staff officer of the Governor or his military secretary. As I understand it, the personal staff officers of the Governor in this state are not deemed to be members or parts of the militia, and are not included within section 1718, which provides what the National Guard of the state shall be composed of. Under the regulations or laws governing the regular army, it is asserted and undoubtedly true that adjutants of regiments or adjutants general of brigades are, or may be, staff officers of the commanding officers, being detailed from the various officers of the regiment or brigade by orders and not commissioned as such. But it does not seem to me that this fact has anything to do with the question under consideration in this case as to the commissioning and tenure of office of the Adjutant General. The contention is made that section 1774, Rev. Codes 1905, is conclusive upon the question as to whether the Adjutant General is a commissioned officer or is merely a detailed staff officer of the Governor. I do not understand that said section does anything more than to provide the compensation for the officers and enlisted men when called out as a regiment or brigade for active service. This section does not mention an Adjutant General, as his compensation is fixed by section 1737 of the Code. I think the words "staff officers" as used in section 1774 refer entirely to the staff officers of the commanding officers of the regiment or brigade. The words "staff officer" as used in that section have the same meaning and refer to the same officers as the officers referred to under section 1747 of the same Code, and in neither section do they refer to the Governor's staff. As a matter of fact, the duties of the Adjutant General in this state are almost exclusively independent of the Governor, except that the Governor is the superior officer as Commander in Chief. I do not find any reasonable basis for the contention that the relator has not been removed from the office of Adjutant General, but has simply been relieved from the duties. The basis of the contention that he has not been removed is that the office and duties of Adjutant General are simply incidental to some other office, and that he is detailed from such other office

to perform the duties of Adjutant General. This means that the relator performed the duties of Adjutant General by virtue of being brigadier general or some other commissioned officer. I do not so understand the statute relating to the appointment and duties of Adjutant General. The relator was not appointed to the military office of brigadier general, nor has he ever held that office so far as the record shows. The office to which he was appointed or commissioned is that of Adjutant General, and that commission or appointment carried with it, as a matter of law, the rank of brigadier general. He had no right and could not perform any duties by virtue of the rank of brigadier general thus conferred upon him. To say that he has not been removed from this office when another commission has been made to it, and the new appointee is performing the duties of the office is an assertion not warranted by the facts, it seems to me. The office which the relator held in the militia prior to his commission to that of Adjutant General has now been filled by another, and the relator cannot be returned to that office. When an officer is detailed to perform the duties of another office he retains his old office and title, and when the detail is at an end he returns to his former office. The cases cited to the effect that the office remains in the incumbent although the command is taken away from him are not in point, and they seem to have been based on local statutes. It will not be denied by me that the Commander in Chief may, under certain circumstances, detail some other officer from the militia to perform the duties of Adjutant General. It is sufficient for the purposes of this case to say that the appointment of the relator was not such a detail, but was an unconditional appointment under a commission. Prior to the enactment of chapter 136, p. 244, of the Laws of 1905, there was no provision of law in this state requiring Adjutants General to be appointed from the National Guard. In the case of such an appointment, can it be contended that the Adjutant General could be removed summarily without court-martial by the Governor? If so, what position or office or title in the militia would he retain thereafter, on the theory that his appointment was simply a detail? It is contended that under section 1719, Rev. Codes 1905, providing that the Governor has "full power to appoint the Adjutant General," the power is conferred upon the Governor to remove an Adjutant General at his will. If it conferred that power upon the Governor, it is not expressed in that section. To say that

this section confers the power of removal is adding materially to its provisions. The power of removal should not be implied, but should be directly authorized, and it is not contended that any statute in this state expressly authorizes removals in such case as the one now under consideration. It is worthy of notice that section 192 of the Constitution has always been deemed to include the office of Adjutant General in this state, and this office has always been held under the same tenure as the strictly military offices of the regiment, from that of colonel to second lieutenant. No appointments to the office have been made except to fill vacancies. It has been conceded with practical unanimity that the tenure of the office has been during good behavior until the enactment of chapter 136, p. 244, of the Laws of 1905. I think the fact of such construction of the provisions of the law and Constitution since the organization of the militia in this state is entitled to weight as showing that the tenure is not limited in the absence of statute. If the Adjutant General holds during the pleasure of the Governor, why was it deemed necessary to pass chapter 136, p. 244, of the Laws of 1905? I think more weight should be attached to the construction given by the Legislature of 1905 and by the state militia officers and Governors since the organization of the militia to the constitutional and statutory provisions in regard to the office of Adjutant General and the tenure thereof than to the fact that the laws and Constitutions of some other states limit the tenure of that office. The question as to what the tenure of that office is, is to be determined by this court as a question of law, and not as a question of policy. Whether it is a good or a bad policy to limit the tenure of the office of Adjutant General is a question for the Legislature of this state, and what the people or Legislatures of other states consider to be sound policy is not a matter for this court, and should have no bearing as to what construction is to be given to these constitutional and statutory provisions. Tenure of office during good behavior seems to be the accepted policy in this state, and everywhere, so far as I know, as to the commissioned officers of the militia. I think that there is no danger of injury to the National Guard through the tenure of office during good behavior of the Adjutant General, subject to court-martial for violation of duty, than through uncurbed power vested in a Governor or Commander in Chief. It seems to be conceded by all parties that the Legislature has full constitutional authority to enact a law

limiting the tenure of Adjutant General's office. Such authority is granted by section 191 of the Constitution, which is as follows: "All militia officers shall be appointed or elected in such manner as the Legislative Assembly shall provide;" and there is no basis for the contention that the enactment of such a law would be repugnant to section 192. That section relates only to the powers of the Governor. Section 191 is an express authorization for the Legislature to provide for the appointment or election of all militia officers, and this language is broad enough to authorize a law relating to removals by the appointment of successors to all officers of the militia, where the tenure is not fixed. It is by virtue of section 189 of the Constitution that section 1731, Rev. Codes 1905, relating to disbandment and consolidation of companies, was enacted. People v. Hill, supra. There is no similar section pertaining to the removal of Adjutants General. Hence section 192 of the Constitution is controlling against the power of the Governor to peremptorily remove him. In section 1719, Rev. Codes 1905, the same language is used in reference to the appointment of Adjutants General as is used in reference to the appointment of brigadier generals, and section 1720 of the Code provides that all commissions shall be issued by the Governor, and that no commissioned officer shall be removed except by sentence of court-martial. It will not be contended that a brigadier general could be summarily removed by the Governor. If he could not remove a brigadier general, why should a different rule apply to an Adjutant General, who is an officer of the militia by state and federal law, and appointed and commissioned by the Governor the same as a Brigadier Genreal would have to be? It is claimed that Blake v. U. S., 103 U. S. 462, 26 L. Ed. 462, is decisive of the question that an Adjutant General may be removed without court-martial where the tenure of his office is not fixed by law, but I do not so understand that decision. The section of the United States statute similar to our section 192 of the Constitution was under consideration, and it was held by that court, in view of the statutes which were repealed at the same time that the section under consideration was enacted, and in view of the political conditions and reasons that induced the enactment of that statute, it referred to removals by the President alone, and not to removals by the President with the consent and concurrence of the Senate. The language of the section construed in that case was held susceptible of two constructions, and

for reasons given in the opinion the court held that the intention of Congress was to prevent removals by the President alone. It is not an authority on the question whether the appointing power can remove an officer of the militia of this state not holding under a fixed tenure in violation of section 192 of the Constitution. In that case, the intention of Congress was gathered from past history and prevailing conditions. In this case the language of the statute and Constitution is not equivocal, and can be construed without resort to historical events, and when past history is considered it shows that the construction contended for by the respondent has been repudiated.

For these reasons I am of the opinion that the writ of quo warranto should be issued, and I therefore respectfully dissent from all the conclusions reached by my Brethren.

(120 N. W. 47.)

THE STATE OF NORTH DAKOTA, EX REL. T. F. McCUE, ATTORNEY GENERAL, v. ARTHUR G. LEWIS, AS AUDITOR OF CASS COUNTY, STATE OF NORTH DAKOTA.

Opinion filed January 29, 1909.

Asylums — Maintenance — County Liability.

1. By chapter 23, page 18, Laws 1907, the legislature appropriated the total sum of $86,600 for the purpose, as stated, "of paying the current and contingent expenses and for permanent improvements of the Institution for the Feeble Minded at Grafton for the period beginning March 1, 1907, and ending March 1, 1909." Out of such sum but $11,500 was appropriated for maintenance of said institution. By chapter 237, page 374, Laws 1907, "the person legally responsible for the support of any person * * * admitted to said institution shall pay semi-annually to * * * said institution the sum of fifty dollars; but if the person so liable be unable to pay such sum * * * it is hereby made a charge upon the county." Such act requires the county auditor, when furnished with certain proof therein required, to transmit to the superintendent of such institution his warrant as such auditor for the sum of $50 every six months, such payments, or so much thereof as may be necessary, to be expended in providing suitable clothing for the inmate, any excess remaining to be covered into the state treasury at stated times and credited to the fund for the maintenance of the institution. *Held*, that said acts are in pari materia, and, when construed together, they clearly disclose the legislative intent that the appropriation of

$11,500 for maintenance of such institution should be supplemented to the extent of payments required to be made under the provisions of chapter 237 aforesaid.

Same.

2. The fact that such institution has sufficient money in its maintenance fund derived from the appropriation and voluntary payments made pursuant to the provisions of chapter 237, page 374, Laws 1907, by other counties and by persons legally liable for the support of inmates, is no defense in a proceeding by mandamus to compel the county auditor of C. county to transmit his warrant to the superintendent of such institution, as required by chapter 237 aforesaid.

Same.

3. It is undoubtedly within the power of the legislature to take charge of and provide for the indigent insane and feeble minded persons within its boundaries by general taxation, and to relieve the several counties from such burden except as they bear their proportion through such taxation. It is equally within the power of the legislature to require each county to maintain its own indigent persons, or to reimburse the state in whole or in part for so doing. The fact that the institution for the feeble-minded is a state institution in no manner restricts or limits the legislature in the exercise of such power. There is nothing in the provisions of section 174 of the constitution of this state which deprives the legislature of the exercise of such power.

Constitutional Law — Management of Fiscal Affairs of County.

4. The contentions that chapter 237 aforesaid is unconstitutional, as being violative of sections 69, 172, 174 and 186 of the state constitution, are not sustained.

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

Mandamus by the state, on the relation of T. F. McCue, Attorney General, against Arthur G. Lewis, as auditor of Cass county. Judgment for relator, and defendant appeals.

Affirmed.

Barnett & Richardson, for appellant.

Jeff M. Meyers, for respondent.

FISK, J. As stated by appellant's counsel: "The above-entitled action is a proceeding brought by the Attorney General of the state of North Dakota against the defendant, as county auditor of Cass county, asking for the issuance of a writ of mandamus directing said defendant to transmit to the superintendent of the Institution for the Feeble-Minded of Grafton, N. D., three warrants in the sum of $50 each, payable to said superintendent, by virtue of the

provisions of chapter 237, p. 374, of Laws 1907, and particularly section 1167, Rev. Codes 1905, as amended by said act. This section provides that, if the county judge of the county from which any indigent inmate is admitted shall certify that such inmate is unable to pay the sum of $50 semi-annually to the said institution, it is made the duty of the county auditor to transmit a county warrant for $50 semi-annually for each patient so situated upon presentation of the proper certificate of the superintendent from said institution. It is admitted that on July 1, 1907, there were three inmates in said institution which had been admitted to said institution from Cass county, and that said inmates are dependent upon the county for support and are indigent, and that the county judge of Cass county has duly certified to that effect in Exhibits A. B. and C. It is also admitted that proper certificates have been presented by the superintendent of the said institution to this defendant demanding that the defendant transmit his warrant under the terms of chapter 237 of the Laws of 1907 aforesaid, and that the defendant refused, and still does refuse, to so transmit his warrant. Thereupon the above-entitled proceeding was commenced seeking to compel this defendant to issue his warrant according to the provisions of section 1167, aforesaid. No question is raised in this proceeding as to the solvency of Cass county." The learned trial court awarded a peremptory writ as prayed for by the relator, from which decision this appeal was taken.

By chapter 23, p. 18, Laws 1907, the legislative assembly appropriated the sum of $86,600 for the purpose, as stated in the act, "of paying the current and contingent expenses and for permanent improvements of the Institution for the Feeble-Minded at Grafton, for the period beginning March 1, 1907, and ending March 1, 1909." The specific purposes for which such appropriation was made are enumerated in the act as follows:

For maintenance	$11,500
For employes' wages, including officers' salaries	24,000
For fuel and lights	9,000
For training school supplies and amusements	400
For incidental expenses	1,000
For drugs medicines, etc	500
For repairs	500
For plumbing	250
For beds and bedding	600

For furniture	600
For electrical supplies and repairs	100
For supplies for engine room	400
For laundry machinery and repairs	200
For paints and painting	750
For farm implements and vehicles	600
For new power house, including water tank and tower	15,000
For remodeling west wing	12,000
For fire apparatus and water connections	1,000
For farm house repairs	500
For granary and machine sheds	800
For stock	400
For improvement to grounds	500
For additional land	6,000
Total	$86,600

It is appellant's contention, among other things, that by such act the Legislature intended such appropriation to be sufficient, and that it in fact is sufficient, for all the needs of said institution, during the present fiscal term, for maintenance, including funds necessary to purchase clothing for the inmates. It will be seen that, by the provisions of the above act, the sum of but $11,500 was appropriated for maintenance. Just what the Legislature intended to include within the term "maintenance" is not clear, but it does appear that the same was not intended to cover employes' wages and salaries, fuel and lights, school supplies, incidental expenses, drugs and medicines, repairs, beds, and bedding, furniture, and the other items for which specific sums were appropriated. There being no specific appropriation for food and clothing of the inmates, it follows that the same was intended to be covered by the $11,500 item appropriated "for maintenance," and, without reviewing the testimony at length, suffice it to say that we are entirely convinced from the record that such appropriation is not sufficient to cover these items during the fiscal term. In fact we do not understand appellant's counsel to contend to the contrary, but they do contend that of the total amount appropriated for all funds there is a sufficient amount, and that the emergency board is empowered to increase the maintenance fund by transferring to such fund moneys belonging to other funds of said institution. This latter contention we will notice later.

When we examine chapter 237, Laws 1907, together with sections 6, 8, 9, c. 108, pp 143, 144, Laws 1903, which were amended by the said act of 1907, we are forced to the conclusion that the legislative intent was to supplement the appropriation for maintenance of said institution by requiring the payment of $100 per annum by the person legally responsible for the support of any inmate, and to make such payment a county charge in cases of indigent inmates. By the provisions of section 3 of chapter 237 aforesaid, it is provided that such payments shall be credited to the inmate for whom it shall have been received, "and so much thereof as may be necessary shall be expended in providing suitable clothing for such inmate, and, at the expiration of one year, such superintendent shall place the excess over the actual expense of providing such clothing to the credit of the state for the benefit and use of the maintenance fund of said institution, * * * and, in case of the death or removal of such person so admitted before the termination of the annual period for which such payment is made, the board of trustees shall reimburse pro rata the persons or counties so paying, respectively." Said act and chapter 23 aforesaid are in pari materia, and should be construed together, and, when thus construed, the legislative intent as above stated is well nigh conclusive. Chapter 23 was approved March 2, 1907, and Chapter 237, supra, was approved five days later, clearly showing that both bills must have been under consideration by the legislative assembly at the same time. We conclude, therefore, upon this branch of the case, that it was intended that any balance remaining out of the annual payments of $100 for the clothing of inmates should be covered into the state treasury and placed to the credit of the maintenance fund of such institution, and to this extent such maintenance fund appropriation should be supplemented. Consequently it could not have been, and was not, the legislative intent by the appropriation covered by chapter 23, aforesaid, to provide a "full and complete appropriation for the operation and maintenance of this institution," as argued by appellant's counsel.

But it is strenuously and ingeniously contended by them that, with the exception of a small deficit, there are sufficient moneys in the various funds appropriated as aforesaid to maintain and operate said institution for the remainder of the fiscal year without taking into consideration any moneys which have been received or are due from inmates or counties under the provisions of chapter

237 aforesaid, and the emergency board can transfer such funds to the maintenance fund. It is also urged by such counsel, as a reason why relator should not prevail, that the foregoing funds as supplemented by the voluntary payments made by inmates and certain counties under said act are amply sufficient for all the needs of such institution for the present fiscal period. Such contentions do not appeal to us with favor, and we deem them unsound on principle. If the act in question (chapter 237, Laws 1907) be constitutional, and we shall presently determine this question, we do not see why Cass county should escape liability under said act merely because the present needs of such institution are or may be sufficiently supplied through the action of the emergency board and the voluntary payments aforesaid. Counsel concede that, even with the aid of the emergency board, a deficit would arise unless the fund for maintenance is supplemented by payments from inmates and counties, which is a potent fact to be considered in arriving at the legislative purpose in the enactment of the statutes above mentioned. If the law which is sought to be enforced by this proceeding is a valid enactment, then this public institution ought not to be financially embarrassed, nor should it be required to rely upon the emergency board to enable it to obtain available funds for its maintenance.

A somewhat similar question to the one here involved arose in the state of Nebraska in the case of State ex rel. Attorney General v. Commissioners of Douglas County, 18 Neb. 601, 26 N. W. 378. The majority opinion in that case goes much farther than we are required to go in the case at bar in upholding respondent's contention. In the Nebraska case it was an agreed and stipulated fact that the amount of tax levied by the state was sufficient to maintain the hospital, including the payment of all the expense of board, etc., of all the patients, and hence it was wholly unnecessary for the maintenance of such institution that any further burdens should be imposed upon counties having patients in such institution under the provisions of the statute there in question. But, in the face of these conceded and stipulated facts, the majority of the court upheld the right to exact from the counties the payments required by the statute. We quote from the majority opinion as follows: "It must be borne in mind that the question is simply one of the power of the Legislature to impose the tax. All suggestions as to its expediency must be banished from the case. The

legislative department being one of the coordinate branches of the government of the state, cannot be controlled by the courts, so long as it acts within its jurisdiction, and the limitations of the Constitution. In fact, within those limits it is the supreme and controlling power of the state, and both the executive and judicial must yield a willing obedience to its mandates." Whether under the conceded facts in that case the majority or minority opinion is sound upon the proposition regarding which the court was divided we express no opinion, but under the facts in the case at bar we consider both opinions in point as supporting respondent's contention upon this branch of the case. In the majority opinion it is also said: "By the statement of facts agreed upon, it appears that the tax imposed by the state at large is and has been sufficient for the support and maintenance of the hospital, and that, in addition thereto, each county is required to impose a tax sufficient to pay the expense of its patients who are there confined. It is clearly within the power of the Legislature to provide for the maintenance of the insane by general taxation of the state, and to relieve the several counties from the burden, except as they bear their proportion with the other counties of the state, or to require each county to maintain its own insane in hospitals provided by them, or to pay the expense of the maintenance of their insane in a hospital provided by the state. In this each state has adopted the course which to its Legislature has seemed most judicious, and we think it is clearly within the legislative power to provide by law and taxation in the first instance for the support of the insane by the state, and then require the counties, which otherwise would have to support the insane having a residence within their borders, to repay the state the amount thus expended. Any other view would leave the care of this, the most unfortunate class of our citizens, to the will and caprice of the several boards of the several counties in the state, which would result in anything but a harmonious system of caring for them." The dissenting opinion by Maxwell, C. J., recognizes the power of the Legislature to require counties to reimburse the state for the expense of maintaining insane patients, and the dissent is put on the ground that the counties had already been taxed for and had paid their pro rata share of the entire sum necessary to maintain such patients, and hence that to require them to pay again under the statute in question would be subjecting them to double taxation, and this the Legislature has no

power to do under the Constitution. In the later case of Baldwin v. Douglas County, 37 Neb. 283, 55 N. W. 875, 20 L. R. A. 850, there is an intimation that the dissenting opinion of the Chief Justice in the former case was right and the majority opinion wrong, but, as before stated, the point involved and upon which the court disagreed in that case is not involved, under the facts, in the case at bar. The Supreme Court of our sister state of South Dakota in the case of Bon Homme County v. Berndt, 15 S. D. 494, 90 N. W. 147, is on record in a well-reasoned and to our minds sound opinion supporting the rule announced by the Nebraska court in State v. Douglas County, supra.

Counsel for appellant attempts to differentiate the case at bar from the Nebraska and South Dakota cases upon the ground of a difference in the statutes relative to the method required of the counties in raising funds with which to reimburse the state. The statutes in South Dakota and Nebraska respectively, require the counties to levy and collect a tax sufficient to raise a designated sum with which to reimburse the state for the approximated expense of maintaining such patients, while the North Dakota statute (chapter 237, Laws 1907) merely provides for the payment of an arbitrary sum, without prescribing the method of raising the same, for the purpose of clothing each inmate, any surplus remaining to be covered into the state treasury and credited to the maintenance fund of such institution. We are unable to discover any vital distinction on principle between these statutes. If, as held by the South Dakota and Nebraska courts, it is within the power of the Legislature to require the counties to pay the entire expense of maintaining their insane, it is certainly within the power of the Legislature to require them to defray a portion of such expense, and this is all our statute does. The manner of raising such fund must necessarily be by taxation.

It is next contended by appellant's counsel that the institution for the feeble-minded is a state institution, and hence funds for its maintenance must be provided for as prescribed in section 174 of our Constitution. While it is true that such institution belongs to the state, it in no manner follows that the Legislature has not the power to provide for its partial or entire maintenance by the respective counties, as was expressly held in the foregoing authorities. The contention that chapter 237 aforesaid is unconstitutional because the payments exacted thereunder constitute a tax in excess

of 4 per cent., and hence violates section 174 of the Constitution of this state, is wholly without merit, the same being based upon a false premise as we have sufficiently shown above. The whole fallacy of appellant's contention upon this point lies in the unwarranted assumption that, because this institution is owned and controlled by the state, its maintenance and the maintenance of the inmates thereof are necessarily a state charge, and that the Legislature has no power to require the respective counties to maintain their indigent inmates or to aid the state in maintaining them. As before stated, the Legislature has the undoubted power to require the counties to pay all or any portion of the expense of maintaining such inmates. What we have just said sufficiently disposes of appellant's contention that chapter 237 is violative of subdivision 23 of section 69 of our Constitution. The argument that said act is special legislation with reference to the assessment and collection of taxes, and also with reference to the powers and duties of county auditors, is not supported by the citation of any authority, and is not deserving of serious consideration. The act is clearly general in its operation. Vermont Loan & Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. 318.

It is next asserted that said act violates the provisions of section 172 of our Constitution, which provides that the fiscal affairs of a county shall be transacted by a board of county commissioners. This contention, to our minds, is as devoid of merit as those we have just noticed. It could not have been the intention of the framers of the Constitution by the adoption of section 172 to prohibit the Legislature from enacting laws similar to chapter 237 aforesaid, but it was their intention merely to vest in the board of county commissioners "the business transactions of the county—the performance of such duties as the law has defined and placed upon county commissioners, or such as uniformly pertain to that office." Martin v. Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838. It was held by this court in said case that the words "fiscal affairs," as used in the Constitution (section 172), "are not limited to matters pertaining solely to public revenue, as they doubtless are in some connections." And, again, in the later case of State v. Heinrich, 11 N. D. 31, 88 N. W. 734, this court used language recognizing the power of the Legislature to require the payment of claims and demands against counties without first being audited by the board of county commissioners. We quote: "The board of

county commisisoners have the general superintendence of the fiscal affairs of the county, and constitute a board of audit for all claims and demands against their counties, the amounts of which are not fixed by law." See also, State v. Albright, 11 N. D. 22, 88 N. W. 729, wherein the power of the Legislature to require the payment of salaries of county officers as fixed by law without first being audited by the county commissioners is recognized.

Counsel for appellant also argue that the act in question contravenes the provisions of section 186 of the Constitution of this state which provides: "No bills, claims, accounts or demands against the state, or any county or other political subdivision, shall be audited, allowed or paid until a full itemized statement in writing shall be filed with the officer or officers, whose duty it may be to audit the same." A sufficient answer to such contention has, we think, been made by what we have just said regarding appellant's last contention. Furthermore, section 186 by its language clearly applies only to those accounts or demands, the audit of which is made the duty, by law, of some officer, and under the act in question there is no duty devolving upon the county auditor to audit the claims therein mentioned.

It is next urged that the act in question fixes a specific, arbitrary sum to be paid for each inmate, and that the sum fixed is excessive. The record does not support counsel's last contention; but be that as it may, it is entirely clear and the Supreme Court of Nebraska in State v. County of Douglas, supra, so held, that "this must in the first instance at least be left to the wisdom of the proper department of the government." Unless the amount fixed by the Legislature is clearly unreasonable, its payment will be enforced.

Having disposed of each of appellant's points adversely to his contention, it follows that the judgment appealed from must be, and the same is accordingly, affirmed. All concur.

(119 N. W. 1037.)

FOSTER COUNTY STATE BANK, A CORPORATION v. P. J. HESTER.

Opinion filed January 29, 1909.

Rehearing denied March 6, 1909.

Guaranty — Construction — Extent of Liability.

1. H., who owned a majority of the capital stock of a state bank, sold and assigned the same to M and others. At said time there was among the bills receivable of the bank a note against one C., secured by a chattel mortgage; the face value of the note being $2,430, and the estimated value of the security being about $1,400. As a part consideration for the purchase of said capital stock, H. executed and delivered to respondent the following guaranty:

"Whereas, among the bills receivable in the Foster County State Bank of Carrington, North Dakota, there are notes and obligations secured by certain chattel property, and executed and delivered by George D. Corliss, amounting to the sum of $2,400.00; and

"Whereas said bank is about to be transferred to T. F. McCue and other stockholders:

"Now, therefore, I, P. J. Hester, do hereby guarantee and agree to pay the difference between $1,430.00 and the sum of $2,430.00, in the event that same cannot be realized out of the said personal security, and the said George D. Corliss, and I hereby waive protest, notice of protest and presentment for payment upon this obligation, also time of the collection of the original indebtedness, with the exception that the said bank shall use ordinary means to recover the debt out of said Corliss and the above mentioned securities, otherwise this guaranty shall be absolute and payable to the said Foster County State Bank, its successors or assigns.

"Dated this 16th day of November, A. D. 1903.

"P. J. Hester."

Held, construing said instrument, that the same was intended in effect as a guaranty of collection of the entire indebtedness of $2,430 with a limitation of liability under the guaranty to the sum of $1,000. In other words, defendant is liable under the guaranty to pay such portion of the indebtedness, not exceeding $1,000, as plaintiff is unable to collect from the security or from C.

Same — Evidence — Burden of Proof.

2. The burden rests on plaintiff to show the extent of H's liability under the guaranty; in other words, the burden is on plaintiff to show how much of said original indebtedness it has been unable to collect either out of the security or from C.

Same — Appeal and Error — Findings — Evidence.

3. The trial court found, and such finding is entitled to the same weight as the verdict of a jury, that on November 4, 1905, there remained the sum of $1,430 due on such indebtedness, for which judgment was rendered in plaintiff's favor in February, 1906. *Held,* that the evidence sufficiently discloses that there was at least the sum of $1,000 still due on such original indebtedness. Hence, appellant is liable under the said guaranty for the amount recovered in the court below.

Same — Extension of Time — Discharge of Guaranty — Maturity of Collaterals.

4. The defense that appellant's liability under the guaranty was extinguished by an extension of time for the payment of the indebtedness is not sustained by the evidence; the proof showing that certain notes which were subsequently accepted by plaintiff from the principal debtor were thus accepted merely as collateral security, and under the express condition that their acceptance should not operate to extend the time of payment of such indebtedness, or operate in any way to affect appellant's liability under the guaranty.

Same — Deferred Maturity of Collateral Does Not Extend Payment of Guaranteed Debt.

5. New notes representing the indebtedness, although made payable at a date later than the date of the maturity thereof, will not operate to extend the time of such indebtedness, so as to exonerate a guarantor, where a contrary expressed intent is shown.

Appeal and Error — Findings Sustained.

6. The person who represented the plaintiff bank in accepting the new notes testified positively that such new notes would be received only as collateral security to the indebtedness. Such fact was denied by C. The finding of the trial court upon this question was in plaintiff's favor, and such finding is sustained by this court.

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

Action by the Foster County State Bank against P. J. Hester. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Affirmed.

S. E. Ellsworth, for appellant.

Extension of time of payment or performance without the guarantor's consent discharges him. Rev. Codes 1905, Sec. 6092; 14 Am. & Eng. Enc. Law (2nd Ed.) 1165; 20 Cyc. 1473; 14 Am. &

Eng. Enc. Law (2nd Ed.) 1166; Shipman v. Kelley, 38 N. Y. Supp. 597; 24 Am. & Eng. Enc. Law (1st Ed.) 833, 835; Shipman v. Kelley, 41 N. Y. Supp. 328; Springer Lith. Co. v. Graves, 66 N. W. 66; Schnitzler v. Bank, 42 Pac. 496.

The notes are presumptive evidence of a consideration. Rev. Codes 1905, Sec. 5325; Niblack v. Champery, 72 N. W. 402.

Slightest benefit is a consideration. Shipman v. Kelley, supra; Niblack v. Champery, supra.

T. F. McCue, for respondent.

Extension to release a surety must be based upon sufficient consideration. McCormick H. & M. Co. v. Raie, 9 N. D. 482, 84 N. W. 346; Roberts v. Richardson, 39 Ia. 390.

Finding supported by testimony will not be disturbed. Magnusson v. Linwell, 9 N. D. 154, 82 N. W. 746; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762; 2 Enc. Pl. & Pr. 396.

Acceptance of collateral security maturing after the principal debt does not discharge a surety. U. S. v. Hodge, 6 How. 279; German Ins. Co. v. Vahle, 28 Ill. App. 557; Big Rapids Nat. Bank v. Peters, 120 Mich. 518; 79 N. W. 891; Remsen v. Graves, 41 N. Y. 471; Fox v. Parker, 44 Barb. 541; Brandt on Suretyship, Sec. 319.

FISK, J. This case was tried in the district court of Foster county by the court; a jury having been waived. Plaintiff's cause of action is based upon the following written guaranty:

"Whereas, among the bills receivable in the Foster County State Bank of Carrington, North Dakota, there are notes and obligations secured by certain chattel property and executed and delivered by George D. Corliss, amounting to the sum of $2,430.00; and

"Whereas, said bank is about to be transferred to T. F. McCue and other stock holders:

"Now therefore I, P. J. Hester, do hereby guarantee and agree to pay the difference between $1,430.00 and the sum of $2,430.00 in the event that same cannot be realized out of the said personal security and the said George D. Corliss, and I hereby waive protest, notice of protest, and presentment for payment upon this obligation, also time of the collection of the original indebtedness, with the exception that the said bank shall use ordinary means to recover the

debt out of said Corliss and the above-mentioned securities, otherwise this guaranty shall be absolute and payable to the said Foster State Bank, its successors or assigns.

"Dated this 16th day of November, A. D. 1903.

P. J. Hester."

The foregoing guaranty was executed and delivered by said Hester to plaintiff bank as a part consideration for the sale by said Hester and the purchase by one McCue and others of a majority of the capital stock of such bank. At the time of such sale and purchase the said George D. Corliss was indebted to the bank in the sum of $2,430, represented by certain notes secured by a chattel mortgage, and it is plaintiff's contention that such security was of the estimated value of only $1,430.00, that the said Corliss was insolvent, and that the guaranty aforesaid was given by Hester with the intention and for the purpose of guaranteeing the payment or collection of such indebtedness over and above the estimated value of the security aforesaid, and this contention was sustained by the trial court. On the other hand, the appellant contends that such guaranty extends to no specific portion of such indebtedness, but only to the difference between $1,430.00 and $2,430.00, or $1,000, and that no liability exists on such guaranty for the reason that prior to the commencement of this action plaintiff realized on such indebtedness from the security and from payments made by Corliss a sum in excess of $1,000. It is also appellant's contention that the plaintiff bank, without the knowledge or consent of defendant, entered into a valid contract with the said Corliss extending the time for the payment of such indebtedness, and that thereby defendant was released from such guaranty. At the conclusion of the trial the district court made findings of fact and conclusions or law, and judgment was ordered and entered in plaintiff's favor for the amount prayed for. Thereafter a motion for a new trial, based upon a statement of the case duly settled, was made and denied, and this appeal is from the judgment and order aforesaid.

Plaintiff assigns error as follows: "(1) The court erred in denying the motion of defendant made at the close of all testimony, except that of the witness McCue, that the action be dismissed upon the ground and for the reason that the guaranty relied upon by the plaintiff in express terms guarantees and agrees to pay only the difference between $1,430.00 and $2,430.00; it appearing from

the undisputed evidence that the $1,000 of the said debt guaranteed by the defendant has been paid. (2) The court erred in overruling the objection of the defendant to the testimony of the witness McCue with reference to an oral agreement between said witness and the defendant regarding the guaranty on which the action is brought, upon the ground that the instrument is clear and unambiguous on its face, that the testimony is offered for the purpose of varying the terms of a written instrument, and is inadmissible for that or for any purpose. (3) The court erred in holding that the time of payment of the indebtedness of $2,430 owing by one George D. Corliss to said plaintiff, payment of part of which was guaranteed by said defendant, was not extended by said plaintiff accepting and said George D. Corliss giving to said plaintiff on the 1st day of October, 1904, four notes, one for $706 and three for $700 each, due respectvely on the 15th day of September in the years 1905, 1906, 1907 and 1908. (4) The court erred in holding that no consideration passed from the debtor, Corliss, to respondent for the acceptance of the four renewal notes. (5) The court erred in holding that respondent, prior to the bringing of this action, used all reasonable means to collect the indebtedness of the debtor, George D. Corliss. (6) The court erred in holding that respondent was entitled to recover of appellant the sum of $1,000, with interest thereon at the rate of 7 per cent, from the 24th day of May, 1906, or any sum or amount whatever. (7) The court erred in holding that the testimony introduced by said plaintiff showed a liability in favor of said plaintiff against said defendant, and in ordering and in entering a judgment in favor of said plaintiff and against the said defendant. (8) The court erred in denying defendant's motion for a new trial."

In his printed argument appellant's counsel considers his assignments of error numbered 1, 2, 6, and 7 together. These assignments involve a construction of the written guaranty above mentioned. As before stated, appellant contends that, whenever there was paid on the Corliss indebtedness or realized from the security a sum equal to or in excess of $1,000, defendant's liability under such guaranty ceased. Such contention is, we think, clearly erroneous. The instrument sued upon is not a guaranty of payment, but amounts merely to a guaranty of collection of such portion of the indebtedness of $2,430 as cannot be collected out of the security or the principal debtor, not exceeding, however, the sum of $1,000.

The terms of the guaranty are somewhat ambiguous, but we think it apparent that the intent was that appellant should pay to respondent such portion of the $2,430, not exceeding $1,000, as could not be collected out of the security or from the principal debtor.

In construing said instrument is is proper to take into consideration the circumstances surrounding the execution and delivery thereof. Appellant was selling and assigning his capital stock in said bank to McCue and others, and among the assets of the bank were these bills receivable in the form of promissory notes executed and delivered by Corliss and secured by chattel mortgage. Corliss was insolvent, and the chattel security was estimated at the value of only $1,400. The purchasers of this stock were unwilling to accept this paper without such guaranty, and it is manifest that the purpose in giving and receiving such guaranty was to supplement such chattel security. To the extent that this indebtedness was deemed sufficiently secured by the chattel mortgage, respondent or the vendeees of the capital stock thereof were not interested in procuring additional security; but they were vitally interested in having the collection of such paper guaranteed as to sums due thereon in excess of the amount which could probably be realized thereon out of such chattel security. We hold that it was the intention of the parties that Hester should be liable under the guaranty to pay to respondent such sum, not exceeding $1,000, as plaintiff should be unable to collect by recourse to the security and to the principal debtor. By giving the instrument this construction we are enabled to give effect to the apparent intent of the parties.

In the light of the rule of construction thus adopted, we are next required to determine whether the evidence is sufficient to warrant the trial court's finding to the effect that at the time of the commencement of the action there was still due plaintiff on such original indebtedness the sum of over $1,000. The record is somewhat meager regarding the exact amount realized by plaintiff on such indebtedness. This is occasioned by reason of the fact that Corliss was indebted to the plaintiff bank on other notes, and the record is silent regarding the application of certain payments made by him. The burden was on plaintiff to prove defendant's liability under the guaranty. In other words, it was required to prove its inability, by the exercise of reasonable diligence, to collect either out of the security or from Corliss the entire original indebtedness, and also the specific sum, if less than $1,000, which it has thus been

unable to collect. It is entirely clear from the evidence that there is a balance of such indebtedness still remaining unpaid, and the only question in this connection is whether such balance equals or exceeds the sum of $1,000. The evidence discloses that in October, 1904, such indebtedness, with accrued interest aggregated the sum of $2,806, for which four notes were executed and delivered by Corliss to plaintiff, one for $706, and three for $700 each. It further appears that Corliss was indebted to plaintiff upon at least two other notes, amounting with interest to about $347 each. These notes are in no manner involved in this litigation, except for the purpose of showing that certain moneys received from the proceeds of certain grain were properly applied thereon; such grain being covered by chattel mortgages securing such notes. Of the $2,806 represented by the four notes above mentioned it is not contended that the same has been paid, with the exception of the amount due on the first two notes and a small payment on one of the others. Furthermore it is undisputed that of the original indebtedness and interest thereon there was due in May, 1906, a balance of $1,468, for which judgment was recovered against Corliss, and no part of which has since been paid. The inevitable conclusion therefore is that, after properly applying all payments claimed to have been made by Corliss, there still remains due on such original indebtedness a sum in excess of $1,000. The record fails to disclose any directions by Corliss as to the application of the various payments. Hence under the provisions of section 5243, Rev. Codes 1905, the creditor could make the application, and, if the creditor fails so to do, the court will apply such payments, first, to interest due, and, second, to the principal. It is therefore entirely clear that, if defendant is liable at all, he is liable for the full amount sued for.

Appellant's next and only other contention is based upon his assignments of error numbered 3, 4. 7, and 8, which present the question whether his liability under the guaranty was extinguished by an extension of time for the payment of the indebtedness thus guaranteed. If plaintiff bank, without appellant's consent, entered into a valid agreement with Corliss, whereby the time for the payment of the indebtedness was extended, then, of course, the guarantor was thereby exonerated. Such in effect is the statute law of this state as well as the general rule. Section 6092, Rev. Codes 1905; 14 Am. & Eng. Encyc. of L. 1165; 20 Cyc. 1472, and cases cited.

The undisputed evidence discloses that in October, 1904, plaintiff took from Corliss four promissory notes, one for $706, and the other three for $700, each, due respectively on September 15, 1905, 1906, 1907, and 1908, which notes represented the amount due from Corliss to the bank at their date; and to secure these notes Corliss executed and delivered to the bank a chattel mortgage upon all crops to be raised during 1905 on section 35, township 146, range 66. It is appellant's contention that the acceptance of these notes amounted in law to an extension of time for the payment of the indebtedness, and, having been accepted without the consent of Hester, his liability under the guaranty ceased. This contention would, no doubt, be sound, were it not for the fact, as found by the trial court, that such notes were accepted merely as collateral and under the express condition, as testified to by the witness McCue, that their acceptance should not operate to affect the liability of the guarantor. The witness McCue, who acted for the bank in taking said notes and mortgage, positively testified that he stated, at the time they were received, that they were taken merely as collateral security to the original indebtedness, and that such indebtedness should remain intact and the liability of the guarantor not affected thereby. It is true that the witness Corliss disputed this, but McCue's version of the facts is both reasonable and probable. He was a lawyer, and as such must have known that the acceptance of such notes and mortgage in the manner contended for by Corliss would release Hester's guaranty, and thereby this valuable right would have been lost to the bank. The trial court evidently believed McCue's testimony, and we are not disposed to overrule the trial court's finding upon such issue of fact. The case being one properly triable to a jury, where a jury is waived, the findings of the court are entitled to the same weight as a verdict of a jury would have been. Encyc. Pl. & Pr. 396, and cases cited; 6 Cur. Law, 1830, and numerous recent cases therein collated.

Under the facts thus established, can it be said, as a matter of law, that appellant was exonerated from liability under his guaranty? We think not. But it is insisted by appellant's counsel that the giving of the new notes, in the absence of an agreement to the contrary, operated per se to extend the time of payment of the original indebtedness, and he argues that no such agreement was entered into, even conceding the truth of McCue's testimony. We see no merit in such contention. If McCue's testimony is to be believed, then

that of the witness Corliss must be discredited, as their testimony is wholly inconsistent and cannot be reconciled. Our attention has been called by appellant's counsel to the case of Frank v. Williams, 36 Fla. 136, 18 South. 351, and numerous other cases, holding to the effect that testimony by the creditor that he did not extend the time of payment by taking the notes, and similar expressions, are mere conclusions and cannot control the legal affect of his acts. These cases were no doubt correctly decided upon the facts there involved, but they differ widely from the facts in the case at bar, as the following language in the above-cited case discloses: "The cashier of the bank, it is true, testifies that there was no contract with the company, or with any one, to give time until the new note was paid; but this does not at all affect the case, since, as we have seen, the taking of a new security implies an agreement to suspend the original debt, unless the parties agree that it shall not so operate, and no such agreement is proven in the present case." The correct rule is stated in Brandt on Suretyship & Guaranty (3d Ed.) § 403, as follows: "The mere fact that the creditor takes collateral security for the debt, which matures after the time the debt for which the surety is liable comes due, will not discharge the surety, if it does not amount to on extension of the time of payment. If, when the collateral security is given, there is an express agreement, either that the time of payment of the debt shall or shall not be extended thereby, such agreement will prevail. If there is no express agreement, it has been held that no agreement to delay the collection of an overdue debt is implied from the receipt by the creditor from the principal of a note or other obligation not yet due, merely as collateral security therefor. In holding this to be the law, the following distinctions were drawn: 'There is a class of securities payable on time, the taking of which, on an antecedent debt, implies an agreement for the suspension of the antecedent debt; but that class of cases is confined to those where the creditor accepts the note or bill for and on account of the antecedent debt, and the new security, for the time being, at least, is to take the place of and represent the original debt. That class is distinguishable from, and not to be confounded with, the class where the creditor has accepted simply a new additional or collateral security for an antecedent debt. In the former transaction an agreement to give time may be implied, but not out of the latter transaction.'" In section 413 the same author states that even where the creditor

extends the time of payment to the principal, but at the same time expressly reserves all remedies against the surety, the latter is not discharged by such extension. We understand the above to be correct statements of the law and are amply supported by authorities therein cited. See also 1 Brandt on Suretyship & Guaranty, §§ 402-414, and cases cited, and especially Austin v. Curtis, 31 Vt. 64; Remsen v. Graves, 41 N. Y. 471; Globe Mutual Insurance Co. v. Carson, 31 Mo. 218; Newcomb v. Blakeley, 1 Mo. App. 289; Noll v. Oberhellmann, 20 Mo. App. 336; Schlager v. Teal, 185 Pa. 322, 39 Atl. 963.

Our conclusion therefore is that the judgment of the district court is correct, and the same is accordingly affirmed.

ELLSWORTH and CARMODY, JJ., not participating.

(119 N. W. 1044.)

BEN PFEIFER v. T. T. HATTON, AS CONSTABLE OF SARGENT COUNTY.

Opinion filed October 15, 1908.

Exemptions — Claim to — Sufficiency of Schedule.

1. A debtor, desiring to avail himself of the additional exemptions allowed under section 7117, Rev. Codes 1905, must make a schedule of all his personal property, of every kind and character, including money on hand and debts due and owing to him, as required by section 7119, Rev. Codes 1905, and a failure to substantially comply with the provisions of such section will defeat his claim to such exemptions.

Same.

2. The purported schedule made by plaintiff in this case examined, and *held*, not a substantial compliance with the statute, as it does not purport to list all of his personal property.

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

Action by Ben Pfeifer against T. T. Hatton, as constable of Sargent county. Judgment for defendant, and from an order denying a motion for judgment non obstante, or for a new trial, plaintiff appeals.

Affirmed.

Rourke, Kvello & Adams, for appellant.

O. S. Sem and *J. E. Bishop,* for respondent.

FISK, J. Plaintiff and appellant seeks to recover a judgment for the possession of certain personal property, which was levied upon by respondent under an execution against plaintiff, which property the latter claims as exempt. Defendant had judgment in the court below, and from an order denying plaintiff's motion for a judgment non obstante, or for a new trial, plaintiff appealed.

The sole question involved is whether plaintiff complied with the statute (section 7119, Rev. Codes 1905), in claiming his exemptions. The record discloses that after such levy plaintiff appeared before a justice of the peace, and caused an affidavit to be prepared, which he signed and swore to as hereinafter set forth. A copy of said affidavit was also made by the justice and delivered to plaintiff, who delivered same to defendant. The original was neither delivered nor exhibited to the officer. If there was a substantial compliance by plaintiff with the statute relating to the manner of claiming additional exemptions, the order appealed from should be reversed, otherwise it should be affirmed. Section 7119, so far as here involved, reads: "Whenever any debtor, against whom an execution, warrant of attachment, or other process has been issued, desires to avail himself of the benefits of section 7117 of this Code, said debtor, his agent or attorney, shall make a schedule of all his personal property of every kind and character, including money on hand and debts due owing to the debtor, and deliver the same to the officer having the execution, warrant of attachment, or other process, which said schedule shall be sworn to by the debtor, his agent or attorney, and any property owned by the debtor and not included in the schedule shall not be exempt as aforesaid."

The only schedule, or purported schedule, made by appellant is as follows, omitting formal parts:

"State of North Dakota, County of Sargent—ss.:

"Before me, John B. Johnson, a justice of the peace in and for the township of Hall, county of Sargent and state of North Dakota, came Ben Pfeifer, defendant, who being by me duly sworn according to law, deposes and says that the following is his personal property which is now part of property being attached. The list is as follows: All my dishes for family use, value $20.00; all furniture such as beds, chairs, commode, dresser, 1 kitchen cupboard, churn, milk cans, value $35.00; all books, wall pictures, baby carriage,

value $10.00; all poultry such as chickens, ducks, value $35.00; all farm tools and extras needed on a farm, 1 bobsled, 1 breaking plow, value $35.00. The balance in car attached am agent for F. J. Pfeifer and supposed to deliver. Bernard Pfeifer.

"[Duly verified.]

"I, Ben Pfeifer, defendant in above action, also claim all bed clothes, and clothing to wear by me and family and that I claim all of above as exempt according to law, value $10.00.

"Bernard Pfeifer."

Among other things it is respondent's contention that appellant, in attempting to claim his exemptions, failed to substantially comply with the statute aforesaid, first, because the so-called schedule is not, and does not purport to be, "a schedule of all of his personal property of every kind and character, including money on hand and debts due and owing to the debtor;" and, second, service of a mere copy upon the officer was in no manner a compliance with the statute. Whether the service by copy upon the officer was a substantial compliance with the statute it is unnecessary for us to decide, as we are clearly of the opinion that the so-called schedule was wholly insufficient, and was not a substantial or any compliance with the law. Appellant, by his affidavit, merely lists certain property, and avers that the same is his personal property. He, in his affidavit, nowhere states, in substance or effect, that the property therein listed is all his personal property, of every kind and character. The statements in the affidavit may be entirely true, and still appellant may have a large amount of other personalty.

While exemption laws should be liberally construed so as to effectuate the objects sought to be accomplished thereby, still he who seeks to take advantage of such statute must substantially comply with the requirements thereof, and this the appellant signally failed to do. Therefore the trial court did not err in making the order appealed from, and the same is accordingly affirmed. All concur.

(118 N. W. 19.)

STATE OF NORTH DAKOTA, EX REL. R. J. PURCELL v. HANS ANDERSON, AS AUDITOR OF GRAND FORKS COUNTY, NORTH DAKOTA.

Opinion filed October 2, 1908.

Elections — Nomination by Primary Election.

1. Section 12, chapter 109, page 157, Laws 1907 (it being the Primary Election Law) reads: "12. Percentage of Votes Required for Nomination. If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than 30 per cent of the total number of votes cast for secretary of state of the political party, he or they represented at the last general election, no nomination shall be made in that party for such office, but if 30 per cent or more of such vote is cast and there is more than one candidate for any such office, the person receiving the highest number of votes shall be declared the nominee of such party for such office; provided, further, that where there is more than one person to be elected to the same office the persons to the number to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such office." *Held,* that the proviso limits the application of the 30 per cent rule, construed in State ex rel. Montgomery v. Anderson, 118 N. W. 22, 18 N. D. 149, to candidates for nomination to offices of which there is not more than one of the same name to be filled at the succeeding election.

Same — Vote Required to Nominate.

2. Under such proviso, when more than one office of the same name, within the same territory or subdivision, is to be filled, candidates for nomination to the number to be nominated, receiving the highest number of votes of the party which they represent, are the nominees of such party.

Appeal from District Court, Grand Forks County; *Templeton,* J.

Mandamus by the state, on relation of R. J. Purcell, commanding Hans Anderson, as auditor of Grand Forks county, to recognize relator as the duly nominated Democratic candidate for the office of county justice of the peace of that county, or show cause, etc. From an order sustaining a demurrer to the writ issued, relator appeals.

Reversed.

Jeff. M. Meyers, for appellant.

J. B. Wineman, for respondent.

SPALDING, J. This is an appeal from an order sustaining a demurrer to the allegations of an alternative writ of mandamus,

granted by the district court of Grand Forks county upon the petition of the appellant, commanding the auditor of said county in his official capacity to recognize and treat the relator therein as being a duly nominated Democratic candidate for the office of county justice of the peace of Grand Forks county, or show cause, etc. In an opinion this day filed, in the case of State ex rel. Montgomery v. Anderson, 118 N. W. 22, 18 N. D. 149, as county auditor, we have held that the 30 per cent, provision in section 12, c. 109, p. 157, Laws 1907, known as the "Primary Election Law," is calid. This proceeding is intended to test the meaning and validity of clause 3, being a proviso of sai dsection. The whole section reads as follows: "If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than 30 per cent. of the total number of votes cast for Secretary of State of the political party, he or they represented at the last general election, no nomination shall be made in that party for such office, but if 30 per cent. or more of such vote is cast and there is more than one candidate for any such office, the person receiving the highest number of votes shall be declared the nominee of such party for such office; provided, further, that where there is more than one person to be elected to the same office, the persons to the number to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such officers." Among the offices to which this proviso is applicable, if valid, are those of representative in Congress, commissioners of railroads, members of the House of Representatives, county constables, and county justices of the peace.

It is unnecessary to enter upon a lengthy discussion of this proviso or its meaning. The latter appears very clear upon the face of the provision and we construe it as meaning that for the offices named, or for any others where more than one office of the same name is to be filled at the same election, the candidates to the required number receiving the highest number of votes cast for such offices shall be the nominees of the party. The reason for this provision is apparent. When we consider the fact that the ballots, after being counted, are deposited in a box which is locked and sealed, and is not accessible to any officer or person, except for purposes and on occasions provided for by statute, none of which has any relation to the question before the court in this matter, it would be often impossible for county auditors or canvassing boards to

apply the 30 per cent. requirement. In instances where four candidates are to be nominated for offices of the same name one voter may vote for one candidate, for two, for three, or for four, and if more than four names appear, he may vote for any combination of such names, and no provision is made for determining how many voters vote for candidates for such offices. This fact furnishes ample reason for such proviso. While the reasons which we have assigned in the opinion in the other case would logically have like force in considering the case at bar, the character of the situation renders it impracticable and often impossible to apply them.

Hence we are of the opinion that the order was erroneous. It is reversed.

MORGAN, C. J., concurs.

FISK, J. (concurring specially). I concur in the result arrived at in the foregoing opinion, but base such concurrence upon the views expressed in my dissenting opinion in State ex rel. Montgomery v. Anderson, 118 N. W. 22, 18 N. D. 149.

(118 N. W. 29.)

STATE OF NORTH DAKOTA, EX REL. E. R. MONTGOMERY, v. HANS ANDERSON AS AUDITOR OF GRAND FORKS COUNTY, NORTH DAKOTA.

Opinion filed October 2, 1908.

Statutes — Subjects of Legislation — Power of Legislature.

1. The legislature has the power to legislate on subjects not prohibited, either in express terms or by necessary implication, by the constitution.

Elections — Nomination by Primary Election — Validity of Primary Laws.

2. It is competent for the legislature to provide for the nomination of party candidates for elective offices by a direct vote of the members of the different political parties at an election held for that purpose.

Elections — Nomination by Primary Election — Regulations — Reasonableness and Uniformity.

3. While the legislature has the power to provide for nominations by a direct vote, and to prescribe rules and regulations for the conduct of primary elections and the government of political parties, such rules and regulations must be reasonable, and operate on voters and candidates of the same class with substantial equality, but absolute equality in all things is not a necessary requirement.

Constitutional Law — Judicial Powers—Expediency of Legislation.

4. The fact that in the opinion of the court, simpler and perhaps more effectual or reasonable rules and regulations might have been provided than the legislature did provide will not alone justify the courts in holding the regulations made invalid.

Elections — Nomination by Primary Election — Vote Required to Nominate.

5. Section 12, chapter 109, page 157, Laws 1907 (the primary election law), reads as follows: "If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided or shall equal less than 30 per cent of the total number of votes cast for secretary of state of the political party he or they represented at the last general election, no nomination shall be made in that party or such office, but if 30 per cent or more of such vote is cast and there is more than one candidate, for any such office, the person receiving the highest number of votes shall be declared the nominee of such party for such office; provided, further, that where there is more than one person to be elected to the same office the persons to the number to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such offices." *Held,* (a) that the 30 per cent requirement therein contained applies to county and district offices as well as to other offices; (b) that under its terms candidates of a subdivision of the state for a local office must receive 30 per cent of the party vote of their party cast at the last general election for the candidate of such party for secretary of state within such subdivision, or no nomination is made.

Elections — Nomination by Primary Election — Vote Required to Nominate.

6. The 30 per cent requirement in said section is intended (a) to prevent the nomination of candidates to represent a party by accident, or when the party did not intend to make a nomination; (b) to restrain the action of voters, at primary elections, within the parties to which they belong; (c) to define and fix the number of votes, necessary to constitute an expression of the party, and to determine what is the act of a party as a party.

Elections — Nomination by Primary Election — Vote Required to Nominate — Validity of Requirement.

7. The 30 per cent requirement relates to offices of which there is only one of a kind, and while, in the opinion of the court, some other method might have been provided which was more simple and possibly more reasonable to accomplish the purposes hereinbefore referred to, this matter is not, as a regulation, so unreasonable as to render said provision or requirement invalid, and it is accordingly *held,* that, when only one office of the same name is to be filled at an election, and candidates for nomination for such office at the preceding primary election failed to receive 30 per cent of the party vote designated, no party nomination is made for such office.

Constitutional Law — Judicial Powers — Expediency of Legislation.

8. Arguments as to the expediency and reasons why the provisions made may not be the most expedient, are properly addressed to the legislature, and will not justify this court, for the reason that the most expedient method has not been provided, in holding the provision of the law in question invalid.

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

Mandamus by the state, on the relation of E. R. Montgomery, commanding Hans Anderson. as auditor of Grand Forks county, to recognize relator as the duly nominated Democratic candidate for the office of clerk of the district court of that county, or to show cause, etc. From an order sustaining a demurrer to the alternative writ issued, relator appeals.

Affirmed.

Jeff M. Myers, for appellant.

J. B. Wineman, for respondent.

SPALDING, J. This action is here on appeal from an order of the district court of Grand Forks county, sustaining a demurrer to the alternative writ of mandamus theretofore issued by that court, commanding the respondent to recognize and treat the relator as the duly nominated Democratic candidate for the office of clerk of the district court of Grand Forks county, to be voted for at the next ensuing general election, or to show cause, etc. The only question raised is the constitutionality of section 12, c. 109, p. 157, Laws 1907, said chapter being the primary election law, and section 12 reading as follows: "If the total vote cast for any party candidate

or candidates for any office for which nominations are herein provided shall equal less than 30 per cent. of the total number of votes cast for Secretary of State of the political party he or they represented at the last general election, no nomination shall be made in that party for such office, but if 30 per cent. or more of such vote is cast and there is more than one candidate for any such office, the person receiving the highest number of votes shall be declared the nominee of such party for such office; provided further, that where there is more than one person to be elected to the same office the persons to the numbers to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such offices."

It is first contended that the 30 per cent. limitation is not intended to apply to candidates for offices to be filled by an electorate or constituency comprising less than the entire voting population of the state; that is, that it does not apply to the nomination of candidates for county and district offices. This contention is based upon the language employed by the Legislature in the phrase "if the total vote cast for any party candidate or candidates for any office for which nominations are herein provided shall equal less than 30 per cent. of the total number of votes cast for Secretary of State of the political party he or they represent at the last general election, no nomination shall be made in that party for such office." It is contended that a literal construction of this provision would require the candidate for a county office merely to receive a vote equal to 30 per cent. of the vote of the whole state for the office of Secretary of State at the last general election. The meaning of this section is not expressed as clearly as it might have been, but it is apparent to us that, considering the purpose of the act, the subjects covered by it, the context and the well-known fact, which must have been in the minds of the legislators, that in no county of the state could there be any probability, if a posibility, of any candidate, or any candidates, for any office receiving 30 per cent. of the total vote of the party in the whole state, that this was not what the Legislature intended. On the contrary, we are satisfied that the intention was, and a fair construction of the section is, that the candidates for an office must receive 30 per cent. of the vote cast for Secretary of State at the last general election by their party within the district or subdivision in which they are candidates; that is, the district or subdivision which the office which they are seeking to

fill represents. As, for example, in a legislative district it must be 30 per cent. of the party vote for Secretary of State cast at the last general election within that particular legislative district.

The second point urged by the appellant is that, if the 30 per cent. limitation clause does not apply to county and district officers, is is an unreasonable and unwarranted exercise by the Legislature of the police powers of the state, and is therefore unconstitutional. In determining this point, it becomes necessary to consider what the legislative assembly was attempting to do, and the object and purpose of this provision as gathered from the language of the section, and the knowledge possessed by the court of contemporaneous history. That the Legislature has the power to legislate on subjects not prohibited, either in express terms or by necessary implication by the Constitution, is so well established that it will not be controverted. This principle is forcibly expressed in Commonwealth ex rel. McCormick v. Reeder, 171 Pa. 505, 33 Atl. 67, 33 L. R. A. 141, wherein the court says: "Whatever the people have not, by their Constitution, restrained themselves from doing, they, through their representatives in the Legislature, may do. This latter body represents their will, just as completely as a constitutional convention, in all matters left by the written Constitution. Certain grants of power very specifically set forth were made by the states to the United States, and these cannot be revoked or destroyed by state legislation. Then come the specific restraints imposed by our own Constitution upon our own Legislature. These must be respected; but, in that wide domain not included in either of these boundaries, the right of the people, through the Legislature, to enact such laws as they choose is absolute. Of the use the people may make of this unrestrained power it is not the business of the courts to inquire. We peruse the expressions of their will in the statute, then examine the Constitution, and ascertain if this instrument says 'Thou shalt not' and if we find no inhibition, then the statute is the law simply because it is the will of the people, and not because it is wise or unwise." It is not contended that the Legislature lacks the power to regulate the nomination of party candidates for office, and provide for holding party conventions or so-called primary elections for that purpose. The only requirements are that the regulations provided shall be just and reasonable, and operate on voters and candidates of the same class with substantial equality. In Kenneweg v. Alleghany Co. Commissioners, 102 Md. 119, 62

Atl. 249, the Court of Appeals of Maryland held that the Legislature had the power to pass a law regulating the primaries of the numerically stronger parties only, and excluding from its provisions the smaller parties, and, among other things, the opinion says: "The General Assembly being then the depositary of all legislative power, except when restrained by the organic law, it follows that it is clothed with full power to enact a primary election law, as there is no provision in the Constitution to deprive it of that authorty." And it holds that power to enact a primary election law is inherent in the Legislature. It is said in State ex rel. McCarthy v. Moore, 87 Minn, 308, 92 N. W. 4, that it cannot be expected that any system can accomplish absolute equality in all things, and that no plan will ever be devised which will place all candidates on a perfectly similar footing.

It is important to consider at the outset what the objects sought to be accomplished by the 30 per cent. provision are. In our opinion they are: (1) To prevent the nomination of candidates to represent a party by accident, or without intention on the part of the voters to nominate; (2) doubtless, as contended, one object is to restrain the action of voters at primary elections within the parties to which they of right belong; (3) that the Legislature sought by the limitation in question to define what constitutes an expression of the party will, or what is the act of the party as a party.

On the first proposition, which leads into the third, our attention has been directed to the results in some subdivisions of the state of the vote at the recent primary. No candidates filed petitions for certain local offices, but in several subdivisions where a party vote equals several hundred, candidates for such offices received two or three or five votes each. To hold that such candidates should be considered nominees of the party on the strength of so insignificant a vote would thwart the purpose of the primary election law as expressed in the first section, and be destructive of all party organization and discipline. It is just such accidents as this that we construe this section as intended to guard against and prevent. In other words, it was the intention of the Legislature in enacting it to secure a fair, just, and unquestionable expression of the voters of a party as to who should be its nominees, and to prevent candidates receiving an insignificant number of votes from posing as representatives of the party by securing the printing of their names upon the party ticket.

The second feature is likewise a legitimate and necessary element in a primary election law. It provides for all parties making nominations at the same time and places, and in meetings presided over by the same officers. It is strenuously argued that when 30 per cent. of the voters have attended the meetings and voted for some of the officers, inasmuch as they cannot call for ballots of more than one party, this purpose is accomplished. There is much force in this argument, but because the Legislature might have provided for a more effectual, and perhaps a more reasonable, method of keeping voters within their own parties than the one they saw fit to provide, will not alone justify this court in holding the provision which was made invalid. It undoubtedly has, as it stands, a tendency in the direction mentioned. The New Jersey court says: "A difference of opinion between the courts and the Legislature as to the expedience of making such a distinction" (that is, a distinction in the method of nomination) "if such a difference existed, could not find expression in any judicial action; this being one of those matters in respect to which the court cannot, as Judge Cooley phrases it, 'run a race with the Legislature.' ". In the same opinion it is said that, "primary elections are so matters of public concern that they are proper objects of legislative oversight; that the question of their reasonable regulation presents a problem in the legislative discretion, the solution of which is solely a legislative function." Hooper v. Stack, 69 N. J. Law, 562, 56 Atl. 1. In Dapper v. Smith, 138 Mich. 104, 101 N. W. 60, the Supreme Court of Michigan in holding an oath, required on the part of the candidate by the primary election law of Michigan, unconstitutional says: "It by no means follows that reasonable provision may not be made by legislation for an initiative in placing on the ballot the names of those to be voted for; as, for instance, by requiring a petition by a stated percentage of the voters of the party."

As we view the purpose of this provision from the consideration which we have been able to give it in the brief time allowed us by the exigency of the occasion, the third proposition is the controlling one, namely, that the Legislature sought, by the limitation in question, to define what constitutes an expression of the party will. There is a marked analogy between the primary election provided for and a political convention. This election, in effect, constitutes political mass conventions of the various parties, composed of voters

of the respective parties, each depositing his ballot in his own precinct instead of at one central point, and there is likewise a marked analogy, in the proceedings under this law, to those of a party convention or conventions. It cannot be doubted that in a party convention its members would have the right and power to adopt rules, and, among other provisions, fix the number or percentage of voters or delegates necessary to constitute a quorum or to express the will of the convention and its members in the nomination of a candidate. We find that some party organizations require only a plurality vote, others a majority, and still others two-thirds or three-fourths of its membership, to nominate. Under the primary system the party does not assemble at one place, and is thereby precluded from making rules to govern its proceedings. Rules or regulations must necessarily be provided by some means. The Legislature has provided such rules. They in all respects correspond to the rules almost uniformly adopted as one of the first steps in the proceedings of a party convention. It has said that to make a nomination for a designated office 30 per cent. of the voters of the party must cast their ballots for some candidate for such office. In other words, if 30 per cent. of the party, as measured by the vote for Secretary of State at the last election, does not act on the nomination of a candidate for a particular office, a quorum of the party is lacking. While the legislative assembly might, and in our opinion could, have provided a simpler, more plainly expressed, and perhaps a more reasonable, method of determining the fact that a party does not care to make a nomination or present a candidate for a particular office, yet to us one object of this provision seems to be to provide a method whereby the members of a political body can express, by their failure to vote on the different candidates for any specific office, their desire to make no nomination for that position. Under the terms of the law, taken all together, they cannot exercise their desire to leave an office unfilled on their party ticket in any other manner. To illustrate: Assume that a candidate of one party for clerk of court, which, so far as the nature of the duties is indicative, is a nonpolitical office, is satisfactory to the mass of voters of all other parties and they desire to nominate no candidate in opposition. No method is provided by the statute by means of which candidates can be prevented from filing petitions if they succeed in securing the number of signatures necessary. An individual succeeds in securing the requisite number

of signers to a petition, gets a few votes, and in the abesnce of some such provision, he becomes the party nominee. The Legislature has said that unless candidates for that office receive 30 per cent. of the party strength, as measured by the vote designated, this failure to vote on that office constitutes a failure of the party to directly express its choice. The law provides specifically no other method for this, or for determining how a party may express its satisfaction with the candidacy of the member of another party, without directly nominating a member of the other party.

The provision of section 601, Rev. Codes 1905, that to enable a party to secure representation on the Australian ballot at the general election it must have cast 5 per cent. of the vote at the next preceding general election was for years, and may now be, in force. Its validity was never questioned in this state. Similar provisions have been upheld in other states wherein the percentages range from 1 to 10. The Legislature saw fit to say that it should take 5 per cent. of the actual vote of the state to constitute a party, or to evidence that a party was actually in existence, and of such respectable numbers as to justify its recognition as a political party. This principle has been sustained in Pennsylvania, Illinois, Kentucky, Ohio, Rhode Island, Nebraska, Massachusetts, Oregon, Minnesota, and perhaps in other states. We see no distinction between the power of the Legislature to prescribe what percentage of the voters of a state shall be deemed a party and its power to say what percentage of the members of a party shall be necessary to evidence that a specific act is the act of a party, or that a certain individual is the candidate of the party. If the Legislature has power to say that it shall require 5 per cent of the total vote of the state to constitute a party, it must certainly have the power to say that it shall require the votes of a definite percentage of the members of a party to evidence the act of the party. In other words, in this instance, the Legislature says that if 71 per cent. of the voters of a party are not sufficiently interested in the different party candidates for nomination for a particular office to vote on it, it is conclusive evidence that the members of that party desire to place no one in nomination for such office.

Few will contend that a provision permitting only 1 per cent. of the voters of the state to nominate for a specified office would furnish any adequate or reasonable expression of the party as to who should represent it on the ticket for such office. On the other

hand, a requirement that every member of the party must vote for candidates at the primary, or nominations are not made, would be clearly unreasonable. A reasonable number must be found somewhere between these two percentages. The Legislature has fixed it at 30 per cent., and if this is not clearly either reasonable or unreasonable in the minds of sane and reasonable men, it is a legislative question, and the court is not justified in declaring the provision invalid. It is argued that, because a candidate may have had nearly votes enough to secure his nomination when the only candidate seeking to represent his party, the few votes lacking should not be permitted, in effect, to nullify the many votes which he may have received, but this is an incident to all elections wherein a majority or any requisite number of votes is necessary to control. It is the last few votes which in every close election prevent the unsuccessful candidate or party from being the successful one. The comparison may be extended by reference to the provisions of the law, which have never been questioned, requiring a certain percentage, or a fixed number of the voters, to sign a petition before a candidate can have his name printed on the official ballot. Can it fairly and justly be said that a candidate who may receive a smaller vote at the primary election than the number of signatures necessary to secure the printing of his name on the official ballot should be the nominee of the party, or that the act of the few voters who may have voted for him should evidence the will of the party as a party? When the members or delegates met in a partisan convention, it was a simple matter for such body to adopt rules for the government of the party and of the members of the convention, but under the primary system, which abrogates party conventions, who can say what shall evidence the act of a party as a party, if not within the province of the Legislature to do so? We do not deem this requirement a restriction on the elective franchise, but rather a legislative expression or definition of what percentage of a party vote is necessary to evidence that an act is the act of the party, or a candidate the candidate of a party.

The provision under discussion may well furnish an incentive to voters to attend the primaries, and in a measure to overcome their indifference. Certainly if the members of a party lack sufficient interest in its welfare and maintenance as an organization to attend the election, they have no reason to complain, and if, having attended and voted for candidates to fill most of the places on their

party ticket, when only a cross is required to express their preference as to another candidate, they fail to make it while in the booth, it would seem to strongly indicate a desire to refrain from placing a party condidate in nomination for that office. This is a contingency which cannot well be reasonably provided against by the legislative assembly, and unless the Legislature has failed to provide the opportunity for an expression of the individual preference of the voter and of the party, we are unable to see that the law is obnoxious to any constitutional provision. In the case of Johnson v. Grand Forks County, 16 N. D. 363, 113 N. W. 1071, which has been cited by both parties, we are treating of the rights of individuals and candidates. The purpose of the provision in question in this proceeding is to protect the party as a political body; and, while the language employed and the regulations established may not, in all respects, be the most expressive or simple, yet we are not prepared to say that the latter are so unreasonable as to render the provision in question invalid. In this connection the remarks of the court in De Walt v. Bradley, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814, are pertinent. In discussing an election law, that court says: "The act does not deny to any voter the exercise of the elective franchise because he happens to be the member of a party which at the last general election polled less than 3 per cent. of the entire vote cast. The provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets. The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations, in order to ascertain what names should be printed on the ballot. The right to vote can only be exercised by the individual voter. The right to nominate, flowing necessarily from the right to vote, can only be exercised by a number of voters acting together. Three persons may claim to be a political party, just as the three tailors of Tooley street assumed to be the people of England. It follows, if an official ballot is to be used, nominations must be regulated in some way; otherwise the scheme would be impracticable and the official ballot become the size of a blanket." And in State v. Drexel, 74 Neb. 776, 105 N. W. 174, the Supreme Court of Nebraska says: "But it is equally necessary to recognize the existence of political parties, and to classify them by some convenient standard. The law would hardly serve its purpose without some limitations and

restrictions as to a party's numerical strength. To say that a number of voters, however small, may associate themselves together as the embodiment of some political principle or policy of government, and be entitled to representation on the primary ballot, would pave the way to endless confusion, and to destroy in a large measure the objects sought to be attained by such a law. The limitation as to numbers must be fixed at some point." See, also, Healy v. Wipf (S. D.) 117 N. W. 521.

For these reasons the order of the district court is affirmed.

MORGAN, C. J., concurs.

FISK, J. (dissenting). I fully concur in what is said in the majority opinion upon relator's first point; nor do I disagree with such opinion as to many other propositions therein discussed, but which I do not consider have any relevancy to the vital question here involved, which is whether the 30 per cent. feature of the primary election law is a legitimate and constitutional enactment. Upon this proposition I am forced to dissent from the views expressed in the majority opinion, and will briefly set forth my reasons for so doing.

Conceding that the objects sought to be accomplished by this percentage clause are as stated in the majority opinion, it is very clear to my mind that all such objects may be fully accomplished by a much less drastic statute. Relator's counsel does not contest either the validity or the propriety of a limitation upon the right to make party nominations by requiring a certain percentage of its members to attend the primary and vote before such party shall become entitled to have its ticket appear upon the official ballot, and for the purpose of discussion he concedes that even a 30 per cent. limitation, when properly applied, might be justified, but his contention is, as stated in his brief, that: "When the required percentage of individual members of a given party have attended the primary, called for their party ticket, and voted, all possible beneficial ends have been accomplished, and any more extended limitation becomes obnoxious to the law as unreasonable, unnecessary, arbitrary, and merely captious interference with the constitutional privilege of the individual citizen, and therefore becomes and is judicially reprehensible." Whether such a limitation, or any limitation which is based upon the vote of the party at a prior general election, is justifiable when properly applied I express no opinion. As I view it, all the

ends sought to be accomplished by requiring a reasonable percentage of the votes cast at the primary to nominate, and this is as far as any Legislature has gone in other states, so far as I am aware.

The specific vice existing in this feature of the law is forcibly illustrated by the particular facts disclosed by the record on this appeal. At the recent primary election in Grand Forks county 650 Democrats, or about 32½ per cent. of the total voting strength of their party, actually attended and voted for certain candidates of their party as such. For some unknown reason, or through indifference, and perhaps because he had no opposition, 27 or about 12 per cent. of such electors failed to vote for relator, thereby reducing his percentage slightly below 30 per cent. The result is, under the holding of the majority of this court, that 88 per cent of those who did vote for relator, or 573 Democrats in said county, are practically disfranchised as to such office, and this without any corresponding benefit to the public. To my mind such a result ought not to be possible. After mature deliberation I am forced to the conclusion that the argument and reasoning of relator's counsel is unanswerable. I can discover no beneficial or reasonable purpose in the 30 per cent. limitation clause aforesaid, except to prevent the members of one political party from participating in the nominations of candidates in other party organizations, and such a result will be just as fully accomplished without extending such limitation to any candidate upon the primary ballot. Under the law each party's ballots are printed separately, and it is impossible for an elector to vote a split ticket. In other words, he is restricted to the party whose ballot he calls for. Hence it is plain that the mischief sought to be remedied by the 30 per cent. limitation clause does not require the application of such clause to each or any candidate; but, if 30 per cent. of the party voters attend the primary, and actually call for and vote any portion of their ticket, they are powerless to participate in any manner in the nominations of other party candidates. The inevitable result, therefore, of the practical working of said provision is to unnecessarily interfere with and render difficult, and in some instances entirely preclude, a party organization from nominating a full or even a partial ticket. It is a matter of common knowledge, of which we must take judicial notice, that at the recent primary election in this state one of the party organizations, with but few exceptions, cast but a very slight vote in excess of 30 per cent. for any of its candidates, and many of its candidates received

less than such percentage. It is not difficult to see that such a result may often happen. A combination of circumstances may easily arise which would defeat any party from nominating a full, and perhaps any, ticket. The history of the primary law in this state shows that the percentage of the electorate of the state who attend such primaries is small when compared with the total number of qualified voters. This may be accounted for in various ways. Quite a respectable per cent. of the voting population take but scant interest in any election, and are to a great extent indifferent as to the exercise of the elective franchise. If left to their own volition, many of them would not go to the polls even at a general election. This class are still more indifferent regarding primary elections. Again the primary takes place at a busy season for the great majority of our citizens, and many of them may feel that they cannot afford to take the time necessary to enable them to attend. Still another reason may be that there is no contest for nominations within a party, and in such a case the primary of such party goes by default, so to speak. Again it may frequently happen that the vote for a party candidate for the office of Secretary of State in certain portions of the state, or throughout the entire state, as was the fact at the last general election, may greatly exceed the normal vote of his party, and thereby render it very difficult or impossible for such party to cast 30 per cent. of such vote at the primary two years later. The per cent. of so-called independent voters, or those who ignore party lines, is so large that such a result is not at all unlikely to happen. The foregoing are matters within the common knowledge of all and should be taken into consideration in determining the reasonableness of the limitation clause in question.

It is idle to argue that the 30 per cent. clause can be justified as a reasonable exercise of legislative power in order to obviate accidental nominations not desired by the party. The party's will is expressed solely by the members thereof who attend the primary, and it is not a legitimate argument to say that those who remain at home or do not attend thereby in any manner give expression to the party will. A holding to the effect that a party, which is recognized by the law as such, cannot make a nomination where the per cent. of those actually attending the primary and voting thereat falls below 30 per cent. of its total vote cast at some time in the past, although every elector therein who attended such primary voted for a par-

ticular candidate as its nominee, is, to my mind, a startling and unheard of principle, and is, I believe, indefensible from a constitutional standpoint. It would be just as unreasonable to say that a candidate at a general election, although he receives a majority of the votes cast, shall not be deemed elected unless he also receives a certain percentage of the total votes cast at some prior election. The general rule in this country is that the will of a majority of those voting shall control.

It is said in the majority opinion that the controlling purpose of this limitation clause is to define what constitutes an expression of the party will. This, to my mind, is a strained construction, but be that as it may, it is entirely clear that the Legislature, under the guise of defining what shall constitute an expression of the party will, cannot entirely thwart, or in any manner unnecessarily hinder or impede, the expression of such will.

It is also said in the majority opinion that: "There is a marked analogy between the primary election provided for and a political convention. This election, in effect, constitutes political mass conventions of the various parties, composed of the voters of the respective parties, each depositing his ballot in his own precinct instead of at one central point, and there is likewise a marked analogy in the proceedings under this law and those of a party convention or conventions. It cannot be doubted that in a party convention its members would have the right and power to adopt rules, and, among other provisions, fix the number or percentage of voters or delegates necessary to constitute a quorum or to express the will of the convention and its members in the nomination of a candidate." This is all very true if the primary is considered as a mass convention composed of those who attend and participate. It is not true if those who remain at home, as well as those who attend, are to be deemed members thereof. Who ever heard of a mass convention adopting a rule that no nomination shall be made unless the candidate receives a majority or plurality, as the case may be, of the votes of those who stayed away as well as those who attended? Under the practical operation of such provision it is a very easy matter for the dominant party, and for that matter any party having sufficient strength, to completely annihilate all opposition in the future by other party organizations. This can be accomplished by casting enough of its votes in favor of the candidate, or candidates, for Secretary of State of such opposite party, or

parties, to swell his vote to an amount in excess of 70 per cent. of his normal party strength, so that at the succeeding primary such party could not muster the required 30 per cent., even if every one of its voters should attend and vote. We would then have the strange and absurd situation of a legal party organization without the legal power to nominate a single candidate. Such a situation may not only possibly but may quite probably arise. A political party could well afford to sacrifice this merely ministerial office for one term in order to annihilate all future party opposition. A statute which permits such a condition to be brought about is manifestly against public policy and void.

It must be remembered that the right to nominate candidates for office is inseparably connected with the right to vote for such candidates when nominated. The exercise of the elective franchise is the most important right of the citizen, and any law is unconstitutional which unnecessarily and unreasonably restricts, or interferes with, the free exercise thereof. As held by this court in Johnson v. Grand Forks County, 16 N. D. 363, 113 N. W. 1071: "The Legislature has the right to make any reasonable regulations to prevent fraud in the conduct of elections, voting by persons not qualified under the Constitution, and for the speedy conduct of the business incident to elections. The question for courts to determine is whether they go beyond the bounds of reason, and whether they place any restrictions around the exercise of the right of suffrage which limits it arbitrarily or unnecessarily." As said by the Supreme Court of Illinois in the recent case of People v. Board of Election Commissioners, 221 Ill. 9, 77 N. E. 321: "The right to choose candidates for public offices, whose names will be placed upon the official ballot, is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature. There is scarcely a possibility that any person will or can be elected to office under this system unless he shall be chosen at a primary election, and this statute, which provides the methods by which they shall be done, and prescribes and limits the rights of voters and of parties, must be regarded as an integral part of the process of choosing public officers, and as an election law. It is undoubtedly true, as urged by counsel for defendants, that it has become not only proper, but necessary, to provide additional safeguards and protection to the voters at primary elections, to the end that their will may be fully expressed and faithfully and honestly carried out, and any law

having that object in view would naturally commend itself to the lawmaking power. The legitimate purpose of such a law, however, must be to sustain and enforce the provisions of the Constitution and the rights of voters, and not to curtail or subvert them or injuriously restrict such rights." In State v. Drexel, 74 Neb. 776, 105 N. W. 174, the Supreme Court of Nebraska, in speaking upon the same subject, took occasion to say: "To say that the voters are free to exercise the elective franchise at a general election for nominees, in the choice of which unwarranted restrictions and hindrances were interposed, would be a hollow mockery. The right to freely choose candidates for public office is as valuable as the right to vote for them after they are chosen." See, also, the following authorities, inferentially supporting the general doctrine above announced that the rights of nomination and of candidacy are incident to the right of suffrage, and that therefore any unnecessary and unreasonable hindrance or impediment to the exercise of the former rights is, to the same extent, a hindrance and impediment to the exercise of the latter. Johnson v. Grand Forks County, supra; Dapper v. Smith, 138 Mich. 104, 101 N. W. 60. No state, so far as I am able to discover, has any similar provision. Respondent's counsel intimates that the state of Washington requires 40 per cent. to nominate, but upon examination of their primary law I find that a plurality vote of those voting nominates, except as to congressional candidates and those for state offices, when there are four or more candidates, in which event it is, in effect, provided that the electors shall designate their first and second choice, and if no candidate receives 40 per cent. of the first choice votes cast, then the first and second choice votes for each candidate shall be added together, and ercise o fthe elective franchise, and hence is unconstitutional.

For the foregoing reasons I am constrained to hold that the 30 per cent. clause aforesaid is both an unreasonable and unwarrantable and wholly unnecessary restriction and limitation upon the exercise of the elective franchise, and hence is unconstitutional.

(118 N. W. 22.)

FRANK E. YOUNG, FOR THE USE AND BENEFIT OF OLE JOHNSON-BOSTROM v. C. O. ENGDAHL.

Opinion filed November 20, 1908.

Rehearing denied January 15, 1909.

Quieting Title — Adverse Claims — Burden of Proof.

1. In an action to determine adverse claims to real property, the burden is upon plaintiff to establish his title as alleged, where such title is put in issue by the answer.

Quieting Title — Adverse Claims to Lands — Evidence.

2. Plaintiff claims title to the real property in controversy under a certain quitclaim deed claimed to have been executed and delivered by one Frank E. Young, who concededly was the owner. The original deed, as well as all correspondence relating to the transaction, is claimed to have been lost or destroyed, and plaintiff's sole proof of the execution and delivery of such quitclaim deed consisted of Exhibit A, being a transcript of a record in the office of the register of deeds purporting to be the record of a quitclaim deed executed by one Frank E. Young to him. *Held,* that the introduction of such exhibit merely proved a prima facie case for plaintiff, the presumption of law being that the original, of which Exhibit A is a copy, is the genuine deed of Frank E. Young; but *held,* further, that such prima facie case is completely overthrown and disproved by the other evidence in the record, which clearly shows that the Frank E. Young, who owned the property, did not execute a quitclaim deed.

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

Action by Frank E. Young, for the use of Ole Johnson-Bostrom, against C. O. Engdahl. Judgment for plaintiff, and defendant appeals.

Reversed.

F. H. Register and *Newton & Dullam,* for appellant.

R. N. Stevens and *A. J. Hedrix,* for respondent.

FISK, J. This is the statutory action to determine adverse claims to real property. Plaintiff had judgment in the court below, and defendant appeals, and asks for a trial de novo of the entire case in this court.

Plaintiff's alleged title to the real property in controversy is put in issue by the answer, and the important question for decision is whether a certain purported quitclaim deed under which plaintiff

asserts ownership is the genuine deed of one Frank E. Young, who concededly had the fee-simple title thereto. It is, of course, plain that, in order to maintain the action, it is incumbent on plaintiff to prove his title as alleged in the complaint. Conrad v. Adler, 13 N. D. 199, 100 N. W. 722. Has he done so? A proper answer to this question necessitates a consideration of the testimony. Plaintiff's sole proof that he acquired the title from Young consists of Exhibit A, which is a certified transcript of the record in Book 48 of Deeds, at page 566, in the office of the register of deeds of Burleigh county. Such record discloses a purported quitclaim deed of the land in controversy from one Frank E. Young to plaintiff, dated September 5, 1904, and acknowledged before one Lillian R. Noll, a notary public in and for Cook county, Ill., on September 8, 1904. The consideration recited is $50. The residence of the grantor is not disclosed, nor is his signature attested by any witness. The notary's certificate of acknowledgment recites that, "Before me personally appeared Frank E. Young, known to me to be the same person described in, and who executed the within instrument, and acknowledged to me that he executed the same;" but by her testimony it clearly appears that she did not personally know such grantor, and had no recollection of having taken such acknowledgment. She testified, however, that it was her custom not to take acknowledgments unless she personally knew the person whose acknowledgment she took, or he was introduced by a person whom she did know. The original deed was not produced, and it is claimed to have been lost. Plaintiff's title is clearly dependent upon the genuineness of the purported deed as that of the owner, Frank E. Young. The introduction of Exhibit A serves merely to prove a prima facie case in plaintiff's favor, resting upon the well-recognized presumptions of law that the deed and certificate of acknowledgment are, what they purport to be, genuine and valid, and that there was no fraud or forgery perpetrated in the transaction. We shall assume for the purposes of this case that, in order to overcome these presumptions, defendant's proof must be of a clear, satisfactory, and convincing character.

Tested by such rule, is the plaintiff's prima facie case overthrown when the entire evidence is considered in the light of all the facts and circumstances surrounding the transaction as shown by the record? The uncontradicted evidence is that at and for many years prior to the commencement of the action defendant was, with

plaintiff's knowledge, in the exclusive possession of the premises as lessee of the owner, Young, or by virtue of an alleged tax title, cultivating and improving the same; that he was personally acquainted with Young, and had carried on a correspondence by mail with him up to January 23, 1899, at which date he wrote and mailed his last letter to him, receiving no reply thereto; that since said date defendant made many efforts both by letters and by employing the assistance of other persons whom he had reason to suppose might furnish information as to Young's whereabouts, but all such efforts were without avail. On the other hand, the undisputed evidence discloses that neither the plaintiff nor any of the persons, Hedrix, Knauss, or Bull, who were instrumental in procuring the purported deed in question, had any personal acquaintance with Young, or had ever known or met him. It is a significant fact that the original deed is claimed to have been lost, and could not be produced for inspection at the trial, as well as certain letters claimed to have been received by Hedrix from Young; he claiming that such correspondence had been destroyed. This witness knew that litigation must follow the purchase of this property by plaintiff, and he claims to have had a contract with plaintiff to institute such litigation against the defendant for his services, in which litigation he was to receive the sum of $100, yet he was so careless as to permit the original deed to become lost and the letters claimed to have been received from Young relating to the transaction to be destroyed. Hedrix knew, or had reason to suspect, that defendant was in possession of letters and signatures of Young, which is an important fact to weigh in connection with the pretended loss of the original deed as well as the destruction of the correspondence relative thereto. The uncontradicted testimony is to the effect that in 1892 Young held the property at $500, and was willing to take $1 per acre rental. In 1890 and in 1895 he wrote defendant, fixing a price at $5 per acre or $600 for the 120 acres. Hedrix testified that Young wrote him from Idaho, offering to give him a deed for $100, but that he was never able to locate him thereafter, but, according to the testimony of the witnesses Bull and Knauss, they obtained the deed, of which Exhibit A is a copy, at Chicago for the paltry sum of $25, although the consideration recited in the deed as before stated was $50. The lowest value placed upon the land in 1904 by the various witnesses as to its value is $10 per acre, or $1,200. This is a very material fact tending to show the utter improbability

that Young parted with his title for the insignificant sum testified to by plaintiff's witnesses. The very unusual, and to our minds suspicious, circumstances surrounding the alleged execution and delivery of the deed by Young, can be best understood by a brief review of the testimony.

Witness Hedrix testified that, some four or five months before the commencement of the action, he was employed by plaintiff Bostrom to procure title to the land, and he called upon the firm of Bull & Knauss, real estate men in Bismarck, to assist him in getting the title, and they used means to locate Young, and finally succeeded in locating him at a place in Idaho. When asked why he did not get the deed then, he replied: "When I wrote for the deed, I wanted to see Mr. Bostrom to see whether he would pay for it." Witness claims to have received a letter from Young sent from Idaho, but says the letter was destroyed, as he did not deem it of any consequence. He testifies that, after receiving Young's letter, he made out a deed and forwarded it to him, but the same was returned, and he has never been able to locate Young since. The witness admitted that at the time of the trial he was under sentence to the penitentiary for a crime for which he had been convicted, but the nature of the crime is not disclosed.

Plaintiff Bostrom testified that he was acquainted with the rental value of the land in controversy, and in 1905 such rental value was about $500, and in 1904 about $250, and in the years 1896, 1897, 1898, 1899 and 1900 it was about $100; yet he claims to have purchased the land for the sum of $100. He says he read the deed, but cannot say whether, when he first saw it, the grantee's name therein was blank or not.

Witness Knauss testified that Hedrix spoke to Bull and him about getting a deed to this land some time in the spring or early part of the summer of 1904, and that he carried on correspondence with parties in Washington, Idaho, and Montana with reference to locating Young and procuring a deed to the land in question, but he kept no copies of the letters sent by him, but that the letters received were kept and filed away in the office of Bull & Knauss, the same as other correspondence. He then testifies to getting the deed in question from Chicago. When asked how he knew there was anybody by the name of Frank E. Young in Chicago, he replied: "My recollection is that we received a letter from him at some place out in Idaho, saying that he would be there in Chicago, or that

he was then going to Chicago. We had previously sent a deed in blank for execution. Q. And without any grantee named in it? A. I would not say positively as to that. I do not recollect whether there was or not; but our habit in such cases was to leave it blank." He admits having no knowledge that the Frank E. Young who professed to sign the deed was the same Frank E. Young who owned the land. He merely knows that he received a deed from some person by the name of Frank E. Young, and the same was sent from Chicago. Witness says: "I think it was $25 we paid for the deed. * * * We had previously sent the deed for execution." Witness was asked the following question: "Mr. Knauss, where was the man by the name of Frank E. Young when you first found him? A. He was at a town, as I remember it, in northern Idaho." Witness testified to the receipt of a letter from Frank E. Young, or F. E. Young, written at Kootenai, Idaho, but does not know where the letter now is, and he prepared the deed and sent it out to him at said place, and he says this same deed is the one received from Chicago and came in answer to his letter written to Kootenai, Idaho. Witness also says that, according to his best recollection, when received, the deed was blank as to the grantee's name, and he thinks that he afterwards wrote in plaintiff's name as such grantee. When asked how he conveyed the consideration for the deed to the grantor, witness testified: "We paid that in the first place, sent it to him." But he does not know whether they sent the money to Idaho or Chicago. Later he was asked whether he sent any money out to Idaho when he sent the blank deed, to which he replied: "I do not think we did." He was then asked: "When did you pay for this deed then?" To this he replied: "I do not know, but it seems to me that we sent the money there to Chicago, and I believe that was it." Thereafter the following questions were propounded to the witness, and he gave the following answers: "Q. Did the letters you received from Kootenai give any particular address in Chicago? A. Why, it gave the name of some hotel there. Q. And you think that the deed from this man came to you by letter, do you? A. Yes. Q. And then you sent the money back down to him? A. That is what I think; but I am not sure about it." Later on witness testified that his partner, Bull, was down at or near Chicago at the time, and he believes that Bull got the deed himself, and paid the money direct to Young, and he says that they had previously received a letter from Young, stating that he would

make the deed at Chicago. Witness does not know whether the $25 was paid in cash or by check or draft, and he is unable to produce any of the correspondence claimed to have taken place in connection with the transaction, or to give any information relating thereto.

Witness Bull was sworn, and testified, in substance: That he had none of the correspondence or papers connected with the transaction, and does not know what has become of it. He is unable to state whether the name of any grantee was in the deed when he received it, nor whether any consideration was named in such deed. He first saw deed at Windsor Hotel, in the city of Chicago. When asked to state the circumstances, witness testified: "Why, I had come there to that hotel by appointment to meet Mr. Young. Q. How was that appointment made? A. I had a letter from Mr. Knauss while I was at Wheaton, Ill., visiting my wife's folks. Q. Do you know where that letter is now?" To this the witness replied that the same had been destroyed with other papers which were in his wife's grip, giving as a reason that a certain bottle of medicine which was in the grip became broken, and the papars therein contained became saturated with such medicine. He was then asked: "Q. But you had a letter from Mr. Knauss telling you to meet Mr. Young in Chicago at that hotel, did you? A. Yes, sir; at the Windsor Hotel in Chicago, to get a deed and pay him $25 for it, and I went to the hotel, and did not arrive there on time, owing to my inability to locate the hotel, and, when I finally got to it, I asked for Mr. Young, and the clerk asked me who I was, and I told him, and he said Mr. Young had waited for me a while, and then left, leaving some papers with him (the clerk) for me, and I examined the paper and saw that it was a deed properly executed and signed, and the clerk said he was to deliver it to me and I was to leave $25, so I took the deed and deposited the $25 there with the hotel clerk, and sent the deed to Mr. Knauss here in Bismarck. Q. You never saw Mr. Knauss personally with reference to this meeting, as you state? A. No, sir; I recollect that he sent the letter to me at Wheaton, Ill. Q. Do you know the name of the clerk of that hotel? A. No, sir; I had never seen him before and have never seen him since. I was not in the hotel; that is, I was not in the hotel over five minutes altogether. Q. The only thing you did was to leave the money with the clerk, was it? A. Yes, sir. Q. You do not know but what the clerk executed that deed, do you?

A. No, sir. Q. Do you know whether or not the man who executed this deed had any interest of any kind or description whatsoever in this land described in this deed? A. No, sir; I do not of my own knowledge. Q. You know it was the Windsor Hotel, do you? A. I am not really positive of that. I do not know the directions in Chicago very well."

The foregoing is the substance of the testimony of the persons who were instrumental in procuring the purported deed, and it impresses us very forcibly as being unworthy of credence. Hedrix, Knauss and Bull are all interested in the outcome of the litigation. According to the testimony, Hedrix is to receive $400 attorney's fees in the event plaintiff wins in establishing title. Whether Knauss and Bull are to share in this fee does not appear, but it does appear that they parted with but $25 according to their testimony to procure the alleged deed, and they received the sum of $100 from Bostrom therefor, and, if the deed is a forgery, they are legally bound to refund such sum. It is strange that these parties were so successful in locating Young while defendant was so unsuccessful, although he put forth every effort possible to do so, and even offered a reward for information leading to his whereabouts. Defendant was in possession of the premises, and had been for years, as Young's tenant, and was indebted to him for rent. He carried on a correspondence with Young until January, 1899, when it abruptly ceased since which time defendant has been unable to get any word from him. The fact that Young did not write or communicate with defendant during these many years is very convincing evidence that something happened to him to prevent it. It also impresses us as quite remarkable and unusual that so soon after Hedrix, Knauss, and Bull located Young, as they claim, they should have struck the bargain testified to by them whereby Young agreed to accept $25 for his interest in the land. Hedrix says that the letter received from Young was an unconditional acceptance of his offer to pay $25 for a deed. It is also rather a suspicious circumstance that Young did not immediately sign the deed in Idaho, which Hedrix claimed to have sent him, and return the same, instead of notifying Hedrix of his contemplated visit to Chicago, where he would close the deal by executing the deed. Why did he delay closing the deal until he reached Chicago? It is also rather out of the ordinary method of doing business for Young to execute the deed in the manner in which it is claimed he did without

giving his residence or address in the body of the instrument, without having his signature attested by witnesses, and it is also strange that he left the same with the hotel clerk to be delivered on receipt of the selling price. It is also a strange coincidence that Bull happened to be at or near Chicago at this particular date. It is, moreover, passing strange that every document—the alleged original deed and all correspondence relating to the transaction—by which the genuineness of the deed might be established, are lost or destroyed. Moreover, if the story told by Bull is true, the testimony of this hotel clerk would have been valuable evidence to corroborate his story, but no attempt was made to procure the testimony of this hotel clerk would have been valuable evicumstances, as well as others which we have not alluded to, all point with irresistible force to the conclusion that the story told by these witnesses is unworthy of credence, and the same has every earmark of fraud and perjury. Their story is most unreasonable and improbable, and we are morally convinced that Young's signature to the purported deed upon which the plaintiff's title is based is nothing less than a forgery, and we therefore have no hesitation in holding that the prima facie case made by plaintiff by the introduction of the certified copy of the purported deed is completely overthrown and disproved by the evidence in the record.

Entertaining these views, it follows that the judgment appealed from must be reversed, and the action dismissed; and it is so ordered.

MORGAN, C. J., concurs.

SPALDING, J. (dissenting). The conclusion reached by my associates in this case is sustained on the theory that three persons named in the opinion have committed perjury and one or more of them forgery, or have procured some other person to commit forgery. I am of the opinion that the evidence taken altogether does not warrant such a conclusion.

The complaint was in the statutory form for quieting title. The answer consisted of a general denial and an assertion of a superior title based upon a tax deed obtained by the defendant to the land in question while occupying it as a tenant of Frank E. Young, the original owner. When the case went to trial, the latter was the defense relied upon. Fraud was not pleaded. It is true there were several unusual facts and circumstances disclosed in the evidence,

such as loss of the deed and of the correspondence, but it must be borne in mind that negotiations were commenced with a firm which afterwards dissolved, and each member thought the other had the correspondence. The loss of some of the corespondence was reasonably and satisfactorily accounted for.

Considerable emphasis is laid upon the fact that the deed was not witnessed, and that the name of the grantee was not inserted, nor the residence of the grantor. My professional experience satisfies me that neither of these under the law and the custom of dealers in real estate in this state can be considered as necessarily a suspicious fact. The law of this state, unlike that of some states, requires no witnesses to the execution of deeds, and the practice of executing deeds and mortgages without witnesses is prevalent. The testimony does not disclose that the name of the grantee was omitted from the deed when executed. The witness testifying as to that testified that he did not know whether it was omitted or not, that he presumes it was, but disclaims knowledge. The defendant's own testimony shows that Young was a traveling man, and that he had corresponded with him on several occasions some years before this suit was instituted, and that he received one letter from him from Tacoma, another from Spokane, one from North Yakima, and one which did not disclose his whereabouts. He also testified that search was made for him in places where he had been known to be at times, and that he was unable to locate him, all of which goes to show that he may have had no fixed residence to insert in the deed.

The fact that the notary who took the acknowledgment was unable to recollect the fact of having done so, in view of her situation and the extent of her business, is not significant. She is a notary in the Sherman House in Chicago, and testified that she takes great numbers of acknowledgments. The transaction with her occurred 16½ months before her testimony was given, and, like other notaries, the most she could do was to testify that she had no recollection of the fact. She testified that from the time she became a notary she established the practice never to take an acknowledgment without either knowing the party personally or being introduced by some one that she did know, and stated positively that Frank E. Young was either introduced to her at the time the acknowledgment was taken by some person or persons with whom she was personally acquainted or that she personally knew him at

that time, but that she had no distinct recollection with regard to this deed. It is well established that where a certificate of acknowledgment is regular on its face the failure of the officer to recollect regarding the taking of the acknowledgment is not sufficient to overcome the recitals of the certificate. Wright v. Bundy, 11 Ind. 398; Tooker v. Sloan, 30 N. J. Eq. 394; Ford v. Osborne, 45 Ohio St. 1, 12 N. E. 526. The great weight of authority is to the effect that, where the grantor has appeared before the officer and an acknowledgment has been taken, the certificate of the officer in due form is conclusive of the facts certified, and cannot be impeached except for duress or fraud in which the grantee participated or of which he had notice before parting with his money. 1 American & English Encyclopedia of Law, 557, and cases cited. In those states which hold that it can be impeached it is held that the evidence to impeach the certificate must be clear and convincing beyond a reasonable doubt, and should do more than to produce a preponderance against its integrity, and should by its completeness and reliable character fully and clearly satisfy the court that the certificate is untrue and fraudulent, and that the presumption in favor of the regularity of the certificate is as strong as any that can be brought against it by the testimony of an interested witness, and that the burden of proof rests upon the party undertaking to impeach the certificate to show that it is false. 1 American & English Encyclopedia of Law, 560; 1 Cyc. 618.

The whereabouts of Young was ascertained by Knauss when Bull was absent, visiting his wife's relatives 25 miles from Chicago, and the evidence would indicate that when Mr. Young replied to an inquiry as to executing a deed, etc., for the land, he was on his way to Chicago, and therefore stated that he would execute the deed when he arrived there. The small price which he accepted, in view of the other facts, casts no suspicion whatever upon the transaction.

He had previously asked for $500 at one time, and $600 at another for the land, but, after offering it at those prices, a tax deed had been issued to it, and it is altogether probable and natural that he should deem anything he could get after the execution of the tax deed, no matter how small, so much clear gain. Again, if the circumstances of the situation are sufficient to justify the court in holding the title of plaintiff invalid, this can be done without reflection upon the integrity of any one except some one unknown, who may have personated Young in Chicago.

I do not deem the defendant's testimony worthy of full credit when viewed in the light of the fact that he was attempting to defraud his landlord by acquiring a tax title, adverse to his landlord's title, and the further fact that it was clearly shown that he made or caused to me made a change in the description of the land in the tax deed after its delivery to him, making it conform to the description of the land in controversy, which it did only partially when issued, and then caused a corresponding change to be made in the county records. While this case is in this court for trial de novo regardless of the findings of the trial court, yet, especially in this kind of a case, the findings of that court should be given due weight, and are entitled to much respect.

All the witnesses whose words are challenged testified personally before the judge of the district court, and he had a far better opportunity to judge from their demeanor, their appearance of candor, or lack of it, and other considerations, whether they were telling the truth or committing perjury than we have. In any action like this where title is attempted to be impeached purely by means of circumstances any of which may occur without fraud or an intent to defraud, the explanation given by witnesses can be best judged of by that court in whose presence they testify, and, when such court makes findings, they should be entitled to more than ordinary weight.

These reasons and others which I shall not discuss impel me to the conclusion that the judgment of the district court should not be reversed.

(119 N. W. 169.)

McCARTHY BROTHERS COMPANY, A CORPORATION v. McLEAN COUNTY FARMERS ELEVATOR COMPANY, A CORPORATION, AND P. J. HESTER, DEFENDANTS AND RESPONDENTS, AND JAMES F. WILTSIE, DEFENDANT.

Opinion filed December 14, 1908.

Attachment — Affidavit Stating More Than One Ground.

1. An affidavit for an attachment, which states in the language of the statute, that the debtors "have sold, assigned, transferred, secreted or otherwise disposed of, or are about to sell, assign, transfer, secrete or otherwise dispose of their property with intent to cheat or defraud their creditors," states but one ground for attachment.

Same.

2. The use of the disjunctive conjunction "or" in subdivision 4, section 6938, Rev. Codes 1905, is not to connect two grounds for an attachment, but said subdivision states one ground only consisting of different phases of facts or conditions, intimately related, pertaining to that one ground.

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

Action by the McCarthy Bros. Company against the McLean County Farmers' Elevator Company and others, in which action an attachment was procured and levied upon defendants' property. From an order vacating the attachment, plaintiff appeals.

Reversed and remanded.

Newton & Dullam, (A. L. Brice, of Counsel), for appellant.

The disjunctive "or" as used in the statute may be employed in an affidavit, to characterize and include two or more phases of the same fact, attended with the same result. 3 Enc. Pl. & Pr., 24, 25; Drake on Attachment, 100; Tessier v. Lockwood, 24 N. W. 734; Wood v. Wells, 2 Bush (Ky.) 197; Klenk v. Schwalm, 19 Wis. 111; Winner v. Kuehn, 72 N. W. 227; McCraw v. Welch, 2 Col. 284; Blinn v. Davis, 56 Tex. 423; Collman v. Teddlie, 30 So. 99; 4 Cyc. 505; Johnson v. Mayer, 20 La. Ann. 1203; Penniman v. Daniels, 190 N. C. 154; Howard v. Oppenheimer, 25 Md. 350; Bobyshell v. Emanuel, 12 Smeads & Marshall, 63; Dawley v. Sherwin, 59 N. W. 1027.

McCulloch & Gibson and *S. E. Ellsworth,* for respondents.

An affidavit that states two different, separate and distinct grounds of attachment in the alternative is fatally defective. 3 Enc. Pl & Pr. 23, and cases cited; 4 Enc. of Law & Proc. 504; Birchall v. Griggs, 4 N. D. 305, 60 N. W. 842; Guile v. McNanny, 100 Am. Dec. 244; Stacy v. Stichton, 9 Iowa, 399; Cronin v. Crooks, 27 N. Y. Supp. 822, 38 N. E. 268; Dintruff v. Tuthill, 17 N. Y. Supp. 556; Kagel v. Schrenkeisen, 37 Mich. 174; Cook v. Burnham, 44 Pac. 447; Blackinton v. Rumpf, 40 Pac. 1063.

MORGAN, C. J. This is an action for the recovery of money upon contract, and at the time that the summons was issued a writ of attachment was procured, and thereafter levied upon the property of the defendant the McLean County Farmers' Elevator Company. The sole contention between the parties on this appeal is as to the

sufficiency of the affidavit on which the writ of attachment was issued. So far as the question in issue is concerned, the affidavit is as follows: "And that the defendants have sold, assigned, transferred, secreted, or otherwise disposed of, or are about to sell, assign, transfer, secret, or otherwise dispose of, their property, with the intent to cheat or defraud their creditors, or to hinder or delay them in the collection of their debts." The McLean County Farmers' Elevator Company and P. J. Hester appeared in the action, and moved to dissolve the attachment on the ground "that the said attachment was improvidently issued * * * without the filing of a sufficient and proper affidavit for attachment." After a hearing upon said motion the district court granted the same, and vacated the levies which had been made under the writ. Subsequently, and within the time prescribed by the statute, the plaintiff appealed to this court from the order vacating the attachment.

Respondents contend that the affidavit states no ground for attachment, for the alleged reason that two distinct grounds are stated in the affidavit, and that such distinct grounds are connected by a disjunctive conjunction, which fact renders the statements of the affidavit meaningless and inconsistent. The appellant contends that but one ground is stated in the affidavit, and that such ground is set forth in literal compliance with the provisions of the statute. The statute prescribing what an affidavit for attachment shall state is as follows (section 6938, Rev. Codes, 1905): "In an action on a contract or judgment for the recovery of money only, the wrongful conversion of personal property, or for damages, whether arising out of contract or otherwise, the plaintiff, at or after the commencement thereof may have the property of the defendant attached in the following cases: * * * (4) When the defendant has sold, assigned, transferred, secreted or otherwise disposed of, or is about to sell, assign, secrete or otherwise dispose of his property, with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts." Although the authorities do not agree as to the construction which statutes like the one before us should receive, we are agreed they should be construed so that groups or classes of facts of conditions, connected disjunctively and placed under one subdivision as grounds for an attachment, should be deemed but one ground where they relate, in a general way, to one subject or condition, or to different phases of one general subject, leading to one and the same result.

In this case the subject dealt with under subdivision 4 is the fraudulent sale or assignment or disposition of property with fraudulent intent as a ground of attachment. Whether the defendant is about to assign or sell, or has assigned or sold, his property with fraudulent intent, it is equally a ground for an attachment. Whatever the state of the transaction contemplated is, it is equally a ground for attachment, whether the sale has been consummated, or is in process of completion. The result is the same as to the fraudulent character of the transaction. In either case it is fraudulent, and is a ground for issuing an attachment writ. It is often very difficult, if not impossible, to determine whether the fraudulent scheme has been consummated, and that fact would often render an attachment wholly ineffectual if the creditor must determine beforehand whether the fraudulent sale has been completed or is in process of completion. It will be noticed that the affidavit is in the exact language of subdivision 4 of said section 6938. Other subdivisions of that section relate to other grounds of attachment in the alternative. For instance, subdivision 2 of the section states as a ground of attachment that the "defendant has absconded or concealed himself." Subdivision 3 states as a ground for attachment that the defendant "has removed, or is about to remove," his property. We think it therefore clear that it was the legislative intention to make the facts stated in subdivision 4 of said section 6938 a separate ground of attachment, and, when they are stated in the language of the subdivision, are to be considered as one ground of attachment only, although stated disjunctively. The intent was, it seems clear to us, to include as one ground of attachment a sale, or contemplated sale, of one's property with fraudulent intent. The disjunctive conjunction "or" in such cases is not meant to connect independent grounds, but different phases of one ground.

Although there is a wide discrepancy in the holdings of the courts on this question, in different states where the statutes are like ours, we think that the better rule is stated as follows: "Where the statute, which defines grounds for attachment, separates them into groups or subdivisions, an affidavit which follows the language of the statute in setting forth a cause embraced by one of the groups or subdivisions is sufficient. And though the statement of the grounds for attachment be made in the alternative by the use of the disjunctive conjunction 'or,' yet, if they are of the same class and

character, being the consummation of one wrongful act, the statement will be deemed consistent, and an attachment issued thereon sustained. Ordinarily, however, an alternative statement or the averment of two grounds disjunctively will be void for uncertainty, as will be shown in the next succeeding section." Shinn on Attachment and Garnishment, § 145, p. 237. In section 146 the same authority says: "When the statute employs the disjunctive conjunction 'or' in connecting phrases, which, taken together, state but one ground for attachment, an affidavit following the words of the statute is not objectionable. As for example, an averment that the debtor 'is converting, or is about to convert, his property into money, or is otherwise about to dispose of his property with intent,' etc., states but one ground for attachment. * * * An averment that the debtor has 'absconded or concealed himself,' etc., forms but one ground for attachment; and, where it is doubtful whether he has 'departed or keeps concealed,' the fact may be alleged in the alternative form. The statement in the affidavit that the plaintiff has good reason to believe that the defendant has done, or is about to do, the act complained of will not invalidate the affidavit when the statute allows an attachment for either case." In Waples on Attachment and Garnishment, § 136, the rule is stated as follows: "The use of the disjunctive is allowable in affidavits, if the statute uses it in such a sense as to express but one ground. For instance, if the grounds are numbered in the statute, and under one number is placed the ground 'if the debtor absconds or conceals himself,' may not the affiant swear that his debtor has absconded or is concealing himself? It is, under some circumstances, the only honest form of path that the plaintiff can take with regard to his debtors' disappearance. When the leading idea of a statute ground for attachment is the avoidance of process by absconding, the means of avoidance may be sworn to in the alternative; so may incidental facts respecting other leading grounds." In Wood v. Wells, 2 Bush (Ky.) 197, the court said: "In setting out the grounds of attachment, the alternative word 'or' is used; but the grounds alleged are of the same class or character of acts, and are so intimately connected with the consummation of the wrongful act, usually in such cases following in quick succession, the conception to carry it out, it is most difficult to know or ascertain when the sale or disposition of the property, which is the last act of the drama, is accomplished; and the one may therefore, and perhaps

should be, regarded as the antecedent of the other, and the grounds may be thus stated to guard against an error as to how the fact is. But even if it be taken as the statement of two grounds of attachment in the alternative, it must be regarded as sufficient. The appellant could neither be surprised nor prejudiced by the grounds being thus stated." In Klenk v. Schwalm, 19 Wis. 111, the court said: "These causes for an attachment, it is insisted, are repugnant and inconsistent, because is is argued that, if a man has assigned, disposed of, or removed his property with intent to defraud his creditors, there is no reason for saying that he is about to do it. The statute allows an attachment for several causes, one of which is 'that the defendant has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property with intent to defraud his creditors.' It is impossible frequently, for a creditor to ascertain whether a debtor has actually consummated a fraudulent transfer of his property or whether he is about to do so, and therefore the Legislature has made these one ground for an attachment. Fraudulent sales are generally secret, 'and it may be very difficult to say at a given moment whether they are fully accomplished or not. * * *' And when regard is had to the manner in which the Legislature has enumerated the different cases in which the attachments may issue, there can be no doubt that the second subdivision of section 2 (Rev. St. 1858, c. 130) was considered as constituting in fact one ground or cause of attachment." The following authorities sustain the principle laid down by the cases from which the foregoing quotations are taken: Enc. P. & P vol. 3, pp. 24, 25; Drake on Attachment, § 102; Cyc., vol. 4, p. 505; Tessier v. Englehart, 18 Neb. 167, 24 N. W. 734; Winner v. Kuehn, 97 Wis. 394, 72 N. W. 227; McCraw v. Welch, 2 Colo. 284; Coleman v. Teddlie, 106 La. 192, 30 South, 99; Cook v. Burnham, 3 Kan, App, 27, 44 Pac. 449; Penniman v. Daniels, 90 N. C. 154; Howard v. Oppenheimer, 25 Md. 350; Dawley v. Sherwin, 5 S. D. 594, 59 N. W. 1027; Parsons v. Stockbridge, 42 Ind. 121; Conrad v. McGee, 9 Yerg. (Tenn.) 428; Irvin v. Howard, 37 Ga. 18; Johnson v. Emery, 31 Utah, 126, 86 Pac. 869.

In ruling that the affidavit stated more than one ground for attachment, the trial court erred. Order reversed and cause remanded for further proceedings. All concur.

(118 N. W. 1049.)

HELMA LOWE *v.* OLE ABRAHAMSON, AND THOMAS CASEY.

Opinion filed December 31, 1908.

Liens — Farm Laborer — Female Cook Not Farm Laborer.

A woman employed in a family living upon a farm, who does ordinary housework and assists in cooking meals for laborers doing the farm work, is not a "farm laborer" within the meaning of section 6277, Rev. Codes 1905, giving a lien for the wages of farm laborers.

Appeal from County Court, Ransom county.

Action by Helma Lowe against Ole Abrahamson and Thomas Casey. Judgment for plaintiff, and defendants appeal.

Reversed.

T. A. Curtis, for appellants.

Rourke N *Kvello,* for respondent.

MORGAN, C. J. This is an action for the foreclosure of a farm laborer's lien, and is jointly brought against the owner of the land and his tenant. The complaint alleges that the plaintiff rendered services to the defendant Ole Abrahamson, who rented the premises, in the capacity of a farm laborer, at the agreed price of $5 per week; that such services were performed upon land which is specifically described in the complaint, and the crop which was raised upon said land is also specifically described therein. The relief demanded is that plaintiff's right to a laborer's lien be established, and that such lien be foreclosed, and that she be paid the amount due her for such services, to wit, the sum of $61.70, together with her costs and disbursements. In the claim for a lien filed by plaintiff it is stated that she "performed services in the capacity of a kitchen laborer." The answer denies that the plaintiff performed any services in the capacity of a farm laborer, and denies that any valid laborer's lien was filed. After a trial the court made findings of fact and conclusions of law in favor of the plaintiff, and ordered a sale of the grain raised upon the land to satisfy the plaintiff's lien for services as a farm laborer, together with costs and disbursements. The defendant Thomas Casey, the owner of the land, has appealed from said judgment, and demands a trial de novo under the provisions of section 7229, Rev. Codes 1905.

The sole question presented on the appeal is whether the plaintiff is entitled to a lien as a farm laborer upon the crops raised upon the land upon which her employer lived and resided, and for whom she was working as a servant from July 28th to November 8, 1906. The evidence as to the contract under which she was employed, and as to the services which she performed is as follows: "Q. What were her labors on the farm? A. She done kitchen work, cooking and washed dishes. Q. You had quite a number of men there? A. Yes, sir. Q. How big a force? A. I had 4 or 5 men most of the time, and Mr. Casey had a couple men there at the same time. Q. And she cooked for all these parties? A. Yes, sir. Q. And prepared all the meals also? A. Yes, sir. Q. That is what you kept her for? A. Yes, sir." On cross examination the witness stated: "Q. Mrs. Abrahamson done some of the work around the house? A. Yes, sir. Q. In fact did just as much as Helma (the plaintiff)? A. Not much of the cooking, but she helped quite a lot. Q. Mrs. Lee was there? A. Yes, sir. Q. Helma Lowe is a girl. A. Yes, sir. Q. And all the work she did was in the kitchen and around the house? A. Yes, sir." That is all of the testimony in regard to the character of the work performed by the plaintiff, as testified by her employer, the defendant Abrahamson. The statute under which the lien is claimed is chapter 63, p. 87, § 1, Laws 1895, (Rev. Codes 1895, § 4826), being section 6277, Rev. Codes 1905, and so far as applicable is as follows: "Any person who performs services for another in the capacity of a farm laborer between the first day of April and the first day of December of any year, shall have a lien on all crops of every kind, grown, raised, or harvested by the person for whom the services were performed during said time, as security for the payment of any wages due or owing to such person for services so performed, and said lien shall have priority over all other liens, chattel mortgages or other incumbrances, excepting however, seed liens and thresher's liens." Without a statute giving such lien or a special contract farm laborers would not be entitled to a lien upon the crops, and must rely upon the personal responsibility of the landlord or cropper for their pay. The statute was passed to secure farm laborers against irresponsible landlords, and against the liens of implement dealers, which often covered the whole crop. We must look to the terms of the statute to ascertain who are entitled to avail themselves of its provisions. It should be liberally construed to give effect to the

intent of the Legislature in enacting it. Its provisions should not be restricted or added to, as it is the sole function of the Legislature to say to whom this special lien shall be given.

The general principle of construction that statutes in derogation of the common law are to be strictly construed can have no application in this state, as section 6224, Rev. Codes 1905, expressly provides that the provisions of the Code shall "be liberally construed with a view to effect its objects and to promote justice." Section 6691, Rev. Codes 1905, provides that, except when defined or explained in the statute, the "words used in any statute are to be understood in their ordinary sense, except when the contrary intention appears," etc. Whether the plaintiff is entitled to a lien under said section 6277 depends upon the meaning or construction to be given to the words "farm laborer" as used therein. As ordinarily understood, a farm laborer is one who labors upon a farm in raising crops, or doing general farm work. As commonly accepted, we think the words do not include those engaged in domestic work. They refer to work performed directly in connection with the crops raised on the farm. Under the evidence, it appears that the plaintiff did no work except in the house. She did the cooking for four or five men who were working on the farm for Abrahamson, and for two other men who were working for Casey. It does not appear that the persons working for Casey did any work for Abrahamson, or in connection with the crop on the farm. We think that the legislative intention was to secure only those persons whose work is directly connected with the raising of the crops. If the plaintiff be given a lien upon the crop in this case, it will result in her receiving pay out of the crop for some services that were not even remotely connected with the crop, or contributed in any way to the bringing of the same into existence. We do not think that the work done by plaintiff can be classed as farm labor within the meaning of the lien law. Although the statute is to be liberally construed to secure a lien in favor of persons who have labored upon the farm, we are satisfied that it was not intended to include those within its provisions whose work was only indirectly connected with the crop. We find this construction sustained under somewhat similar statutes in McCormick v. Los Angeles City Water Company, 40 Cal. 185; Sullivan's Appeals, 77 Pa. 107; Allen's Appeals, 81 Pa. 302; Boisot on Mechanic's Liens, § 111. Respondent relies on Winslow v. Urquhart, 39 Wis. 260, and Breault

v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545, as sustaining her rights to a lien under the facts of this case. These cases sustain the right of a cook in a logging camp to a lien upon the logs that were cut or banked by the crews for whom the cooks prepared the meals. In these cases the cooks went into the logging camps, as members of logging crews, and did no other work, except to cook for them. In this case the plaintiff did other work besides cooking, and cooked for others than the farm laborers. Under the evidence as to the work performed by the plaintiff, we are satisfied that she was not a farm laborer within the provisions of said lien statute.

The judgment is reversed and the action dismissed. All concur.

(119 N. W. 241.)

NELS O. ENGHOLM AND MARIE SOPHIA ENGHOLM v. J. M. EKREM, LUDVIG WATNE, LORENCE HUSBY, HERMAN PETERSON, ZION NORWEGIAN CHURCH, A CORPORATION, AND CITY OF MINOT.

Opinion filed November 24, 1908.

Rehearing denied January 8, 1909.

Homestead — Estoppel — Grounds of Estoppel.

1. Plaintiffs, who are husband and wife, and who were the owners of the real property in dispute, being a portion of their homestead, entered into a verbal agreement to sell the same to E. Pursuant thereto E. paid part of the purchase price, entered into possession, and made certain permanent improvements thereon, with the full knowledge and acquiescence of plaintiffs. *Held*, that E. thereby became the equitable owner of the premises, and that plaintiffs, by their acts, are estopped to question the validity of such contract.

Same — Married Women.

2. The doctrine of equitable estoppel by conduct applies as against married women the same as against all persons sui juris.

Same — Statute of Frauds and Homestead Laws.

3. Neither the statute of frauds nor the various statutory provisions enacted for the protection of homestead claimants can be held to do away with the general equity doctrine of estoppel in pais.

Estoppel — Fraud.

4. Actual fraud at the time of the act set up as constituting the estoppel is not essential to the application of the doctrine of estoppel, it being sufficient that the act relied on constitutes constructive fraud.

Homestead — Fraud — Equitable Title.

5. E. having acquired the equitable title to this property, it would operate as a constructive fraud upon his rights to permit plaintiffs to succeed in their purpose to divest him of such ownership. The homestead laws should not be construed so as to permit the owners of homesteads to perpetrate a fraud, either actual or constructive, upon the rights of others.

Costs — Attorney's Fees.

6. Costs are purely the creature of statute, and can be awarded only when expressly authorized by law. It is accordingly *held*, that certain allowances by way of attorney's fees were erroneous, and the judgment is modified by eliminating such items therefrom.

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

Action by Nels O. Engholm and wife against J. M. Ekrem and others. Judgment for defendants, and plaintiffs appeal.

Modified and affirmed.

L. W. Gammons and *Purcell & Divit*, for appellants.

Equity cannot give specific performance unless the land is specifically determined. 2 Pom. Eq. Rem. Sec. 764, 765, 767. Contract for conveyance of homestead not in writing and jointly signed and acknowledged by both spouses, is void. Helgeby v. Dammen, 13 N. D. 167, 100 N. W. 245; Silander v. Gronna, 15 N. D. 552, 108 N. W. 544; Garr Scott & Co., v. Collins, 15 N. D. 622, 110 N. W. 81.

Estoppel will not supply the want of power. Whitlock v. Gosson, 53 N. W. 980; Weatherington v. Smith, 109 N. W. 381; Alt v. Banholzer, 40 N. W. 830; Murphy v. Renner, 109 N. W. 593; Anderson v. Culbert, 7 N. W. 508; Stinson v. Richardson, 44 Ia. 373; Donner v. Redenbaugh, 16 N. W. 127.

Statements in a deed do not estop the maker or his spouse. Whitlock v. Gosson, supra; Weatherington v. Smith, supra; Alt v. Banholzer, supra; Halso v. Leanright, 65 Ala. 431; Mortgage Co. v. Payne, 18 So. 164; Hells v. Mathews, 68 Georgia, 490; Timothy

v. Chambers, 21 Am. St. Rep. 163, and note, 11 S. E. 598; Doyle v. Coburn, 6 Allen 71; Showers v. Robinson, 43 Mich, 502; Texas Land Co. v. Blollock, 13 S. W. 12; Hines v. Nelson, 24 S. W. 541; Watkins v. Markham, 36 S. W. 145.

Lack of acknowledgment will defeat the contract of both or either spouse. Tabler v. Sullivan, 29 S. W. 972; Aultman & Tayloy v. Jenkins, 27 N. W. 117; Phillips v. Bishop, 48 N. W. 1106; Horback v. Tyrrell, 67 N. W. 485, 37 L. R. A. 434; Smith v. Pearce, 7 Am. St. 44; Kalamazoo Bank v. Johnson, 24 S. W. 350; Richardson v. Woodstock Iron Co. 9 L. R. A. 348; Parks v. Barnett, 16 So. 136; Barton v. Drake, 21 Minn, 299; Dye v. Mann, 10 Mich, 290; Ayers v. Probasco, 14 Kan. 141; Delaney v. Walker, 79 S. W. 601; Smith v. Pearce, 7 Am. St. Rep. 44; Parks v. Barnett, 16 So. 136; Garr, Scott & Co. v. Collins, supra, Silander v. Gronna, supra, Murphy v. Renner, supra.

Misrepresentation to effect an estoppel must be one of fact. Donner v. Redenbaugh, supra; Chellis v. Coble, 15 Pac. 505; Bigelow on Estoppel, 554; Wright v. DeGraff, 14 Mich. 163; Bigelow on Estoppel, 619; Mayenborg v. Haynes, 50 N. Y. 675.

A void contract does not constitute color of title. Balou v. Bergvendson, 9 N. D. 285, 83 N. W. 10; Power v. Kitching, 10 N. D. 254, 86 N. W. 737; Wood v. Conrad, 50 N. W. 903; Seymoure v. Cleveland, 68 N. W. 171; Colman v. Stalnacke, 88 N. W. 107.

Costs are wholly a matter of statute. 11 Cyc. 24, 25 and 27; Turnquist v. Cass Co. Drain Co. 11 N. D. 514, 92 N. W. 852.

Palda & Burke, and *Bosard & Ryerson,* for respondent.

Oral contract for sale of homestead made by both husband and wife and possession taken by purchaser, purchase price paid and valuable improvement put on, will warrant a specific performance Grice v. Woodworth, 69 L. R. A. 584.

Estoppel will be enforced against a married woman. 2 Pom. Eq. Jur. 814.

Any act or word to controvert which would work fraud upon one who acts thereon, estops him who made or spoke it. Davis v. Davis, 26 Cal. 23; Crout v. De Wolfe, 1 R. I. 393; Duell v. Bear R. & A. M. Co. 5 Cal. 85; Mitchell v. Reed. 9 Cal. 204; McGee v. Stone, 9 Cal. 600; Snodgrass v. Ricketts, 13 Cal. 360.

FISK, J. This action was brought to determine adverse claims to a small tract of land described in the complaint and situated

in the city of Minot. Defendant Ekrem answered separately, alleging both a written and an oral contract by the terms of which plaintiffs agreed to sell to him and he agreed to purchase a certain portion of the premises and alleging a part performance thereof on his part. The other defendants, with the exception of Husby and Peterson, answered, but it is unnecessary to state the issues raised by such answer, as they were awarded judgment against the plaintiffs, and the correctness thereof is not challenged by the appellants on this appeal, except as to certain allowances by way of attorney's fees, which will be hereafter noticed. As a result of the trial in the district court judgment was entered in favor of defendant Ekrem, decreeing specific performance of the oral contract of sale alleged by him. Aside from a determination of the correctness of the allowance of attorney's fees, we are called upon only to retry the issues between plaintiffs and the defendant Ekrem.

The facts out of which the dispute arose between plaintiffs and Ekrem are briefly as follows: Plaintiff Nels Engholm became the owner of the property involved, together with something over an acre of land adjoining the same, and about the month of January, 1902, he and his wife, the other plaintiff, established their residence upon said tract of land, the entire tract being inclosed by a fence on all sides, except as bounded by Mouse river. This entire tract constituted their homestead, and was of the value of from $2,500 to $3,000, the buildings thereon consisting of their dwelling house and a barn. In the summer of 1904 Ekrem, with knowledge of the homestead character of said tract, had certain negotiations or talks of an informal character with plaintiffs relative to a sale and purchase of the whole or a portion of the tract, which negotiations continued up to October 6th of that year, on which date on oral contract was entered into, as hereafter stated. On October 7, 1904, plaintiff Nels Engholm and defendant Ekrem entered into a written contract of sale upon the same terms as the oral agreement made the previous day, by the terms of which a portion of said tract, situate in the southwest corner thereof, 150 feet on the south and 200 feet deep, Nels agreed to sell and convey, and Ekrem agreed to purchase, for the consideration of $600, payable as follows: Five dollars cash at the date of the execution of the contract; $95 on December 15, 1904; $250 on November 1, 1905, and $250 on November 1, 1906. Engholm, as party of the first part, agreed that upon the full, prompt and faith-

ful performance of the contract by Ekrem he would convey to him said premises by good and sufficient deed of conveyance with the usual covenants of general warranty. On October 8th plaintiffs sold and conveyed by deed to defendant Peterson a portion of said tract lying north of the portion described in the Ekrem deed. Their dwelling house was situated on the land sold to Peterson, and after such sale plaintiffs continued to live in said dwelling house, paying rent to Peterson for the use thereof, until about Christmas, 1904, when they removed therefrom, and took up their residence in a new dwelling, built, after the sale to Peterson, on that portion of the land left in the southeast portion of said tract. Within a few days after the Ekrem contract was entered into he entered on said premises, and commenced to grub out trees and excavate for a dwelling, and in the latter part of October, 1904, he commenced building a house on the tract claimed to have been purchased by him, his house and plaintiffs' being in the course of construction at the same time, and the following spring Ekrem also built a barn on the tract claimed by him. Plaintiff Marie Engholm did not sign the written contract, and she refused to do so when the same was presented to her a few days later for her signature. On October 28th a receipt for $95 was signed by both plaintiffs and delivered to Ekrem, representing a payment at that time made on the land contract of such sum. Plaintiff Marie at first refused to sign such receipt, and remonstrated against the sale of the land. It is claimed by plaintiffs that her signature thereto was obtained through fraud and misrepresentations, regarding which there appears to be a dispute in the testimony. Marie took no action to prevent the erection of the house by Ekrem, nor did she remonstrate against his holding the premises until the following spring, when plaintiffs attempted to restrain Ekrem from building his barn.

The disputed questions of fact which we are called upon to retry are: First, whether plaintiffs, and especially Marie Engholm, entered into the oral agreement on October 6th to sell to Ekrem the portion of the tract claimed by him, it being contended by plaintiffs that the only contract entered into was the written contract signed only by Nels Engholm and defendant Ekrem, and it is contended by appellants that no agreement, either oral or in writing, was ever entered into for the sale of the particular land claimed by Ekrem; second, whether Marie Engholm's signature to the receipt for $95 aforesaid was obtained through misrepresentations, or

with full knowledge on her part of the facts. It is also contended that the payment of this money was not made to her or to her husband in her presence; and third, whether the facts on which an estoppel be claimed as against plaintiffs, and especially Marie Engholm, are sufficiently established. In appellants' printed argument they first direct our attention to their objections to certain evidence, with the statement that such objections are based upon two general propositions as follows: "First, it appearing that the property in question was a homestead, any evidence attempting to establish a contract of sale is not admissible, except a written instrument signed and acknowledged by both husband and wife; second, no acts of acquiescence or ratification of an oral contract can by way of estoppel supply the place of the statutory form of conveyance." These propositions need not be specially noticed at this time, as they are the same as those involved in the main propositions of law to be hereafter considered. Addressing ourselves to the facts, we will dispose of the controverted questions in the order in which they are presented in appellants' brief.

The trial court's finding No. 9 is the first finding challenged. This finding is as follows: "That during the summer and fall of the year 1904 the plaintiffs, Nels O. Engholm and Sophia Engholm, were desirous of selling a portion or all of said tract of land embraced in their purchase of Gullison and Watne to J. M. Ekrem, and at various times during the summer, and up to October 7, 1904, each and both of said plaintiffs requested J. M. Ekrem to purchase a portion of said tract, or all thereof, as said Ekrem desired, and had several negotiations with Ekrem in attempting to sell all or a portion of said tract to him, according as he desired to purchase all or a portion of the same, and the said negotiations led up to the execution of the attempted contract of sale, hereinafter set forth, and at the solicitation of each and both of said plaintiffs to purchase a portion or all of said tract said J. M. Ekrem inspected said premises so offered for sale by plaintiffs, and on October 6, 1904, while on said premises, in company with both plaintiffs, said plaintiffs, each and both of them, agreed to sell, and defendant J. M. Ekrem agreed to buy, a rectangular piece of land 150 feet in width and 200 feet long, or four lots each 50x150 feet in area, side by side, and in the southwesterly portion of said tract of land purchased by Engholm from Watne, and lying wholly east of the west boundary fence of said tract as erected by said Gullison prior to

the purchase of said tract by Engholm, and wholly to the east of the strip of land left for highway purposes and afterwards platted as Nedrud avenue as aforesaid; that the agreed purchase price to be paid for said tract of land 200 feet long by 150 feet in width was the total sum of $600, or $150 for each lot 50x150 feet in area; that Nels O. Engholm and Sophia Engholm, his wife, plaintiffs, each and both agreed to sell said tract of land to J. M. Ekrem at said time and place, and J. M. Ekrem agreed with Nels Engholm and wife to purchase said tract for the consideration of $600, and at said time and place paid down on the purchase price of said tract, as a part of the purchase price thereof, the sum of $5, said Ekrem paying the same to Nels Engholm. It was further agreed at the said time and place that the balance of said purchase price shall be payable in amounts and at periods as follows, to wit: Ninety-five dollars during the fall of that year, or before January 1, 1905, $250 during the fall of 1905, and $250 during the fall of 1906; that the last two payments, aggregating $500, should draw interest at the rate of 8 per cent per annum until paid, the first payment of $95 to be without interest." It will be noticed that much of the matter set forth in said finding is merely evidentiary in character, and should have no place in the finding. After eliminating such superfluous matter the ultimate fact found is that on October 6, 1904, plaintiffs jointly agreed with the defendant Ekrem to sell to him on specified terms the property therein specifically described. (This alleged oral contract is the one specifically enforced by the judgment appealed from.) Appellants' counsel attack this finding upon two grounds: First, they contend that the description of the property to be conveyed was too indefinite ;and second, that the burden of proof has not been sufficiently met to warrant the finding that a contract was made by either plaintiff, and especially by Marie Engholm. As to the first ground we think the finding is supported by the evidence. It is true the exact description is left somewhat uncertain by the proof; but, when the evidence is taken as a whole, we are not prepared to say that the finding, in so far as the sufficiency of the description is concerned, is not justified by the evidence, and we think the description sufficiently definite to warrant specific performance of the contract. The second objection urged against such finding is more serious. As stated by appellants' counsel, the rule is that the contract must be "clearly and satisfactorily established in all its terms." Such is the well-settled rule, 2 Pom.

Eq. Rem. § 765, and cases cited. In the light of this rule we have carefully examined the tesitmony, and, without reviewing and analyzing the same at length in this opinion, suffice it to say we are agreed that the finding that such agreement was made is amply supported by the proof.

The eleventh finding is next challenged, upon the ground that it is entirely unsupported by any evidence, but as appellants' counsel in their brief assert that their point on such finding is entirely immaterial, and pass it without argument, we will not notice it further.

Finding 13 is challenged upon the ground that it has no support in the evidence. This objection, in so far as Mrs. Engholm is concerned, is clearly sound. The proof shows that she refused to sign the receipt for the payment of the $95, but was induced to do so by her husband, with Ekrem's knowledge and tacit consent, under the representation that she was merely signing the same as a witness, and she personally received no part of such payment.

Findings numbered 14 (there being two by that number) are challenged in certain particulars; but, as we deem the portions thus challenged wholly immaterial, we pass these objections without further comment.

Finding No. 17, in so far as it finds that both plaintiffs caused notice to be served upon Ekrem to vacate and quit the premises occupied by him, is without support in the evidence so far as Mrs. Engholm is concerned; and the portion of said finding wherein it is found that Engholm practiced fraud and deception in having the written contract changed as to the description of the property lacks any support in the proof.

The next finding, which is also numbered 17, finds that the plaintiffs, and each of them, at the time of the sale of said tract of land to defendant Ekrem, intended to and did abandon all claim thereto as a homestead, and that they, at the time of the sale of the portion of the tract to Peterson, intended to and did abandon their homestead right to such tract, and it further finds that it was the intent of each of the plaintiffs at all times up to and until July 11, 1905, and up to the time of the commencement of this action, to claim, use, and occupy, as and for their homestead solely and only, that portion of said tract not agreed to be conveyed to Ekrem and not sold to Peterson. This portion of the finding is challenged by appellants' counsel upon the ground that it amounts

merely to a conclusion of law. We think this criticism is in part correct. The question of intent is one of fact, but whether they did abandon their claim thereto as a part of the homestead is, we think, a mere conclusion; but, in any event, there is no express testimony to the effect that plaintiffs, or either of them, intended to or did in fact abandon their homestead claim to the tracts aforesaid, and such fact can only be inferred, if at all, from their conduct. Said finding also sets forth that Ekrem paid $100 of the purchase price to the plaintiffs, and that they received and have retained the same. We find no testimony in support of such finding in so far as Mrs. Engholm is concerned. It nowhere appears that she ever received any portion of the money paid to her husband.

The facts, in addition to those not in dispute, and which we think are sufficiently established by the evidence, may be briefly summarized as follows: (1) The homestead of the plaintiffs included the land which they orally agreed to sell to Ekrem on October 6th. (2) Such homestead, at and prior to October 6th, did not exceed two acres in extent, nor $3,000 in value. (3) On October 6, 1904, the plaintiffs orally agreed with the defendant Ekrem for the sale, on specified terms, of the portion of their homestead now claimed by Ekrem, but no written contract to such effect was ever executed by Mrs. Engholm, she refusing to execute such written contract. (4) Mrs. Engholm signed the receipt which has been mentioned supposing she was signing merely as a witness, and this, with the personal knowledge of Ekrem, and she was induced to do so through deception practiced upon her by her husband, with the knowledge and tacit consent of defendant. (5) Prior to the erection of the buildings by defendant Ekrem he had knowledge of Mrs. Engholm's refusal to sign any paper for the purpose of disposing of said tract claimed by defendant. Prior to acquiring such knowledge Ekrem had done some grubbing upon the land preparatory to building thereon. In the light of the foregoing facts we will now consider the legal propositions advanced by appellants' counsel.

They first contend that the alleged oral contract was too indefinite as to description of property, and that the evidence to establish it is not of that clear and satisfactory character to warrant the court in specifically enforcing the same. As before stated, we think these contentions are unsound. They have been sufficiently disposed of in the preceding portion of this opinion, and hence they will not be further noticed at this time.

It is their next contention that, by section 5052, Rev. Codes, a contract for the conveyance of the homestead of a married person which is not in writing and, jointly signed and acknowledged, is absolutely void, and hence they argue that the oral agreement was void, and that there is, as a matter of law, no contract upon which the doctrine of part performance can operate. And they also assert, in effect, that the doctrine of estoppel cannot be made available to supply the place of the statutory conveyance; that an estoppel cannot be predicated on a void conveyance of a homestead. It is of course manifestly true that the alleged oral contract of sale was void under the statute of frauds; it not being in writing. It is equally true that, because of the homestead character of the land, the written contract of Nels O. Engholm, in the absence of his wife's signature, was a nullity. What, then, are the rights of the parties under the facts aforesaid? Can the equitable doctrine of estoppel by conduct be invoked in respondent's behalf? If, as appellants' counsel contend, this question must be answered in the negative, then a wrong has been suffered by respondent for which he may have no adequate remedy. The appellants by their conduct induced respondent to pay a portion of the purchase price and to enter into possession of the premises in good faith and to make valuable improvements thereon. Upon the plainest principles of justice respondent should be held to be the equitable owner of the premises, and appellants should not be permitted, in a court of equity to deny such ownership in him. Neither the statute of frauds nor the various statutory provisions enacted for the protection of a homestead claimant can be held to do away with the general equity doctrine of estoppel in pais. While it is true some courts have held to the contrary, the weight of modern authority is to the effect that the doctrine of equitable estoppel will be applied to a married woman as well as to a feme sole. The doctrine is not invoked to render valid a contract which is void under the statute of frauds or under statutes for the benefit and protection of the homestead claimants, but it is invoked to prevent the successful perpetration of fraud by preventing wrongdoers from urging the provisions of such statutes to shield them in their tortious conduct. We are agreed that under the facts as disclosed by this record the appellants should be, and are, estopped from asserting title to the premises as against the respondent. In support of our conclusion on this point we call attention

to Grice v. Woodworth, 10 Idaho, 459, 80 Pac. 912, 69 L. R. A. 584, 109 Am. St. Rep. 214, and the numerous cases cited; Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W., 365, 1 L. R. A. 522; and 2 Pom. Eq. Jurisprudence, § 814 and cases cited. The Idaho case is directly in point, under a statute relating to the conveyance and incumbrance of the homestead identically the same as section 5052, Rev. Codes 1905, of this state. Among other things, the court said: "The verbal agreement for the transfer of the homestead in question was assented to by both husband and wife, and was followed by change of possession and permanent improvement placed thereon by the purchaser and a payment of the purchase price. Those acts operated to transfer the equitable title to the appellant. That being true, a court of equity will compel the respondent to convey the legal title to the appellant." The decision was placed upon the ground of estoppel or waiver, and not upon the principle of abandonment. In speaking of the doctrine of equitable estoppel as applied to married women the court quotes approvingly from 2 Pom. Eq. Jur. (3d. Ed.) § 814, as follows: "Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly toward the enforcement of the estoppel against married women as against persons sui juris, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right, or to maintain a defense." The foregoing text is supported by the citation of numerous modern authorities, both English and American, and that it states a correct rule we entertain no doubt. The opinion in Galbraith v. Lunsford, supra, is, to our minds, a very clear and sound exposition and treatment of the question here involved, and the same meets with our full approval. The gist of the decision in that case is that there is no exception as to married women in the application of the principle of equitable estoppel, and that actual and positive fraud at the time of the act set up as constituting the estoppel is not essential to the application of

the doctrine of estoppel; it being sufficient that the act relied on constitutes constructive fraud.

We are convinced that the facts in the case at bar are clearly sufficient to bring the case within the rule above stated. The verbal agreement for the sale of these lots was entered into voluntarily by both of the plaintiffs, and was followed by delivery of possession to the grantee, who, with full knowledge of the wife, and with her tacit consent and acquiescence, made valuable improvements thereon and paid a portion of the purchase price. Thus defendant Ekrem became the equitable owner of the property, and it would operate as a constructive fraud upon his rights to permit plaintiffs to succeed in their purpose to divest him of such ownership. It was never intended that the homestead laws should be so construed as to permit their owners to perpetrate a fraud, either actual of constructive, upon the rights of others. In reaching the above conclusion we have not overlooked any portion of the very able and learned argument presented by appellants' counsel dealing with the question of the essential requisites of an estoppel in pais or the authorities cited in support thereof, but we deem it of no beneficial use to enter into a detailed discussion of those questions or of the numerous authorities cited, or to add anything further to what we have above stated in support of our conclusion that the doctrine of estoppel is applicable to the facts as we find them to exist. Our conclusion on the foregoing question also renders a consideration of the question of abandonment unnecessary.

The only remaining point to be disposed of relates to the allowance in the judgments of certain costs, by way of attorneys' fees, in favor of the defendants, Ekrem, Zion Church, and city of Minot; the sum of $75 being allowed to the first-named defendant, and the sum of $25 to each of the others. Appellants contend that the trial court erroneously allowed these items. That this contention is correct we fully agree. Costs are wholly the creature of statute and hence are not allowable in the absence of an express statute permitting such allowance. 11 Cyc. 24, and 5 Encyc. of Pl. & Pr. 110, and numerous cases cited. Turning to our statute (sections 7173-7179, Rev. Codes 1905) we find no warrant therein for the allowances here complained of. By the provisions of these sections certain items termed "costs" are allowable by way of indemnity for expenses in the action, but nowhere is there any provision for the allowance of attorneys' fees as such. In actions such as this the

costs specified in section 7174 may be allowed to either party in the discretion of the court, under section 7179, Rev. Codes 1905. but the court has no power under this section, or under any other section, to award costs not expressly authorized by statute. The judgment awarding these items must therefore be modified according to the views here expressed.

As thus modified the same will be and is hereby affirmed. All concur.

(119 N. W. 35.)

L. J. RANSIER *v.* MARY J. HYNDMAN, JOHN HYNDMAN, MARY J. HYNDMAN AS GUARDIAN OF JOHN HYNDMAN AND ARCHIBALD MCLEAN, THE UNKNOWN HEIRS OF CHARLES KOLMAN, DECEASED, AND ALL PERSONS INTERESTED IN SAID ESTATE.

Opinion filed January 13, 1909.

Wills — Undertaking — Appeal From Order Revoking Letters.

Rev. Codes N. D., 1905, section 7968, which exempts an administrator, executor or guardian from the necessity of giving an undertaking on appeal in certain cases, does not apply to one who appeals from a decision of the county court revoking the probate of a will and also his letters of administration issued under such will.

Appeal from District Court, Towner county; *Cowan,* J.

Action by L. J. Ransier against Mary J. Hyndman and others. Judgment for plaintiff, and defendant McLean appeals.

Affirmed.

Fred E. Harris and *William Bateson,* for appellant.

Where an appeal affects the estate, or the administrator jointly with the estate, it may be taken and the administrator's official bond alone is sufficient. 2 Cranch C. C. 200; Sawyer v. Cheney, 59 Ga. 368; Uebel v. Maltese, 2 Utah, 430; M'Cauley's Admr v. Griffin's Ex'or, 4 Grat. 9; 2 Munf. 341; 1 Rand. 393; Erwin v. Erwin, 61 S. W. 159; 42 S. W. 578; 28 S. W. 236; 45 S. W. 827; 27 Ark, 599; 27 Ga. 330; 84 Ind. 272; 25 Miss. 463; 42 Mo. 376; 59 N. H. 90; 2 Pa. St. 404; 91 Ind. 378; Fuller v. Fuller's Estate, 44 Pac. 72.

Davis & Sennett, for respondent.

Where the appeal affects only the administrator's interests personally, apart from those of the estate, he must furnish a regular appeal bond. Butler v. Jarvis, 117 N. Y. 115, 22 N. E. 561; Erlanger v. Danielson, 26 Pac. 505; In re McDermott's Estate, 59 Pac. 783; Fuller v. Fuller's Estate, 44 Pac. 72; Coutlet v. Atchison, 52 Pac. 68; Mallory v. Burlington, etc. & Co., 36 Pac. 1059; In re Skerrett's Estate, 22 Pac. 85.

FISK, J. This is an appeal from a judgment of the district court of Towner county dismissing an appeal taken to that court from a decision of the county court holding the will of one Charles Kolman, deceased, void, and revoking the probate of such will and the letters of administration issued to appellant Archibald McLean thereunder, and appointing L. J. Ransier administrator of the estate. Such appeal was dismissed by the district court upon the ground that no undertaking on appeal had been given; and the sole question here involved is whether under section 7968, Rev. Codes 1905, such an undertaking was necessary. This section provides: "An executor, administrator or guardian may appeal without filing an undertaking from a decree or order made in any proceeding in a case in which he has given an official bond; and when he appeals in that manner the bond stands in place of such undertaking. A special guardian may appeal without filing an undertaking although he has not given bond, but the appeal will not operate as a stay unless taken from an order which grants or refuses a transfer of the case." We are entirely clear that the judgment of the district court was correct, and must be affirmed. The appellant, as well as the other parties who joined with him in appealing from the decision of the county court, were not absolved by the provisions of said section from giving the undertaking on appeal required by law. Appellant McLean at the time such appeal was taken was not an executor, administrator, or guardian within the meaning of said statute. His letters of administration had been revoked by the county court. Therefore he was not acting nor could he act for and in behalf of the estate in taking the appeal; and it is too plain for discussion that none of such other parties came within the provisions of said law. Furthermore, McLean is the only party before this court asking for a reversal of the judgment appealed from.

Without attempting a review of all the authorities upon the question, we call attention to the following, the reasoning in which

we fully approve: Coutlet v. Atchison, etc., R. Co., 59 Kan. 772, 52 Pac. 68; Mallory v. Burlington, Pac. R. Co., 53 Kan. 557, 36 Pac. 1059; Fuller v. Fuller Estate, 7 Colo. App. 555, 44 Pac. 72; Erlanger v. Danielson, 88 Cal. 480, 26 Pac. 505; In re Skerrett's Estate, 80 Cal. 62, 22 Pac. 85; In re McDermott's Estate, 127 Cal. 450, 59 Pac. 783. The statutes in the various states in which the foregoing cases were decided are similar to section 7968, Rev. Codes N. D., above quoted. In Erlanger v. Danielson, supra, Temple C., said: "It is also contended that no bond was required under section 965 (Code of Civil Procedure). We cannot agree with this contention. * * * We think it equally evident that section 965 has no application to this case. This is not a proceeding upon the estate of which he was administrator within the purview of that section. In the first place, he was not administrator. Whatever effect his appeal, when perfected, would have upon the order removing him, it was in full force until then. It follows that, when he filed his notice, he was not such officer, and then had no administrator's bond. Suppose the contrary were held, and the order removing him was affirmed. How could his sureties be held for costs incurred after his duties as administrator has ceased? But the section has reference to matters in which the estate is interested. This is his personal matter. The undertaking of his sureties is that he shall faithfully perform the duties of his office. How can he be said to be discharging official duty in appealing from an order relieving him from such duty? " The Kansas court in Coutlet v. Atchison, etc., R. Co., supra, after quoting their statutory provision to the effect that no executor or administrator shall be required to give bond to entitle him to appeal, said: "The plaintiff in error contends that under the last sentence of this paragraph of the statute she was exempt from the obligation to give an appeal bond. In this she is in error. When the order removing her was made by the probate court, she was no longer administratrix. Her appeal from that order was not appealed in behalf of the estate, or in furtherance of the trust she had been filling. Her appeal was in assertion of a personal right only." To the same effect are the holdings in the other cases.

Counsel for appellant has called our attention to certain authorities which we have examined, and, with the exception of the case of Uebel v. Maltese, 2 Utah, 430, we do not deem them in point as

supporting appellant's contention. It will be found by examination that they merely recognize the general rule of construction of similar statutes, that the executor or administrator is absolved from giving an appeal bond only in those cases where the object of the appeal is to assert the rights or protect the interests of the estate which he represents. The Utah case above referred to involved a construction of the twenty-fourth rule of the Supreme Court regulating appeals from the probate court. The opinion does not enlighten us as to the provisions of this rule, and, not being advised with reference thereto, we are unable to determine whether the case supports appellant's contention. No authorities are cited in the opinion of the court.

The judgment appealed from being correct, the same is accordingly affirmed. All concur.

(119 N. W. 544.)

JOHN BRANDENBURG AND SUSAN J. BRANDENBURG v. WALTER PHILLIPS AND THEODORE J. ROSS.

Opinion filed January 15, 1909.

Appeal and Error — Record — Statement of the Case.

1. In an equity case tried and appealed under the provisions of Rev. Codes 1905, section 7229, a statement of the case is not required to enable this court to review questions appearing on the record proper.

Vendor and Purchaser — Contract — Rate of Interest.

2. The sole question which the appellate court is asked to review relates to the rate of interest which plaintiffs are entitled to recover. *Held,* that the findings of fact of the trial court disclose that plaintiffs had no cause of action at the time this action was commenced, and that, in any event, the rate allowed by the judgment below exceeds the amount called for by the contract between the parties; hence appellants have no cause for complaint.

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

Action by John Brandenburg and Susan J. Brandenburg against Walter Phillips and Theodore J. Ross. From a judgment in plaintiff's favor defendants appeal, asking for a modification of the judgment.

Affirmed.

Smith Stimmel, for appellants.

S. B. Bartlett, for respondents.

FISK, J. By this appeal appellants seek to have the judgment of the district court modified as respects the amount of the recovery, it being their contention that they were entitled to recover interest on the principal sum found due, towit, $2,900 at the rate of 8 instead of 5½ percent. as allowed. This is the sole question presented. The action is one for equitable relief, and was tried without a jury, and comes here for trial de novo in so far only as the issue above stated is concerned. No statement of case is incorporated in the record, and we are confronted with the question of practice, whether without such statement of case we can review the part of the judgment complained of. It is appellants' contention that a statement of the case is necessary only where there is some issue of fact to be retried in the appellate court, and that in this case there is no retrial of such issue required; plaintiffs merely seeking a modification of the judgment on account of an error appearing upon the judgment roll, citing the opinion of this court in McHenry v. Roper, 7 N. D. 584, 75 N. W. 903. On the other hand, respondents' counsel argue that it is essential to the determination of the question presented that this court should have before it all the evidence in the case. Among other things, they say: "A judicial determination of the rate and amount of interest to which plaintiffs are entitled necessarily involves the consideration by the court of the evidence and all the evidence. The court cannot decide that the findings of the trial court are either right or wrong without having before it the evidence upon which those findings are based. The appellants evidently assume that the findings of fact of the district court are right and the conclusions of law wrong. If the evidence was before this court, it might conclude that the findings of fact were wrong and the conclusions of law right. Without the evidence, or any part of it, appellants cannot ask the appellate tribunal to indulge in assumptions. A consideration by the court of the appeal herein therefore requires an examination of the evidence and retrial of the issues of fact."

It is manifestly true that in the absence of a settled statement, this court is powerless to review any question of fact, nor can we

review any question of law not appearing on the record proper. The only record before us as shown by the printed abstract is the pleadings, consisting of the complaint and answer, the findings of fact, and conclusions of law of the trial court, and the judgment rendered pursuant thereto, and from which the appeal was taken. We agree with appellants' contention that a statement of case is not necessary to enable this court to decide the only controverted question between the parties, towit, the rate of interest to which plaintiff is entitled under the conceded facts as shown by the trial court's findings. The sole question, in other words, is whether the conclusions of law are warranted by the findings of the trial court. It is perfectly apparent that they are not, as there is absolutely nothing, either in the findings or in the contracts which are a part of the complaint and admitted in the answer, to justify the conclusion that defendants are liable for the payment of interest at the rate of 5½ per cent.; there being no reference anywhere to any stipulation or agreement for the payment of such rate. What rate, therefore, are they legally liable to pay under the facts as found? A correct answer to this question necessitates a consideration of the findings, which so far as material to the question here involved, are as follows:

"(1) That the plaintiffs and defendants made and entered into the contracts mentioned and set forth in the complaint in this action. [The contracts mentioned and set forth in the complaint are two in number. The first, which is designated Exhibit A, is a contract whereby plaintiffs agreed to sell to defendants, and the latter agreed to purchase from plaintiffs, certain real and personal property for the consideration of $3,000. Of this sum $1,500 was to be cash on delivery of deed, and the balance either in cash or a secured note due in one year at 8 per cent. interest per annum. Such contract is dated March 20, 1905, and possession of a portion of the premises was to be given to the vendees on or before May 1st, and the remainder upon completion of the inventory of the personal property. On July 17th following the parties entered into a contract known as Exhibit B, which recites the making of the previous contract and the payment of $100 as a part of the purchase price of such property, and also reciting that the title to said property was found to be incomplete and defective, and that first parties had commenced legal proceedings to perfect such title. Then follow these stipulations: It is agreed upon the part of said

first parties that, as soon as the title to said property can be perfected, to deliver to said second parties a good and sufficient warranty deed, together with an abstract of title showing the parties of the first part to have a good and marketable title to said premises, clear of all liens and incumbrances. That the said second parties agree upon the delivery of said warranty deed and abstract of title to them * * * that they will pay to said first parties the sum of twenty-nine hundred dollars with interest thereon at the rate of four per cent. per annum from April 1, 1905. * * * It is further mutually agreed that after the completion of the abstract hereinbefore mentioned the parties of the second part shall have two days in which to examine the same before being required to accept said deed and pay the purchase price hereinbefore mentioned.]

"(2) That on or about the 25th day of January, 1906, the plaintiffs tendered to the defendants a warranty deed of the premises described in the complaint in this action, together with abstracts of title thereto, and demanded of said defendants the payment of the balance of the purchase price of said premises in accordance with the terms and conditions of the contracts mentioned and set forth in the plaintiff's complaint; that said defendants refused to accept said deed and pay the balance of the purchase price of said premises upon the ground that the abstract so presented did not show that the plaintiffs had a good and marketable title to said premises for the following reasons: [Here follows seven alleged reasons why the abstract failed to show a marketable title.]"

Findings 3 and 4 are to the effect that the United States government parted with its title to the real property by the issuance of a patent to one David H. Ortley more than six years prior to the commencement of this action; that said Ortley died in 1864, leaving as his sole heir at law and next of kin Henry F. Ortley.

"(5) That the abstract presented to defendants by the plaintiffs on January 25, 1906, did not show that the plaintiffs' title to the premises described in the complaint was a good and marketable title; that the evidence and abstracts introduced on the trial of this action on the 21sth day of September, 1906, did show that the plaintiffs had a good and marketable title to said premises at the time they tendered said deed and abstracts to defendants on the said 25th day of January, 1906."

The conclusions of law, among other things, recited: "That the plaintiffs are entitled to have and recover from the defendants the sum of $2,900, with interest on the same at 4 per cent. from January 25, 1906, to April 1, 1906, and at 5½ per cent. from January 25, 1906, to the date of the entry of judgment herein, and that, on the payment of said sum, the plaintiffs deliver to the defendants a warranty deed of the premises, * * * conveying the same to the defendants clear and free of all liens and incumbrances, except a lien for taxes subsequent to the year 1905."

It thus appears that by the explicit terms of the contract defendants were not obliged to pay the $2,900 until such time as plaintiffs delivered to them a warranty deed, "together with an abstract of title, showing the parties of the first part to have a good and marketable title to said premises," and by the express language of the findings "the abstract presented to defendants by the plaintiffs on January 25, 1906, did not show that plaintiffs' title to the premises * * * was a good and marketable title;" and the fact that plaintiffs had such title on January 25, 1906, was not made to appear until September 21, 1906, during the trial of this case, when the evidence and abstracts introduced disclosed such fact. How, under these facts, can it be said that plaintiffs are entitled to recover interest from January 25, 1906, at a rate in excess of 4 per cent? The contract between the parties must control, and the findings upon their face therefore disclose that plaintiffs had no cause of action at the time these proceedings were commenced. Until such time as plaintiffs delivered or tendered to defendants a warranty deed, together with an abstract of title showing that plaintiffs had a good and marketable title to the premises as stipulated in the contract, defendants were under no legal duty to pay the balance of the purchase price, and hence until such time arrived the agreed rate of interest to be paid was 4 per cent.

The trial court having allowed a greater sum and which has been paid by defendants, plaintiffs have no cause to complain. The finding of the trial court fails to point out the defect in plaintiffs' title as disclosed by the abstract; and hence we have no method of determining whether such defect was one upon which defendants relied in refusing to make payment.

Judgment affirmed. All concur.

(119 N. W. 542.)

BJARNIE PETERSON v. WILLIAM CONLAN AND CHRISTOPHER CONLAN, DEFENDANTS, WILLIAM CONLAN, APPELLANT.

Opinion filed January 7, 1909.

Animals — Injuries — Evidence — Appeal and Error.

1. Action to recover for personal injuries inflicted upon plaintiff by an alleged vicious bull or stag, which it is claimed was the property of appellant, and which was negligently suffered and permitted to escape from its inclosure and to trespass upon the land where the injuries were inflicted. *Held,* that the evidence was sufficient to require the issue as to appellant's ownership of the offending animal to be submitted to the jury, and, the jury having by the verdict found such issue in plaintiff's favor, the same will not be disturbed by this court.

Same.

2. The complaint was apparently framed to embrace the following alleged grounds or theories of recovery: First, that the animal was vicious, and was known to be vicious by its owner, and that he kept and harbored the same in such a negligent manner as to permit its escape from his inclosure and to inflict the injury complained of Second, that the animal was trespassing at the time of the injury. Hence its owner is liable for any damage done by it. Third, negligence of the owner in permitting the animal to thus escape. The trial court submitted the issues to the jury on the first two theories only. *Held,* conceding, without deciding, the evidence of the known viciousness of the animal to be sufficient to require its submission to the jury, that a new trial must be ordered because of errors hereinafter mentioned in the instructions relative to the second ground or theory above stated; it being impossible to determine on which theory the verdict was rendered.

Same — Trespassing Animals — Instructions.

3. Plaintiff, not being the owner or entitled to the possession of the real property on which the animal was trespassing at the time of inflicting the injury, cannot recover as for a trespass, and the instructions to the jury relative to this phase of the case constitute reversible error.

Same — Injury — Proximate Cause.

4. Such instructions were erroneous, for the further reason that they, in effect, amounted to a peremptory charge to find for plaintiff, provided the jury found appellant to be the owner of the animal, regardless of the question of appellant's negligence, and also without regard to whether the particular injury complained of was proximately caused by such trespass. Section 6582, Rev. Codes 1905, restricts a recovery in such cases to damages proximately caused by the trespass.

Same — Judgment.—. Theory of Case — Statutory Liability.

5. The recovery cannot be sustained on the third ground named because the case was not tried, nor the jury instructed, on such theory. Neither, for the same reason, can the recovery be sustained upon the theory that there is a statutory liability resting on defendant under sections 9405, 9408, Rev. Codes 1905, as contended for by respondent.

Appeal from District Court, Pembina county; *Kneeshaw,* J.

Action by Bjarnie Peterson against William Conlan and Christopher Conlan. From a judgment for plaintiff, William Conlan appeals.

Reversed.

Bangs, Cooley & Hamilton, for appellant.

Knowledge by the owner of the vicious inclination of a domestic animal, is essential to charge such owner with damages. Finney v. Curtis, 21 Pac. 120; Spring Co. v. Edgar, 99 U. S. 645; Vrooman v. Lawyer, 13 Johns 339; Losee v. Buchanan, 51 N. Y. 476; 2 Cyc. 368; 2 Am. & Eng. Enc. Law, 364; May v. Burdett, 3 Eng. Rule Cases, 108.

Owner is not liable without prior knowledge of the particular vicious propensity that caused the harm. Losee v. Buchanan, 51 N. Y. 476; Cooley on Torts, (2nd Ed.) 402; Moynahan v. Wheeler, 22 N. E. 702; Weide v. Thiel, 9 Ill. App. 223; Hammond v. Melton, 42 Ill. App. 186; Meredith v. Reed, 26 Ind. 334.

The owner of an animal is liable for any injury done by it while trespassing. Cooley on Torts, (2nd Ed.) 400; Shearman & Redfield on Negligence, Sec. 627; Sprague v. Fremont R. Co. 6 Dak. 86, 50 N. W. 617; Bulpit v. Matthews, 34 N. E. 525; Bostwick v. Railroad Co. 2 N. D. 440, 51 N. W. 781; Randall v. Gross, 93 N. W. 223; 2 Cyc. 392; Van Leuven v. Lyke, 1 N. Y. 515; Marsh v. Hand, 24 N. E. 463; Malone v. Knowlton, 15 N. Y. Sup. 506; Kinmouth v. McDougal, 19 N. Y. Sup. 771; Dolph v. Ferris, 7 Watts & Serg. 367.

Breach of the close by a trespassing animal makes owner liable for damage done, regardless of knowledge of vicious tendency. Chunot v. Larson, 43 Wis. 536, 28 Am. St. Rep. 567; Page v. Hollingsworth, 7 Ind. 319; Lee v. Burke, 15 Ill. App. 651; Angus v. Radin, 8 Am. Dec. 626; Morgan v. Hudnell, 40 N. E. 716; Mosier

v. Beale, 43 Fed. 358; Dufer v. Cully, 3 Or. 377; Beckett v. Beckett, 48 Mo. 396.

M. Brynjolfson and *Jeff M. Myers,* for respondent.

FISK, J. Plaintiff had judgment in the court below for the sum of $1,200, and costs, and this appeal is from such judgment, and from an order denying a motion for a new trial.

The action was brought against the appellant and his son, and plaintiff's cause of action, as alleged in the complaint, is, in substance as follows: That on September 25, 1904, defendants were the owners of a certain vicious bull or stag, well knowing the said animal to be vicious and dangerous to mankind, and they did willfully and wrongfully keep and harbor said animal, and wrongfully and negligently permitted the same to run at large and trespass upon the lands of plaintiff; that on said date, and while said animal was thus trespassing upon plaintiff's lands, it charged upon and gored the plaintiff with its horns, inflicting grevious bodily injury, to his damage in the sum of $3,000. The answer amounts to a general denial. The complaint was apparently drawn to embrace several grounds or theories of recovery. First, the ground or theory that defendants are liable because of the fact that the animal was vicious and known to be such by defendants, and that they kept and harbored the same in such a negligent manner as to permit the same to escape from defendants' inclosure and inflict the injury complained of; second, upon the ground or theory that the injury was inflicted while the animal was trespassing upon plaintiff's land; and third, that defendant was negligent in permitting the animal to escape from its inclosure and to trespass upon the land of plaintiff and his neighbor where the injury was inflicted.

As stated by appellant's counsel, to sustain a recovery upon the first ground, it must appear, first, that appellant was the owner of the animal at the date of the injury; second, that such animal was vicious; and, third, that he was known by the appellant to be vicious. It is appellant's contention that the proof is insufficient to show his ownership of the animal at the date of the injury, and hence that under no theory of the case can the recovery be sustained. The appellant admits his ownership of the animal from the time of its birth until the spring of 1904, but he swore that at said time he sold the same to his son and codefendant, Chris. Conlan, and this testimony is corroborated by that of the son. Opposed to this is the testimony of the witness Gudman, a butcher

at Cavalier, who testified that he purchased the animal from appellant shortly after the injury, and he details a certain conversation with appellant prior to that time, and in the early part of September, in which appellant said he had a steer and a cow he wanted to sell; that he wanted to get rid of the stag because he was acting a little cross, and he had trouble to keep him in the fence. After the injury, and in the latter part of September, appellant asked witness if he could not take that steer from him, saying, "It wasn't his steer, but it was Chris. Conlan's, but he wanted to sell him. He was tied up in the barn, and he had to sell him. * * * He said at that time that it wasn't his steer." It seems to be conceded, at least appellant does not deny the fact, that the animal which inflicted the injury complained of is the identical animal which was thereafter sold to Gudman; and the jury by the verdict, and the trial judge in denying the motion for a new trial, reached the conclusion, after hearing the testimony and observing the witnesses upon the stand, that appellant was, in fact, the owner of the animal at the time it inflicted the injuries aforesaid. While, as argued by appellant's counsel, it is possible to harmonize the testimony of the witness Gudman with that of the appellant and his son, still we think the jury was not bound to do so, but on the contrary was justified in construing it as sufficient proof of an admission made by appellant contrary to his sworn testimony; and, when thus construed, we think it created a substantial conflict in the testimony upon the issue regarding appellant's ownership of the animal at the date of the injury. Hence the finding of the jury upon this issue will not be disturbed by this court. Whether the evidence is sufficient upon which to sustain the recovery upon the first ground or theory above stated it is unnecessary to determine. The only proof in the record tending to show that the animal was vicious, and that appellant had knowledge thereof, is the appellant's admission, testified to by the witness Gudman, that the animal "was acting a little cross, and he had trouble to keep him in the fence." It is not contended by respondents' counsel that this was sufficient proof that the animal was vicious, and that appellant had knowledge thereof; nor do they rely upon any such theory in the case to sustain the verdict.

Respondents' counsel seek to sustain the judgment upon either one of the following grounds: (1) That the injury was inflicted while the animal was trespassing upon plaintiff's land, and hence plaintiff may recover for the injury as aggravated damages grow-

ing out of such trespass; or (2) that the animal was a bull, and was permitted to run at large, contrary to the provisions of section 9405, Rev. Codes 1905, and that defendant is liable under section 9408, Rev. Codes 1905, for the damages caused to plaintiff by such injury. It is appellant's contention in brief that trespass will not lie, for the reason that the injury was not inflicted upon plaintiff's land, but was inflicted upon the land of plaintiff's neighbor, a few rods from the dividing line between plaintiff's and his neighbor's land. In other words, he contends that "the particular injury suffered by the plaintiff will not support an action, unless it be considered as a part of, in connection with, and in aggravation of, a trespass; and, if plaintiff was not in possession of the lands upon which the trespass was committed, there was, as to him, no trespass of which the personal injuries were an aggravation." He also contends that the recovery cannot be sustained under the facts upon any theory of law.

The learned trial court submitted the case to the jury under instructions which recognized two theories of recovery. First, upon the theory of the known viciousness of the animal; and second, upon the theory of defendant's liability if the animal was a trespasser at the time of inflicting the injury. The instructions pertaining to the first theory were, we think, strictly accurate, assuming that there was sufficient evidence to require a submission to the jury of the questions of the viciousness of the animal and of defendant's knowledge thereof. Upon the other phase of the case we deem the instructions faulty; and, in view of the impossibility of determining upon which theory the jury arrived at the verdict, a new trial must follow. Aside from the questions of the ownership of the offending animal and the extent of the damage, the instructions amounted to a direction of a verdict in plaintiff's favor. They were as follows: "That the court instructs you that, notwithstanding the fact that you may not find that the defendants, or either of them, had any knowledge of the vicious character of the stag prior to the date of the injury, and notwithstanding the fact that you may not find the defendants, or either of them, had any notice or sufficient reason to believe that the stag in question was cross and ugly, or had shown vicious propensities prior to the injury, yet notwithstanding the fact that you may not so find, the court instructs you that if you do find, by a fair preponderance of the evidence, that on the 25th day of September, 1904, on the date of

the alleged injury the defendants, or either of them, was the owner of the black stag in question, and you further find that on or about said date that said stag injured the plaintiff as alleged in the complaint, and you further find from the evidence that at the time of the injury the stag was in a place that he had no right to be, and that plaintiff was in a place that he had a right to be, and further find from the evidence that at the time of the injury the stag was a trespasser, and you further find that such stag was trespassing on the land of another, without the owner's consent, and that while such stag was so trespassing, he inflicted the injuries on the plaintiff complained of by him, and you do not find that the plaintiff was guilty of contributory negligence, then the court instructs you that your verdict must be for the plaintiff, and against such of the defendants as you may find were the owners of the stag at the time of the injury, for all damages sustained by him that were the proximate result of the injury, not exceeding the sum of $3,000."

The testimony without dispute disclosed that the animal inflicted the injury to plaintiff; that at the time such injury was inflicted the animal was a trespasser upon Spearman's land, while plaintiff was rightfully there, at least as a mere licensee, and there was not even a suggestion or intimation that plaintiff was guilty of contributory negligence. These instructions were evidently given upon the theory, supported by some of the cases in other jurisdictions, that the owner of a trespassing animal is liable in any event for all damages whether they could have been anticipated or not, which are caused either proximately or remotely by such animal while trespassing. The authorities in support of this rule proceed upon the doctrine that plaintiff has a cause of action against the owner of the animal for the trespass, and that the damages for the special injury may be recovered as aggravated damages growing out of, and connected with, the primary trespass. Conceding the soundness of this rule does not aid respondent, as he cannot maintain trespass, not being the owner or entitled to the possession of the property upon which the animal was trespassing at the time of the injury, and it cannot be properly said that the personal injuries were the result of the previous trespass of the animal upon plaintiff's farm. Plaintiff must recover, if at all, upon a theory of the law consistent with the facts. The facts not bringing the case within said rule, we express no opinion with reference thereto, except to call attention to the following cases bearing upon the question: In the recent

case of Troth v. Wills, 8 Pa. Super, Ct. 1, a very instructive discussion of the rule, both in the majority and minority opinions, is found. In that case plaintiff was injured by a trespassing cow while in the act of driving such animal from her son's garden. The cow was not known to be mischievous or vicious, but plaintiff's recovery was sustained upon the theory that the injury was inflicted while the animal was trespassing, and that such injury was incident to the primary trespass, or so closely associated with it as to form a substantial part or an immediate result of it. Two out of the five judges dissented, upon the ground that plaintiff, not being the owner or entitled to the possession of the garden, could not maintain trespass, and also upon the ground that the injuries inflicted were not the natural or proximate result of the trespass. We quote as follows: "In the present case, had the owner of the garden brought suit against the appellant for the injury done by the cow in breaking in and entering the inclosure, eating or trampling the growing vegetables, or indeed any other harm that domestic cows, as a class, are prone and accustomed to do, and that this one had caused him, he certainly would have been entitled to recover. That, however, is not the case before us. We are called on to determine whether the rule * * * shall be established in Pennsylvania that the owner of a useful, gentle, and domestic animal, belonging to a class recognized from the earliest times as harmless to man, * * * shall be responsible for the conduct of the animal, foreign to its well-known nature and habits, if it happen that through any negligence of such owner, or his servant, it is permitted to trespass on the land of another, and there injures a third party. The authorities on this subject are numerous and impossible to reconcile. Some of them rest on statutes or ordinances, not always adverted to in the text-books or digests, in which they are hastily cited. Others are based on the theory, that the right to recover exists because of the trespass to realty, and that any unusual and not to be expected injury caused by the animal to the person of the owner of the land, or his other property, must be alleged and proved by way of aggravation of damages. Another class of cases hold that all injuries committed by an animal, in a place where it has no right to be, must be compensated for by the owner. It is on the latter theory of the law that the plaintiff must recover, if she can sustain her action, as we do not deem it worth while to notice the few erratic and sporadic cases, seemingly decided

on no discoverable reason, except an assumed natural equity, that any one injured by anything animate or inanimate, belonging to another should be compensated by the owner." After reviewing a number of decisions in Pennsylvania and other states, and differentiating them from the case under consideration, the opinion proceeds: "The adoption of the rule, sanctioned by the decisions of many respectable tribunals in other states, that the owner of every trespassing domestic animal is liable, merely because it is a trespasser, for all injuries it may commit, however contrary to its usual nature and disposition, and regardless of his knowledge of its special viciousness, might often lead to strange and unthought of consequences. For instance, suppose that a pet lamb, always regarded as a harmless playmate of children, is permitted to wander from its owner's premises into those of a neighbor, and there, in play or anger, butts a child from a high veranda, or a trespassing hatching hen, discovered on its nest by the little son of the owner of the premises, pecks out the eye of the boy as he is lawfully trying to drive it away, the unfortunate owner would be liable in each instance for all the resulting damages. In vain would he urge that the animal causing the injury belonged to a class ordinarily docile in its nature and harmless to man, that he had no reason to anticipate that it would do such unusual mischief, and that he was only responsible for the things hens, lambs, and milch cows usually do, and may be expected to do, when trespassing; that is, for the natural and probable consequences of their trespasses. The answer, under the rule we are considering, would be, 'You were guilty of negligence in permitting your animal to trespass, and therefore you are liable for all its freaks, for the consequences of the wrong, near and remote, probable and improbable, for the things you had reason to anticipate, and those which no one would be likely to think could happen, save as a remote possibility.' The results that might follow the application of such a rule demand its rejection, where it has not already been fully adopted." To the same effect are Klenberg v. Russell, 125 Ind. 531, 25 N. E. 596; Fletcher v. Rylands, 1 Eng. Rul. Cases, 236; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623, and numerous other cases.

Appellants counsel give it as their opinion, however, that under the weight of authority the owner of a trespassing animal is liable in an action of trespass for any injury done by such animal while trespassing, citing Cooley on Torts (2nd Ed.) p. 400; Sherman and

Redfield on Negligence, § 627; Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99; Van Leuven v. Lyke, 1 N. Y. 515, 49 Am. Dec. 346; Beckett v. Beckett, 48 Mo. 396, and other cases. However this may be, we are very firmly impressed with the justness, as well as soundness, on principle, of the rule that only such damages may be recovered, where the trespass is not willful, as will compensate the injured party for all the detriment proximately caused by such trespass, and such is the statutory rule in this state. Section 6582, Rev. Codes 1905. The fact that the detriment could, or could not, have been anticipated is not controlling, but the test is whether the injury was the proximate result of the breach of duty owing by defendant to plaintiff. If so, he is liable; otherwise not. After reviewing certain cases relating to the rule here under consideration, Bartholomew, J., in Ouverson v. City of Grafton, 5 N. D. 291, 65 N. W. 678, referred to the above statute, saying: "And our statute (Comp. Laws 1887, § 4600) seems to go further, and to make defendant liable for any result which is proximate, though not anticipated." If therefore, it be conceded, as contended for by respondent's counsel, that plaintiff may recover as for a trespass, the question would then arise whether, under the facts, the injury inflicted to plaintiff's person by such animal could be deemed the proximate, as distinguished from the remote, result of the trespass. Upon this very interesting question we are not required to express an opinion, as we hold, under the facts, that plaintiff has no cause of action for the trespass.

We are convinced that plaintiff's cause of action, if he has any, other than upon his first theory, is not for trespass, as his counsel contend, but that it is for negligence of the defendant in permitting the animal to escape from his inclosure and to do the injury complained of. The uncontroverted testimony is to the effect that the offending animal was a bull, and the owner owed to plaintiff and all persons the common-law duty of exercising due care to protect them, not only from known viciousness, but from the mischievous acts of such animal, which might reasonably be expected from the natural disposition and propensities of animals of this class. Whether defendant exercised such care under the facts of the case at bar as a reasonably prudent person would be expected to exercise under the like circumstances was for the jury to determine. We think the complaint sufficient to support a recovery under this theory, but such theory was not adopted in the trial of the case, nor in the

court's instructions, but on the contrary, as before stated, the jury was instructed, in effect, that if the animal was a trespasser, its owner, regardless of any negligence on his part, was absolutely liable to plaintiff for the injury done. We think the question as to defendants' liability should be determined by the rule announced in Barnum v. Terpening et al., 75 Mich, 557, 42 N. W. 967, and Hammond v. Melton, 42 Ill. App. 186, and similar cases, in which it was held, in effect, that it was for the jury to say whether defendant was negligent, in view of the known or ordinary propensities of such an animal, in the manner of keeping or restraining the same.

Respondent asks us to sustain the recovery upon the theory that the animal, being a bull, was permitted or allowed by defendant to run at large, and hence that there is a statutory liability, under section 9408, Rev. Codes 1905, resting on defendant to respond in damages for all injuries inflicted by such animal. We are not called upon to determine whether the facts proved bring the case within the statute aforesaid, it being a sufficient answer to respondent's contention that no such ground of recovery was relied on, either in the pleadings, or at the trial of the case. The conclusion we have reached renders it unnecessary to notice appellant's assignment in detail.

For the error in the instructions pointed out, the judgment and order appealed from are reversed, and a new trial ordered. All concur.

(119 N. W. 367.)

Abe Siegel v. Cassel Marcus.

Opinion filed January 7, 1909.

Partnership — Sale of Good Will — Consideration — Legality.

1. Upon the dissolution of a copartnership between S. and M., it was mutually agreed that the latter's interest in the partnership assets, including cash and merchandise, was of the value of $1,100, and in consideration of S. paying to M. said sum in cash for his said interest, M. agreed with S. "not to engage for the next two years" in the same business theretofore conducted by such firm, in the same city, "in the manner aforesaid, or with any partner, partners, firm, company or corporation for the period aforesaid." *Held*, that such contract is based upon a sufficient consideration and is in all respects legal and enforceable.

Same — Breach of Contract — Vendor of Good Will Acting as Clerk for Rival of Vendee.

2. After the dissolution of such copartnership and the entering into of such contract M. entered the employ as a clerk of one E., whom he was instrumental in procuring to open a rival business adjacent to that of S. and M., attended to the purchase of stock for such rival business.

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

Action by Abe Siegel against Cassel Marcus. From a judgment for plaintiff, defendant appeals.

Affirmed.

J. W. Tilly, for appellant.

Promise without consideration is void. 6 Am. & Eng. Enc. Law, (2nd Ed.) 673; Lang v. Werk, 2 Ohio St. Rep. 530.

Where one sells the good will of a business, and bargains not to engage in it for a limited period in a certain locality, he is not barred from acting as a clerk in the same business, period and location. Battershell v. Bauer, 91 Ill. App. Ct. 181; Haley Grocery Co. v. Haley, 35 Pac. 595; Bishop on Contracts, (Enlarged Ed.) 521.

T. H. McEnroe, for respondent.

The good will of a business may be sold along therewith, within a limited period and territory. Rev. Codes, 1905, Sec. 5430; Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713.

The seller of the good will of a business must observe the spirit as well as the letter of his agreement. Emery v. Bradley, 34 Atl. Rep. 167; Kramer v. Old, 34 L. R. A. 291; Whitney v. Slayton, 40 Me. 224; Dwight v. Hamilton, 113 Mass. 175; Boutelle v. Smith, 116 Mass. 111; Jefferson v. Market, 37 S. E. 758; 24 Am. & Eng. Enc. Law. 859; Meyer v. Lebau, 26 So. 463; Angier v. Webber, 92 Am. Dec. 765; Nelson v. Johnson, 36 N. W., 868.

FISK, J. This litigation arose in the district court of Cass county and comes here for trial de novo. The action was brought to obtain a perpetual injunction restraining defendant from engaging in any manner in the pawnbroker, secondhand clothing and jewelry business in the city of Fargo for the period of two years from and after February 18, 1907; it being plaintiff's contention that defendant entered into a lawful and binding contract to abstain during such period from engaging in such business in said city.

The facts are not seriously in dispute, and may be summarized as follows: Prior to February 18, 1907, respondent and appellant were copartners engaged in the secondhand clothing, jewelry, and pawnbroker business at 218 Front street in Fargo. On that date by mutual consent such copartnership was dissolved, and a full settlement was effected between them, whereby it was agreed that appellant's interest in the copartnership property, which consisted partially of cash and partially of merchandise, was of the value of $1,100, which sum respondent agreed to pay, and did pay, to appellant in cash as consideration for the execution and delivery by appellant to respondent of the following agreement: "For and in consideration of the sum of eleven hundred dollars ($1,100), to me in hand paid by Abe Siegel, I hereby specifically agree as a part of the consideration for said money, not to engage for the next two (2) years in the pawnbroker, second-hand clothing and jewelry business within the city of Fargo, Cass county, N. D., and I also hereby sell, assign, set over and deliver all my right, title, interest and lien in, to and upon the second-hand clothing, jewelry and pawnbroker business now owned and conducted by Abe Siegel & Co., at No. 218 Front street, Fargo, N. D., and every claim thereto and thereunder, and waive all right to the use of the said name or any part thereof in any business whatsoever. And I further agree as a part of the consideration herein, not to engage in the said business aforesaid, in the manner aforesaid, or with any partner, partners, firm, company or corporation for the period aforesaid. The receipt of said eleven hundred dollars ($1,100) is hereby specifically acknowledged. Said sale and purchase being made at my request and all of said goods being delivered unto said Abe Siegel free and clear of any and all incumbrance and indebtedness on my account or through me. And in execution hereof, and in agreement hereto, I have hereunto set my hand and seal the day and year first above written, that is to say, this 18th day of February, A. D. 1907, in the presence of the witnesses whose names are hereunto attached. Cassel Marcus. Witnesses: Matt. Siegel. E. Siegel."

In September, following, one Sam Epstein embarked in a similar pawnbroker business two doors east of respondent's place of business on Front street in said city, where he has continued said business ever since. Appellant at or prior to the opening of said store by Epstein entered into a contract of employment as clerk to work for and manage said store for said Epstein at a salary of $60 per

month, and appellant at the time of the commencement of this action was thus engaged in conducting said business as aforesaid; he being experienced in the business, while Epstein was inexperienced. There was considerable testimony tending to show that appellant was a partner with Epstein in such business, and, while it was admitted by said parties that they had certain preliminary negotiations looking toward the consummation of a copartnership arrangement between them, such negotiations were never consummated. Appellant and the said Epstein both testified, and the trial court found, that such negotiations were never completed. At the conclusion of the trial, the district court made findings of fact and conclusions of law favorable to plaintiff, and judgment was rendered perpetually enjoining appellant from engaging in said business in the city of Fargo in any manner whatever "as hireling, clerk, agent, or with a partner, partners, firm, or corporation" until after February 18, 1909, and for costs and disbursements, to reverse which judgment this appeal is prosecuted.

The only controversy between the parties arises on account of a disagreement between them regarding their legal rights under the agreement above stated; it being appellant's contention that his employment as a clerk in the store of Epstein did not and does not violate the terms of said agreement, while respondent contends to the contrary Minor questions are raised which we will consider later. It is conceded at the outset by appellant's counsel, and in this respect the law is well settled, that where a person, on the sale of a business or his interest in a business, contracts with the purchaser that he will not engage in that particular line of business in a certain locality for a certain period of time, he is bound by such contract, and a court of equity on a proper showing will restrain him from violating such agreement. This court, in Mapes v. Metcalf, 10 N. D. 601, 88 N. W. 713, in effect so held. Among other things, the court there said: "It has always been held lawful for the vendor of the good will of a business to bind himself to refrain from conducting a like business within a limited territory and for a limited period, provided, only, that his agreement to refrain shall be no more extensive than is necessary to secure to the vendee the fruits of his purchase." Section 5374, Rev. Codes 1905, provides: "Partners may upon or in anticipation of the dissolution of the partnership agree than none of them will carry on a similar business within the

same city or town where the partnership business has been transacted, and within a specified part thereof."

It seems also to be reasonably well settled, and we think correctly so, that parties to such contracts must not only comply with the letter but with the spirit thereof as well. It was so held in the late case of Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650, where the court, among other things, said: "Where injunctive relief is asked, it is the duty of the court to restrain the contracting parties from violating the spirit as well as the letter of the agreement." In Emery v. Bradley, 88 Me. 357, 34 Atl. 167, we find the following language; "It must be evident that for the defendant to get into and carry on the business * * * as clerk or agent of any person would violate the spirit and purpose of his agreement with the plaintiff. He would be carrying on the business, though as clerk or agent. It does not matter how or in what manner and what name he acts, if he in fact carries on the business he agreed not to carry on, he is acting, he is breaking his promise, whether he acts as principal or agent. Located at Bar Harbor and carrying on the photograph business there as clerk or agent, he would be in direct competition with the business he sold to the plaintiff, as much so as if he were to be doing the same acts in his own name. The spirit of his agreement requires that he should not compete in this business with the plaintiff, either directly, in his own name, or indirectly, as clerk or agent of some one else. In equity and good conscience he should abstain from both modes of competition. Under the allegations in the bill he can and should be enjoined from both"—citing Whitney v. Slaton, 40 Me. 224; Dwight v. Hamilton, 113 Mass, 175; Boutelle v. Smith, 116 Mass. 111. In Finger v. Hahn, 42 N. J. Eq. 606, 8 Atl. 654, we find this language: "I cannot perceive that the mere fact of his being employed at the salary protects him against this covenant. In my judgment, the letter and spirit of the covenant are just as certainly violated as though he were in partnership with Horst, or had the entire ownership and control of the business himself. In common sense or reason, the object of every such covenant is to get rid of the competition which endangers the business of the purchasing party, to remove beyond reach the influence of the vendor's popularity, business integrity, knowledge, or skill, and to make it impossible for personal influences and friendly considerations, arising from long-continued business acquaintance, exerting themselves to

the prejudice of such purchaser. Without these considerations, such contracts are quite meaningless. But not one of these influences is there which will not be felt or brought to bear, to a greater or less extent, if the vendor engage in business even as a clerk." To the same effect, see Jefferson v. Markert, 112 Ga. 498, 47 S. E. 758; Meyer v. Labou, 51 La. Ann. 1726, 26 So. 463; Nelson v. Johnson, 38 Minn. 255, 36 N. W. 868; 24 Am. & Eng. Encyc. of Law, 859; 20 Cyc. 1280, and cases cited.

Appellant's counsel rely upon Grimm v. Warner, 45 Iowa, 107, Battershell v. Bauer, 91 Ill. App. 181, Haley Grocery Co. v. Haley, 8 Wash. 75, 35 Pac. 595, and Bishop on Contracts, p. 521, as supporting the contrary rule. We have examined these authorities, and, with the possible exception of the Illinois case, we do not consider them at all in point. In the latter case the agreement was "to never start in the dry goods, clothing, boot or shoe business in Milton, Pike county, Illinois, directly or indirectly," as long as appellees continued in business in said place. It was said: "The contract did not prohibit appellant from accepting employment as assistant or clerk to others engaged in the like business mentioned in the contract, and we do not understand it is contended by appellees that it did, and in this view we think appellees failed to prove the case." This case, when considered in the light of the particular wording of the contract there under consideration and the tacit admission of appellees that the contract did not prohibit appellant from accepting employment as an assistant or clerk to others, cannot be deemed an authority in support of appellant's contention in the case at bar.

In the light of the above well-established rule, it is entirely clear to our minds that under the facts the trial court very properly held that appellant was violating his said contract with plaintiff. The facts in the case at bar disclose a clear violation by appellant of the spirit, if not the letter, of the contract, and render it a plain case for equitable relief. The record fairly discloses that appellant was instrumental in causing such rival business to be established; that he went to Minneapolis, where he purchased stock with which to start the business; and that he was the active agent in the conduct and management thereof after it was started. The testimony further shows that appellant at times stood on the sidewalk in front of respondent's store soliciting his prospective patrons away from him and urging them to become patrons of Epstein's place of business.

But appellant contends that, if the contract be given the construction herein given to it, it would violate paragraph 23 of article 1 of our state Constitution, which provides: "Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor." We think such contention devoid of merit. Such constitutional provision is not applicable to the facts in this case and was not intended to abolish the long and well established rule recognized by the foregoing authorities and others too numerous to mention.

Appellant also contends that there was no adequate consideration for the contract in question. This contention is supported by the argument that, inasmuch as appellant's interest in the cash and stock of the copartnership existing between plaintiff and himself was of the value of $1,100, he was entitled to such sum as a matter of law without executing and delivering to plaintiff the agreement aforesaid. But the fallacy of such argument is apparent for the reason that there was no legal duty resting on plaintiff to purchase appellant's interest in the merchandise. By the voluntary agreement of the parties plaintiff purchased such interest paying cash therefor, and as a part of the consideration for such contract of purchase the execution and delivery of the contract in question was made a condition thereof. This was perfectly legitimate, and there was ample consideration therefor. Section 5374, Rev. Codes 1905; Kramer v. Old, supra; 24 Am. & Eng. Encyc. of Law (2d Ed.) 853.

Judgment affirmed. All concur.

(119 N. W. 358.)

SIDNEY D. ADAMS v. W. J. HARTZELL AND SARGENT COUNTY. W. J. HARTZELL, DEFENDANT AND APPELLANT.

Opinion filed January 19, 1909.

State Insolvency Law.

1. St. Wis. 1898, chapter 80, with the acts amendatory thereof and supplemental thereto, which provide that, when a resident of that state has made an assignment of his property for the benefit of creditors, the proceedings thereunder shall be under the jurisdiction of the circuit court, and that the assignee may be removed, and the creditors may elect a successor, and for the discharge of the debts of the assignor, is a state bankruptcy or insolvency law.

Insolvency — Assignment for Benefit of Creditors — Extra Territorial Effect.

2. A deed of assignment for the benefit of creditors, executed in 1893 within the state of Wisconsin, in accordance with the provisions of St. Wis. 1898, chapter 80, and amendatory and supplemental acts of the Wisconsin statutes in force at that date, has no extra-territorial effect on real estate, and does not convey title to real estate situated in the state of North Dakota.

Same — Power of Assignee — Conveyance of Realty in Another State.

3. A deed of assignment for the benefit of creditors, made in accordance with, and under the provisions of, chapter 80 and supplemental and amendatory acts of the Revised Statutes of Wisconsin of 1898, contained a power authorizing the assignee named in such deed to do the acts and things necessary in the premises to the full execution of the trust created, and to execute, acknowledge, and deliver all necessary deeds, instruments and conveyances, and to sign the name of the assignor to such instruments whenever necessary to carry into effect the object, design, and purpose of the trust. *Held,* that such power of attorney gave the assignee no authority to execute deeds in the name of his principal to any real estate not conveyed by the deed of assignment; and hence a deed, executed by such assignee in the name of the assignor, and as attorney in fact for the assignor, to lands situated in the state of North Dakota not conveyed by the deed of assignment, does not operate to convey title.

Quieting Title — Quitclaim Deed Carries Title Sufficient to Support Action.

4. A deed granting, selling, remising and releasing to the grantee the premises described, although containing the word "quitclaim," conveys title on which an action to determine adverse claims to real property may be maintained.

Trial — Stipulations — Conclusiveness and Effect.

5. The parties in this action entered into a stipulation in writing of the facts on which the case should be tried. It was agreed in such stipulation that the facts therein stated constituted all the facts in the action, and should be the evidence of the same and considered proven. A trial and arguments were had, and the case submitted, after which plaintiff submitted a motion for leave to take testimony on questions not covered by the stipulation. The motion was granted, and plaintnff only given leave to submit additional testimony. No fraud or deceit on the part of defendant was shown relative to the stipulation. *Held,* that entering an order solely to permit the plaintiff to take and submit additional evidence on questions of fact, not included in the stipulation, without giving defendant the right to rebut such evidence, or to submit evidence on the facts covered by the order, was error.

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

Action by Sidney D. Adams against W. J. Hartzell. Judgment for plaintiff, and defendant appeals.

Reversed with directions.

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

Statutory assignment for benefit of creditors does not pass title to realty in another state. Security Trust Co. v. Dodd, 173 U. S. 624; Segnitz v. Trust Co., 83 N. W. 327; Wells v. Walsh, 57 N. W. 969; McClure v. Campbell, 37 N. W. 343; Hutchinson v. Peshine, 16 N. J. Eq. 170; Lessee of Roderick's Heirs, 2 Hammond, 380; Osborn v. Adams. 18 Pick, 247.

Nor passes title to land not inventoried. Bock v. Perkins, 139 U. S. 628; Price v. Haynes, 37 Mich. 487; Scott v. Colman, 5 Litt (Ky.) 349; Guerin v. Hunt, 6 Minn, 375; Rundlett v. Dole, 10 N. H. 458.

Court has no power to alter a stipulation of facts. Gerdtzen v. Cockrell, 50 Minn. 546; Bingham v. Winona Co. 6 Minn. 136; Keys v. Warner, 45 Cal. 60.

Where assignee in Federal bankruptcy fails to take over property as too much incumbered to have value as an asset, title remains in bankrupt. Bushane v. Ball, 161 U. S. 515; Bank v. Lasater, 115 U. S. 115; Reynolds v. Crawfordsville Bank, 112 U. S. 405; Paige v. Waring, 76 N. Y. 463.

Rourke, Kvello & Adams and *Shepart & Catherwood* for respondent.

An assignment for the benefit of creditors is voluntary and vests title in the assignee. Segnitz v. Trust Co., 83 N. W. 327; Barth v. Backhus, 140 N. Y. 230, 35 N. E. 425, 37 A. S. R. 545; Townsend v. Coxe, 37 N. E. 689.

Assignment for benefit of creditors will be upheld in this state, except as to resident creditors and bona fide purchasers. Thompson v. Ellenz, 59 N. W. 1023; Williams v. Kemper Co., 43 Pac. 1148; Cole & Cunningham 33 L. Ed. 547; Barnett v. Kinney 37 L. Ed. 249; Memphis Bank v. Honchues, 115 Fed. 96.

Admission of evidence after a stipulation of all facts is made between parties, is discretionary with the court. Second Nat'l Bank v. First Nat'l Bank, 8 N. D. 50, 76 N. W. 504; Turner v. St. John, 8 N. D. 245, 78 N. W. 340; Ward v. Clay, 23 Pac. 50; Meldrum v. Kenefick, 89 N. W. 863; Keens v. Robertson, 65 N. W. 897; Butler v. Chamberlain, 92 N. W. 154; Brown v. Cohn, 60 N. W. 826; 4 Current Law, 1555.

Quitclaim deed insufficient to support title in action to determine adverse claims. Hamilton v. Beaudreau, 47 N. W. 952; Kerr v. Freeman, 33 Miss. 292; Orton v. Smith, 59 Sup. Ct. 266, 15 L. Ed. 393.

SPALDING, J. This is an action to determine adverse claims to the N½ of section 2 in township 132 N. range 57 W., in Sargent county, N. D. Plaintiff had judgment in the district court, and the defendant, Hartzell, appeals, and asks a trial de novo.

Many questions are raised which depend largely on the determination of the main question. The facts are as follows: One Field, whom we infer to be a resident of Wisconsin, held a first mortgage on the land in question. One F. T. Day, also a resident of Wisconsin, held a second mortgage thereon. Both these mortgages were duly recorded. Day became the owner of the fee to said premises on the 23rd day of July, 1890, through a sheriff's deed conveying the same to him under a foreclosure of his second mortgage. June 3, 1893, Day made an assignment for the benefit of creditors to one Momsen, under the provisions of chapter 80 of the Revised Statutes of Wisconsin of 1898, and the acts amendatory thereof and supplemental thereto. Momsen on the same day consented to act as such assignee, and a certified copy of the original deed of assignment was filed and entered in the office of the clerk of the circuit

court of Milwaukee county, Wis., as required by the laws of Wisconsin. A certified copy of such certified copy of the deed of assignment was filed for record in the office of the register of deeds of Sargent county, N. D. on the 21st day of June, 1898, and the original deed of assignment on the 25th day of April, 1906. A schedule of property was duly filed as required by law, but neither the deed of assignment, nor the schedule, included the land in controversy. April 20, 1895, Momsen, as assignee under license of the circuit court of Milwaukee county, executed, acknowledged, and delivered to Field, the holder of the first mortgage, a deed, which he also executed in the name of Day, as his attorney in fact. This deed was filed for record in the office of the register of deeds for Sargent county on the 20th day of June, 1898. The deed of assignment contains a provision reading as follows: "And, in furtherance of the premises, the said party of the first part does hereby make, constitute and appoint the said party of the second part, his true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in said premises, to the full execution of the trust hereby created, * * * and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances, and the said party of the first part does hereby authorize said party of the second part to sign the name of said party of the first part * * * to all instruments in writing whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust." It is apparent that the deed to Field was signed in the name of Day by Momsen as his attorney in fact by reason of the provision above quoted. In May, 1902, Field deeded to one Lindsley, and in December, 1904, Lindsley deeded to Adams, the plaintiff and respondent herein. This latter deed was recorded April 7, 1905. This in brief is the chain of title on which respondent relies. Appellant relies for his title upon a quitclaim deed executed and delivered to him by Day May 5, 1903, and filed for record in the office of the register of deeds of Sargent county, N. D., May 9, 1903. At the date of the assignment the premises described were wholly uninclosed, and no buildings or other improvements were thereon. Momsen, neither as assignee or otherwise, ever took possession thereof, and no assignment, insolvency, or other similar proceedings, either original or ancillary to the Wisconsin assignment, were ever had or instituted in this state.

The Wisconsin statute referred to, under which such assignment was made, which was received in evidence, reads as follows:

"Chapter LXXX.—Of Voluntary Assignments.

"Supervision of. Sec. 1693. The circuit court or the judge thereof in vacation, shall have supervision of the proceedings in all voluntary assignments made under the provisions of this chapter, and may make all necessary orders for the execution of the same.

* * * * * * *

"Inventory of Assignor's Assets. Sec. 1697. (As amended by chapter 251, Laws 1885; chapter 317, Laws 1887.) Within twenty days after the execution of the assignment, the assignor shall also make and file in the office of said clerk a correct inventory of his assets and a list of his creditors, stating the place of residence of each such creditor and the amount due to each, which inventory and list shall be verified by his oath, and have affixed a certificate of the assignee that the same is correct, according to his best knowledge and belief; but no mistake therein shall invalidate such assignment or affect the right of any creditor.

* * * * * * *

"Removal of Assignee. Sec. 1702. (As amended by section 1, c. 548, Laws 1887.) The circuit judge may, upon notice and after a hearing, remove any assignee who is shown to be incompetent, or to have become disqualified, or to have wasted or misapplied any of the trust estate, and shall also remove any such assignee upon the application of a majority of the creditors of such assignor, who shall also represent a majority in value of the debts allowed against said estate, and compel by order a settlement of his account and surrender of the estate to his successor, and shall appoint the person named in such petition, or some suitable person as his successor, who shall qualify in the same manner provided by law for the assignee appointed by the instrument of assignment; and in place of any assignee who shall die or be removed may appoint another, who shall give the bond and be subject to like duties and responsibilities as to the estate remaining undisposed of, and proceedings remaining to be taken, as if appointed by the instrument of assignment.

* * * * * * *

"Who may be Discharged. Sec. 1702d. (Section 1, c. 385, Laws 1889.) Any person who shall have made a voluntary assignment for the benefit of his creditors under or in pursuance of the laws

of this state, may be discharged from his debts as a part of the proceedings under such assignment upon compliance with the provisions of this act."

In addition to this such statute contains other provisions relating to the discharge of the assignor.

The principal question in this case is, Did the assignment referred to transfer the title of Day to the land in question? The authorities as to the effect of voluntary assignments for the benefit of creditors upon the title of real estate situated outside the jurisdiction in which the assignor resides and makes his assgnment may be said to be not altogether harmonious; many of them holding that such an assignment conveys the real estate wherever situated, while others qualify this in favor of creditors who are not residents of the state where the assignor resides, and where the assignment is made. As to the effect of involuntary assignments, or what may be termed "state bankruptcy or insolvency laws," on real property in other jurisdictions, there is practically no conflict of authorities. It, therefore becomes necessary to decide whether the assignment of Day, as controlled by the statutes of Wisconsin, is a voluntary or an involuntary assignment, and what its effect was upon the land involved in this action. The general principle seems to be that where the assignment is made in accordance with the provisions of a statute which is, in effect, a bankruptcy or insolvency statute, and under the terms of which the assignor may be discharged from his indebtedness, although the act of assignment itself may have been voluntary on the part of the assignor, yet in the contemplation of the law it is an involuntary assignment, and the proceeding is one in bankruptcy or insolvency. This rule rests upon the well-established principles that the title and disposition of real property are exclusively subject to the laws of the state where it is situated, and that such state alone can prescribe the mode by which the title can pass; that the laws of one state will not be permitted to control the trust, the action of the trustee, or the disposition of the trust property in another state, the subject of the trust being real property —as well as the general principle that the statutes of a state can operate only within the state which enacts them. We cannot attempt to cite all the authorities supporting this but give a few only. See Security Trust Co. v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 835; Townend v. Coxe, 151 Ill. 62, 37 N. E. 689; Rhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691;

Franzen v. Hutchinson et. al,. 94 Iowa, 95, 62 N. W. 698; Weider v. Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617; Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; Walters et al. v. Whittock, 9 Fla. 86, 76 Am. Dec. 607; note, 78 Am. Dec. 594; note, 65 L. R. A. 353.

As to the construction to be placed upon the statute of Wisconsin, we are not left in doubt, because, aside from its having been construed by the courts of other states, the Supreme Court of Wisconsin has settled its meaning and effect in this particular, and we shall not take it upon ourselves to over-rule the construction which that court places upon a law of its own state.

We may say, in passing, that respondent contends (not very strenuously, however) that, irrespective of the fact that the deed from Momsen to Field was executed by Momsen as assignee, the fact that he also executed it in the name of Day, as his attorney in fact, conveyed title. There is no merit in this contention. Our quotations from the deed of assignment indicate with perfect clearness that Momsen was constituted Day's attorney in fact to empower him to execute deeds of conveyance simply and only for the purpose of carrying into effect the terms of the deed of assignment, and that Momsen's authority and power as attorney in fact for Day are limited to carrying out the provisions of the assignment, and that they do not extend to the execution as attorney for Day of deeds of property not included within the assignment. Hence, if the land in controversy was not conveyed by the assignment, Momsen was not authorized to execute a deed thereto by force of the power contained in the instrument. If authorities are needed to sustain this point, which we think they are not, Osborne v. Adams, 18 Pick. (Mass.) 245, is in point. A statutory assignment had been made in Connecticut, for the benefit of the assignor's creditors. On the same day, and in connection with the assignment, the assignor, Powell, by deed executed in Connecticut, conveyed to the same party who was made the assignee in the deed of assignment land situated in Massachusetts. The latter deed referred to the general assignment as to the purposes of the conveyance. The Massachusetts court held the statutory deed of assignment to be void as to lands in Massachusetts, and that it could neither pass title or aid one otherwise defective, and that the last-named deed was ancillary to the assignment proceedings, and that it could no more take notice of a trust created under a foreign government than it could of a will not proven or recorded in Massachusetts.

Several Wisconsin cases might be cited construing the above statute, but we deem it only necessary to refer to Segnitz v. Garden City Banking & Trust Co., 107 Wis. 171, 83 N. W. 327, 50 L. R. A. 327, 81 Am. St. Rep. 830. This case involved an assignment executed in conformity with the statute of Wisconsin quoted above, and the title to personal property of the assignor situated in the state of Illinois; but, for the purpose of determining the title to such property, and as a foundation for its conclusion, the learned court passed upon the character and effect of the law in question in general. We may as well quote at considerable length from the opinion in this case, as we deem it conclusive as to the above question, and therefore as to the effect of the Day assignment on real property in this state, and some other questions discussed by the respondent: "The assignment under consideration was made June 3, 1898, and the law applicable thereto may be found in chapter 80 and chapter 80a, Samb. & B. Ann. St. So far as chapter 80 is concerned it only assumes to regulate and control the manner in which such assignment shall be made and executed. Chapter 80a, however, added some new features, which led this court to speak of our whole system relating to voluntary assignments as an insolvent law. Holton v. Burton, 78 Wis. 321, 47 N. W. 624; Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569. In Binder v. McDonald, 106 Wis. 332, 82 N. W. 156, this court criticised these statements, and limited them to the additions made to the general assignment law by Acts 1889, c. 385, now included in chapter 80a. This court has never had occasion to examine and construe the purpose and force of those features of our assignment law which enable the debtor to obtain a discharge from his debts. A very similar system in Minnesota was considered in McClure v. Campbell, 71 Wis. 350, 37 N. W. 343, 5 Am. St. Rep. 220, and it was distinctly held that an assignment made in that state, pursuant thereto, had no extraterritorial effect. Similar statutes have been the subject of frequent discussion in other courts, and the almost uniform line of decisions is in accord with the conclusion stated. Many of the cases are cited and reviewed by the Supreme Court of the United States in the recent case of Trust Co. v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 835. In Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545, and Townsend v. Coxe, 151 Ill. 62, 37 N. E. 689, the courts of last resort in New York and Illinois had occasion to consider the

law of this state, and the legal effect of an assignment thereunder; and both courts came to the conclusion that those portions of our law which enabled the assignor to obtain a discharge from his debts gave it the character of a bankrupt law, and that such an assignment was ineffectual to transfer title to property of the insolvent situate in those states. Of course we are not bound by those decisions; but, in so far as they rest upon valid reasons and sound conclusions, they are entitled to weight. Chapter 80, as already noted, only assumes to deal with the making and administration of common-law assignments. Prior to 1889 an insolvent debtor could only obtain a discharge from his debts by procedure under chapter 179, an act entirely independent of the assignment statutes. This chapter provided for a petition, a schedule of all creditors, and an inventory of property, and in a proper case an assignment was directed. Recognizing the futility of such a course by a debtor who had made a voluntary assignment, in 1889 the Legislature adopted the provisions which have been incorporated in chapter 80a. The form of procedure was based upon the assumption that the debtor had made a voluntary assignment. Among other features, it provided that such debtor might become discharged from his debts, as a part of the proceedings under the assignment, and that every creditor, residing within or without the state, who should accept a dividend out of the assigned estate, or participate in any way in the proceedings, should be bound by the order of discharge, subject to the right of appeal. If this coercive feature of the scheme had been contained in the original assignment executed by the debtor, it would have rendered the assignment void. It became legal only by force of the statute. Thus the way was opened to every debtor making an assignment, not only to distribute his property to his creditors, but to demand a discharge from his indebtedness as to every creditor who should come in or accept a dividend. It was, in legal effect, tacking a bankrupt law to the assignment law; and, inasmuch as the distribution of the estate depends not upon the will of the assignor, but upon the positive requirement of the lawmaking power, we can see no escape from the conclusion that in so far it becomes statutory, and not voluntary. It is only in the cases where the making of the transfer and the distribution of the assigned estate are the voluntary acts of the assignor that the law recognizes the extraterritorial effect of the deed of assignment.

When the state steps in and regulates the distribution of the assigned estate in accordance with conditions which only the sovereign can prescribe, and the conditions so prescribed are such as to bring into play the essential features of a bankrupt law, the operation of the assignment will be limited to the state where made. No question of comity arises, or at least that rule cannot be extended to cases of this kind. * * * The legal effect of the assignment being only to convey to the assignee the title to such assets as were within the state, the filing of a claim by the defendant only has the effect to recognize its validity to that extent. It creates no greater right in the assignee than was conveyed by his deed. We do not see how any question of estoppel can arise, unless it should arise over some question of administration of the estate actually assigned. Whether the court in which the proceedings are pending may deny the right of defendant, under the circumstances, to participate in dividends is a question not before us."

Many cases make a broad distinction between the effect of such an assignment upon real and personal property, but no such question is in the case at bar. It is sufficient to say that all such distinctions are exercised in favor of the assignee's title to personal property. The Supreme Court, in McClure v. Campbell, 71 Wis. 350, 37 N. W. 343, 5 Am. St. Rep. 220, construed a similar insolvency law of the state of Minnesota and its application to property in Wisconsin. It is argued that the Minnesota law differs essentially from the Wisconsin law. This is true in regard to many of its details, but it is not true as to the principle relied upon; the point being that both laws provide for a discharge of the debts of the insolvent. In the McClure case, in construing the Minnesota law, it was held that, the property being administered by and under the direction of the court of Minnesota, the assignment had no extraterritorial effect, and did not defeat an attachment levied upon property in the state of Wisconsin by a creditor of the assignor, that such assignment made in Minnesota under the insolvent law of the latter state did not affect the property of the assignor situate in Wisconsin, even though, in the sense that the debtor was not compelled to make the assignment, it was voluntary. The Wisconsin court in that case, referring to the construction given the Minnesota statute by the Supreme Court of Minnesota, says that they regard it as binding upon the Wisconsin court. In Townsend v. Coxe, supra, the Supreme Court of Illinois holds the Wisconsin law to be a bank-

ruptcy or insolvency law, and ineffective to pass title outside the state of Wisconsin. Many other authorities might be cited in harmony with the decision of the Wisconsin court, but we deem the decision of that court binding upon us as to the character of the Wisconsin proceeding, and we hold that the statute in question is a bankruptcy or insolvency law, and therefore transfers no title to real property situate in the state of North Dakota.

It is claimed by the respondent that the appellant's title, being derived from a quitclaim deed, is insufficient as the ground for maintaining an action to quiet title, and consequently is not adequate to support a counterclaim. There is no merit in this contention. The authorities cited are not in point, and, if they were, are contrary to the great weight of authority. The deed to the respondent grants, sells, remises, and releases unto the defendant; and, even if, according to the contention of the appellant, it is only a quitclaim deed, it as effectually passed all title as one containing full covenants. See 1 Am. & Eng. Enc. Law, 860, and cases cited.

One other point remains to be considered. Prior to the trial in the district court the parties entered into a stipulation of the facts, on which it was agreed the case should be submitted. This stipulation was suggested by the respondent, and it was consummated with great care by correspondence covering a period of several weeks. It was in writing, and signed by the respective parties. It begins in the following language: "It is stipulated and agreed by and between the plaintiff and the defendant, W. J. Hartzell, in the action above entitled, that the following facts shall constitute all of the facts in the action above entitled, and shall be evidence of the same, and may be read as evidence at the trial of said cause, subject to the stipulation herein contained relative to objections." After stating the facts agreed upon, the concluding paragraph is as follows: "That the facts herein stipulated shall be considered proven, and each fact so stipulated will be subject to all legal objections on the trial, except the manner of bringing said facts before the court, as the respective parties of this cause may deem advisable to interpose, and either party may make such objections and have the same incorporated into the record at the time of the trial, or such objections may be considered made and entered for all purposes without being formally noted in the record." This stipulation was dated January 6, 1906, but was not consummated until the 15th of that month. We infer that the trial occurred early in March, 1906.

The case was submitted upon the stipulation and the arguments of counsel. Subsequently, and about the 13th of March, 1906, the respondent gave notice of motion for an order permitting the presentation of further testimony in his behalf. This motion was submitted on affidavits on the 17th day of April, 1906, when the appellant objected to its consideration. The court overruled the objection and granted the motion. We shall not discuss the evidence submitted on the motion. It is sufficient to say that it disclosed no fraud or deceit on the part of appellant relative to the stipulation. The respondent did not ask to have the stipulation set aside, but that he be permitted to introduce additional evidence. The court granted the motion solely for the purpose of permitting the plaintiff to present evidence on three points, and it is urged by the appellant that this order was erroneous. In this we agree with the appellant. We do not hold that the solemn stipulation of facts made by the parties may not, under some circumstances, in the exercise of a wise discretion, be vacated, and additional evidence be received. Such is not this case. Had the court seen fit to vacate the stipulation as to both parties, or to permit both parties to submit additional testimony, or even to have given the defendant the opportunity, through this order, to rebut new evidence offered by the plaintiff, a different principle would be involved and a different rule might apply. The order continued in force the stipulation in question as to the defendant. He was still bound by its terms, and was not permitted to submit rebutting or other evidence. It was a one-sided affair, and cannot be sustained in a court of equity. Authorities are not wanting to support this conclusion. Indeed some hold that a stipulation of facts, made as this one was made, is a contract, and can only be vacated upon grounds which would warrant setting aside other express contracts. We call attention to Bingham v. Supervisors Winona County, 6 Minn. 136 (Gil. 82), Gerdtzen v. Cockrell, 50 Minn. 546, 52 N. W. 930, Keys v. Warner, 45 Cal. 60, Welsh v. Noyes, 10 Colo. 133, 14 Pac. 317, Chapman v. Coats et al., 26 Iowa, 288, Ish v. Crane et al., 13 Ohio St. 574, Franklin v. Ins Co., 43 Mo. 491, McNeill v. Town of Andes (C. C.) 40 Fed. 45, and In the Matter of Smith, 9 Abb. N. C. (N. Y.) 452.

In the case of Welsh v. Noyes, supra, the trial court had stricken out a material portion of what was, in effect, a stipulation of facts, and the appellate court held that while the trial court may relieve the party from such stipulation by pursuing the right method, that

a portion of the stipulation could not be stricken out, and that the proper way to relieve the party from a stipulation inadvertently, or otherwise, made against his intentions was to cancel the whole stipulation, and that the course pursued was erroneous. In Gerdtzen v. Cockrell, supra, the Supreme Court of Minnesota held that the party could not on motion be relieved, in whole or in part, from a release which by the terms of a stipulation he had effected, leaving the other party still concluded and bound by it, and held that it could not be presumed that one party would have entered into such agreement unless the other party had also done so, and that the agreement, if it could be set aside at all, must be wholly set aside. These cases are not decided on facts precisely like those of the case at bar, but the principles involved, we think, are identical. This question might be entitled to more serious consideration, except for the fact that nearly all the evdence submitted under the order of the court by the respondent was unquestionably immaterial and irrelevant or incompetent.

The judgment of the district court is reversed, and it is directed to enter judgment quieting the title to the land described in the appellant, as against all claims of the respondent. All concur.

(119 N. W. 635.)

THE STATE OF NORTH DAKOTA EX REL. THOMAS H. POOLE v. S. L. NUCHOLS, W. C. TREUMANN, WM. R. PURDON, B. C. BOYD, ARTHUR E. MCKEAN AND R. A. THOMPSON.

Opinion filed February 11, 1909.

Constitutional Law — Jurisdiction of Supreme Court.

1. Sections 86 and 87 of the constitution of North Dakota constitute a grant of power to the Supreme Court, and, the language thereof being restrictive in its terms, this court has such jurisdiction, and only such, as is expressly or by necessary implication, therein granted.

Same — Writ of Prohibition.

2. By section 86 the Supreme Court is granted appellate jurisdiction only, "except as otherwise provided in this constitution," together with "a general superintending control over all inferior courts. * * *" Section 87 is the only place in the constitution where it is otherwise provided. This section grants power to the Supreme Court "to issue writs of habeas corpus, mandamus, quo warranto,

certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction." *Held,* that the writ of prohibition not being one of the enumerated writs, this court is without jurisdiction to issue the same, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending cause, or to effectuate this court's general superintending control over inferior courts.

Same — Inferior Courts — Courts-Martial.

3. A court-martial is not an inferior court within the meaning of section 86 of the Constitution; it not belonging to the judicial, but to the executive, department of the government. The inferior courts referred to in section 86 are the courts enumerated in section 85 which belong to the judicial department.

Application by the State, on the relation of Thomas H. Poole, for writ of prohibition against S. L. Nuchols and others.

Writ denied.

Engerud, Holt & Frame, for plaintiffs.

Andrew Miller, Attorney General, and *Brigadier General M. A. Hildreth, Retired, Judge Advocate,* for defendants.

Unconstitutionality of Articles of War is no defense to a charge of disobedience of an order of the commander in chief. Dudley on Military Law, 135; Winthrop on Military Law, Vol. 2, p. 189; Military Laws of the United States, 973 and cases cited.

Conduct unbecoming an officer and gentleman in the 61st Article of War is a proper charge. Carter case, 105 Fed. Rep. 617, 183 U. S. 386.

The commission of or attempt to commit a crime constitutes such conduct. Dudley Military Law, 409, Carter case, 183 U. S. 365; Military Laws of the United States 996; 2 Winthrop's Military Law and Precedents, 1104, 1114, 1115.

The governor as commander in chief has power to order a general court-martial. Sec. 71, 75 Constitution; Secs. 1719, 1764, 1797, Political Code.

Retired officer is subject to the Articles of War. Military Law of U. S. p. 492; Dudley on Military Law, p. 53.

The court has jurisdiction of accused because he is a retired officer of the national guard, and as such is subject to the orders of the commander in chief, and has disobeyed them. Sec. 1764 Political Code; Section 1797 Political Code; Military Laws of U. S. p. 494;

Barrett v. Hopkins, 7th Fed. Rep. 312; Houston v. Moore, 5 Wheat. 1; 126 N. Y. 504; 35 So. 729; 55 Atl. 952; 206 Pa. St. 165; Smith v. Whitney, 116 U. S. 167; 29 L. Ed. 604; Carter Cases, 183 U. S. 363; 97 Fed. Rep. 496; 99 Fed. Rep. 949; 105 Fed. Rep. 614.

Prohibition will not lie to a general court-martial. 1 Winthrop's Military Laws and Precedents, 53; 116 U. S. 168; United States v. Maney, 61 Fed. Rep. 140.

Where a court-martial has jurisdiction, supreme court cannot interfere. I Winthrop's Military Law and Precedents, 61; 23 Fed. Rep. 879; 100 U. S. 13; 21 Fed. Rep. 620; Dynes v. Hoover, 20 How. 83; People v. Van Allen, 55 N. Y. 36; State v. Stevens, 2 McCord, 38.

FISK, J. Relator makes application to this court for the issuance of a writ of prohibition to enjoin and prohibit defendants, who are members of a court-martial, from further proceeding with the trial of relator upon certain designated charges and specifications, a copy of which was made a part of the application. Elaborate arguments were presented on behalf of relator, and also against his contention, and numerous reasons were urged both in favor of and against the issuance of such writ, but they all relate to the merits, being based upon the apparent assumption, which we deem erroneous, that this court possesses jurisdiction to issue such writ. A majority of the court are agreed that no such jurisdiction has been conferred by the Constitution, and hence the relator's application must be denied. This is not a case, such as has frequently arisen in this state, where the exercise of original jurisdiction is discretionary, and dependent upon whether the subject-matter is publici juris and affects the "sovereignty of the state, its franchises and prerogatives or the liberties of the people;" but it is one in which we are asked to exercise a jurisdiction not conferred at all by the Constitution. It is a case of a total want of jurisdiction. This is clearly apparent by the language employed in the Constitution with reference to the powers conferred upon the Supreme Court. Section 86 provides: "The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." It is entirely clear from the above language that the chief function of

this tribunal is the exercise of appellate jurisdiction only, and incidentally it is given a general superintending control over all inferior courts under such regulations as may be prescribed by law. It is also equally plain that aside from the jurisdiction thus conferred this court has no jurisdiction except such as the next section grants to it. Section 87 is as follows: "It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction. * * *" These sections constitute a grant of power and are restrictive in their terms. Hence this court possesses such jurisdiction and only such as is either expressly or by necessary implication granted to it by said sections. As stated. "The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only." The only place where it is otherwise provided is in section 87, and it is a significant fact that the writ of prohibition is not one of the writs therein enumerated, which this court has power to issue. It therefore inevitably follows that, if this court has jurisdiction to issue such writ, it must be by virtue of its superintending control over inferior courts as its issuance is not "necessary to the proper exercise of its jurisdiction" within the meaning of such clause in section 87. The writ is not asked for the latter purpose, and the court is not exercising or attempting to exercise any jurisdiction, for the proper exercise of which such writ is necessary.

If authorities are required in support of the foregoing views, we call attention to the following cases in addition to our own decisions: People ex rel, v. Circuit Court of Cook County, 169 Ill. 201, 48 N. E. 717; Wheeler v. N. C. Irr. Co., 9 Colo, 249, 11 Pac. 103; People v. Richmond, 16 Colo. 274, 26 Pac. 929. On account of the similarity of the Constitutions of Illinois and Colorado with that of this state relative to the grant of power to the Supreme Court, the foregoing authorities are peculiarly in point. The Illinois court in the foregoing case in an able opinion construed the Constitution of that state, and reached the conclusion that it had no original jurisdiction to issue a writ of prohibition. We quote: "The Constitution is a limitation upon the powers of the Legislature, but it is regarded as a grant of power to the executive and judicial departments of the government. Hence the executive and judiciary can only exercise such powers as are granted by the Constitution. Field v. People, 2 Scam. 79. The constitution only specifies three cases in which this

court can exercise original jurisdiction, and the issuance of writs of prohibition is not one of them. Original jurisdiction being thus conferred upon the Supreme Court in certain specified cases, it cannot exercise original jurisdiction in cases not specified. In all other cases than those named its jurisdiction is appellate only. Campbell v. Campbell, 22 Ill 664. A prohibition is an original remedial writ, as old as the common law itself. Thomas v. Mead, 36 Mo. 232; McConiha v. Guthrie, 21 W. Va. 134; High on Ex. Legal Rem. § 762. It would seem, therefore, to be clear that this court has no original jurisdiction to issue a writ of prohibition. There are cases in many of the states where courts of last resort are held to have original jurisdiction to issue such writs; but it will be found upon examination that in states where such decisions have been made the Constitution of the state in express terms confers either the power to award writs of prohibition, as in Virginia and West Virginia (James v. Stokes, 77 Va. 225; McConiha v. Guthrie, supra), or the power to award "original remedial writs" as in Missouri (Thomas v. Mead, supra), or the power to issue any remedial writs necessary to give the court of last resort general supervision and control over the inferior courts as in North Carolina (Perry v. Shepherd, 78 N. C. 63).

Is the court-martial such an inferior court as this court has superintending control over within the meaning of section 86, supra? We think not. While treated and often referred to by the authorities as an inferior court of peculiar and limited jurisdiction, it is nowhere held, so far as we have been able in our brief research to discover, that such court, when acting within the limits of its special jurisdiction, is not supreme. This is as it should be. Were it otherwise the military power of the state, which is a branch of the executive department, might be seriously embarrassed, if not completely paralyzed, by the interference of the civil courts in the necessary discipline of its organized forces. To attribute to the framers of the Constitution an intent to give to the civil courts a superintending control over the military courts-martial would be to attribute to them an intent to depart from the well-known, and we believe almost universally recognized, rule to the contrary in this country. See Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601, and cases cited, where it was said: "And this court, although the question of issuing a writ of prohibition to a court-martial has not come before it for direct adjudication, has repeatedly recognized

the general rule that the acts of a court-martial within the scope of its jurisdiction and duty cannot be controlled or reviewed in the civil courts by writ of prohibition or otherwise"—citing numerous cases. The Constitution should be construed in the light of well-settled principles recognized in this country prior to its adoption, and also in the light of contemporaneous history, and, when thus construed, no such intent will or can be inferred from the language employed in section 86. Furthermore, it is very apparent that the courts over which this court is given a superintending control are the inferior courts belonging to the judicial department, and which are expressly enumerated in the preceding section of the Constitution. A court martial can in no sense be said to belong to the judicial department of the state, although its functions are judicial in character. As before stated, such court-martial belongs to the executive department, and is organized and its judgments approved by the Governor as Commander in Chief. Of course, if it exceeds its jurisdiction or acts without jurisdiction, its judgments are a nullity, and any person aggrieved thereby may seek proper redress in the civil courts having jurisdiction, and such courts will furnish appropriate relief. Whether in a proper case the writ of prohibition may be employed by a court having power in the exercise of its orinal jurisdiction to issue the same to enjoin and prohibit a court-martial from exceeding its jurisdiction or from acting in a case without jurisdiction we are not here required to decide. Such question is not before us, and we therefore refrain from intimating an opinion thereon further than to say that the authorities appear to leave the matter in doubt. See Smith v. Whitney, supra, and the few early American and English cases therein cited; 16 Encyc. of Pleading and Practice, 1108. See, also, the valuable note in 111 Am. St. Rep. p. 936; Grove v. Mott, 46 N. J. Law, 328, 50 Am. Rep. 424, and cases cited; Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914; and also 2 Andrews, Amer. Law (2d Ed.) pp. 207, 351-2, citing numerous cases. The author of this valuable treatise, among other things, says: "The writ of prohibition is not a proper writ in such cases for the reason that the courts-martial are not inferior to, and in fact are not within the same department with, the judicial establishment of the state"—citing High on Ex. Leg. Rem. (3d Ed.) 720-732. It is entirely clear, however, for the reasons heretofore stated, that this court has been given no jurisdiction to issue such a writ for the purpose aforesaid, or for any

purpose other than in aid of its appellate or original jurisdiction, or where the same is necessary to effectuate its superintending control over inferior courts.

Entertaining these views, it is unnecessary, as well as improper, to notice the various contentions of counsel upon the merits.

Writ denied.

Morgan, Carmody and Spalding, JJ., concur.

ELLSWORTH, J. (dissenting in part and concurring specially). I am unable to concur in that part of the opinion of the majority of the court which holds that this court is wholly without jurisdiction in any case to issue the writ of prohibition to a court-martial.

I fully agree that this court is without jurisdiction to issue this writ originally, or at all, except in furtherance of its power of superintending control over inferior courts. Whether or not a court-martial comes within the meaning if the words "inferior courts," as contained in section 86 of the state Constitution, is the test of the power of this court to exercise any control over its proceedings even when it is acting without or in excess of its jurisdiction. It is a question in the determination of which we have little light or assistance from the decisions of other courts. The Supreme Court of the United States in the case of Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601, characterizes the question as one of great importance, but in its deliberate consideration of an appeal from the Supreme Court of the District of Columbia is disinclined either to assert or deny the power of that court to issue the writ of prohibition to a court-martial.

The courts of several states, notably of New York and New Jersey, have at times asserted the power of a certain supervisory control over courts-martial upon the theory that courts-martial fall within the accepted definition of inferior courts; and the proposition that this court in the case of a court-martial acting without or clearly in excess of its jurisdiction has the power under its grant of supervisory control over inferior courts to issue to it the writ of prohibition impresses me with great force. In the case here presented, however, I prefer to rest my concurrence in the result reached by the majority of the court on the ground that, whether or not a power of this court exists to issue the writ in a proper case, no case is here shown for the exercise of it.

The office of the writ applied for in this proceeding is not to review the procedure or correct the mistakes of the inferior court to which it issues, but only to prevent that court from assuming jurisdiction of a matter beyond its legal cognizance. The writ of prohibition never issues unless it appears that an inferior court is about to exceed its jurisdiction. The inquiry of the superior court is then directed wholly to two points only; (1) what are the limits of the jurisdiction of the inferior court; and (2) does it appear upon the face of its procedure that it is acting within these limits? The investigation permissible, even to a court having full jurisdiction to issue the writ, is therefore very narrow; and cannot, in any case, extend to the detail of the pleading, practice, or general procedure of the inferior court. If from such inquiry it appears in this case that the court-martial in question was acting within the limits of its special jurisdicton, I fully concur with the majority of this court in holding that it is supreme and cannot be interferred with by the civil courts, even though when acting without or in excess of its jurisdiction it is amenable to the superintending control of this court. A court-martial is a military tribunal, constituted and convened in the manner provided by law, to try and determine offenses against the military service. In this state a general court-martial can be ordered only by the Governor as Commander in Chief of the militia and National Guard. Its jurisdiction is defined and its precedure regulated by the Articles of War of the United States. Rev. Codes 1905, § 1764. From the application of the relator, Thomas H. Poole, for the writ of prohibition, it appears that he is a member of the National Guard of the state, and that the court-martial in question is convened by order of the Governor of the state as Commander in Chief of the National Guard. It further appears from the application or was admitted by counsel upon the hearing that the officers composing the court-martial are those whom the Governor is authorized by law to detail for that purpose, and that, when convened and sitting as a court, the relator came before it and in person or by counsel participated in its proceedings. It is thus clearly apparent that the court-martial is a lawfully organized tribunal, and that it has jurisdiction over the person of the relator. Whether or not it has jurisdiction over the subject-matter is to be determined by an examination of the charges preferred against relator and upon which the court-martial is proceeding to try him. A copy of the charges are attached to relator's

application, and it appears therefrom that they are two in number, viz: "disobedience of orders in violation of the 21st Article of War," and "conduct unbecoming an officer and a gentleman in violation of the 61st Article of War." Reference to the Articles of War of the United States (Rev. St. § 1342 [U. S. Comp. St. 1901, p. 944]) which are expressly made a part of our own statute (Rev. Codes 1905, § 1764) discloses that by article 21 disobedience to any lawful command of his superior officer and by article 61 conduct unbecoming an officer and a gentleman are specified as offenses against military law and regulation. When properly constituted and convened, a court-martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offenses specified in the Articles of War. Relator admits that he is charged almost in the language of the Articles of War with two offenses against military regulation. These offenses being thus charged in writing and in due and regular form before the court-martial, it has on the face of its proceedings jurisdiction over the subject-matter, or, in other words, the right to hear, try, and determine the charges preferred against relator. Certain specifications follow each of the two charges setting out the particulars of the offenses; but whether the specifications support the charges or the evidence adduced at the court-martial supports the specification it is not for this court, on such an application, to consider. The court-martial having jurisdiction of the person of relator and of the subject matter may proceed in accordance with his own practices and usages to try and determine these matters without interference from this court. An abundance of the highest authority sustains the foregoing propositions. Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601; Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236; Rose v. Roberts, 99 Fed. 948, 40 C. C. A. 199; United States v. Maney (C. C.) 61 Fed. 140.

While I dissent, therefore, from the holding that this court is without jurisdiction in a proper case to issue to a court martial the writ of prohibition, I believe that, assuming the jurisdiction of this court to exist, there is no case here shown by relator for the exercise of it, and concur in holding that the writ should be denied.

(119 N. W. 632.)

STATE OF NORTH DAKOTA, EX REL. M. F. MINEHAN v. OLE B. WING, AS COUNTY AUDITOR OF MCLEAN COUNTY, IN THE STATE OF NORTH DAKOTA.

Opinion filed March 6, 1909.

Courts — Supreme Court — Original Jurisdiction — Issue of Mandamus.

1. Following State ex rel. Steele et al. v. Fabrick (N. D.) 117, N. W. 860, *held*, that the question of the division of a county and the creation of a new county does not call for the exercise of the original jurisdiction of the Supreme Court by the issuance of its writ of mandamus directed to the county auditor requiring him to certify the returns of an election held upon such question, unless the circumstances are of such an exceptional character that adequate relief cannot be obtained in the district court.

Courts — Supreme Court — Original Jurisdiction — Emergency.

2. Under the circumstances disclosed by the record, *held* that no emergency or exigency exists in the present instance warranting the Supreme Court in taking original jurisdiction to issue its writ of mandamus.

Original Jurisdiction of Supreme Court.

3. State ex rel. McCue, Attorney General, v. Blaisdell, secretary of State, et al. (N. D.) 119 N. W. 360, distinguished.

Application by the State, on the relation of M. F. Minehan, for writ of mandamus to Ole B. Wing, County Auditor of McLean County.

Application denied.

Herbert F. O'Hare and *Newton & Dullam,* for relator.

J. P. Nelson and *Engerud, Holt & Frame,* for defendant.

SPALDING, J. The alternative writ of mandamus was issued by this court on the 19th day of January, 1909, commanding the defendant Wing, as county auditor of McLean county, to certify and make his certificate to the Secretary of State showing and declaring that a majority of votes cast at the November, 1908, election in McLean county was in favor of the formation of the new county of Stevenson, together with the number of votes cast for and against the formation of said new county at such election in McLean county by the voters thereof, or to show cause on a subsequent date why he had not done so. To this writ the defendant made return. It is not necessary to refer to it at

length. The parties appeared through counsel on the return day when certain motions were submitted and arguments had thereon and on the merits.

Three separate propositions for the division of McLean county and the creation of new counties were submitted to the voters of that county and voted upon at the November, 1908, election. Among them was the question of the creation of Stevenson county. More affirmative than negative votes were cast on the question of its formation, but the defendant contends that there were fatal irregularities in the notice of the submission of the questions, in the conduct of the election, and in many other respects which need not be detailed.

The defendant at the outset objects to this court taking original jurisdiction, and we are compelled to determine whether a case is presented which will justify this court in the exercise of a sound legal discretion in taking original jurisdiction. We have so recently quite fully considered the subject that we are not called upon to review the authorities or to state at length the reasons for our conclusion. It is suffcient to say that on this question the views of this court are quite fully stated in State v. Fabrick, N. D. 117, N. W. 860, as far as it relates to the issuance of the prerogative writ except in case of emergency or exigency. The proceeding referred to was an application to this court for a writ of mandamus directing the auditor of Ward county to submit to the electors of that county at the November, 1908, election, various propositions for the division of Ward county and the creation of new counties therefrom. In that case we said: "In this case the matter involved pertains to the division of a county. Counsel forcibly urge that these matters are of great public concern, and involve the sovereignty and franchises of the state, by reason of the fact that the electors of Ward county will be deprived of voting on this matter of great concern to them unless the order be complied with to submit the proposition of the division of the county to them. We cannot agree with the contention of the relators that the state at large is proximately affected or concerned in the question of the division of Ward county, or whether that county be divided into two counties, or whether it be divided into four counties. It is a question of concern to the residents of the proposed counties, but that it directly concerns the state at large we cannot see. It is no more a matter affecting the state at large than would be the question of the formation of particular

school districts out of prescribed territory or the location of a schoolhouse therein. It pertains wholly to the private convenience of the local inhabitants. * * * For these reasons, it is clear that the facts do not present a question of such concern to the state at large as to call for the issuance of the writ." In that case the writ was, however issued upon the ground, and for the reason that an emergency or exigency existed such as warranted this court in taking original jurisdiction to issue such writ, and that a practical denial of justice would result unless the writ was issued. We then proceeded to state the facts which we held created such an emergency, namely, that, if the relators were compelled to first apply to the district court, it was doubtful whether a final decision in that court could be had in time for the submission of the question to the voters at the November election, and because in the event of an appeal, we were certain that the question could not be decided prior to the election at which the question was to be submitted, and in that case the petition of the relators for the division of the county would avail them nothing. We went as far as we think the doctrine of exigency will warrant going. We are agreed that no such emergency exists in the present instance. The election has taken place. The fact that taxes must be assessed, and that salaries may be affected by the formation of the new county, creates no exigency requiring the action of this court. The taxes will be assessed and levied whether the new county is formed or not. The county officials will be paid and the interests of unknown parties who might derive benefits from the formation of the new county by appointments to fill the offices thereby created are so remote as to not properly enter into the determination of the question. The proper place for the relator to make application for his writ is the district court, and we see no disadvantage in his doing so, except slight delay which may be occasioned thereby. That any delay would result is by no means certain, as some of the members of this court are of the opinion that the complete determination of the issues would require a reference to take evidence. See State ex rel. Murphy v. Gottbrecht et al. (N. D.) 117 N. W. 864. It is proper to add that the Attorney General did not consent to the use of his name as relator in this proceeding, but he did consent to the use of the name of the state on the relation of a private party, but he does not appear in the proceeding.

It is suggested that there is no distinction between this application and the one of State ex rel. McCue v. Blaisdell and Fabrick N. D. 119 N. W. 360, and that, inasmuch as we took jurisdiction in that case, we should do so in the present. There are several marked differences between that proceeding and this. The relative position of the parties is reversed. The relator in that case corresponded to the defendant in this proceeding, and was seeking to restrain the Auditor and Secretary of State from certifying the result of the election. A clear-cut proposition of law was presented on the decision of which the officials of several counties were waiting before knowing what action to take. While the rights of the people of only one county were directly in question, those of a number of counties in different judicial districts were in fact dependent on our action. The attorney general appeared on behalf of the relator, and both parties assumed that the court should take jurisdiction. In fact, both parties desired it to do so, and the question of its being a proper case for the exercise of original jurisdiction was not presented, or even suggested, and was not considered by the court. Hence it forms no precedent.

The application is denied, and the alternative writ quashed. All concur.

(119 N. W. 944.)

T. W. GRIFFIN, *v.* THE DENISON LAND CO., AND ALL OTHER PERSONS UNKNOWN CLAIMING ANY ESTATE OR INTEREST OR LIEN OR INCUMBRANCE UPON THE PROPERTY DESCRIBED IN THE COMPLAINT, AND THEIR UNKNOWN HEIRS, DEFENDANTS. THE DENISON LAND CO., DEFENDANT AND APPELLANT.

Opinion filed December 31, 1908.

Rehearing denied February 26, 1909.

Newspapers — "Daily and Weekly" — Publication of Delinquent Tax List.

1. A paper published each week under the name the "Bismarck Weekly Tribune," by the same parties who publish a daily paper under the name the "Bismarck Daily Tribune," such weekly being composed of matter printed in the Daily Tribune and set out from day to day for publication in the weekly, is a weekly edition of the Bismarck Daily Tribune within the meaning of section 1259, Rev. Codes 1899 (section 1574, Rev. Codes 1905.)

Same — Sufficiency of Designation.

2. Section 1259, Rev. Codes 1899 (section 1574, Rev. Codes 1905), relating to the publication of the delinquent tax list and notice of sale, provides that: "The county auditor under the direction of the board of county commissioners or a majority thereof, shall give notice of the sale of real property by publication thereof once a week for three consecutive weeks, * * * in such newspaper as may be designated by the county commissioners for that purpose in the county. * * * In counties having daily papers, the delinquent list shall be published in one issue of the daily edition and in two issues of the weekly edition of the same paper so selected by the board of county commissioners." By resolution the board of county commissioners of Burleigh county directed the publication of the delinquent tax list and notice of sale for 1898 taxes in the Bismarck Daily Tribune. Such list and notice were published in one issue of the Bismarck Daily Tribune and in two issues of the Bismarck Weekly Tribune. *Held,* that such resolution and publication was a compliance with the statutory provisions quoted, and the publication so made valid.

Taxation — Description of Premises.

3. The correct description of the land assessed is essential to a valid tax.

Same — "Words and Phrases" — "Contiguous Tracts."

4. Section 1480, Rev. Codes 1905 (section 1176, Rev. Codes 1899) defines "tract" as applied to land, when that word is used in the revenue law, as any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person,

or company. *Held,* that the word "contiguous" in that connection means land which touches on the sides, and that two quarters of the same section, which only touch at the corners, do not constitute for the purpose of taxation, one tract or parcel of land.

Same — Description of Premises — Two Tracts Assessed Together.

5. The assessment of two tracts of land as one tract renders the entire tax proceeding void. State Finance Co. v. Beck et al., 15 N. D. 374, 109 N. W. 357. Hence the assessment of two quarters of the same section, which touch only at corners, is a void assessment and renders all proceedings based thereon invalid, and the holder of a tax deed resting on a sale for unpaid taxes levied under such assessment cannot recover from the owner of the land the taxes paid under claim of ownership based upon such tax deed.

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

Action by T. W. Griffin against the Denison Land Company. Judgment for plaintiff, and defendant appeals.

Affirmed in part, and reversed in part, with directions.

Newton & Dullam, D. L. Boynton, of counsel, for appellant.

The designation of the newspaper was sufficient. Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Knight v. Alexander, 37 N. W. 796; Reimer v. Newell, 49 N. W. 865; Sperry v. Goodwin, 46 N. W. 328; Cass County v. Security Imp. Co., 7 N. D. 520, 75 N. W. 775; Emmons Co. v. Bank, 9 N. D. 583, 81 N. W. 22.

The word "contiguous" means in actual contact, touching also adjacent, near, neighboring, adjoining. Century Dictionary; Cyc.; 3 Am. & Eng. Enc. Law (1st Ed.) 803; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357.

The section is the unit of measurement of land and different subdivisions are one tract. Martin v. Cole, 38 Iowa, 141; Farnham v. Jones, 19 N. W. 83; Hall's Heirs v. Dodge, 18 Kan. 280; Weaver v. Grant, 39 Ia. 294.

Omission of description from notice does not vitiate sale. Shawler v. Johnson, 52 Ia. 472; Allen v. Armstrong, 17 Iowa 508; Hurley v. Powell, 31 Iowa 64; Madison v. Sexton, 37 Iowa 562; Slocum v. Slocum, 30 N. W. 562; Davis v. Magoun, 80 N. W. 423.

Legislature can make deed conclusive evidence of recitals therein. Allen v. Armstrong, supra.

Mockler & Johnson, for respondent.

Omission to designate newspaper for publication of notice of tax sale is fatal to proceedings thereunder. Cass County v. Security Improvement Co. 7 N. D. 528, 75 N. W. 775; Russell v. Gilson, 31 N. W. 692; Eastman v. Linn, 2 N. W. 693.

Power to sell land for taxes is a naked power, and strict compliance with statute essential. Woodbridge v. State, 43 N. J. Law, 262, 270, and cases cited; Hooper v. Ex'rs, 16 N. J. Eq. 382; Williams v. Peyton, 4 Wheat. 77; Early v. Doe, 16 How. (U. S.) 608.

Assessment and taxation of two tracts as one render entire proceeding a nullity. State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Boardman v. Bourne, 20 Ia. 134; Ackley v. Sexton, 24 Ia. 320; Martin v. Cole, 38 Ia. 141; Linn County Bank v. Hopkins, 28 Pac. 606, 27 Am. St. Rep. 309.

"Contiguous" means touching sides, adjoining, adjacent. Two tracts touching at one point only are not contiguous. Linn Co. Bank v. Hopkins, supra; Kresin v. Mau, 15 Minn. 87 (Gil).

In absence of things inherently essential to a valid tax, payment as a condition of relief is not required. Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Roberts v. Bank 8 N. D. 504, 79 N. W. 1049.

SPALDING, J. This action was brought to quiet title to the S. E. ¼ of section 2 in township 139, range 81 and the N. E. ¼ and the S. W. ¼ of section 22 in township 140, range 81, in Burleigh county. The plaintiff claims to be the owner in fee. The defendant claims to be the owner by virtue of two certain tax deeds issued on sales of said land for taxes for the year 1908, one deed being for the S. E. ¼ of section 2, and the other for the two quarters named in section 22. No question is made about the title being adequate to warrant the relief which the plaintiff seeks if the tax titles of the defendant are invalid.

The first objection made to respondent's title applies to both tax deeds, and is the only one made to the validity of the first deed mentioned. It goes to the sufficiency of a resolution passed by the board of county commissioners of Burleigh county designating the newspaper in which to publish the notice of sale of lands for delinquent taxes for the year 1898, and the publication thereunder. Plaintiff had judgment quieting title in him as against defendant and these tax deeds in the district court. If the resolution referred to was adequate and sufficient under the provisions of the law,

appellant is entitled to a reversal of the judgment in the district court as to the S. E. ¼ of section 2, but other questions are raised on his title to the other two quarters. If, on the other hand, the resolution was insufficient, appellant's title must fail as to all three tracts described. Section 1259, Rev. Codes 1899 (section 1574, Rev. Codes 1905), as far as material to this controversy, reads as follows: "The county auditor, under the direction of the board of county commissioners, or a majority thereof, shall give notice of the sale of real property, by publication thereof once a week for three consecutive weeks, * * * in such newspaper as may be designated by the county commissioners for that purpose in the county. * * * In counties having daily papers, the delinquent list shall be published in one issue of the daily edition and in two issues of the weekly edition of the same paper, so selected by the board of county commissioners." The resolution of the county commissioners directing the publication of the delinquent tax list for 1898 taxes, and the notice of sale, designated the Bismarck Daily Tribune as the official paper in which to make the publication of such list. The record shows that the list was published in one issue of the Bismarck Daily Tribune and in two issues of the Bismarck Weekly Tribune, that the papers are published by the same parties, and that the weekly is made up of the contents of the different issues of the daily.

It is contended that, to comply with the law, it was necessary in such case for the county commissioners to direct the publication in one issue of the daily and in two issues of the weekly, each by name, and, having failed to do so, that no legal or valid publication was made. It is also intimated that the "Bismarck Daily Tribune" and the "Bismarck Weekly Tribune" are separate and distinct newspapers; in other words, that the Weekly Tribune is not the weekly edition of the Daily Tribune. It is conceded that this resolution is jurisdictional. We are cited to no authorities which we consider directly in point to sustain respondent's construction of the statute. He cites Russell v. St. Paul, M. & M. Ry. Co, 36 Minn. 366, 31 N. W. 692. In that case the Minneapolis Tribune was designated as the paper in which the delinquent tax list should be published. The Tribune Company published two papers, one the "Minneapolis Weekly Tribune," and the other the "Minneapolis Daily Tribune." The list and notice were published in the "Minneapolis Weekly Tribune." The statute required simply a designation by resolution of the paper in which the list and notice were to

be published, and said nothing about daily and weekly papers or issues. The Minnesota court held that the order directing the publication named a paper which did not exist, and that from such order the public would be unable to ascertain where to look for the published list. That court said: "An omission by the board to designate any newspaper, or publication in any other than the one designated by it, would be fatal to any judgment entered thereon." He also cites Cass County v. Security Improvement Company et al., 7 N. D. 528, 75 N. W. 775, and that case is in principle identical with the Minnesota case. The designation was the "Fargo Forum," when, in fact, two papers were published, neither of which was named by the resolution. As we have said, we do not consider these authorities as sustaining respondent's contention. The statute did not require publication in both daily and weekly editions, and the resolutions designated neither the daily nor the weekly, but a paper which did not exist in either case. Neither does the appellant cite any authorities in point.

In the case at bar a paper was published in Burleigh county, known as the "Bismarck Daily Tribune." It was a daily paper. If the fact that the word "Daily" appeared in its title and the word "Weekly" in the title of the other makes two separate and distinct papers, and not daily and weekly editions of the same paper, in a legal sense, then no legal publication of the delinquent tax list and notice of sale could be made, as no provision is made for publication in papers which have only a daily or only a weekly edition in counties in which a daily paper is published, as the publication in a daily paper and also in a separate weekly paper is not authorized by the statute. A weekly edition of the Tribune was also published. Necessarily the Weekly Tribune could not be called or named the "Bismarck Daily Tribune," because such a name would be misleading and furnish no means by which to distinguish the weekly issue from the daily. The law directs what shall be done in counties in which a daily paper is published, namely, that the delinquent list shall be published in one issue of the daily edition and in two issues of the weekly edition of the same paper. Read in connection with the law, the resolution of the board of county commissioners designating the "Bismarck Daily Tribune" notified the public where to look for one publication of the notice; read in connection with the law, the resolution also notified the public that a weekly edition of the Tribune was published, and to look in that edition for the other

two publications of the notice. In proceedings of this kind, based upon a statute, the public must of necessity inspect the statute and be guided by its requirements, and when the statute prescribes that one publication shall be made in the daily edition and two in the weekly, and the resolution names the daily, it necessarily follows that the other two publications must be made in the weekly, and no further direction on that subject need be contained in the resolution. Indeed, if the resolution had also specified the Weekly Tribune, it would have added nothing to the information which the statute in connection with the resolution gave either the public or the owner of the land. We must hold that the resolution was sufficient, and so holding settles the title to the S. E. ¼ of section 2.

We come now to the questions relating to the N. E. ¼ and the S. W. ¼ of section 22. It will be necessary only to refer to one of the questions raised. These tracts were assessed as one separate piece of land and were sold as such. If this description is not in substantial conformity with the requirements of the statute, all proceedings based on such assessment must be held invalid. The correct description of the land assessed is essential to a valid tax. State Finance Co. v. Beck et al., 15 N. D. 374, 109 N. W. 357. This court has very recently held that the assessment of two tracts as one renders the entire proceedings void. State Finance Co. v. Beck et al., supra; Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049. But in the Beck Case the tracts assessed were 80 rods apart, while in the case at bar the lands described corner each other, and touch nowhere except at the corners. The validity of this assessment therefore depends upon the determination of whether two quarters of the same section which corner are, within the meaning of the tax law, one tract of land. Whatever construction may be placed upon the meaning of the word "tract" in relation to sales under foreclosure of mortgages or on execution, it does not necessarily follow that the same meaning should apply to the word as used in the revenue law. Section 1480, Rev. Codes 1905 (section 1176, Rev. Codes 1899) in defining words and terms used in the revenue law, uses this language: "The terms 'tract or lot,' and 'piece or parcel of real property,' or 'piece or parcel of land,' mean any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person or company." It will be seen from this that the correct interpretation of the word "tract," as used in the revenue law, and the consequent validity or invalidity

of the assessment in question, depends upon the meaning of the word "contiguous" or the term "contiguous quantity of land." The authorities are in direct conflict on this subject. We shall not take the time to analyze and refer to all the cases. We will, however, say that authorities construing the homestead law are in point in construing the revenue law, while any construction we may place on these terms in the revenue law may not apply to the homestead law. We arrive at this conclusion for the reason that homestead exemptions are looked upon with favor, and the laws providing for them are generally liberally construed, while tax laws usually recieve a strict construction.

We have made a careful examination of all the authorities which we find attempting to define the word "contiguous" in its application to tracts or bodies of land. The Century Dictionary defines the word as: "Touching; meeting or joining at the surface or border." The Standard Dictionary: "Touching or joining at the edge or boundary; close together; adjacent, adjoining; followed by to." The Thesaurus Dictionary defines "contiguous" as "touching or joining at the edge or boundary." Webster says it is from the Latin word "contiguus," akin to contingere, "to touch on all sides," and then follows this definition: "In actual contact; touching; also adjacent; near, neighboring; adjoining." He refers for an illustration of its meaning to "contiguous angles," and defines "contiguous angles" as such angles as have one leg common to both angles. Applying the Webster definition of contiguous angles, which we think furnishes the most pertinent definition of the word in this connection, "contiguous tracts of land" must be tracts or bodies of land which has one side, or at least part of one side, in common. Following this construction, two quarter sections of land which only touch at the corner, no parts of the sides being common, do not constitute "contiguous bodies of land." This question was passed upon in Bank v. Hopkins, 47 Kan. 580, 28 Pac. 606, 27 Am. St. Rep. 309, wherein the word "contiguous" is defined as "touching sides, adjoining, adjacent," and it is there held that two tracts of land touching only at one point are not contiguous. The same conclusion was arrived at in Minnesota, where it was held that two tracts of land mutually touching only at a common corner, a mere point, cannot, according to any authority or authorized use of the language, be spoken of as constituting one body or tract of land. Kresin v. Mau, 15 Minn. 116 (Gil. 87). To the same effect, see

Bulger v. Robertson, 50 Mo. App. 499, where "contiguous lots" are held to be such as lie "adjacent or adjoining to each other." In Holston S. & P. Co. v. Campbell, 89 Va. 396, 16 S. E. 274, it is held that the primary meaning of the word "contiguus" is in actual contact, or touching, and the court says: "It is not synonymous with 'adjacent,' although sometimes used in that sense, and vice versa." And Worcester's Dictionary is quoted as authority to the effect that: "What is adjacent may be separated by the intervention of some other object; what is contiguous must touch on one side." We think that the meaning of the word "contiguous" is to some extent comparative, and depends considerably upon the context and the subject under consideration. We conclude that in the use of that word in the tax law it means that two tracts of land touching only at a mere point at the corners cannot be considered as contiguous tracts or quantities of land. It follows that the tax title of appellant to the N. E. ¼ and the S. W. ¼ of section 22 is invalid. For the same reason appellant cannot recover taxes paid on these two quarter sections.

The judgment of the district court is affirmed as to the N. E. ¼ and the S. W. ¼ of section 22 in township 140, range 81, and reversed as to the S. E. ¼ of section 2 in township 139, range 81, and that court is directed to enter judgment quieting title in the respective parties accordingly. The appellant will recover costs. All concur.

(119 N. W. 1041.)

J. P. Lamb & Co., v. The Merchants National Mutual Fire Insurance Company.

Opinion filed December 31, 1908.

Rehearing March 4, 1909.

Insurance — Mutual Fire Insurance.

1. The powers of the officers of a domestic mutual fire insurance company are more limited than those possessed by like officers of stock companies.

Same — Interest and Liability of Policy Holders.

2. A mutual fire insurance company organized under the laws of this state is an association of individuals to provide mutual relief in case of loss by fire. All policy holders are members, and each one has

the same proportionate interest that every other member possesses, and is liable to the same proportionate extent.

Same — Rights of Members.

3. The members of a mutual fire insurance company organized under the laws of North Dakota are all entitled to the same treatment, and the officers of such a corporation cannot favor one member at the expense of his fellow members, as this would contravene the principle of mutuality which is at the foundation of mutual insurance.

Corporations — By-Laws.

4. By-laws of a corporation are laws for the regulation of its officers and the management of its property. They have much the same force and effect as between the members and officers in the conduct of the affairs of the corporation that a public statute has, unless in conflict therewith, and can only be repealed or amended in the manner provided by law.

Same — Contract — What Constitutes.

5. The statutes under which a domestic mutual fire insurance company is organized, its articles of incorporation or charter, and by-laws all enter into the contract of insurance, and are binding, not only on the organization, but on each member thereof.

Same.

6. While the officers of a domestic mutual fire insurance company, the by-laws of which are required by law to be adopted by a vote of the members, may waive many irregularities, they have no power to waive any matter of substance contained in such by-laws, and it is accordingly *held,* that the secretary of such a corporation has no power to waive definite terms of its by-laws which provide under what circumstances and for what time credit may be given members for premiums or assessments, or to give such credit in any other manner than that provided by such by-laws.

Same — Failure to Pay Premium — Suspension of Policy — Effect on Loss.

7. A section of the by-laws of a domestic fire insurance company which was printed upon the policy in suit, provided that, if the premium should remain unpaid for thirty days after the taking effect of the policy, such policy should be and remain suspended until the payment by the policy holder and the receipt and acceptance by the company of such premium, and that during such period the policy should be unenforceable and the company not liable thereon, and that, if it remained suspended for sixty days, it should be canceled without notice. In this case no premium was ever paid, and the policy was canceled as required by such by-laws. *Held,* that the

holder of such policy cannot recover for loss occurring after the expiration of such period and the cancellation of the policy, and before payment of premium.

Appeal from District Court, Nelson county; *Fisk*, J.

Action by J. P. Lamb & Co. against the Merchants' National Mutual Fire Insurance Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals.

Reversed.

Geo. A. Bangs, for appellant.

The conditions of standard policies can only be waived as provided therein, Kerr on Insurance, 432; O'Neal v. Am. Fire Ins. Co. 30 Atl. 940; Northern Assurance Co. v. Bldg. Assn. 183 U. S. 308; Enos v. Ins. Co. 8 Pac. 379; Gladding v. Ins. Co. 4 Pac. 764; Couch v. City F. Ins. Co., 38 Conn. 181; Pandor v. Am. Mut. Ins. Co. 12 Cush. 469; Allemania F. Ins. Co. v. Hurd, 37 Mich. 11; Northam v. Duchess C. Mut. Ins. Co. 59 N. E. 912; Hartford Fire Ins. Co. v. Landfare, 88 N. W. 779; Moore v. Hanover Ins. Co., 36 N. E. 191.

Officers of a mutual insurance company can only bind it by its adopted form of policy. May on Insurance, Sec. 146; Evens v. Trimountain Ins. Co., 9 Allen, 329; Brewer v. Company, 14 Gray 203; Belleville Mut. Ins. Co., v. Van Winkle, 12 N. J. Eq. 333.

Obligations of a member of a mutual insurance company are evidenced by its charter, constitution and by-laws. Holland v. Sup. Council 54 N. J. L. 490; Thibert v. Sup. Lodge K. of H., 81 N. W. 220; Am. Ins. Co. v. Henley, 60 Ind. 515; Borgards v. Farmer's Mut. Ins. Co. 44 N. W. 856; Railway P. F. C. Assn. v. Robison, 147 Ill. 138; 22 Cyc. 1414.

Officers of a mutual insurance company cannot waive the provisions of its by-laws adopted for the members's protection. Mulvey v. Shawmut Etc. Ins. Co. 4 Allen 116; Behler v. German Ins. Co. 68 Ind. 354; Wilson v. Conway Ins. Co. 4 R. I. 141; Westchester Ins. Co. v. Earle, 33 Mich. 150; Leonard v. Am. Ins. Co. 97 Ind. 299; Merserau v. Phoenix Mut. Life Ins. Co. 66 N. Y. 274; Miller v. Hillsboro F. Assn. 42 N. J. Eq. 459; Evens v. Trimountain Ins. Co. 9 Allen 329; Starke Co. Mut. Ins. Co. v. Hurd, 19 Ohio 149; Hutchinson v. Western Ins. Co. 21 Mo. 97.

When, by the terms of a policy, it is suspended by failure to pay premiums, non payment of a premium not maturing before a loss, renders the company not liable. Phoenix Ins. Co. v. Bachelder, 49 N. W. 217; Curtin v. Phoenix Ins. Co. 21 Pac. 370; Joliffe v. Madison Mut. Ins. Co. 39 Wis. 111; Gorton v. Dodge Co. Mut. Ins. Co. 39 Wis. 121; Wall v. Ins. Co. 36 N. Y. 157; Williams v. Ins. Co. 19 Mich. 457.

Unless premiums are paid according to the policy it is suspended. Iowa Life Ins. Co. v. Lewis, 187 U. S. 335; Williams v. A. P. C. Ins. Co. 19 Mich. 451; Atty Gen. v. Cont. L. Ins. Co. 93 N. Y. 70; Robertson v. Mut. Ins. Co. 88 N. Y. 541; Cont Ins Co. v. Dorman, 125 Ind. 189; Cayford v. Met. Life Ins. Co. 78 Pac. 258; Gorton v. Ins Co., supra.

The requirements of a statute can be waived only as provided therein. Straker v. Phoenix Ins. Co., 77 N. W. 752; O'Neil v. Am. F. Ins. Co., 166 Pa. St. 72; Anderson v. Manchester Fire Assur. Co., 59 Minn. 182; Union Centr. L. Ins. Co. v. Polard, 94 Va. 146; Hermony v. Fid. M. L. Assn. 151 Pa. St. 17; Temple v. Niagara F. Ins. Co. 85 N. W. 361; Clevenger v. Ins. Co. 2 Dak. 114, 3 N. W. 313; Fid. Life Assn. v. Ficland, 74 Md. 172; Queen Ins. Co. v. Leslie, 47 Ohio St. 409; White v. Prov. S. Assn., 163 Mass. 108; Bourgeois v. Ins. Co. 57 N. W. 347.

Frich & Kelly, for respondent.

Waivers and estoppels are binding in mutual as well as non-mutual companies. Prat v. Dwelling House Mut. Ins. Co. 29 N. E. 117; Laclede F. I. Co. v. Ormsby, 72 S. W. 139; Russel v. Ins. Co., 45 N. W. 356; McBride v. Ins. Co., 33 S. E. 729; Philbrook v. Ins. Co., 37 Me. 137; Watts v. Assn. 82 N. W. 441; Kansel v. Ins. Co. 16 N. W. 430; Pino v. Ins. Co., 92 Am. Dec. 529; Elkins v. Ins. Co., 6 Atl. 224; Pottsville Ins. Co. v. Minnequa Imp. Co., 100 Pa. St. 137.

Unconditional delivery of policy is a waiver of the advance payment clause. Corson v. Mut. I. Co., 85 N. W. 806; Phoenix Ins. Co. v. Hart, 36 N. E. 990; Proebstel v. Ins. Co. 45 Pac. 308; Arnold v. Ins. Co. 84 Pac. 182; Brown v. Ins. Co., 38 N. W. 135; Ins. Co. v. Gilman, 13 N. E. 118; State Ins. Co. v. Hale, 95 N. W. 473; Farnum v. Ins. Co., 23 Pac. 869.

Demand of premium may amount to waiver. Farmers Mut. Assn. v. Koontz, 30 N. E. 145; Farmers Union Assur. Co., v.

Wilder, 53 N. W. 587; Olmstead v. Farmers Mut. I. Co., 15 N. W. 82; 19 Cyc. 796.

So demand of proofs of loss. Fidelity Mut. Ins. Co. v. Murphy, 95 N. W. 702; Smith v. Ins. Co., 3 Dak. 80, 13 N. W. 355; 19 Cyc. 801.

SPALDING, J. This is an appeal from a judgment in favor of the plaintiff in an action on a fire insurance policy issued by appellant on a stock of merchandise and from an order denying a motion for a new trial.

It is not necessary to quote the pleadings. The principal issue was as to certain acts of appellant's secretary constituting a waiver or estoppel in favor of respondent, who had not paid any part of the premium due on the policy. The facts referred to consisted in sending respondent the renewal policy in suit without an application, giving it notice that $13.60 was due it on a policy for the same amount on the same property, which was about to expire, with a notice that $20.40 more would pay the premium on the new policy, and about four months later sending it notes to execute for the premium which remained unpaid and about five weeks after the fire which destroyed the property insured answering letters from respondent and not expressly denying liability, and sending it a blank proof of loss. Appellant is a domestic fire insurance company organized under the laws of this state providing for the organization of such companies. It has no capital stock. Policies are issued to members, and each holder is a member and entitled to vote at the annual and other meetings of the corporation. It conducts its business under by-laws adopted by the members in accordance with the provisions of section 4201, Rev. Codes 1905. Section 2 of article 8 of the by-laws of appellant reads as follows: "If the premium of any policy issued by this company shall remain unpaid for thirty days after such policy takes effect, such policy shall be and remain suspended until the payment of the policy holder and the receipt and acceptance by the company of such premium. During the period of such suspension aforesaid, such policy shall be unenforceable against the company and the company shall not be liable thereon under the terms thereof or otherwise. If such policy remains suspended for sixty days it shall be cancelled without notice to the insured and the premiums on the same charged at the short rate for the thirty days during which such policy was in

force. The sending of any statement due on the policy shall not constitute a waiver of any of the rights of the company or of the conditions of the policy or clauses thereto annexed and shall not be considered in any manner as the giving of credit to the insured. On request of the policy holder in writing the secretary may extend the time of payment of the premium, provided such extension is in writing and signed by the secretary. During the period in which any policy is suspended as aforesaid the receipt by the company of the premium from the insured shall not reinstate such policy or be binding upon the company unless such premium has been fully accepted and acknowledged by the company before any injury or damage occurs to the property covered by and included in such policy." The trial court found that the acts referred to above constituted a waiver by appellant which entitled respondent to recover on the policy. We shall not consider the sufficiency of these acts to constitute a waiver, if a waiver of that nature were possible. Neither shall we determine the constitutionality or unconsitutionality of the standard policy law of this state which is suggested. We are satisfied that in the proceedings in the trial court there was a failure to distinguish between the powers of officers of stock and those of mutual companies. The books contain many cases in which the attention of the courts has not been directed to this distinction. A mutual insurance company organized under the laws of this state is an association of individuals organized to provide mutual relief for loss suffered. Its members all pay the same premiums or assessments for the same protection, and, when the policy expires, receive the same percentage or pro rata share of any net profits or surplus after complying with the statute providing for a reserve fund. Sections 4441, 4442, Rev. Codes 1905. Their minimum contingent liability is fixed by section 4440, Rev. Codes 1905, and the by-laws they adopt. Each member has the same proportionate interest in the surplus that every other member possesses and is liable to the same proportionate extent. All are entitled to the same treatment in matters relating to premiums, assessments, surplus, losses and liabilities. If one is favored in these respects by the officers or agents of the corporation, it is at the expense of his fellow members, and contravenes the principle of mutuality, which is the corner stone of the system of mutual insurance. Officers of stock companies may deal with its policy holders (who do not by virtue of being so become members

or stockholders) with a far wider range of discretion than those of mutual companies, and conversely the company may be liable for acts of officers and agents, which, if done by those representing the members and governed by by-laws of a mutual company, would not bind or render liable their principal. May on Insurance, at section 146, says: "Mutual insurance, it is truly observed, is essentially different from stock insurance, and much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to local business. They need many by-laws and conditions that are not required in stock companies; and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires toward himself. If the officers have discretionary power as to the terms of the contract, or even as to its form, it is obvious that different parties may become members upon different terms and conditions, and thus the principle of mutuality will be completely abrogated. When the company have once determined the forms in which their policies shall be made, and the conditions upon which they are willing to contract, it is nothing less than a violation of duty for the officers to undertake to bind the companies they represent by other and inconsistent contracts, patrol or otherwise." Baxter v. Chelsea Mutual Fire Ins. Co., 1 Allen (Mass.) 294, 79 Am. Dec. 730. There is also a distinction between the powers of officers of those mutual companies whose by-laws are enacted by directors as in New York, and those governed by by-laws made by the members themselves, as in this state. In those of the first class, courts hold acts of officers or agents as a waiver or estoppel which are not held to be so as against the latter class. Pratt v. Dwelling House Mutual Fire Insurance Company, 130 N. Y. 206, 29 N. E. 117. The by-laws of a corporation are the laws for the regulation of its affairs and the management of its property. They have much the same force and effect when applied to its members and officers in the conduct of the affairs of the corporation that a public statute has. They can only be repealed or amended in the manner provided by statute, which in this state in a corporation like the appellant is by vote of the members or, and only, by directors when the power to do so has been delegated to them by the same proportion of members

as may make amendments themselves. Sections 4201, 4204, Rev. Codes 1905. The statutes under which it is organized, the articles of incorporation or charter, and the by-laws of a domestic mutual fire insurance company all enter into the contract of insurance, and are binding not only on the organization, but on each member thereof. Montgomery v. Whitbeck, 12 N. D. 385, 96 N. W. 327; Kerr on Insurance, § 59; 1 Joyce on Insurance, § 318; Miller v. Hillsborough Fire Ins. Ass'n, 42 N. J. Eq. 459; 7 Atl. 895; 1 Beach Law of Insurance, Sec. 109; 10 Cyc. 352, and cases cited in note 55; Leonard v. American Insurance Company, 97 Ind. 299. Many authorities hold that the officers of a mutual insurance company may waive provisions in the by-laws which are not of the substance; that they may waive many irregularities and even waive the proof of loss, and irregularities in the form of the proof. We find no authorities, however, to the effect that, where the members of a corporation themselves adopt the by-laws and a vote of the members is required to repeal or amend them, any officer of the corporation may waive any matter of substance contained in such by-laws, unless authorized to do so by a resolution or vote of the members. This principle is reasonable, and its enforcement is necessary to the carrying out of the objects of a mutual company. It is simply a recognition of the well-established general principle that it requires action by the same authority to undo a thing which did or had the power to do it originally. Only those who can make are empowered to unmake. If even the president of a mutual corporation can waive compliance with one substantial requirement of the by-laws in dealing with one member of the corporation, he can waive compliance with some other requirement by another member. He could permit one member to be insured for a less premium than would be required of another member under the same circumstances, or he could credit one member a larger pecentage of the net surplus than is given to other members, and the element of mutuality would be wholly eliminated.

In the case at bar the provision quoted was not only a by-law of the company, with which as we have seen the respondent was charged with notice, but it was printed upon the policy, and attached to the policy was a notice calling respondent's attention to the by-laws and another notice informing it that it was a member of the corporation, and giving the date of its annual meeting, and notify-

ing it that it could vote thereat. This by-law fixed the powers of officers in extending credit to members under the circumstances which surrounded the issuance and delivery of the policy involved. The credit was in plain terms limited to 30 days (with one exception which has no application in this case), and respondent was further notified that, if the premium was not paid at the end of that time, the policy would be suspended and in 60 days cancelled. If the secretary could waive these provisions of the by-laws, it would, in effect, be an amendment or repeal of such by-laws in a manner differing from the method provided thereby and by statute.

We find this principle most fully set forth in the reports of the Supreme Judicial Court of Massachusetts, a state which has long been recognized as not only far in the lead on the subject of equitable and just insurance laws, but the decisions of whose courts are unusually harmonious on the subject of insurance. Brewer v. Chelsea Mutual Fire Insurance Co., 14 Gray (Mass.) 203; Evans v. Tri Mountain Mutual Fire Ins. Co., 9 Allen (Mass.) 329; Mulrey v. Shawmut Mutual Fire Ins. Co., 4 Allen (Mass.) 116, 81 Am. Dec. 689; McCoy v. R. C. Mut. Ins. Co., 152 Mass. 272, 25 N. E. 289. See, also, Stark County Mutual Fire Ins. Co. v. Hurd, 19 Ohio, 149; Leonard v. American Insurance Co., supra; Bosworth v. Western Mut. Aid Soc., 75 Iowa, 582, 39 N. W. 903; M. W. A. v. Tevis et al, 117 Fed. 369, 54 C. C. A. 293. In Brewer v. Ins. Co., supra, Mr. Justice Bigelow, in delivering the opinion of the court, says: "By the twentieth article of the by-laws of the corporation by which the rights of parties under the contract are regulated, it is provided that before the policy shall be delivered the assured shall pay such premium, and give such deposit note as the president and directors shall determine. The effect of this stipuation was that the contract of insurance should not be completed nor the policy take effect until such premium was paid and such note given. It is admitted in the present case that the assured had not complied with this by-law. The plaintiff, however, seeks to avoid the effect of such noncompliance, and to maintain the policy as a valid contract, on the ground that this stipulation in the by-laws for payment of the premium had been waived by the officers of the company. On looking into the evidence, which is fully reported in the exceptions, it does not appear that there was any proof of waiver by the corporation. The case, therefore, comes directly within the recent decision of this court in Hale v. Mechanic's Mutual Fire Insurance Co., 6 Gray,

109, 66 Am. Dec. 410. The president, secretary, and board of directors were all special agents with limited powers, and no authority to dispense with the by-laws. Those could be changed only in pursuance of the twenty-second article at an annual meeting, or at a legal meeting of the company called for that purpose, by a vote of a majority of the members present. * * * But such decisions do not apply in a case like the present, where the policy is issued by a company established on the mutual principle, in which the by-laws are made to fix and regulate, by the same stipulations in every policy, the rights of all the assured alike, and the assured are themselves members of the company, and as such have notice of every provision contained in their by-laws." By-laws of this kind are self-executing. Maginnis Est. v. N. O. & C. M. Ass'n 43 La. Ann. 1136, 10 South. 180; Yoe v. M. B. Ass'n, 63 Md. 86; Rood v. Ry. & C. Ass'n (C. C.) 31 Fed. 62.

Some contention is made by the respondent that inasmuch as there was due it from the company $13.60 as its share of the net receipts for the preceding year on the policy it then carried, and because the company sent it a statement showing this amount due and the balance necessary to pay the premium on the policy in suit, this share of the net earnings should be applied on the premium due to carry the policy as far as it would pay for it at a pro rata rate. We cannot agree with this contention. The notice sent respondent was simply for the purpose of informing it that the old policy had earned $13.60, and that, on its remitting $20.40 in addition, the new policy would be carried for one year. Respondent never offered to pay the balance, and on one occasion refused to retain the policy. This identical question was considered in Hollister v. Mutual Fire Ins. Co., 118 Mass. 478, where it is held that, if a by-law of a mutual fire insurance company provides that any risk insured shall be suspended unless an assessment is paid within a certain time, it is not a valid excuse on the part of a member for a neglect to pay the assessment that the company owes him a less sum if he does not offer to pay the balance. This, however, is immaterial in the case at bar, for the reason that the trial court found that the surplus mentioned should be applied at short rates in payment of the policy, and because, if so applied, it would not carry the policy to the date of the fire. We must hold that the secretary had no power to waive the by-law quoted under the facts disclosed by the evidence in this case. We have arrived at this conclusion without reference

to the requirements of section 4440, Rev. Codes 1905, to which our attention has been called. It reads: "Mutual insurance companies shall charge and collect upon their policies the full mutual premium in cash or notes absolutely payable and may in their by-laws fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by their cash funds; provided that such contingent liability of a member shall not be less than a sum equal to and in addition to the cash premium written in the policy. The total amount of the liability of a policy holder shall be plainly and legibly stated upon the back of such policy."

It might be contended with considerable force that an affirmance of the judgment in this case would be sustaining a direct violation of such statute. Indeed, some remarks contained in Montgomery v. Harker, 9 N. D. 527, 48 N. W. 369 referring to this identical section and others, appear pertinent. They read: "The language of the section just quoted is unambiguous, and plainly requires a corporation to charge and collect a fixed premium from each of its members. This may be cash in advance or a note payable absolutely. But it is an absolute and unconditional payment; a premium in fact, and is to be written in the policy. The funds derived from such premium constitute a cash fund subject to be used for the payment of losses and expenses." And in Montgomery v. Whitbeck, supra: "The law, a part of this contract, required that the amount of the cash premium accepted should be written in the policy; that the company should charge and collect upon the policies the full mutual premium in cash or in notes absolutely payable. None of these requirements made prerequisite to a valid insurance contract was observed in this case. The note given was payable only upon the contingency of a loss and assessment.* * * These requirements were ignored. No cash fund could be obtained for the payment of expenses or losses under the form of contracts admitted until assessments could be made and collected. No valid consideration was given for the insurance contract. The policy of the law would be frustrated if this invasion of its mandate could be tolerated. This policy was and is void." It may be inquired whether, if giving a note with the amount payable left in uncertainty avoided the policy by reason of a conflict with the statute providing for a fund out of which to pay losses and expenses, instead of a note absolutely payable, why the failure to pay cash or to give any note whatever should not equally avoid the policy. Quoting further from the

opinion in that case: "Every member of this corporation was a party to these contracts, individually as the assured and collectively as the corporation. As parties to the contract with the corporation, they were severally in pari delicto. No estoppel operates either in favor of or against any of them, because there is nothing upon which it can be built." But we do not find it necessary to pass upon this feature of the case.

The judgment is reversed. All concur.

Hon C. J. Fisk, J., being disqualified, Hon. Chas. A. Pollock, Judge of the Third Judicial District, sat in his stead.

On Rehearing.

SPALDING, J. Counsel for respondent submit a petition asking a rehearing. They insist that the original opinion of this court indicates that certain controlling facts and authorities were overlooked. The petition is not framed in the spirit that we would expect to see exhibited by counsel of the high reputation for fairness which those signing it possess or should exhibit toward the court, and is not altogether entitled to the consideration which we give it. It seems also to rest upon a misconstruction of what we held to be the law applicable in the premises. We did not attempt to decide that the acts of appellant might not in some cases, or if done by officers of a stock company, constitute a waiver, although there is a vast number of authorities, we think, a very large preponderance of them, holding similar acts no waiver. Counsel assume that the delivery of the policy to respondent was unconditional. This is not the fact. The conditions on which it was delivered were plainly stated on the policy, and were a part of the by-laws of which respondent had notice as a member of the company, and by which it was bound. Farmers' Mutual Insurance Company v. Kinney, 64 Neb. 808, 90 N. W. 926; Corey v. Sherman, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 514; Brown v. Stoerkel, 74 Mich, 269, 41 N. W. 921, 3 L. R. A. 430; 74 Mich, 269, 41 N. W. 921, 3 L. R. A. 430; 7 Current Law, 1784. This by-law gave credit for 30 days. Afterwards, if the premium was still unpaid, the policy was suspended and in 60 days cancelled. The cancellation took place before the loss occurred and the premium was never paid. The policy and by-laws were actual notice of these conditions, and, as stated in the original opinion, were self-executing. 7. Cur.

Law, 1793, note 20; Lehman v. Clark, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648. Had the insured paid the premium after default, and had it been accepted by the insurer, pursuant to a usage or custom which had become established either in its dealings with the respondent or generally, a different question would be presented, but, as we show in the original opinion, no part of the premium was accepted or retained, or even offered.

While we rested our decision upon the broad ground that the secretary cannot, under the laws which govern him, waive the conditions prescribed by such laws, respondent still argues that the waiver did take place. It must be borne in mind, as before stated, that this is a purely mutual company. It has no capital stock, and must depend solely upon the payment of premiums and the additional liability imposed upon its members by statute to enable it to pay losses. If its secretary can extend ambiguous or unlimited credit to one member, contrary to the terms of the agreement entered into through its by-laws by its members, of which respondent was one, he can do so with all members, and it would be wholly devoid of power to meet losses as they might occur. The same effect would follow, and the same law apply, as though it was an assessment company. It is said in National Masonic Accident Association v. Burr, 44 Neb. 256, 62 N. W. 466: "A member who fails to pay his assessment when due, though he may afterwards pay it, and his rights as a member be reinstated from the time of making such payment, has no cause to complain because his rights as a member and his claims against the association are not made to date back so as to cover any injury he may have received during the time of his default, for this is his express contract, and it is a reasonable one." The law of this state provides that mutual companies shall make collections in the shape of premiums, payable in advance, to enable them to meet losses. The premiums are fixed at figures which it is supposed will admit of all losses being paid therefrom, but, in case of a miscalculation or an emergency, an additional liability is placed upon members. Upon the other hand, if, at the end of the year, it is found that the members have overpaid, they are entitled to a return of the surplus. If losses are paid outside of reasonable limits, necessary to permit the transaction of business, without the payment of any premiums, it could only be by taking money with which to do so from the surplus in the hands of the company belonging to other members, or from the

small percentage required as a reserve. The latter would soon be exhausted, and thus compel assessments to make up the deficiency or force a suspension, or both. Still further, the policy had ceased to exist by its terms and those of the by-laws of the company. For this reason, it is clear that the same principle does not apply that would be applicable had the policy still been in force. No contract was in existence. Can it be contended that by replying to letters of the respondent, or even by sending it a blank proof of loss, a new contract was entered into? It is not a question of waiving a mere suspension, but one of making a wholly new contract, and it requires an express agreement to do this. The doctrine of waiver is not applicable. The insurer had received no benefits under the policy, and, there being no policy in effect, no forfeiture in a legal sense occurred. It is held in Equitable Life Assur. Society v. McElroy et. al., 83 Fed. 631, 28 C. C. A. 365, that, where a life insurance policy has become void, it cannot be revived without a new contract between the parties. See, also, Diehl v. Adams County Mutual Insurance Company, 58 Pa. 443, 98 Am. Dec. 302; Beatty v. Lycoming County Insurance Company, 66 Pa. 9, 5 Am. Rep. 318. It is immaterial whether notice of suspension, cancellation, and demand for payment were sent and received prior to loss, though the proof strongly tends to show that some of these things were done. The by-laws of the policy were notice of what would happen, and the sending of a notice that payment might still be made during the period of suspension could be no waiver, and it was so stated in the by-laws.

It is insisted that we assume the constitutionality of the standard policy law, and that the terms of the standard policy are in conflict with the by-law quoted. If the standard policy law is unconstitutional, the by-law is certainly effective. If valid, the standard form of policy expressly makes the by-laws of mutual companies a part of their policies. Section 5951, Rev. Codes 1905, only applies where a note or obligation is given for the whole or a part of the premium, and has no bearing on this case. Neither have the provisions of section 4446. It is urged that the principle which this court holds controlling was not insisted upon in the lower court, and was but faintly touched upon in appellant's brief. On the contrary, its discussion occupies a very considerable part of the brief submitted by appellant, and respondent answers it in his brief, and states that all matters were more or less fully argued and considered in the

trial court. We might add that, in view of the persistency and earnestness with which respondent urges its claims to a rehearing, we have most carefully reviewed the authorities, and that the reasons stated in the original opinion in support of our decision have ample support, not only by the overwhelming weight of authority where the question has been raised, but by reason as well. One point was, however, not referred to which we deem it advisable to mention at this time. The policy contained a provision reading as follows: "No offcer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as, by the terms of this policy, may be indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy, exist or be claimed by the insured, unless so written or attached." The authorities on similar provisions are in hopeless conflict, but the Supreme Court of the United States in 1901 had this identical provision under consideration in Northern Assurance Company of London v. Grand Building Association, 183 U. S. 308, 22 Sup Ct. 133, 46 L. Ed. 213, and, after an exhaustive review of the conflicting authorities, sustained the provision in question as against the contention that it could be waived in some manner other than in writing indorsed on the policy. The opinion in that case is most instructive, as is also that in Modern Woodmen of America v. Tevis et al., 117 Fed. 369, 54 C. C. A. 293, in which the opinion of the Circuit Court of appeals of the Eighth Circuit was delivered by Judge Sanborn. We append a list of a few authorities bearing directly or indirectly on the questions involved in the case at bar, several of which are to the effect that acts of agents and officers or insurance companies similar to those urged as constituting a waiver in the case at bar do not create a waiver of the terms of the policy: Driscoll v. Modern Brotherhood of America, 77 Neb. 282, 109 N. W. 158; Farmers' Mutual Insurance Company v. Kinney, 64 Neb. 808, 90 N. W. 926; National Masonic Accident Association v. Burr, 44 Neb. 256, 62 N. W. 466; Kocher v. Supreme Council Ben Legion, 65 N. J. Law, 649, 48 Atl. 544, 52 L. R. A. 861, 86 Am. St. Rep. 687; Borgraefe v. Sup. L. & C. of Honor, 22 Mo. App. 127; Burdon v. Mass. & C. Ass'n, 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146; Garlick v.

Miss. Valley Ins. Co., 44 Iowa, 553; Morrow v. Des Moines Ins. Co., 84 Iowa, 256, 51 N. W. 3; Ware v. Insurance Co., 45 N. J. Law, 177; Carlson v. Supreme Council A. L. of H., 115 Cal. 466, 47 Pac. 375, 35 L. R. A. 643; McCullough et al. v. Home Ins Co., 118 Tenn. 263, 100 S. W. 104; Lyon v. Supreme Assembly of the Royal Society of Good Fellows, 153 Mass. 83, 26 N. E. 236; Boyd v. Insurance Company, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676; Van Buren v. St. Joseph County Village Fire Ins. Co., 28 Mich. 398; Hughes v. Wisconsin Odd Fellows Mutual Life Ins. Co., 98 Wis. 292, 73 N. W. 1015.

The petition is denied. All concur.

(119 N. W. 1048.)

EMELIA DUSABECK JOHNSON v. ALBERT RICKFORD.

Opinion filed June 28, 1909.

Trespass of Animals — Fence Laws.

1. That part of section 1939, Rev. Codes 1905, originally passed as section 6, chapter 69, page 102, Laws 1895, in the words, "provided, that all corral fence exclusively for the purposes of inclosing stacks, if outside of any lawful enclosure, shall not be less than sixteen feet distant from such stack so inclosed, shall be substantially built with posts not more than eight feet distant from each other, and with not less than five strands of barbed fence wire, and shall be not less than five feet high," is applicable, during the "open season," to those counties of the state in which the provisions of section 1933, Rev. Codes 1905, permitting live stock to run at large from the 1st day of December until the 1st day of April of each year, have not been abolished by an election duly held for that purpose.

Same.

2. In a county of this state in which the provisions of section 1933, Rev. Codes 1905, are operative, a party can maintain an action against the owner of ranging animals for the damage occasioned by breach of a lawful fence, under the provisions of section 1940, Rev. Codes 1905, only upon a showing that at the time of the alleged trespass he had secured his property by a strong and sufficient fence against the intrusion of live stock, and that, notwithstanding the protection afforded by such fence, the animals have breached or broken such fence and destroyed property within the inclosure.

Same.

3. A good and sufficient fence deemed in law sufficient to exclude ranging live stock, between the 1st day of December and the 1st day of April in each year, in those counties in which the provisions of section 1933, Rev. Codes 1905, are operative, must in height, strength and distance from inclosed stacks comply with the provisions of section 1939, Rev. Codes 1905, or present a barrier as effective for the purpose of a fence as that described in that section.

Same.

4. The party bringing an action in damage against the owner of ranging animals during the "open season" for live stock, for breach of an inclosure under the provisions of section 1940, Rev. Codes 1905, who does not show upon the trial that at the time of the alleged trespass he has secured his property against the intrusion of animals by a fence deemed in law sufficient to exclude them, fails to show a liability on the part of the owner of such animals, or to establish a cause of action against him.

Appeal from District Court, Griggs county; *E. T. Burke,* Judge.

Action by Emelia Dusbabeck Johnson against Albert Rickford. Judgment for plaintiff, and defendant appeals.

Reversed, and action dismissed.

Lee Combs, for appellant.

A lawful fence is a condition precedent to relief. Coomerford v. Dupuy, 17 Cal. 308; Darling v. Rogers, 7 Kan., 592; Larkin v. Teller, 5 Kan. 434; Fillmore v. Booth, 29 Kan. 134; Chase v. Chase, 15 Nev. 259; Smith v. Williams, 2 Mont. 195; Clarendon Land Invest. & Agency Co. v. McClellant Bros., 29 Tex. 483, 31 L. R. A. 669, 34 S. W. 98; Runyon v. Patterson, 87 N. C. 343; Studwell v. Ritch, 14 Conn. 293; Mann v. Williamson, 70 Mo. 661; Oil v. Rowley, 69 Ill. 469; Cooly on Torts, 597, et seq. 16 Cent. L. J. 345; Lord v. Wormwood, 29 Me. 282, 50 Am. Dec. 586; Peterson v. Johnson, 111 N. W. 659; Totten v. Cole, 33 Mo. 138; Willhite v. Speakman, 79 Ala. 400.

A. M. Baldwin, for respondent.

Respondent was only bound to protect her hay by such a fence as common prudence required. Ely v. Rosholt, 11 N. D. 559, 93 N. W. 864.

ELLSWORTH, J. As cause of action the plaintiff and respondent alleges: That on and prior to December, 1905, she owned about 70 tons of hay stacked upon a tract of land in Griggs county, which hay was protected by a good and sufficient fence; that during the months of December, 1905, and of January and February, 1906, live stock belonging to the defendant and appellant broke through said fence and destroyed hay belonging to plaintiff to the amount of 10 tons and of the value of $50; that during said period plaintiff repeatedly repaired the fence in question and notified defendant that his animals were destroying her hay, and on the 12th day of February, 1906, caused notice to be served on defendant of the damage occasioned by his stock, and the probable amount thereof. The answer of defendant and appellant denies generally the claim for damages of plaintiff, and as matter of defense alleges that at all times during the months of December, 1905, and of January and February, 1906, his stock were licensed by statute to run at large, and that plaintiff had not protected her hay by any proper or legal fence, as prescribed by the laws of this state. The action was originally brought in justice court of Griggs county, and from a judgment entered therein in favor of plaintiff, an appeal was taken by the defendant and appellant to the district court of the Fifth judicial district for Griggs county, and from a judgment entered therein in favor of plaintiff, an appeal was taken by the defendant and appellant to the district court of the Fifth judicial district for Griggs county. In November, 1907, the action came on for trial in the district court and was tried to a jury. It then appeared, from the evidence introduced, that in the winter of the year 1905-6, plaintiff and respondent had two stacks of hay, containing, as she estimated, about 70 tons, placed upon a certain tract of land in Griggs county. Whether the land on which the stacks were placed belonged to plaintiff does not appear. She surrounded the stacks by a fence constructed by placing cedar posts 17 or 18 feet apart, and placing thereon four barbed wires, the first wire 16 inches from the ground, and the others above it at intervals of from 8 to 10 inches. This fence was placed at an uneven distance from the stacks; at some points being from 1 to 2 rods distant, and at others approaching to within 5 feet and 8 or ten inches of the sides of the stacks. At these points it appears, according to the statement of one of the witnesses for plaintiff, that the hay could be reached from outside the fence by "a good strong bull or cow with a long

neck, if he was hungry," by putting his head between the wires and stretching them as far as the posts permitted.

It seems that cattle belonging to the defendant, at a number of times in the months mentioned, broke through this fence and destroyed some of the hay stacked in the inclosure. At another time the snow drifted about a portion of the fence until it reached above all the wires except one. As the snow was hard packed, some of the cattle walked upon the top of the drift and over the top wire of the fence and reached the hay in this way. After plaintiff found that stock was breaking into the inclosure about her haystacks, she had stays placed between the posts at a distance of about eight feet apart. When the snow accumulated so that the animals could walk over the top of the fence, she had it removed, or the crust broken so that the fence could not be passed, except by breaking it. There is also evidence that plaintiff on several occasions notified members of the family of appellant that his stock was breaking over her fence and destroying her hay. It further appeared that the dwelling of appellant was less than one-half mile distant from the haystacks in question, and that appellant was accustomed, during the period in question, to turn his stock out upon his own premises, which adjoined those of plaintiff, to run at large or "range" upon surrounding uninclosed lands. One witness testified that, during the winter of 1905-06, he saw a path in the snow made by stock, which started from appellant's yard and went directly to the haystacks of plaintiff. None of the witnesses had at any time seen appellant drive his stock along this path or by any other route upon plaintiff's premises or to her haystacks, and had not seen him or any of his employes driving his stock away from plaintiff's stacks. It further appeared upon the trial that there had not been held in Griggs county an election by which the provisions of section 1933, Rev. Codes 1905, or of chapter 44, Code Civ. Proc. (Rev. Codes 1905, §§ 7865-7871), had been abolished within that county.

At the close of plaintiff's evidence, the defendant moved the court to direct the jury to find a verdict for the defendant upon the ground "that the plaintiff has failed to establish a cause of action against the defendant, as alleged in plaintiff's complaint, or otherwise, and upon the further ground that the evidence in the case does not establish any liability on the part of the defendant to the plaintiff, under the facts and circumstances shown by the evidence or alleged in plaintiff's complaint." This motion being denied by

the court, the defendant offered no evidence, and the court submitted the case to the jury under an instruction that: "At the time it is alleged that this damage was done, it was lawful for stock to run at large, and during these months plaintiff was required to protect her haystacks against ranging horses, mules, cattle, and sheep." And that it was "the duty of the plaintiff to use the ordinary precautions that common prudence would dictate to protect her property from destruction." "The cattle of the defendant being lawfully at large in this state, the owner of the cattle would not be liable to the defendant, unless you believe from the evidence in this case that he drove them, or caused them to be driven, willfully onto the hay of plaintiff. The law does not contemplate that a person who allows his cattle to run at large under the law, will willfully drive them onto another person's grain or hay and winter them there. That is not the intent of the law, and this is the only condition under which you can find for the plaintiff in this case." The court further instructed the jury that the provisions of law contained in section 1939, Rev. Codes 1905, which has been referred to by counsel in this case, "does not apply in this county, so you are instructed by the court that the law in this suit does not and did not, require the plaintiff to have the fence which was mentioned in the Code, as having posts set eight feet apart." The jury returned a verdict fixing the amount of plaintiff's damage at $40. Whereupon judgment was entered in favor of plaintiff and against appellant for that sum, and from such judgment this appeal is taken.

It has long been a settled rule of law in this state that both the common-law principle that the owner of stock is liable in damages for any trespass by them upon the lands of another, whether fenced or not fenced, as well as the statute declatory of this principle (section 7865, Rev. Codes 1905) has, by the provision of section 1933, Rev. Codes 1905, been abrogated in this state so far as it relates to any such trespass committed between the 1st day of December and the 1st day of April, except in those counties in which the provisions of section 1933 have been abolished by the voters of the county at an election duly held for that purpose. Ely v. Rosholt, 11 N. D. 559, 93 N. W. 864. As no such election had been held in Griggs county, where this action originated, and as the alleged trespass occurred during the months of December, January, and February, it is apparent, even had plaintiff chosen to proceed by that form of action, such action, if brought for damages occasioned by

the trespass of live stock upon uninclosed land, in the absence of a wanton or wilful trespass by defendant, could not be maintained.

Judging from its instructions to the jury, the trial court seems to have entirely misapprehended the character of the action. Plaintiff does not complain of a trespass of defendant's live stock upon her uninclosed land, and in fact neither pleads nor proves that the land where the alleged trespass occurred belonged to or was under her control. She states a cause of action such as is authorized by section 1940, Rev. Codes 1905, in favor of a party who has sustained damage by the breaching or breaking of a lawful fence by cattle belonging to another. Her allegations that her hay was protected by a good and sufficient fence, and that, while the same was so protected, animals belonging to appellant broke through the fence and destroyed the hay, places the cause of action upon very different grounds from the ordinary suit for damage resulting from the trespass of animals. As the gist of such an action is the breach of plaintiff's inclosure, it necessarily follows that the plaintiff in bringing it must show that he has secured his property by a strong and sufficient fence against the intrusion of animals, and that, before the owner of the cattle or animals can be held liable in damages, it must be shown that they have broken a fence, deemed in law sufficient to exclude them. Ely v. Rosholt, supra; Chase v. Chase, 15 Nev. 259; Larkin v. Taylor, 5 Kan. 434; N. O., etc., R. R. Co. v. Field, 46 Miss. 573.

Section 1933, Rev. Codes, 1905, was originally enacted as part of chapter 89, p. 274, Laws 1890. The legislative act containing this provision does not in terms describe the fence deemed in law necessary to protect property against the trespass of animals during the "open season." In 1895 a legislative act was passed providing a means whereby the provisions of the general herd law of the state (now chapter 44, Code Civ. Proc.) might be abolished in any of the counties of the state, and stock permitted to run at large therein during the entire year. This act provided that in any county in which an election had been held in accordance with its provisions, and the result of such election had declared in favor of abolishing the herd law, "a fence constructed as hereinafter described shall be sufficient and lawful." Such fence, when a "corral fence exclusively for the purpose of inclosing stacks, if outside of any lawful inclosure, shall not be less than 16 feet distant from such stacks so inclosed, shall be substantially built with posts not more than 8 feet distant from each other, and with not less than five strands of

barbed fence wire, and shall be not less than five feet high. Any other kind of fence or barrier which is as effective for the purpose of a fence as that above prescribed is hereby declared sufficient and lawful." Laws 1895, pp. 102, 103, c. 69, §§ 5, 6, 7; Rev. Codes 1905, §§ 1938-1940.

As section 1933, Rev. Codes 1905, was in operation at the time of the pasage of this act, and provided for an "open season" from December to April in all counties of the state where its provisions had not been abolished, it is reasonable to suppose that the Legislature had its provisions in contemplation when passing the act defining a lawful fence in counties where cattle were permitted to run at large throughout the year. The language hereinbefore quoted from sections 6, 7, and 8, c. 69, pp. 102, 103, Laws 1895, is general in its terms and applies to "all corral fences exclusively for the purpose of inclosing stacks." It is expressly made applicable to counties in which by a vote of the people the provisions of chapter 44, Code Civ. Proc., are abolished. Section 1938, Rev. Codes 1905. It is therefore a logical and reasonable inference that it was also intended to apply in those counties in which the provisions of chapter 44 are abrogated during a portion of the year by the general operation of chapter 1933, Rev. Codes 1905. It follows therefore that this definition may be regarded as a legislative description of a sufficient and lawful corral fence, exclusively for the purpose of inclosing stacks, whether the question of the sufficiency of such fence arises in counties having only an "open season" for ranging live stock, or in those in which the provisions of the herd law are inoperative at all seasons of the year. Under the definition of a "lawful fence" contained in section 1939, Rev. Codes 1905, it is clear that the fence erected by plaintiff around her stacks was insufficient in several particulars. The posts were 17 or 18 feet apart, instead of 8 feet, as required by law. The fence, instead of being at least 16 feet from the stacks, approached in places within 6 feet, and, owing to the long intervals between the posts, presented a constant temptation to ranging cattle, which common experience teaches are usually hungry, to press upon the wires and break it down. It consisted of but 4 strands of barbed wire, instead of 5, and was not over 46 inches high, being 14 inches short of the 5 feet prescribed by law. It is clear, we think, that such a fence in such a situation was not a lawful or sufficient fence, and that, so far as any trespass of appellant's stock is concerned, the stacks may be regarded as uninclosed.

Respondent insists, however, that a lawful and sufficient fence is to be determined by reference to section 3231, Rev. Codes 1905. This section is as follows: "In all cases where any law of this state requires to be erected or maintained any fence or fences for any purpose whatever, it shall be sufficient and a compliance with such law, if there shall be erected and maintained a barbed wire fence, consisting of 2 barbed wires and 1 smooth wire, with at least 40 barbs to the rod, the wire to be firmly fastened to the posts not more than 2 rods apart, with 1 stay between the posts, the top wire to be not more than 52 inches high, or less than 48, and the bottom wire not less than 16 inches from the ground; or 4 smooth wires with posts not more than 2 rods apart, and with good stays not to exceed 8 feet apart, the top wire to be not more than 56 inches high nor less than 48, and the bottom wire not less than 16 inches nor more than 20 inches from the ground; provided, that 5 smooth wires shall be required to constitute a legal partition fence, provided, that any other fence authorized by law shall also be held a legal fence."

Plaintiff insists that the fence around her stacks was a better fence than is required by this section, as it consisted of posts placed at intervals of about 1 rod, to which were attached 4 barbed wires, instead of 2 barbed and 1 smooth wire, or 4 smooth wires, as there provided. It will be observed, however, that this section of the statute is not applicable to the facts of this case. It applies only in cases where "a law of this state requires to be erected or maintained any fence or fences for any purpose whatever." The law providing for the "open season" does not define or require any fence or fences; whereas, the law of 1895, under a section of which plaintiff is proceeding in bringing her action, provided for a very much higher and stronger fence. It is apparent at a glance that the fence provided for by section 3231 is entirely insufficient as a corral fence for the protection of haystacks, especially when placed within 6 feet of the stacks. The special provision for fences of this character contained in chapter 69, p. 101, Laws 1895, is saved from an implied repeal by the clause contained in section 3231 "that any other fence authorized by law shall also be held a legal fence."

It is very apparent, not only from her pleading, but from the evidence introduced, that plaintiff did not claim or in any sense rely upon an action for damage against appellant for trespass of his

animals upon uninclosed premises. The question of a willful driving of the cattle to plaintiff's land was submitted by the trial court to the jury under an erroneous view of the character of the action. There is, however, neither pleading nor evidence to sustain a finding of the jury against appellant on this point.

As it is the gist of the action which plaintiff has brought to show that the live stock of plaintiff have broken a fence deemed in law sufficient to exclude them, it follows from the foregoing premises that she, upon the trial, failed to establish a cause of action against appellant as alleged in her complaint, and that the evidence introduced does not establish a liability on his part, and that the trial court should have granted the motion of defendant made at the close of all the testimony offered, for a directed verdict in his favor.

The judgment of the district court is reversed, and it is directed to enter an order dismissing the action. All concur, except Morgan, C. J., who did not participate.

(122 N. W. 386.)

WILLIAM KIDDER v. GEORGE B. BARNES, ET AL.

Opinion filed June 17, 1909.

Mortgage — Priority — Discharge of Prior Mortgage.

B and son were indebted to plaintiff in the sum of $40,000, part of which was secured by a mortgage on lands in North Dakota and Minnesota, and part of which indebtedness was unsecured. Being desirous of dividing this indebtedness, B and son made arrangements with plaintiff by the term of which B assumed $24,500 of said indebtedness, which he secured by a mortgage on land in North Dakota. The son assumed $15,500 of said indebtedness, which he secured by a mortgage on the Minnesota lands.

Plaintiff cancelled and surrendered up the old notes and executed a satisfaction of the mortgage on the Minnesota lands, but did not execute any satisfaction of the old mortgage on the North Dakota lands. *Held,* under the evidence in this case, that the old indebtedness was paid and cancelled, and the North Dakota lands were released from the lien of said mortgage executed by B and son.

After the execution of the first mortgage by B and son to plaintiff, and before the execution of the second mortgage by B to plaintiff, he executed a mortgage to W. H. & G. on one quarter section of the North Dakota land. *Held,* that such mortgage was prior and superior to plaintiff's mortgage.

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

Action by William Kidder against George B. Barnes and wife, Williams, Hallett & Griswold, and others. Judgment for plaintiff and defendants Barnes and wife and Williams, Hallett & Griswold appeal.

Modified and affirmed.

Engerud, Holt & Frame, and *B. D. Townsend,* for appellants.

Purcell & Divet, F. P. Lane, and *Mr. Nantz,* for respondent.

CARMODY, J. This is an appeal by defendants from a final judgment in a foreclosure suit. Appellants seek a retrial of the whole case. The complaint alleges, in substance, that defendants George B. Barnes, Sr., and wife and George B. Barnes, Jr., and wife, gave a mortgage to plaintiff, dated November 1, 1899 upon lands described in the complaint and also upon certain lands in Wilkin county, Minn., to secure a debt of $24,000 evidenced by five joint and several notes of said mortgagors to plaintiff bearing even date with the mortgage. Afterwards, on May 23, 1904, these notes evidencing said mortgage debt were cancelled and surrendered pursuant to an agreement of the parties thereto, but the indebtedness and mortgage remained in full force and effect; that pursuant to the same agreement George B. Barnes, Sr., and wife executed to plaintiff on May 27, 1904, four notes aggregating $24,500 in evidence of said mortgage debt in lieu of the old notes, and also executed a mortgage further securing the same upon the North Dakota land described in the previous mortgage and certain additional lands. Plaintiff prays for a personal judgment against George B. Barnes, Sr., and wife, and for a decree of foreclosure. George B. Barnes Sr., and wife plead that the debt and mortgage of November 1, 1899, was fully paid and satisfied by the new notes and mortgage of May 27, 1904, and that the latter mortgage and debt was thereafter paid and discharged on or about January 7, 1905, by an executed agreement made with plaintiff whereby said mortgagors conveyed and released to one Clinton B. Kidder all the mortgaged lands and other property (real and personal). They counterclaim for the recovery of $600 which they allege plaintiff agreed to pay them in connection with the transfer above mentioned. Williams, Hallett & Griswold plead that they hold a mortgage on the southwest

quarter of section 32, township 132, range 52, Richland county, given by said George B. Barnes, Sr., and wife on February 18, 1902, and duly recorded, securing a debt of $1,800. They allege the discharge and satisfaction of plaintiff's mortgages as pleaded by Barnes. They further plead in the form of a counterclaim the existence of the lien of their mortgage, and pray for a judgment establishing the same as a lien superior to any lien or claim of the plaintiff. The reply is a general denial. The issues were tried to the court without a jury, and resulted in findings and judgment substantially in accord with the allegations and prayer of plaintiff's complaint, except that no personal judgment was rendered against George B. Barnes and wife or either of them.

The findings and judgment dismissed the counterclaim of said Barnes and wife. The plaintiff, Willard Kidder, lived in Indiana, and had for many years been an intimate friend of George B. Barnes, Sr., and his family. Barnes Sr., was a clergyman living at Campbell, Minn. He and his son, George B. Barnes, Jr., owned and farmed a large quantity of land, near Wyndmere, known as the "Wyndmere property." It was equipped with the necessary horses, cattle, and machinery. They also owned a section or more of land in Wilkin county, Minn., near Campbell, known as the "Campbell property." Plaintiff had been for some years lending financial assistance to Barnes & Son, and on November 1, 1899, the latter with their respective wives jointly executed to Kidder five notes dated that day, aggregating $24,000. These notes are in evidence. To secure these notes the two Barneses, father and son, and their wives, gave the mortgage in suit, dated November 1, 1899, covering the Campbell and Wyndmere properties. Said mortgage was subject to prior incumbrances against the different tracts described in it. One of these tracts was the southwest quarter of section 32 in township 132, range 52. The title to this tract was at that time in the Howard Benevolent Society. Barnes, Sr., merely had a contract for the purchase thereof upon which there was then unpaid about $2,000. Barnes, Sr., obtained a deed for this land in March, 1902. At the time of obtaining this deed he mortgaged the land to defendants Williams, Hallett & Griswold for $1,800. The mortgage was dated and executed February 18, 1902, and was recorded before the deed to Barnes was recorded, March 15, 1902. The proceeds of this loan were used to pay up the balance due on the contract so as to enable Barnes to get the deed

of the land. In the spring of 1904 Barnes and his son desired to cease doing business jointly, and agreed that the son's share of the property should be set off to him subject to his share of the incumbrances. Plaintiff, as a friend of the family and creditor, was called in to assist in this settlement between father and son. In the settlement the Campbell property was assigned to George B. Barnes, Jr. The Wyndmere properties were retained by Barnes Sr. This settlement was made at Wahpeton, and was completed May 27, 1904. At that time the debt to plaintiff secured by the mortgage of November 1, 1899, was wholly unpaid, and amounted with accrued interest to $32,694.75. Barnes and son also then owed plaintiff three unsecured notes amounting at that time to the sum of $7,-864.43. Thus the total debt due plaintiff from Barnes and son, secured and unsecured, aggregated $40,559.18. Plaintiff discounted this $559.18, making the total debt $40,000, and this debt was then apportioned between Barnes and his son in the ratio of about 60 per cent. to the father and about 40 per cent. to the son. The father assumed $24,500 thereof, and was released from $15,500. The son assumed $15,500, and was released from the remainder. Notes were then executed by the father and son separately for their respective portions of the old debt. Barnes, Sr., then gave plaintiff a mortgage on the North Dakota lands to secure the new notes amounting to $24,500. This new mortgage included all the North Dakota land covered by the mortgage of November 1, 1899, and also some additional tracts. It recited that it was subject to certain prior incumbrances. Upon the consummation of this settlement, plaintiff cancelled and surrendered to the makers all the old notes evidencing the old debt, both secured and unsecured. The Campbell property was released from the old mortgage to plaintiff on November 1, 1899. This settlement and rearrangement of securities was made without the knowledge or consent of Williams, Hallett & Griswold. The financial affairs of Barnes, Sr., which had apparently been in a bad way for some time, went from bad to worse until the latter part of 1904 his situation became utterly hopeless. Chattel mortgages were being foreclosed and attachments were levied, and Barnes contemplated bankruptcy proceedings. At this crisis Barnes again turned to plaintiff for advice and assistance; the object, as claimed by Barnes, being to protect plaintiff as much as possible and incidentally save Barnes from the loss and annoyance of bankruptcy proceedings. As a result of a conversation between

plaintiff and Barnes in Indiana, Clinton B. Kidder, a son of plaintiff, was sent to Wahpeton to act for and represent his father in the adjustment of his affairs with Barnes, Sr. Clinton B. Kidder went to Wahpeton in December 1904, accompanied by Mr. Nantz, a lawyer from Indiana, and Mr. Lane, a lawyer from Minneapolis. George B. Barnes, Sr., and wife conveyed all the mortgaged lands to Clinton B. Kidder, and executed to him a bill of sale of all the personal property on the Wyndmere farm. Also, according to the testimony of Clinton B. Kidder, Barnes agreed to turn over to him a lease of a farm in Sargent county, known as the "Bilstad farm" on which lease there was two years' unexpired term. Clinton B. Kidder redeemed the personal property from the chattel mortgage sales and attachments, and took possession thereof and of all the lands, and has had the possession and use thereof since about January 5, 1905, up to the time of the trial of this action on the 13th day of April, 1906. When the lands were conveyed and chattels sold to Clinton B. Kidder, defendants Barnes and wife claim that he agreed to advance $1,200 in cash to be used in paying certain of Barnes' local debts. Six hundred dollars of this sum was not to be repaid by Barnes and wife. The other $600 was to be repaid, and was treated as a loan, Barnes to give his notes therefor. The defendants claim that the real and personal property was sold and conveyed to Clinton B. Kidder as the agent or trustee and representative of his father in full payment and satisfaction of the mortgage debt and subject to all incumbrances thereon. They also claim that the transaction in May, 1904, was a satisfaction and discharge of the debt and mortgage of November 1, 1899. They also claim that the Williams, Hallett & Griswold mortgage was a prior lien to any lien of plaintiff. Defendant Barnes and wife claim that plaintiff owes them $600 and interest on account of his son's alleged promise to pay that sum in consideration of the conveyance and bill of sale in January, 1905.

The evidence in this case is very voluminous. Much of it is incompetent. We think the evidence shows that all the indebtedness of George B. Barnes, Sr., and wife and George B. Barnes Jr., and wife was settled and cancelled by the transactions in May, 1904. The undisputed evidence shows that by the terms of that transaction the said indebtedness was divided and George B. Barnes, Sr., and wife assumed $24,500 for which they executed their promissory notes payable to plaintiff, secured by a mortgage executed by them

on the Wyndmere lands, which mortgage was subject to all incumbrances of record, and that afterwards George B. Barnes, Jr., and wife executed to plaintiff their promissory notes for $15,500 secured by a mortgage executed by them on the Campbell lands; that plaintiff canceled and surrendered all the notes secured and unsecured that he held against the Barneses; that he executed a satisfaction of the mortgage on the Campbell land which was recorded; that a satisfaction of the mortgage of November 1, 1899, on the Wyndmere lands was partially filled out, but for some reason was never executed. The defendants claim for lack of some necessary data. It is undisputed that at the time the mortgage of date November 1, 1899, was given Barnes, Sr., held a contract of purchase from the Howard Benevolent Society for the southwest quarter of section 32 in township 132 of range 52 on which there was due about $2,000. On the 18th day of February, 1902, Barnes, Sr., and wife gave a mortgage on said southwest quarter of said section 32 to Williams, Hallett & Griswold for the sum of $1,800, and that the $1,800 obtained from them was used to pay the balance of the purchase price on said southwest quarter of said section 32 to the Howard Benevolent Society, and that Barnes, Sr., procured a deed from said society for said land. Plaintiff by reason of this last-mentioned transaction is in a better position than he was in November, 1899, as to this tract of land. Then there was $2,000 due the Howard Benevolent Society. This was reduced to $1,800 by reason of the mortgage given to Williams, Hallett & Griswold. We think the evidence clearly shows that it was the intention and understanding of the plaintiff and defendants Barnes at the time the May, 1904, settlement was made that the mortgage on the southwest quarter of said section 32 to Williams, Hallett & Griswold was prior and superior to that of the plaintiff. A chart was used at this settlement which shows on its face that there was then a mortgage of $1,800 on said southwest quarter of said section 32, which chart is in evidence. It follows that the mortgage to Williams, Hallett & Griswold is prior to any lien of the plaintiff on the southwest quarter of section 32 in township 132 of range 52, Richland county, N. D., and that the judgment entered herein must be modified by subjecting plaintiff's mortgage to the mortgage of Williams, Hallett & Griswold on this said last-mentioned tract of land, and that the mortgage dated November 1, 1899, and the indebtedness secured thereby are fully paid and satisfied. The evidence in regard to the

counterclaim of defendants Barnes is conflicting, and we cannot say that the trial court erred in dismissing it.

The case will be remanded to the district court of Richland county, with directions to modify its judgment in accordance with this opinion, and the judgment so modified is affirmed. Appellants will recover costs of the appeal, and appellants Williams, Hallett & Griswold will recover costs in both the supreme and district courts, but neither appellants George B. and Henrietta A. Barnes nor respondent will be allowed any costs in the district court. All concur, except Morgan, C. J., not participating.

(122 N. W. 378.)

LARS CHRISTIANSON, DOING BUSINESS AS CHRISTIANSON DRUG COMPANY v. KATE HUGHES.

Opinion filed June 29, 1909.

Mechanic's Liens — Wife's Separate Property — Consent of Owner.

Where a husband, without the consent and against the protests of the wife, contracts for and purchases material to paint a dwelling house on land owned by the wife, who, having no knowledge of where he purchased the materials, did not give notice of her objection to the improvements on the dwelling house to the party who furnished said materials, the materialman, under the evidence in this case, acquires no lien under section 6237 of said Revised Codes of 1905 for the materials furnished.

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

Action by Lars Christianson, doing business as the Christianson Drug Company, against Kate Hughes. Judgment for plaintiff, and defendant appeals.

Reversed.

Turner & Wright, for appellant.

Pierce, Tenneson & Cupler, for respondent.

CARMODY, J. This case, which was brought for the foreclosure of a mechanic's lien, is in this court for trial de novo. The complaint alleges that the defendant is the owner of the premises against which the plaintiff seeks to establish a lien, and also the making of the contract, on May 15, 1906, with one D. E. Hughes, the hus-

band of the defendant, under which the plaintiff was to furnish certain materials for the construction, alteration, or repair of a certain building, situate upon land belonging to the defendant, which was then occupied by the said D. E. Hughes and the defendant as a dwelling house. It alleges that between May 15, 1906, and June 29, 1906, at the request of the said D. E. Hughes, and by and with consent of the defendant, the plaintiff sold and delivered to the said D. E. Hughes building materials of the value of $77.10. It further alleges that said materials were furnished for, and were used in and upon, the construction, alteration, or repair of said dwelling house, and by and with the consent of the said defendant. The answer puts in issue every material allegation of the complaint, except that defendant admits her ownership of the premises in dispute, and that the same constitute the homestead of herself and husband. The case was tried to the court without a jury, and resulted in a personal judgment in favor of the plaintiff, and against the defendant, for the sum of $122.02 damages and costs, adjudging a lien therefor upon the premises in controversy, and directing the foreclosure thereof. The personal judgment was rendered inadvertently.

The plaintiff established at the trial that he sold to D. E. Hughes paint, oil, white lead, and other material used in painting the said dwelling house, and states the circumstances as follows: D. E. Hughes on or about May 15, 1906, came into the store of plaintiff and said: "Lars, I want to get some paint to paint my house, and as soon as I get through, I will come in and give you a check for it." The plaintiff further testified that D. E. Hughes at one time was running a wagon shop in Fargo, and that he purchased from plaintiff paints and varnishes for painting buggies, also paint the year before to prime his house, and that he paid for them. The testimony further shows that $10 worth of the paint was sufficient to paint the house one coat; that D. E. Hughes was sent to the insane asylum on the 22d day of June, 1906; that after his incarceration in the asylum the defendant got Mr. Nelson, a painter in Fargo, to paint the house one coat, and that the paint then used cost less than $9. This last-mentioned painting was necessary, on account of the condition of the building after the painting done by D. E. Hughes with the materials he purchased from plaintiff. The plaintiff does not claim to have ever had any conversation, understanding or agreement with defendant on the subject. He relies

solely upon the implied consent on her part to use the materials upon her house, and to the furnishing of them by the plaintiff. Defendant testified that she never consented to the use of the materials, or of the purchase of them for her house. She several times protested to her husband against painting the house with these materials. She told him he had painted the house the year before, and that it did not need painting, and that they could not afford it. She did not know, she never knew, where D. E. Hughes was procuring the paint. He had money with which he could have paid for the paint. He said he was paying for it. She never received any notice from plaintiff that he was extending credit for the materials. She testified that D. E. Hughes bought paint all his life, and she neved paid any attention to it. She did not know where he bought it, or who furnished the paint the year before. She did not give notice to the plaintiff of her objection to his furnishing the materials. The alleged lien was duly filed on the 27th day of September, 1906.

Section 6237, Rev. Codes 1905, is as follows: "Any person who shall perform any labor upon or furnish any materials, machinery or fixtures for the construction or repair of any work of internal improvement or for the erecting, alteration or repair of any buildings or other structures upon land, or in making any other improvements thereon, including fences, sidewalks, paving, wells, trees, grades, drains or excavations under a contract with the owner of such land, his agent, trustee, contractor or subcontractor, or with the consent of such owner, shall upon complying with the provisions of this chapter have * * * a lien upon such building, erection or improvement and upon the land belonging to such owner. * * * The owner shall be presumed to have consented to the doing of any such labor or making of any such improvement, if at the time he had knowledge thereof, and did not give notice of his objection thereto to the person entitled to the lien." The case must turn largely upon the construction to be placed upon said section 6237 of the Revised Codes of 1905. It is not claimed, on the part of the plaintiff, that he had at any time, either directly or indirectly, any contractual relation with the defendant, or that her husband was either the agent, trustee, contractor or subcontractor of the defendant. He admits that his contract was with D. E. Hughes, the husband of the defendant alone. He claims, however, that the defendant, having had actual knowledge that the improve-

ments were being made, and having failed to give the notice required by said section 6237, must be held to have impliedly consented to the furnishing of the materials. He contends that this is the construction placed upon similar statutes, and cites a large number of cases to sustain his contention. An examination of these cases shows that they were decided under statutes unlike ours. Section 3509, Rev. Laws Minn. 1905, as far as material here, reads as follows: "But any person who has not authorized the same may protect his interest from such liens by serving upon the persons doing the work or otherwise contributing to such improvement, within five days after knowledge thereof, written notice that the improvement is not being made at his instance, or by posting like notice and keeping the same posted in a conspicuous place on the premises." The mechanic's lien statutes of California and Oregon are practically the same as the statutes of Minnesota as far as giving notice is concerned. In some of the other states the statutes require the owner to file notice of his objection in the office of the county clerk.

In Wheaton v. Berg, 50 Minn. 525, 52 N. W. 926, the defendant Nilson sold a vacant lot to defendant Berg, the purchase price to be paid within 90 days. The sale contract did not provide for the erection of a building, but provided that in case of non-performance by the vendee "all the improvements on said premises or which may be made thereon" should become the property of the vendor. Berg erected a house upon the premises. It was found as a fact by the court that he purchased the lot for that purpose, and that Nilson knew this when he contracted to sell; that he knew that the house was being constructed from the time when the building operations were commenced, and that he never made any objections thereto. Neither did he post any notice on the premises, as required by said section 3509 hereinbefore quoted. Held, that the parties who performed labor on said dwelling house, or furnished material therefor, were entitled to liens on the premises. In Harlan et al., v. Stufflebeem et al., 87 Cal. 508, 25 Pac. 686, the court found that the owners of the land knew, at the time of the construction of the buildings, and of all the terms and conditions of the contract between Stufflebeem and the plaintiffs at the time it was made, and also that on the completion of the work, he had made a payment to the plaintiffs on account thereof. The other cases cited by plaintiff hold that, where the owner of the land has knowledge of, and consents to the

performance of the labor and the furnishing of the material by the lien claimants under a contract with a person other than the owner, the parties so performing labor and furnishing materials are entitled to liens.

Plaintiff does not claim that defendant had any knowledge that he was furnishing materials which were used on her house. He relies solely upon the fact of her knowledge that the house was being painted, her knowledge of the improvements, as sufficient to charge her with the duty of actertaining the further fact that plaintiff was furnishing materials, for such improvements, and giving him notice of her objection thereto. This we do not think is the correct construction of said section 6237. If it is, D. E. Hughes could have procured the materials from several different persons, or could have had them shipped from a foreign state, and the defendant would have had to hunt up the different parties supplying the materials, or, if they were shipped from a foreign state, find out who shipped them, and give the proper party notice that she objected to the making of the improvement. Such we do not think was the intention of the Legislature in passing the law. In the case at bar the defendant never consented to the improvement being made, or to the furnishing of the materials therefor by plaintiff, or any other person. She objected to the improvements; her husband was not her agent; the contract was not made by her, or in her behalf, and she agreed to none of the terms, conditions, or agreements thereof. She believed her husband to be, and he was in fact, financially able to pay for the materials, and had in fact bought paint from plaintiff for a number of years, and always paid for it. She did nothing to mislead the plaintiff. If her husband could be allowed to incumber the estate of the defendant, against her will and protest, such rights in her separate property granted to her by law would be of little value, and the husband could readily, and in this manner, contract her estate away, and bring her to financial ruin. Under the circumstances, in this case to allow a lien, and thus permit her to be stripped of the title to her estate, and possibly deprive her of a shelter for herself and family, would be contrary to equity and subversive of that protection which the law intended should be thrown around her separate estate.

We do not think it necessary to pass upon the contention of appellant that the presumption mentioned in said section 6237 is a rebuttable one, as it has not application to the facts in this case. We

think such presumption only applies where the owner of the premises has such knowledge of the performance of the labor and the furnishing of the materials as would, by her silent acquiescence in such improvements, create an estoppel against her right to claim a want of consent. In the case at bar defendant evidently did everything within reason in the way of protesting against the making of such improvement. She did not protest to plaintiff against furnishing the paint, but this was not required, as she had no knowledge that he was furnishing the same; and, in view of this fact, it would a be manifestly unreasonable construction of the statute to require her to seek him out in order to give him notice of her objection.

Section 3314 of the Statutes of Wisconsin of 1898, as far as material here, reads as follows: "Shall also attach to and be a lien upon the real property of any person on whose premises such improvements are made, such owner having knowledge thereof and consenting thereto." Section 3314, supra, is nearer like section 6237 of the Revised Codes of 1905 than the mechanic's lien statutes of any of the states in which the cases cited by respondent were decided. We believe that no case can be found in which a lien was upheld under facts similar to those in the case at bar. In most of the cases cited by respondent the owner not only had knowledge of the facts, but expressly consented to the improvements being made. North v. La Flesh, 73 Wis. 520, 41 N. W. 633; Lumber Co. v. Mosher, 88 Wis. 672, 60 N. W. 264. In the following cases it has been held that a party performing labor or furnishing material for improvements on land, under a contract with a person not the owner, was not entitled to a lien: Coorsen v. Ziehl, 103 Wis. 381, 79 N. W. 562; Huntly v. Holt, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111; De Klyn v. Gould, 165 N. Y. 287, 59 N. E. 95, 80 Am. St. Rep. 719.

In Coorsen v. Ziehl, supra, the court, speaking through Justice Bardeen, said: "The proof is that she (the wife) was not consulted before the contracts were made, and that she did not in any way sanction or direct the work as it progressed. She lived in the building with her husband, and undoubtedly knew of the work as it progressed, and from these facts it is argued that she is brought within the terms of section 3314." He then cites cases relied upon by counsel for the plaintiff, and continues: "But there is a clear distinction between these cases and the case at bar. In each case

there was proof of the express consent of the owner to the erection of the building upon which the lien was claimed. Here there is not such proof. * * * Consent cannot be inferred from mere silence under these circumstances." In Huntly v. Holt, supra, the court said: "Consent means the unity of opinion; the accord of minds; to think alike; to be of one mind. Consent involves the presence of two or more persons, for without at least two persons there cannot be a unity of opinion of an accord of minds, or any thinking alike." When the statute uses the words "by the consent of the owner of the land," it means that the person rendering the service or furnishing the materials and the owner of the land on which the building stands must be of one mind in respect to it." In De Klyn v. Gould, supra, the court said: "Mere acquiescence in the erection or alteration with knowledge, is not sufficient evidence of the consent which the statute requires. There must be something more. Consent is not a vacant or neutral attitude in respect of such material interest to the property owner. It is affirmative in its nature. It should not be implied contrary to the obvious truth, unless upon equitable principles the owner should be estopped from asserting the truth." See also, Clark v. North, 131 Wis., 599, 111 N. W. 681, 11 L. R. A. (N. S.) 764, and McClintock v. Criswell, 67 Pa. 183. True, the mechanic's lien statutes of Wisconsin and other states do not contain the presumption mentioned in section 6237; but, as hereinbefore stated, we think this presumption has no application to the facts in the case, at bar.

The trial court will reverse its judgment, and enter judgment dismissing the complaint herein.

Fisk and Ellsworth, JJ., concur; Morgan, C. J., not participating.

SPALDING, J. (concurring specially). I concur in the reversal but not for the reasons given by my Associates. They work a judicial repeal of the statute applicable, to which I cannot assent.

(122 N. W. 384.)

MAX STERN v. CITY OF FARGO, PETER ELLIOTT, AS MAYOR OF THE CITY OF FARGO, AND N. C. MORGAN, AS CITY AUDITOR OF THE CITY OF FARGO.

Opinion filed June 19, 1909.

Powers of Municipal Corporations — Construction Against.

1. Cities have only the following powers: (a) Those granted in express words. (b) Those necessarily implied or incident to the powers expressly granted. (c) Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.

Same.

2. Doubtful claims of power, or doubt or ambiguity in the terms used by the legislature, are resolved against the corporation.

Same — Bond Issue — Constitutional Law — Statutory Construction.

3. The constitution and statutes providing for the issuance of municipal bonds are more strictly construed in actions to prevent their issuance than in actions to prevent their payment after they have been issued and negotiated.

Same — Bond Election — Notice.

4. Section 2678, Rev. Codes 1905, in enumerating the powers of cities, among other things provides how and for what purpose bonds may be issued, and requires that the question of issuing bonds for the construction or purchase of waterworks shall be submitted to a vote of the electors of the city, at an election, after twenty days' notice, stating, among other things, the purpose for which the bonds are to be issued, and the amount thereof. *Held,* that a resolution of a city council, providing for the issuance of $100,000 in bonds, or such part thereof as may be required, and a notice of an election to submit such issuance to the voters, in the same language as the resolution, did not state the amount of bonds to be voted upon, and that without such statement the question of the issuance of bonds is not fairly presented to the electors, who are entitled to know definitely what is proposed in the way of increasing the indebtedness of the city.

Same — City Auditor — Ministerial Duties.

5. The duties of the auditor in issuing the notice of such an election are purely ministerial, and such notice must follow the terms and conditions of the resolution authorizing the election.

Same — Power to Issue Bonds — Delegation.

6. The power to authorize the issuance of bonds is vested in the voters, and they cannot delegate such power to the city council.

Same — Bond Election — Requisites of Notice.

7. The object of the notice of election, and the requirement that the amount of the bonds be stated, is to give the voters and taxpayers such information as will enable them to consider, weigh and discuss the merits of the proposition, and to avail themselves of the opportunity so given to acquire information as to the necessity of the proposed expenditure and the amount of the indebtedness necessary to incur to enable the city council to carry out its plans. When the notice fails to state the amount of indebtedness proposed to be incurred by the issuance of bonds, opportunity is not afforded the voters to inform themselves so as to be able to vote intelligently.

Same — Purpose of Notice of Bond Election.

8. An election for the issuance of bonds, under the provisions of section 183 of the constitution and section 2678, Rev. Codes 1905, for the construction of part of a waterworks system, on a notice which did not state the amount of the bonds to be issued, is invalid, and the council is not authorized thereby to issue bonds voted.

Same — Resolution of City Council — Requisites.

9. A resolution of a city council, providing for an election, and a notice of such an election, under section 2678, Rev. Codes 1905, must state the purpose for which it is proposed to issue bonds.

Same — Notice of Bond Election — Submission of Propositions Singly.

10. The legislature, by the provisions which it has made for the issuance of bonds by cities, has not provided for submitting the question of their issuance to the voters in such a manner as to permit only a vote for or against the issuance of bonds for two or more purposes on a single vote.

Same — Double Question.

11. Under our system of elections, every voter is entitled to the opportunity to vote for or against any question submitted, separately and independently from his vote for or against any other proposition submitted.

Same — Test of Double Question.

12. The test whether questions submitted include one purpose or more is whether the objects for which bonds are to be issued have a natural or necessary connection with each other; and, if they have not, two purposes cannot be made one by verbal connection.

Statutory Construction — Doubt Resolved Against Fraud and Imposition.

13. When the meaning of a statute is doubtful, so that either of two constructions may with propriety be adopted by the court, it is the duty of the court to adopt that construction best calculated to protect the public against fraud and imposition, even though in individual instances such construction may work slight hardship.

Bond Election — Double Question — Statutory Construction — Statute of Doubtful Import.

14. The fact that one construction of a statute of doubtful import, if it be conceded that the meaning of the statute in question is doubtful, would admit of the submission of a question devoid of merit in connection with another of unquestioned merit, and the adoption of a weak proposition by reason of its submission in connection with a meritorious one, furnishes a strong reason for the rule of construction stated in paragraph 11, and this reason applies notwithstanding no question is made in this case as to the good faith or merits of either proposition submitted by the city council.

Same — Double Proposition — Void Bond Election.

15. A resolution adopted by the city council, providing for an election to vote on the issuance of bonds, and a notice by the city auditor of such election, which state the purposes of the proposed bond issue to be "to defray the cost of building and constructing a new waterworks pumping station and installing therein a new high duty pump and necessary steam boilers, * * * and for the purpose of installing an electric light plant in connection with said pumping station for furnishing street and other lights and power," states two purposes and an election held pursuant to such resolution and notice is illegal, and a majority vote in favor of issuing bonds for the purposes stated does not authorize or empower the city council to issue them.

Constitutional Law — Debt Limit of Cities.

16. Section 183 of the constitution, and the statute, provide a debt limit, for general purposes of cities, of 5 per cent, with power to incur additional indebtedness equaling 3 per cent of the assessed valuation on a two-thirds vote, making a possible indebtedness for general purposes of 8 per cent. It is also provided that a city, when authorized by a majority vote, may increase its indebtedness, not exceeding 4 per cent, without regard to existing indebtedness, for the construction or purchase of waterworks or constructing sewers, and for no other purpose whatever.

Query: Can a city issue bonds for the construction of waterworks or sewers in such a manner as to necessarily include the amount of such bonds in the 5 per cent or 8 per cent debt limit provided for ordinary purposes, or must they be issued in such a manner as to be included within the 4 per cent provision for the construction of waterworks and sewers? If they must be so issued as to admit of their being included within the 4 per cent special waterworks provision, the connection of an electrict light plant, or of any other subject except sewers, with waterworks in the issuance of bonds, furnishes an additional reason for holding the proposed issue under consideration illegal.

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

Action by Max Stern to enjoin the city of Fargo, and the Mayor and Auditor thereof, from issuing bonds voted for the construction of a pumping station and electric light plant. Judgment for defendants, and plaintiff appeals.

Reversed, with directions to enter a decree in accordance with a prayer of the complaint.

E. H. Wright, for appellant.

Substantial compliance with law essential to a valid issue of municipal bonds. Harris on Municipal Bonds, 28.

The submission of two propositions in such form as to preclude a vote on each, renders the election void. People v. Baker 23 Pac. 364; City of Denver v. Hagues 63 Pac. 311; State v. Budge, 14 N. D. 532; 105 N. W. 724. Wilkins v. Waynsboro, 116 Ga. 359; 42 S. E. 767; McBryde v. City of Montesano, 34 Pac. 559; Truelson v. Duluth, 63 N. W. 714; Neelburn v. Cuthburt, 23 S. E. 206; Cain v. Smith, 44 S. E. 5; Supervisors v. Ry. Co., 21 Ill., 337; Gray v. Mount, 45 Ia., 591; Hensly v. City of Hamilton, 36 Ohio Cir. Ct. R. 201.

W. C. Resser, City Att'y and *Engerud, Holt & Frame*, for Respondent.

If the purpose of the bond issue is single, and the enterprise a unit, although evolving two results, waterworks and electric light plant, the practice is upheld. Truelson v. City, 63 N. W. 714; Woodbridge v. City, 59 N. W. 296; State ex rel. v. Caffery, 22 So. 756; Heilburn v. Cuthburt, 23 S. E. 206; Ryan v. Orbison, 7 Ohio Cir. Ct. 30; Coleman v. Town, 47 So. 703; Kemp v. Hazelhurst, 31 So. 908.

A mark on a ballot not violating the spirit of the election law, does not nullify the vote. Howser v. Pepper, 8 N. D. 484; 79 N. W. 1018; Perry v. Hackney, 11 N. D. 148; 90 N. W. 483.

SPALDING, J. Section 130 of the Constitution of this state requires the legislative assembly to restrict the powers of municipal corporations as to levying taxes and assessments, borrowing money and contracting debts, and prohibits the diversion of money raised by taxation, loan, or assessment for any purpose, to any other purpose, except by authority of law. Section 183 provides that the

debt of any municipality shall never exceed 5 per centum upon the value of the taxable property therein, but permits any incorporated city, by a two-thirds vote, to increase such indebtedness 3 per cent. on such assessed valuation beyond said 5 per cent. limit, and provides that any incorporated city may become indebted in any amount not exceeding 4 per centum of such assessed valuation, without regard to the existing indebtedness of such city, for the purpose of constructing or purchasing waterworks for furnishing a supply of water to the inhabitants of such city, or for the purpose of constructing sewers, and for no other purpose whatever.

The legislative assembly, in chapter 30 of the Political Code, commencing with section 2632, Rev. Codes 1905, has provided for the organization and incorporation of cities. Article 4 of said chapter, commencing with section 2678, enumerates the general powers of city councils in 78 paragraphs or articles. Paragraph 5 gives it power to borrow money on the credit of the corporation, for corporation purposes, and to issue bonds therefor in such amounts and forms, and on such conditions, as it shall prescribe, and provides that no such city shall become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, exceeding 5 per cent. of the taxable property therein. Then follows the proviso, contained in the section of the Constitution, quoted, relating to an increase of such indebtedness, on a two-thirds vote, of 3 per cent., and the further proviso quoted relating to indebtedness in any amount, not exceeding 4 per cent., for the purpose of constructing or purchasing waterworks, with the additional power to issue bonds therefor, and the further proviso that the city, before or at the time of issuing any of the bonds mentioned, or incurring the indebtedness for which the same are to be issued, shall provide for a direct annual tax sufficient to pay the interest on such debt or bonds when it falls due, and to pay and discharge the principal when the same becomes due, and that such provisions shall be irrepealable until such debt is paid. The final paragraph of the section provides "further that none of the hereinbefore mentioned bonds shall be issued, either for special or general purposes, except as by law otherwise provided unless at an election, after twenty days' notice in a newspaper published in the city stating the purpose for which such bonds are to be issued, and the amount thereof, the legal voters of said city, shall, by a majority vote, determine in favor of issuing such bonds." Paragraph 11 of section 2678 gives

the council power to provide for the lighting of streets, and to provide for the furnishing of lights to the inhabitants of the city, and paragraph 75 to purchase and erect, lease, rent, manage, and maintain any system, or part of system, of waterworks, hydrants, and supply of water, telegraphing, fire signals, or fire apparatus that may be of use in the prevention and extinguishment of fires, and to pass all ordinances, penal or otherwise, that shall be necessary for the full protection, maintenance, management, and control of the property so leased, purchased, or erected.

The city council of Fargo passed, and the mayor approved, on the 1st day of March, 1909, a resolution as follows:

"Be it resolved, by the city council of the city of Fargo:

"That, at the annual election, for elective officers for the city of Fargo, to be held on Monday, the 5th day of April, 1909, there shall be submitted to the legal voters of said city, the question, whether or not one hundred thousand dollars ($100,000.00), or such part thereof as may be required, in bonds of the said city, in denominations of one thousand dollars ($1,000.00), each, to mature as follows, to wit: Thirty thousand dollars ($30,000.00) thereof in ten years from date of issue; thirty-five thousand dollars ($35,000.00) thereof in fifteen years from date of issue and thirty-five thousand ($35,000.00) residue thereof in twenty years from date of issue, and to bear interest at the rate of four per centum per annum, payable semi-annually, shall be issued by the said city of Fargo for the sole purpose of defraying the cost of building and constructing a new waterworks pumping station, and installing therein a new high duty pump and necessary steam boilers and other needed machinery and appliances, and for building, constructing and equipping of a filtration plant in connection with said pumping station, and for paying such portion of the cost of constructing a water main of sufficient capacity, extending from the present location of the waterworks pumping station in Island Park to the selected location for the new pumping station in block two (2) of South Park addition to the city of Fargo, over and above such part of the cost thereof as can be assessed against the property along the route of the said water main, for furnishing to the inhabitants of the said city of Fargo an adequate and pure supply of water; and for the purpose of installing an electric light plant in connection with the said pumping station for furnishing street and other lights and power.

"That the city auditor be, and is hereby directed to have printed on the regular ballots for such annual election the following: 'For issuing bonds for waterworks, filtration and electric light plants and extensions' and 'Against issuing bonds for waterworks, filteration and electric light plants and extensions.'

"That the city auditor be and he is hereby directed to give legal notice that such question will be submitted to the legal voters of the said city of Fargo at such annual election, by publication of this resolution in the official newspaper of the city of Fargo and in the other daily newspapers of the said city, for twenty days next preceding the said election, as required by law."

And the city auditor, in the notice for the annual election of the city of Fargo, included the following notice:

"Notice is hereby given that the annual election in and for the city of Fargo, Cass county, North Dakota, will be held on Monday, the fifth day of April, 1909, at the following polling places in the several wards of the city, to wit: * * *

"Said election will be held for the election of one alderman in each of the seven wards of the city, and there will also be presented to the electors of the city for their votes the proposition of the issue by the city, of $100,000.00 four per cent. bonds, or such part thereof as may be required, for the construction of a new waterworks pumping station and filtration plant, etc., and for the purpose of installing an electric lighting plant in connection with said pumping station, which proposition is more fully set forth in a certified copy of the resolution adopted by the city council, which is published elsewhere in this issue of this newspaper."

The question so submitted received more than a majority of the votes cast on the subject of bonds at such election, and thereafter the city council passed, and the mayor approved, an ordinance providing for the issuance of such bonds. The ballot contained the question, "Shall the city of Fargo issue $100,000.00 or such part thereof as may be required, in bonds of said city?" reciting the denominations, dates of payment, rate of interest, and the purposes stated in the resolution. The appellant brought this action, setting out these facts, and asking that all the proceedings relating to such bond issue, including the tax levy which was provided for in the ordinance mentioned, be adjudged null and void, and for an order enjoining and restraining the mayor and auditor from executing or delivering any of the proposed bonds, and the auditor from cer-

tifying the proposed tax levy to the county auditor. The respondents, the city of Fargo, the mayor, and auditor, interposed a general demurrer to the appellant's complaint. The trial court sustained such demurrer, and plaintiff appeals from the order sustaining it.

Three questions are presented for our consideration by this appeal: (1) That the notice of election does not specify the purpose for which the bonds are to be issued; (2) that the notice of election does not state the amount of bonds that are to be issued; (3) that by reason of the constitutional and statutory provisions heretofore quoted, providing for the issuance of bonds to an amount not exceeding 4 per cent of the assessed valuation, for the purpose of constructing or purchasing waterworks or constructing sewers, and for no other purpose whatever, and to issue bonds therefor, the proposition to issue bonds for the construction of waterworks may not properly be coupled with a proposition to install an electric light plant.

We shall consider the first and third of these propositions together. Preliminary to the consideration of these objections we may say that it is well settled that incorporated cities have only the following powers: (1) Those granted in express words; (2) those necessarily implied or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; (4) that doubtful claims of power, or doubt or ambiguity in the terms used by the Legislature, are resolved against the corporation. Voss v. Waterloo Water Company, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. Rep. 201, and cases cited; City of Champaign v. Harmon, 98 Ill. 491; Thompson v. Lee County, 3 Wall. 327, 18 L. Ed. 177; Minturn v. La Rue, 23 How. 435, 16 L. Ed. 574. It may also be stated as a rule that in considering the legality of a proposed bond issue by a city, courts construe the constitution and statutes more strictly than they are construed in determining the validity of bonds already issued and disposed of. 21 Am. & Eng. Ency. of Law, 33, 45.

1. Neither the resolution authorizing the election, nor the notice published by the auditor, states the amount of the proposed bond issue. The language is "$100,000 or such part thereof as may be required." The members of this court are agreed that this failure to state the amount of bonds which it was proposed to issue invalidates the proceedings. The statute requires the notice to state the

amount of the proposed issue of bonds. The issuance of this notice by the auditor is a ministerial act, and he derives his authority in the premises from the action of the city council, and we conclude that it is essential to the legality of the proceedings that both the resolution of the council and the notice of election state definitely the amount of bonds for and against which the vote is to be taken. Without such statement the question is not fairly presented to the electors. They are entitled to know definitely what is proposed in the way of increasing the indebtedness of the city. Under the notice published, based on the resolution of the council, that body may decide to issue any part of the $100,000 in bonds. The elector may desire to oppose the proposition of the amount so stated definitely were larger or smaller. The proceedings are admitted to be taken under a statute vesting an express power in the council. Its only power to issue bonds is derived from the statute, and any condition which the statute imposes precedent must be complied with fairly and substantially, and the voters are not empowered to delegate the power to fix the amount of the issue, which belongs to them, to the city council. In Schultze v. Manchester, 61 N. J. Law, 513, 40 Atl. 589, an election having been held at which it was voted to authorize the township committee to issue bonds to an amount not exceeding $5,000, under a statute in effect like ours, the court held that the failure to specify the amount to be issued was a fatal defect, and that no such resolution, with discretionary power to the township committee as to the amount to be issued, could be legally submitted, or be of any effectiveness if submitted and adopted, and the court, among other things, says: "The resolution clearly is not one provided by the statute to be submitted to the legal voters. The voters were to determine the amount by voting for a resolution definitely fixing the amount or defeat any issue of bonds by voting against it. They were not to be called to delegate the power to the township committee to issue, in their discretion, bonds to the amount of $500 or $5,000. Under this statute no such discretionary power could be vested in the township committee. The authorities fully bear out this proposition that, when such power exists, under the statute, in the legal voters to order any issue of bonds to a certain fixed amount, that power cannot be delegated to another body. The power was vested here solely in the voters, and they could not, as they did, by voting upon this resolution submitted to them, under the statute, for their determination, delegate the

power to the township committee of exercising a discretion as to the amount. After the election, upon a proper resolution, the action of the township committee could only be ministerial so far as the amount to be issued was involved"—and cites many authorities in support of its conclusion.

In State ex rel. Lexington & St. Louis R. R. Co. v. Saline County Court, 45 Mo. 242, the Supreme Court of Missouri passed upon this question. A law authorized the court to subscribe stock in a railway company, but provided that the subscription should not be made unless a majority of the taxpayers should vote for it, specifying the amount. The court in submitting the question called on the electors to vote for or against an amount not exceeding $70,000. The court held that no amount was specified by the vote; that the question submitted left the precise amount undetermined. To the same effect, see City Council v. Dawson Waterworks Company, 106 Ga. 696, 32 S. E. 907, and Hillsborough County et al. v. Henderson et al., 45 Fla. 356, 33 South. 997. In the latter case the law provided that the resolution submitting the question of issuing bonds to a vote should determine the rate of interest to be paid on the bonds. The resolution submitted provided for a rate of interest of not more than 4 per centum per annum. The court held that this was not a substantial compliance with the statute, and that the fact that the proposition was carried by popular vote did not cure the defect, and that the statute had vested the board with no authority to ask a waiver by the voters. The court says: "If the board can lawfully reserve for future determination by itself the interest which the bonds shall bear, so can it reserve any or all of the other matters required to be fixed in the resolution which it submits for ratification." See authorities cited in opinion. It may be added that the Florida court meets some of the arguments in favor of the validity of the bonds by statements which are apropos in the case at bar. It held that while the maximum rate of interest permitted by the resolution providing for the bonds was so low that it was possible that the form of the resolution in stating 4 per cent. as a limit rather than as a fixed rate of interest, did not materially affect the election; that this however, was mere matter of conjecture, and did not affect the law of the case; that the fixing of a maximum rate implies the possibility of issuing the bonds at a lesser rate; and that, in principle, there was no difference between that resolution and one fixing a greater maximum rate, with a correspondingly greater range of

discretion in determining that to be adopted. The bonds have not been issued. The rights of no purchaser for value are involved, and none of those considerations exist which compel courts to overlook irregularities in the endeavor to protect such purchasers.

In Smith et al. v. Mayor & Council of Dublin et al., 113 Ga. 833, 39 S. E. 327, an election, at which was submitted the question of issuing bonds in the aggregate amount of $25,000, not more than $20,000 of the amount realized therefrom to be used for building a schoolhouse, and not more than $5,000 for enlarging the light and water plant of the city, and the surplus, if any, to be used in such manner as the mayor and council might see fit, was held invalid because not meeting the legal requirement that a notice of this character should specify the amount of bonds about to be issued, and for what purpose. The court held that the notice neither stated the amount nor the purpose.

Amang the reasons for requiring the amount and other particulars to be stated in the resolution and notice, and particularly in the notice, may be mentioned that it is from such notice and resolution that both the taxpayers and voters derive their knowledge that the election is to be held on the question of issuing bonds, and they are entitled to such information on the subject, including a statement of the amount of the proposed issue, as will enable them to consider, weigh, and discuss the merits of the proposition, and to avail themselves of the opportunity so given to acquire information, not only as to the necessity of the proposed expenditure, but as to the amount necessary to carry out the plans of the council and to accomplish the purpose sought. It is perfectly clear that, in the absence of at least as specific information as is required by the statute, complete opportunity is not afforded those interested to so investigate the various questions as to enable them to vote intelligently. Other authorities might be cited in support of our conclusion, but we deem it unnecessary to cite them. Our attention is called to only one authority apparently holding to the contrary. In Railway Company v. Village, 63 Neb. 624, 88 N. W. 661, the Supreme Court of Nebraska held that a similar submission of the statement of the amount was sufficient. Respondent seems to rest its case, as relates to this point, on that authority, but the court of Nebraska expressly states in the opinion that it has been unable to find any law of that state requiring a specific amount to be stated. We find some other authorities to the same effect, but on examination it ap-

pears that they are, like the Nebraska case, based upon statutes which do not require the amount to be stated.

2. Our decision might rest upon our conclusion on the preceeding point, but other questions have been raised; and, inasmuch as the city of Fargo will likely hold another election on the subject, and will not wish to proceed in the dark as to such questions, we will consider and pass upon them. We do so for the further reason that the state is interested in having these questions set at rest. The board of university and school lands desires to purchase any bonds issued by the city of Fargo, and is in the market for bonds issued by other municipalities in this state, and at its request, through the Governor, the Attorney General appeared in the case, made an argument, and submitted a brief.

With respect to the resolution and notice calling for the issuance of bonds for the double purpose, namely, waterworks and electric light plant, and requiring a vote on the two subjects in one, and that this is not submitting it in such a manner as to permit the voter to vote for or against either proposition independently of the other, the authorities are in apparent conflict. In view of this fact, and of the further fact that the bonds have not been issued, and that it is more important that a safe rule should be announced by this court for the guidance of municipalities in submitting such questions than that either line of authorities should be followed, we feel at liberty to adopt that rule, based upon those principles which, to us, appear most nearly in consonance with the statute, the spirit of our institutions, and which will best protect the voter in the exercise of his franchise and the municipality against possble fraud. The authorities are nearly unanimous to the effect that a proceeding by which two questions are submitted, when such questions or their subjects and purposes are not naturally related or connected, is invalid, and renders any election at which such questions have been so submitted invalid. 21 Am. & Eng. Ency. of Law, 47; State ex rel. City of Bethany v. Allen, 186 Mo. 673, 85 S. W. 531; People v. County of Tazewell et al., 22 Ill. 147; Williams v. People, 132 Ill. 574, 24 N. E. 647; Board of Supervisors v. Miss. & Wabash Ry. Co., 21 Ill. 338; Village of Hempstead v. Seymour et al., 34 Misc. Rep. 92, 69 N. Y. Sup. 462; Village of North Tonawanda v. Western Transportation Co., 16 Abb. Prac. (N. S. N. Y.) 297; City of Denver et al. v. Hayes et al., 28 Colo. 110, 63 Pac. 311; People v.

Baker, 83 Cal. 149, 23 Pac. 364, 1112; McBryde v. City of Montesano et al., 7 Wash, 69, 34 Pac. 559; Cain et al., v. Smith et al., 117 Ga. 902, 44 S. E. 5; City of Leavenworth et al. v. Wilson, 69 Kan. 74, 76 Pac. 400; Truelson v. Mayor of Duluth, 61 Minn. 48, 63 N. W. 714; Gray et al. v. Mount et al., 45 Iowa, 591; Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374, 49 N. E. 335; Farmers' Loan & Trust Co. v. City of Sioux Falls et al. (C. C.) 131 Fed. 890—are all squarely to the effect that the submission of double questions in such a manner as to require a vote for or against both is illegal. We shall not take the space to review these authorities at length, or the reasons which the several courts advance in support of their conclusions. All the reasons given by them are applicable in the case at bar.

The contention in the case at bar is that, because the resolution and notice read, "and for the purpose of installing of an electric light plant in connection with the said pumping station for furnishing street and other lights and power," they present only a single question or purpose, and do not come within the rule laid down in most of the authorities referred to above. It is contended that the two purposes or objects, namely, a pumping station and electric light plant, are made one by the use of the phrase "in connection." No serious contention is made that without the use of such words an electric light plant and waterworks or pumping station would be separate and distinct from each other. It appears to us that subjects which are so different, and which have no natural or necessary connection, cannot be made one, and the law and the reasoning of the courts evaded by a play upon words. A verbal joining does not connect them in fact, when they are connected neither naturally nor by statute. It is contended that the city will be enabled to economize in its proposed enterprise by connecting the two; that they may be placed under the same roof; that the same boilers may be used for pumping and furnishing light; or that, if electricity is procured from private parties and transmitted to the plants, it may be used for power for the pumping station. Courts are frequently required to announce general principles and rules in construing statutes, and for the guidance of municipalities as well as private parties. When the meaning of the statute is doubtful, so either of two constructions may be adopted, it is the duty of courts to follow those which to them seem to be the best reasons, and those best calculated to protect the public against fraud and imposition, and

which will best promote the general welfare. Any such general rule may, in individual cases, work hardship, but even so, this fact does not militate against the wisdom of well-established rules of construction. We have no doubt that in the present instance it might be a little more convenient for the authorities of the city of Fargo to lump the expenditures necessary for the construction of the two plants, and in some measure combine them, without separating their estimates or determining in advance the approximate amount necessary to invest in each project, in other words, if not proceeding by guess itself, permitting the voters to do so; but, even if they are built in connection, even if the words "in connection" are considered to mean something more than a mere nominal connection, we see no serious obstacle in the way of determining beforehand, at least approximately, how much it is necessary to provide for investing in each separate enterprise. After that is done, and the questions are submitted to the voters and approved, there is ample time for the council to determine whether the projects shall be united or separated, and without any material prejudice to the city or its inhabitants. Among the reasons why both propositions should not be submitted to a single vote are that our whole election system, whether it relates to candidates or public improvements or works, is built up and founded on the fundamental principle that every elector shall be given the opportunity to vote for or against any candidate, or any proposition, independent of and separate from his vote for or against any other candidate or proposition. No one would seriously argue that an election was fair which only admitted of the voter voting for or against all the candidates on any one party ticket, and inclosing all the names on one party ticket in a bracket would not make such a proceeding valid. It is equally important that the voter be given the same opportunity in voting on questions not relating to candidates. If two propositions can be joined in such a manner that the voter must vote for or against both, it admits of the submission of a question devoid of merit in connection with one for which there is a pressing demand, and of a weak proposition being carried on the strength of a worthy one.

In the case at bar no question is made as to good faith or the merits of either proposition. It is no part of the province of this court to determine the merits, but it can readily be seen that some voters may feel that an urgent necessity exists for an improved water system, and little or none for an electric light plant, or vice

versa. Some voters may think and feel that increasing the indebtedness for the construction of a pumping plant and filtration system, which are naturally connected, is the only burden which should be, at the present, added to those already being carried by the taxpayer. We have no doubt that most of the residents of Fargo feel that some method of filtration and improvements in the water system are almost questions of life and death, but, if so, this only emphasizes the wisdom and necessity of submitting the questions separately. The statute requires the notice to state the purpose for which the bonds are to be issued. We have no doubt that a pumping station and a filter each constitute part of one purpose, and an "electric light plant" another purpose; but, even if they are not technically two purposes, the same reasons are still applicable, and their force is not diminished. The question is, not one of connecting by words, but, identity of purpose, or can one naturally be operated without the other? We are satisfied that the legislative intent was to separate those enterprises or purposes. This is partially apparent from the fact that they are, as we have before indicated, authorized by separate with distinct paragraphs of the section of the Code defining the powers of city councils, and were enacted at different sessions of the Legislature, and that the power of the council relating to waterworks is far broader than its power relating to lighting. See paragraphs 11 and 75, § 2678, Rev. Codes 1905. Most of the authorities cited by respondent supporting the order of the trial court are based upon statutes which in terms connect the two subjects, or the courts, as shown by their opinions, gave it little or no consideration.

In Woodbridge v. City, 57 Minn. 256, 59 N. W. 296, the city charter provided for water and light bonds, and the question does not appear to have been raised as to whether they could be combined. The same is true of State ex rel. Caffery, 49 La. 1152, 22 So. 756. Coleman v. Town (Ala.) 47 South. 703, appears to be in point, but an examination discloses that the subjects are connected by statute. This is conceded by respondent. It is therefore not an authority. In Ellingwood et al. v. City of Reedsburg, 91 Wis. 131, 64 N. W. 885, it was held that the city had the right to issue bonds for water and light plants, but the question of combining was not raised, and the court was passing upon a far more comprehensive statute than our own. In Heilbron v. Cuthburt, 96 Ga. 312, 23 S. E. 206, we find no discussion of the point. People v. Counts, 89 Cal. 15, 26 Pac. 612, is not an authority. The bonds were for the con-

struction of two highways, but they both united with another, and therefore the question presented related to a single purpose, that of making a continuous highway. Linn v. City, 76 Neb. 552, 107 N. W. 983, holds an issue of bonds legal for building separate engine houses and buying sites, but this only presents one purpose. The Tonawanda and Hempstead cases, supra, are directly in point. In the former the principle is announced that there must be a necessary connection between the different objects to make their submission to a single vote legal. In the latter case the court lays much emphasis upon the fact that the subjects of waterworks and lighting system were dealt with in the statute separately, and the court says: "To join in the resolution two or more objects by words, so that they cannot be acted upon separately, compels the taxpayer to vote for or against both, although he may be in favor of one and opposed to the other. He is thus deprived of his freedom of choice"—and holds that waterworks and a lighting system are not related of necessity, and that, without a separate specification of the amount to be applied to each, the resolution submitting the question of issuing bonds for waterworks and a lighting system was idefinite as to purpose, and at variance with both the letter and spirit of the statute, which required the ordinance, or the resolution under which it was proposed, to contract a debt for village improvements, to specify the particular improvement to be made and the amount to be raised therefor.

In the Leavenworth Case, supra, the Kansas court says: "The statute reserves a large and clearly defined discretion in the matter to the people themselves. No plan involving the issuance of bonds can be carried out without their sanction. Even though the mayor and council may contract, they cannot pay by means of bonds unless the people approve. Every arrangement for indebtedness which the mayor and council may make involving city bonds must include an appeal to the ballot box, and must fail if the ballot box be found to contain a majority of adverse votes. This discretion of the taxpayer the mayor and council cannot exercise and cannot control. Since, therefore, no bonds may be issued for any purpose, or for any set of purposes, unless the people be consulted and give their consent, every voter must have a fair opportunity to register an intelligent expression of his will. This the official ballot failed to provide." In Cain v. Smith, supra, the court says: "If the General Assembly was allowed to submit two, three, or more propositions

at one time in connection with the question of incurring a debt, and require the citizen to vote for or against all, the question of incurring a debt would no longer be left to the will of the qualified voters, but would be remitted to the subtlety and ingenuity of those interested and usually influential in passing local legislation, in combining together various matters, which might have the effect to bring about a vote in favor of bonds when it might not have been brought about if the single issue had been submitted to a vote." It might well be inquired whether, in the case at bar, the city authorities have not exercised considerable of the ingenuity referred to in so wording the resolution and notice as to appear to submit only one question or proposition, when in fact submitting two, in such a manner that the voter has no opportunity to exercise his judgment on them independently.

In City of Denver et al. v. Hayes et al., supra, the officers of the city of Denver were acting under a law almost identical with ours, and submitted the question of issuing bonds for different purposes to a vote in the same manner. It says: "That the action of the city council was fundamentally wrong we have not the slightest doubt. The purpose of the framers of the Constitution, which they expressed in the section under consideration, and the object of the General Assembly which is embodied in the city charter, were to prohibit municipal authorities from creating a debt for municipal purposes, and from issuing bonds, unless a majority of the legal electors of the city gave their consent thereto. By the proceedings under review no opportunity was given by the city council to the electors to express their will as to incurring a debt for any particular purpose, and the voice of the electors has never been heard. Neither the constitutional limitation nor the statutory provisions expressly declare that only one purpose may be submitted at the same election, nor that, if more than one purpose may be thus submitted, each shall be separately stated. But the object of neither can be attained, and effect to the language in which they are expressed cannot be given, unless such purposes be separately stated, and the amount proposed to be applied to each particular purpose designated. This must be done, not only in the ordinance which provides for the submission, but in the election notice; and the ballots must be so prepared that every elector may declare his choice as to each purpose, and the amount proposed to be applied thereto

must also be stated. To combine several distinct and independent purposes in one proposition, without specifying the amount which is to be devoted to each, is a clear evasion of the law, and, if permitted, would fritter away the safeguards thrown around such transactions."

In Gray v. Mounts, supra, is found a very lucid explanation of this doctrine, and the court, among its observations on the subject, remorks: "The next matter urged against the validity of the proceedings is the union of two objects, and two separate appropriations for distinct objects, in one proposition, so that the elector could not vote for one and against the other. We think this presents a fatal objection to the legality of the proceedings. The question to be submitted to the voters was not simply whether it was their will to appropriate the fund, but there must be an object for the appropriation in order to constitute the proposition to the voted upon. The object is of the essence of the proposition. This cannot be denied. The appropriation for a given object is the proposition submitted, If there be two objects, and a specified amount of funds to be devoted to each, it is very plain that there are two propositions submitted at the same election. If they are submitted together, it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote, he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of choice. The plan of submitting the questions, for there are two, resembles more the common device of an auctioneer in disposing of worthless goods, whereby a good article is mingled with them and made to draw bids, or the cunning tricks of the gamesters to induce wagers of the unwary, rather than the open, direct, and fair manner that always should prevail in elections by the people. The very letter, as well as the spirit, of our election laws condemns this plan. It has never been heard of that electors were, by any plan, denied the right of choosing one, and rejecting another, candidate for office, to be voted for at the same election."

An examination of the authorities satisfies us that the conflict is more apparent than real. We are, in addition to the reasons already referred to, impressed with some others which we think serve to reinforce the contention that they are separate purposes.

These questions may not be controlling, but are nevertheless of considerable force. Section 130 of the Constitution, supra, requires the legislative assembly to prohibit the diversion of money raised by taxation, loan, or assessment for any purpose, to any other purpose, except by authority of law. The submission of the question in the manner in which it was submitted necessarily commingles the funds obtained by the loan contemplated, and in spirit violates this constitutional provision, without authority of law. As seen, the Constitution and statute provide for a debt limit for general purposes of 5 per cent. and an additional amount equaling 3 per cent of the assessed valuation on a two-thirds vote, making a possible indebtedness for general purposes of 8 per cent. It was also provided that any city, when authorized by a majority vote, may increase the indebtedness, not exceeding 4 per cent., without regard to existing indebtedness, for the construction or purchase of waterworks, or constructing sewers, but for no other purpose whatever. It may well be questioned whether this provision does not contemplate that indebtedness for waterworks or sewers must be incurred in such a manner, at least until the 4 per cent. limit is reached, as to leave the city free to exercise its right to incur the prescribed indebtedness for general purposes to the full limit, independent of waterworks or sewer indebtedness. It is clear that the combination of indebtedness for electric lights with that for waterworks precludes its inclusion in the 4 per cent. allowed for waterworks indebtedness, and reduces to that extent the power of the city given by the Constitution to incur indebtedness for carrying on its other affairs, and that a state of facts may readily arise whereby, by reason of doing this, a city might be seriously crippled in the conduct of its affairs as a municipality and agency of the state. Let us suppose a city with an assessed valuation of $1,000,000. It has the right to issue bonds for waterworks and sewers in the sum of $10,000. It has the power to issue bonds on the vote of a majority of the voters, for general city purposes, in the amount of $50,000. It issues bonds in the amount of $40,000 for waterworks and electric lights. It thereby exhausts its constitutional credit for general purposes, without a two-thirds vote, within $10,000. The assessed valuation of the city decreases $200,000. It is clear that the city would then be left with no power, except on a two-thirds vote, to make use of any of the credit with which the Constitution has clothed it, for general purposes, and the $40,000 created for waterworks purposes would

still be unused, and the city might be rendered powerless to provide for its necessary running expenses. Such a condition is entirely within the possibilities. It might issue waterworks bonds to the full amount of 5 or 8 per cent. in the first instance, and leave nothing for general purposes or emergencies.

In People v City Council, 23 Utah, 13, 64 Pac. 461, the Supreme Court of that state held that, under similar constitutional provisions, the power to incur an indebtedness for water, light, and sewer purposes was absolutely within its own limits, and that the debt created by virtue of a 4 per cent. provision similar to ours for the three purposes named was additional to that permitted for general purposes, and that the purpose of the framers of the Constitution, among others, was to separate the general debt power from the special debt power.

We think it at least questionable and worthy of consideration whether the city can issue bonds intended for waterworks that they will necessarily fall within, or be included in, the ordinary 5 or 8 per cent. debt limit of the Constitution, and in any event until it has exercised its right and power to issue them to the limit provided of 4 per cent. for the special purpose. This is suggested, but as it is not necessary to determine it in this case, and as counsel saw fit to leave the court without enlightenment, we leave it undecided. The order sustaining the demurrer is reversed, and the district court directed to enter a decree in accordance with the prayer of the complaint. All concur.

Morgan, C J., not participating.

(122 N. W. 403.)

RAY UMSTED, A MINOR, BY ALBERT UMSTED, GUARDIAN AD LITEM vs. THE COLGATE FARMERS ELEVATOR COMPANY, A CORPORATION.

Opinion filed June 28, 1909.

Master and Servant — Injuries to Servant — Contributary Negligence — Questions for Jury.

1. Plaintiff, a minor, between 19 and 20 years of age, was injured while in defendant's employ in attempting to operate a dangerous contrivance which defendant's manager had caused to be recently installed for the purpose of utilizing power for a gasoline engine used at defendant's grain elevator in pulling cars into position for loading grain. Such contrivance consisted of a wooden drum or capstan which was securely bolted to the shaft connecting the engine to the machinery in the elevator, and also a long rope extending from such drum, or capstan to a pulley attached to the rail of the railroad track about thirty feet distant and at right angles therewith and thence along the track to the car to be moved. The scheme was to pull the car by causing the rope to wind upon such capstan as the shaft revolved and, in order to operate the same it was necessary for some one to stand back of such capstan and pull the rope sufficiently taut to create enough friction to cause such rope to wind. Plaintiff was by defendant's manager assigned to such duty, and he was injured during the first attempt to operate the contrivance by being caught by such rope and pulled upon and around such drum. *Held,* that the questions of defendant's negligence, of plaintiff's contributory negligence, and his assumption of the risks were, under the facts, properly for the jury.

Same — Assumption of Risk.

2. The rules of law relative to the respective duties and rights of master and servant regarding obvious risks of the service and in respect to negligence, assumption of risk, and contributory negligence are stated at length in the opinion.

Right to Jury Trial — Directed Verdict — Waiver of Jury.

3. At the close of plaintiff's case, defendant moved for a directed verdict, which motion was denied and an exception taken. At the close of defendant's testimony, and after both parties had rested, such motion was renewed and a like ruling made; defendant saving an exception. Thereafter plaintiff asked the court to instruct the jury that the only question for them to consider was the question of the extent of the injury and the amount of damage; it being plaintiff's contention that the evidence was conclusive in his favor upon all other issues. Such request for instruction was granted, and defendant excepted. *Held,* that such ruling was prejudicial error. Defendant was improperly deprived of its right to a trial by jury of all

the issues, such right not having been waived, and the trial court was not warranted in the assumption that defendant in making its said motions thereby waived a jury, and submitted all issues to the court for decision.

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

Action by Ray Umsted, by Albert Umsted, his guardian ad litem, against the Colgate Farmers' Elevator Company. Judgment for plaintiff, and defendant appeals.

Reversed, and new trial ordered.

Ball, Watson, Young & Hardy, for appellant.

Where both parties are guilty of negligence no recovery can be had. West v. N. P. Ry. Co., 13 N. D. 221; 100 N. W. 254; Labat, Master and Servant, Sec. 339.

Where dangers are open and obvious or may be discovered by the exercise of prudence and care, attention need not be called to them. Carlson v. Sioux Falls Co., 8 S. D. 47; 65 N. W. 419; Anderson v. Winston, 31 Fed. 528; Water Supply Co. v. White, 24 N. E. 747; The Saratoga, 94 Fed. 221; Carey v. B. & M. R. R., 33 N. E. 512.

W. J. Courtney, for respondent.

Installing a defective appliance, and knowingly ordering an inexperienced youth into a dangerous place to operate it, with no warning of its dangerous character, render the master liable in damages. 7 A. & E. L. Ency., (2nd Ed.) 423, note 1, cases cited; 5 Thompson on Negligence, Sec. 5378; Meehan v. Great Northern Ry. Co., 13 N D, 432, cases cited; Brazil Black Co., v. Gaffney, 4 L. R. A. (O. S.) 850; Sherman v. Menominee River Lumber Co., 1 L. R. A. 173 Choctaw O. & W. Ry. Co., v. Wilker, 84 Pac. 1086; Tuckett v. American Steam Laundry, 4 L. R. A. (N. S.) 990; 84 Pac. 500; Granrus v. Croxton Mining Co., 113 N. W. 693· Choctaw, Oklahoma R. Ry. Co., v. Jones, 4 L. R. A., (N. S.) 837· 92 S. W. 244; Barrett v. Reardon, 104 N. W. 309; Illinois Southern Railway Co. v. Marshall, 66 L R A, 297; Newbury v. Getchell, 69 N. W. 743; Lohman v. Swift & Co., et al, 117 N. W. 418; James v. Rapids Lumber Company, 44 L. R. A. 33.

Dallemand v. Saalfeldt, 48 L. R. A. 753, notes; 175 Ill. 310; Dizonno v. G. T. No. Ry. Co., 114 N. W. 736.

By a motion for a directed verdict, the mover waives his right to verdict of a jury, unless a specific request to go to the jury is made after his motion is denied. First Methodist Church v. Fadden, 8 N. D. 162; Erickson et al. v. Nat. Bank, 9 N. D. 81; Yankton Ins. Co. v. Fremont E. & M. V. Ry. Co., 64 N. W. 514; Indiana Railroad Co. v. Quick, 109. Ind. 295. When an employe is ordered to use an instrument, which the master knows is dangerous, contributory negligence and assumption of risk cannot avail. Johnson v. Atwood, 112 N. W. 262; Duchene v. Lefebvre, 112 N. W. 865; Cody v. Longyear, 114 N. W. 735; Siegel Cooper Co. v. Tracka, 2 L. R. A., (N. S.) 647; 218 Ill. 559; 75 N. E. 1053; Goodrich v. N. Y. Central Ry. Co., 26 N. Y., S. 767; Hawkins v. Johnson, 105 Ind. 29; Ladd v. Foster, 31 Fed. 827; Lawrence v. Green, 70 Cal. 417; 19 Fed. 794; 14 Fed. 562; 20 Fed. 105; Semeona v. Lindsay, 65 A. T. L. 778; Sherwood v. N. Y. Central Ry. Co., 105 N. Y. 547; Pearce on Railroads, 328, 69 N. Y. 158; 137 N. Y. 1.

FISK, J. Plaintiff, as guardian ad litem for one Ray Umsted, recovered judgment against defendant in the court below for the sum of $5,000 as damages for the alleged negligence of the defendant, resulting in serious personal injury to such minor. At the conclusion of the plaintiff's testimony, defendant moved for a directed verdict, which motion was denied, and an exception taken. At the close of all the testimony, defendant renewed its motion for a directed verdict, which was also denied, and an exception saved. Thereafter, on plaintiff's motion, the trial court, over defendant's objection, instructed the jury that the sole question for them to determine was the extent of the damage suffered by plaintiff on account of his injuries, to which ruling defendant excepted. On all other issues the trial court subsequently made findings of fact favorable to plaintiff. Thereafter defendant moved in the alternative for judgment notwithstanding the verdict, or for a new trial. The latter motion was denied and an exception taken.

The facts necessary to a correct understanding of the questions presented by the appeal are not seriously in dispute, and are as follows: Defendant is a corporation owning and operating a grain elevator at Colgate. The power necessary to operate the machinery in this elevator is generated by a gasoline engine located some distance from the elevator and connected by a shaft which, when in motion, makes about 200 revolutions per minute. One Borneman

was in charge of said elevator as manager, and the said Ray Umsted, the person injured, who was between 19 and 20 years of age at the time of the injury, was employed to assist Borneman in operating such elevator. It frequently became necessary to move cars into position for loading grain and this was done by Ray with the use of a crowbar. Some time prior to the accident Borneman and this young man on several occasions discussed the advisability and feasibility of providing a contrivance whereby power from the engine which operated the elevator could be used in moving cars back and forth, and the following scheme was finally adopted: A wooden capstan or drum was securely bolted onto the shafting between the engine house and the elevator building, and a rope was to be fastened to the car and run through a pulley to be fastened to the rail on the railroad track opposite the capstan, and around the latter, and was to be operated by pulling the rope sufficiently tight to enable the drum or capstan, on account of the friction, to wind the rope as the shaft revolved. The construction of such contrivance and the manner of its operation may best be described by quoting from the testimony.

Plaintiff testified: "While I was there several improvements were made. Among these was a car puller. H. B. Borneman installed it. Tim Russ did the work. I saw him do it and was there when he did it. * * * This car puller was a cylinder made out of about 4x6 about 3 feet long and round in the center, and put on the main shaft with eight bolts, and there was an iron pulley fastened to the rail about 30 feet from the shaft and a rope went from the drum through the pulley and up to the car, and I was to pull. * * * I was instructed to put the rope around the drum and pull the slack up. Borneman instructed me. * * * He told me to put that rope around the drum, and explained how to do it, and told me to stand back of the drum and pull the slack to make the rope bind tight enough on the drum to pull the car. He told me to pull that slack and I did so, and the drum slid and burned the rope, and he threw the engine out of gear and told me to take another hitch around the drum, and Mr. Foster also told me, and they both came out and showed me how to do it, and I did so, and he goes back to the elevator and threw the engine in gear again, and it started about 200 revolutions a minute and the rope broke instantly, and I was caught by the spring of the rope coming back. It caught me

and threw me around this drum." Borneman testified: "Ray Umsted went to work in the elevator some time in August. I had quite a few talks with him about a car puller. These talks came up at intervals, and we talked how we was to make one, and decided to get capstan or drum. We had a cut or picture of a puller; not like this Exhibit B. The puller was oval like, and the rope would stay inside, and there would be no chance for the rope to catch. * * * I did not see Exhibit B put on. I was away. When I came back, I got sight of it, and immediately told Ray to take it off at once. I felt out of patience that the thing was on there. Ray said: 'Can't we try it before we take it off?' I said that 'We hadn't better try it; but to satisfy you we will.' " This witness then states that Ray was to handle the rope by standing back of the capstan and keeping such rope taut. Among other things he says: "If it was going too fast, he was to let go of it a little, and work it off and on so as to pull the car." This witness testified that he considered the contrivance impracticable, and he did not want to use it, but Ray was anxious to try the same, and he gave him a chance to satisfy his curiosity. He describes the manner of the injury in substance as follows: "The rope was about 300 feet in length. The portion not in use was right behind the machine alongside of Ray back of the drum. The rope was wound once around the drum. He was back of the drum holding the rope. I fastened the rope to the car. Umsted went to the drum. I went to the engine. The pile of rope was in a coil just at his left. I started the engine which started the shaft revolving. Its speed is about 120 revolutions per minute. It starts almost full speed. I let it run probably half a minute, then put it back on the loose pulley, stopping the shaft from revolving, and went out. I saw the contrivance was not working. I went to where Ray was. The surplus rope was coiled upon the ground just at his left side about a foot high. I said to him to keep away from the rope on the ground, because it looked dangerous. When I last saw him, he was standing there holding the rope as I described. I went to the engine room and started the engine again. I saw the rope break just at the same time I slipped the belt back onto the loose pulley. It was all done in an instant. The rope raised up about a foot from the ground; that is, to its natural height. I examined the rope and found that it had not gone through the block, and that it broke right close up to the car. It was a three-quarter inch rope. I helped take Ray out and think there were two

strands around his ankle; can't say how much rope was wrapped around the pulley when we took Ray out." Ray was caught in some manner by the rope catching and pulling him onto the shaft which caused his injury. The exact cause of the injury is not clear from the testimony. Both Borneman and the witness Foster agree that, when Ray put the rope around the capstan the second time, he did not put the entire coil of rope around as he had been instructed to do, but made a loop and put that over, and it is the theory of the defense that, on starting the engine, the second time the slack rope, which was lying in the coil, counterwound on the capstan and Ray's left foot became entangled in such rope pulling him upon the revolving shaft, and this is undoubtedly correct, as it is impossible to discover from the testimony how the injury could have happened in any other way.

In disposing of this appeal, however, in so far as the errors assigned upon the ruling of the trial court in denying defendant's motions for a directed verdict and for judgment non obstante veredicto are concerned, it is our duty to construe the testimony in the most favorable light to the plaintiff. We will therefore assume the correctness of his testimony as to how the accident happened, which is to the effect that, after the first attempt to operate the contrivance, the put the entire coil of roope around the capstan again as directed by Borneman, and that, immediately after the shaft commenced to revolve on the second attempt, the rope broke between the car and the pulley, and plaintiff in some unknown manner was caught by the rope which sprang back, and was thereby pulled upon the revolving shaft or capstan, receiving the injuries complained of. Even in the light of these facts we are at a loss to understand how defendant can be held liable for plaintiff's injuries as a matter of law. Plaintiff was about 19½ years of age, and, so far as the testimony discloses, possessed average intelligence, and was capable of exercising the discretion and judgment of the average person of his age. So far as the record discloses, he was equally as well qualified to understand the dangerous character of such contrivance as the witness Borneman, and he certainly had just as much opportunity as did Borneman to acquire knowledge thereof. They talked over together on several occasions the advisability and feasibility of installing such car puller, and plaintiff was partially instrumental in procuring the same to be installed, was present and saw it installed, and assisted Borneman in procuring and adjusting

the rope to such contrivance. In view of these facts, we are forced to the conclusion that although Borneman acted as vice principal in installing such car puller, and hence his negligence was the negligence of the defendant, we think it very clear that, unless a jury was waived, the questions as to whether plaintiff voluntarily assumed the risk incident to the operation thereof, and as to whether he was guilty of negligence which contributed proximately to cause his injuries, were questions of fact for determination by the jury. The doctrine of "the last clear chance" invoked by respondent's counsel has no application to the facts in this case. Such doctrine applies only to a case where the master knew of the plaintiff's peril, and might have obviated the injury, but failed to do so. While the testimony discloses that Borneman had but little confidence in the practicability of the contrivance, it does not appear that he possessed superior knowledge or information to that possessed by the plaintiff that the same was dangerous, or that plaintiff's position near such drum or capstan was necessarily perilous. In other words, plaintiff and Borneman, so far as the record discloses, apparently stood on an equal footing in this regard, and it does not appear that the latter could have avoided the injury after learning of the actual danger which threatened the plaintiff. The jury would have a right to say that, if it was an act of carelessness and negligence on the master's part to install and attempt to operate such contrivance, it was equally an act of carelessness and negligence on plaintiff's part to co-operate with Borneman in the installation and attempted operation thereof. Plaintiff had equal opportunity with Borneman for observing the dangerous character of such contrivance, and, if he knew of and fully appreciated the danger, he should be held to have voluntarily assumed the risk of attempting to operate the same; the risk attendant upon its operation being as easily discernible by him as by Borneman. The rules of law governing cases of this character are so well settled that we deem it unnecessary to do more than to briefly refer thereto.

The servant has a right to assume and to rely upon the assumption that the master has provided a reasonably safe place for him to work, unless such place is obviously and necessarily dangerous; but the master is not required to instruct or protect the servant against obvious, known, and necessary dangers, unless the servant, by reason of his youth, inexperience, and lack of intelligence, is unable to fully understand and comprehend the nature and extent of

such dangers. It is the master's duty to protect, warn, and instruct young and inexperienced employes as to the dangers of the employment if the work is such that either experience or instruction is necessary to enable them to do it with safety. The general rules covering the questions of defendant's negligence and of plaintiff's contributory negligence and assumption of the risk under analogous facts are elementary and well settled. Every conceivable proposition which can arise in such cases is very fully and accurately treated, and the authorities cited in the articles on Negligence, Contributory Negligence, and Master and Servant in 29 Cyc. 400 and 26 Cyc. 921, respectively; also in 21 Am. & Eng. Ency. of Law (2d Ed.) 455; 1 Id. 368; 20 Id. 3; Cur. Law, 540. See, also, the valuable note on Assumption of Risks in 7 A. & E. Ann. Cas. 435, and on the "Right of Recovery by Employes Accepting Extrahazardous Duties" in 97 Am. St. Rep. 884. In the note last referred to the following rules, among others, are correctly stated with many authorities in support thereof relative to assumption of risks and contributory negligence. After stating the general rights and duties of the master, it is said: "If a master has discharged the foregoing duties which the law imposes upon him, then a servant voluntarily engaging in a dangerous or extra hazardous employment assumes the ordinary risks incident thereto which are known or obvious to him. And this doctrine applies as well to those risks which first arise or become known to the servant during the service as to those in contemplation at the original hiring. Moreover, it applies alike to all risks, whether they arise from the negilgence of fellow servants, insufficiency of workmen, method of work, defective tools, appliances and machinery or dangerous premises. * * * However, the rule that a servant assumes the ordinary risks of his employment presupposes that the master has performed the duties of caution, care, and vigilance which the law casts upon him. It is only those risks which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes. And the doctrine of assumption of risks applies only to known dangers or those which are so obvious as to be readily perceived. * * * It is the duty of a servant to use reasonable care to inform himself of the hazards to which he may be exposed. * * * He is bound to use his eyes to see that which is open and apparent to a prudent man. * * * But he need not inspect appliances and premises to determine whether they are safe. He has a right to rely on his

master's inquiry because it is the latter's duty to inquire; and he may assume that his master has discharged his duty and made inquiry. The fact that a servant has as good an opportunity as his master to know of defects involving risks does not necessarily charge him with their assumption or with contributory negligence. Starr v. Kruezberger, 129 Cal. 123 61 Pac. 787, 79 Am. St. Rep. 92; Ehlen v. O'Donnell, 205 Ill. 38, 68 N. E. 766. * * * In determining the issue of assumption of risk, regard must be had to the age, experience, and mental capacity of the employe with a view of ascertaining whether he knew and appreciated the danger. * * * Where a servant in obedience to the requirements of his master incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or when it is reasonably probable that it may be safely used by extraordinary caution or skill, he is not thus guilty of concurrent negligence, and the master is liable for a resulting accident. * * * 'A man who enters on a necessarily dangerous employment with his eyes open,' says Chief Justice Cockburn, 'takes it with its accompanying risks. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it, * * * he may hold the employer liable.' The expression is often met with in the books that a servant assumes the risks of an employment when they are as apparent to him as to the master, or when he has equal means with the master of knowing them. But, as has been very aptly observed, 'the master has no right to assume the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire, and the servant may justly assume all these things are fit and suitable for the use he is directed to make of them.' Magee v. Nor. Pac. R. R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69. And, even when they have equal knowledge of the danger, it must be remembered that master and servant do not stand on terms of equality. The position of the servant is one of subordination and obedience, and he has a right to rely on the supposed superior skill and knowledge of the master. He is not entirely free to act on his own suspicions of danger, and he cannot be deemed guilty of contributory negligence in obeying an order, unless the danger is so glaring that a reasonably prudent man would not incur it. Stephens v Hannibal & St. J. R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336;

Haleburton v. Wabash R. Co., 58 Mo. App. 27. * * * While an employe is generally held to assume the ordinary risks of the service which are known or apparent to him, still mere knowledge of a risk or danger, without a full appreciation and comprehension of it, is not conclusive against his right of recovery in the event of injury. * * * There is a distinction between knowledge of defects in premises and appliances and knowledge of the risks and dangers that result from such defects. If an employe has knowledge of a defect or is chargeable with notice of it because obvious, but is not aware of the danger incident to and attending it, he is not precluded from recovering damages incurred by reason of such defect. * * * The assumption of risks must rest upon positive knowledge of the precise danger, or upon reasonable means of such knowledge, and not on vague surmise of possible dangers. A servant occupies a position of subordination, and may within reasonable bounds rely on the presumed superior knowledge and judgment of his master. Obedience is his primary duty. When ordered to perform work which is not obviously dangerous or which is of such a character that he cannot see that it cannot be done with safety, or about which there may be a difference of opinion as to the danger, he is not called upon to set up his own judgment against that of his superior, but may rely on his master's judgment and execute his orders, notwithstanding suspicions and misgivings of his own. * * * The law would seem plain where the menace or danger is so uncertain as to cause discussion between the employes and the employer with the result that the employer dissuades the employe of his apprehension that the doctrine of assumption of risks cannot be invoked. Goldthorp v. Clark Nickerson Lbr. Co., 31 Wash. 467, 71 Pac. 1091; Harder Min. Co. v. Schmidt, 104 Fed. 282, 43 C. C. A. 532. * * * There may be a modification of the doctrines of assumption of risk and contributory negligence when a servant responds to the direct and express command of the master or his agent, so that he may recover for injuries sustained when otherwise he would be without a remedy. * * * It is the duty of an employe to submit himself to the reasonable demands of his employer, not only as to the work to be done, but as to the manner of doing it; and it is his right to assume that his employer will take the necessary precautions to secure safety, and will not expose him to unnecessary danger. * * * But a servant is not under all circumstances and at all hazards bound to obey the orders of his mas-

ter. Obedience to an order may so manifestly jeopardize the safety of the servant as to not only justify, but to demand, disobedience. If he knows and appreciates the danger to which obedience to an order will subject him, if the danger is so obvious and glaring that no person of ordinary prudence would choose to encounter it, he cannot voluntarily place himself in jeopardy if he has time to deliberate, and then hold his master answerable for the consequences. * * *" We think the Supreme Court of Ohio in Van Duzen Gas, etc., Co. v. Schelies, 61 Ohio St. 298, 55 N. E. 998, announced a sound rule upon the subject of the assumption of known risks by the servant when it said: "The clear result of the best considered cases is that where an order is given a servant by his superior to do something within his employment apparently dangerous, and he, in obeying, is injured from the culpable fault of the master, he may recover, unless obedience to the order involved such obvious danger that no man of ordinary prudence would have obeyed it." We shall not attempt to cite the vast number of authorities supporting the foregoing rules. They may be found collated in the notes and authorities above cited. To warrant a finding that a servant assumed the risks of his employment he need not have had absolute knowledge of the risks if they were such that an ordinarily prudent man under the circumstances could by reasonable diligence have discovered. 26 Cyc. 1203, and cases cited. A servant, although under age, assumes all patent and obvious risk of his employment if he has sufficient intelligence to understand and appreciate it (26 Cyc. 1220 [E]), except where the child is so young as to be incapable of exercising judgment or discretion. The rule of contributory negligence applies where the person is an infant the same as where he is an adult. 29 Cyc. 535 (2) (11). No arbitrary age has been fixed at which a child is required to exercise the care demanded of an adult. In a few states it is held that this question is not one of fact for the jury, but of law for the court (Tucker v. N. Y. Cent. & H. R. R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Nagle v. Alleghaney R. R. Co., 88 Pa. 35, 32 Am. Rep. 413), and that an infant over the age of 12 years will be presumed to be sui juris, and chargeable with the same degree of care and caution as an adult in the absence of proof of mental incapacity. 29 Cyc. 540, and cases cited. Such doctrine is repudiated, however, by most courts which hold that, while a child of 12 years or over may be guilty of contributory negligence, it cannot be said as a matter of

law that he should be required to exercise the same degree of prudence and judgment as an adult, and in every case the question of the intelligence of the child and the measure of his capacity should be left to the determination of the jury. 29 Cyc. 540. As said by the Supreme Court of Wisconsin in the recent case of Upthegrove v. Jones, etc., Coal Co., 118 Wis. 673, 96 N. W. 385: The true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he, in fact, knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger. * * * Where it appears from the undisputed evidence that the defect or danger is open and obvious, and such as, under the circumstances, ought to have been known and comprehended by the plaintiff, then he will be held to have assumed the risk as a matter of law. Upon this question, see, also, the recent case of Dubiver v. City Ry. Co., 44 Or. 227, 74 Pac. 915, 75 Pac. 693, which was a case of an injury to a minor, and wherein it was held that, the evidence being conflicting, it cannot be said as a matter of law that the minor must be charged with that judgment and prudence usually characteristic of adults, and the question of the minor's contributory negligence was held properly submitted to the jury See, also, Twist v. Railroad Co., 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626; Railroad v. Pettigrew, 82 Ill. App. 33; Verdelli v. Gray's Harbor, etc. Co., 115 Cal. 517, 47 Pac. 364, 778; American Malting Co. v. Lelivelt, 101 Ill. App. 320; Thompson v. Edward P. Allis Co., 89 Wis. 523, 62 N. W. 527; Bowden v. Co., 185 Mass. 549, 70 N. E. 1016; Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908; Canton Cotton Mills v. Edwards, 120 Ga. 447, 47 S. E. 937; Tenn. Coal, etc., Co. v. Jarrett, 111 Tenn. 565, 82 S. W. 224; Williams v. Belmont Coal & Coke Co., 55 W. Va. 84, 46 S. E. 802; Langlois v. Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910. See, also, Bailey on Personal Injuries, § 2766, and Thompson on Negligence, 978. Whether the defendant through its vice principal, Borneman, was negligent in installing such car puller and in directing the plaintiff to operate the same without suitable warning of the risks and dangers connected with its operation, and whether the plaintiff knew or ought to have known and appreciated the danger in connection therewith and assumed the risk, and whether he was guilty of contributory negligence, are questions of fact proper for the jury to determine. In addition to the foregoing authorities,

see, also the recent cases of Kerker v. Bettendorf Metal Wheel Co. (Iowa) 118 N. W. 306, and Johnson v. Desmond Chemical Co. (Mich.) 121 N. W. 269.

After a careful examination of the foregoing authorities and many others which we deem it unnecessary to cite, we entertain no doubt that the questions of plaintiff's contributory negligence and assumption of the risks were under the facts disclosed by the record for the jury under proper instructions by the court. It was therefore not error to deny defendant's motions for a directed verdict and for judgment notwithstanding the verdict. This disposes of appellant's assignments of error numbered 1, 2, 4, and 10.

The remaining assignments which it is necessary to consider will be disposed of together. They are assignments 3, 5, 6, 7, and 8. These assignments challenge the correctness of the trial court's rulings in taking from the jury, on plaintiff's motion, all questions except the extent of plaintiff's injuries, and in disposing of the case as a court case by making findings of fact and conclusions of law upon all the issues involved. At the conclusion of all the testimony, and after the court had denied defendant's motion for a directed verdict, the court on motion of plaintiff's counsel instructed the jury that the only question for them to consider was the question of the extent of the injury and the amount of damage. Defendant's counsel took an exception to such ruling, and urge the same as prejudicial error. The learned trial court in granting such motion evidently proceeded upon the theory that by making said motions the parties thereby waived the jury as to all questions except the one as to the plaintiff's damage, and consented in effect to a determination of the other issues by the court. In this we think the court committed error prejudicial to the defendant. The latter neither expressly nor impliedly waived its constitutional right to a jury trial upon all the issues in the case. The lower court no doubt considered as applicable the settled rule in this state that where both parties move for a directed verdict at the close of the testimony, and the party whose motion is denied fail thereafter to specially request that certain questions be submitted to the jury, he will be deemed to have waived a jury trial, and to have consented to a decision of all questions by the court. While it is not entirely clear to our minds that such rule is inapplicable under the facts here presented, we are convinced that its enforcement would work a manifest hardship to appellant, and we are not disposed to extend

the rule to make it apply to cases not strictly and clearly within the prior decisions of this court. The rule is based upon the theory that, by moving for a directed verdict, the attitude of the party thus moving is that there is no issue of fact to be submitted to the jury, and that the court should dispose of the case as a matter of law, and by such motion he is deemed to have impliedly consented to a disposition of the case without the aid of a jury, unless, after an adverse ruling upon his motion, he requests that certain questions be submitted to the jury. Failure to make such request is construed as an election to stand upon his motion, and hence is an implied waiver of a jury trial and a consent to the submission of all questions to the court for decision, and if, in disposing of the case, it becomes necessary for the court to determine issues of fact, the moving party or parties will not thereafter be permitted to urge that such issues should have been submitted to the jury. The case at bar is not strictly within such rule. The record tends to refute such implied consent. Counsel for defendant resisted plaintiff's request for an instruction restricting the issues to be submitted to the jury and excepted to the giving of such instruction. This rebuts any presumption of an implied waiver of the right to have all issues submitted to the jury. Furthermore, the learned trial court incorporated in the record a statement to the effect that defendant's counsel did not intend to waive the right to have the jury pass upon the questions of fact, nor did they intend to waive their objection and exception to such instruction. The case at bar in this respect widely differs from the case of Bank v. Town of Norton, 12 N. D. 497, 97 N. W. 860. In that case, as stated in the opinion, "the jury was discharged because each party consented that the case be decided by the court. Both parties made motions for a directed verdict, and thereafter each stated that he desired to stand upon his motion, which meant no more or less than that the case was by both parties deemed one for the court withoout a jury. That such was meant is emphasized by the fact that neither party objected to the discharge of the jury or excepted thereto, nor asked that the jury be allowed to pass upon all the evidence or upon any particular fact. That such was the attorneys' and court's understanding at the time is borne out by the recitals in the order for judgment, as follows: 'Whereupon the defendant and the plaintiff * * * made independent motions to the court for a directed verdict in favor of their respective parties, * * * and, both parties electing and stipu-

lating in open court to stand upon the record, * * * the court thereupon dismissed and discharged the jury and took complete control of the case.' This recital shows that the trial court understood that the case was by consent of the parties submitted to him for decision on questions of fact and questions of law, and his findings of fact and conclusions of law show that the case was tried by him as a court case. Nothing in appellant's conduct or any objections or motions during the trial or after the trial when copies of the findings were served on him indicated anything different than that he consented that the case be tried as a court case." This precise question has arisen in but a few cases. Counsel for respondent relies upon the case of Galveston, etc., R. R. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066, but in that case defendant, at the close of plaintiff's case, demurred to plaintiff's evidence, and, the plaintiff having joined in such demurrer, it was held that the question of plaintiff's right to recover was withdrawn from the jury. In that case, however, no testimony was introduced in defendant's behalf, and it does not appear that plaintiff made a motion, as in the case at bar, which was granted, restricting the issues for submission to the jury, or that, if such motion was made and granted, defendant saved an exception to such ruling. The question also arose in the Court of Appeals of New York, and in disposing of it the court said: "Upon the close of the evidence and after a motion for a nonsuit had been denied, the judge decided that there was no question for the jury but the question of damages, to which there was an exception. It is questionable whether this exception is available to the defendants in this court. After the defendants had asked the court to determine the questions as matters of law in his favor on a motion for a nonsuit, and they afterwards desired such questions to be submitted to the jury as questions of fact, it was their duty to have specified the questions which they desired to have submitted. O'Neill v. James, 43 N. Y. 84-93; Winchell v. Hicks, 18 N. Y. 558. The court might have assumed that the defendants rested upon their legal propositions and thus have been misled. It would be perhaps rather rigorous to enforce this rule in this particular case, and we have concluded to waive its application." Muller v. McKesson, 73, N. Y. 195, 29 Am. Rep. 123. In Calder v. Crowley, 74 Wis. 157, 42 N. W. 266, a verdict was directed for the plaintiff, and defendant on the appeal contended that under the

most favorable view for the plaintiff that could be taken of the testimony it was a question for the jury, saying: "I claim a verdict should in fact be directed upon that point in favor of the defendant." The court said: "But he did not submit any motion to that effect. Had he done so, however, we should be slow to hold that he thereby waived his right to have the question passed upon by the jury." In Clancey v. Reis, 5 Wash. 371, 31 Pac. 971, the defendants at the close of plaintiff's testimony moved for a nonsuit, and, such motion being denied, they rested their rights upon an exception to such ruling and refused to put in any proof, and the court very properly held that, the testimony presented on the plaintiff's part being sufficient to establish all the allegations of the complaint put in issue by the answer, the trial court had a right to assume such facts to be proven for the purposes of that case, unless the defendants introduced some proof tending to disprove the prima facie case thus made by the plaintiff, and it held that an instruction to the jury to return a verdict for the plaintiff was not erroneous. See, also, Bartelott v. Bank, 119 Ill. 259, 9 N. E. 898.

The prior decisions of this court relating to this question of practice have, we believe, extended such rule to its uttermost limit, and instead of extending it still further, as we are asked to do in this case, we would be rather disposed, on the contrary, to modify such rule as thus established by restricting its application to cases only coming within the evident spirit and intent thereof.

Judgment reversed, and new trial ordered. All concur.

(122 N. W. 390.)

T. M. HANSON v. GREAT NORTHERN RAILWAY COMPANY.

Opinion filed March 9, 1909.

Rehearing denied May 15, 1909.

Carriers — Contract for Carriage of Freight — Law of Place of Contract.

1. A contract entered into for carriage of freight from a point in one state to a point in another state will, in the absence of proof of a contrary intention, be governed by the law of the place where the contract was entered into.

Same — Public Policy — Law of the Forum.

2. Where, however, such contract is against the established public policy of this state, it will not be enforced by our courts.

Evidence — Presumptions as to Law in Another State.

3. In the absence of proof to the contrary, the presumption prevails that the common law is in force in a foreign jurisdiction.

Carriers — Injury to Freight — Limiting Liability.

4. By statute in this state a common carrier may, by special contract signed by the consignor or consignee, limit or modify its common law liability, except that it cannot exonerate itself from liability for loss or damage resulting from the negilgence, fraud or willful wrong of itself or servants. Prior to the enactment of chapter 57, page 83, Laws 1907, it was lawful by special contract, when signed by the consignor or consignee, to exonerate such carrier from liability except for its or its servants' gross negligence, fraud or willful wrong.

Same — Stipulations as to Value of Freight.

5. Such special contract will not be enforced except when fairly entered into and when just and reasonable in the eye of the law. Stipulation fixing a mere arbitrary valuation upon goods for the sole purpose of limiting the carrier's liability in case of loss or damage are not just and reasonable in the eye of the law.

Carriers — Limiting Liability.

6. Whether the carrier may by special contract fixing the value of goods for shipment, when fairly made, limit or restrict its liability for negligence to the value thus agreed upon, is not determined.

Same — Public Policy.

7. Tested by the foregoing rules, the special contract in the case at bar, which fixes the value of the household goods at $5 per hundredweight, is, for reasons stated in the opinion, contrary to the public policy of this state, and hence will not be enforced here.

Appeal from District Court, Nelson county; *Templeton,* J.

Action by T. M. Hanson against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Murphy & Duggan, for appellant.

Party in charge of goods for shipment has full authority to contract for such shipment. 1 Hutchinson on Carriers, 457; Armstrong v. Chicago, M. & St. P. Ry. 54 N. W. 1059; California Powder Works v. Atlantic & P. R. Co., 45 Pac. 691, 36 L. R. A. 648.

By special contract a carrier may grant different rates for goods of different value; and when he represents his goods of lower value, and takes a lower rate, he is bound by his contract. 1 Hutchinson

on Carriers, 401-4, 408; St. Louis v. Weekly, 8 S. W. 134; Hart v. Penn, Ry. Co., 112 U. S. 331, 5 S. Ct. Rep. 151; Louisville & N. R. v. Sherrod, 4 So. 29; Coupland v. Housatonic Ry. Co., 23 Atl. 870-3; Jennings v. Smith, 106 Fed. 139; Met. Trust Co. v. Ry. Co., 107 Fed. 628; McFalane v. Express Co., 137 Fed. 982; Railway Co., v. Patrick, 144 Fed. 632; Michelitschke v. Wells Fargo Co., 50 Pac. 847; Pierce v. Southern Pac. Ry. Co., 47 Pac. 847; 52 Pac. 302; Alair v. Northern Pac. Ry. Co., 54 N. W. 1072, 19 L. R. A. 764; Smith v. American Express Co., 66 N. W. 479; O'Malley v. Gt. N. Ry. Co., 90 N. W. 974; 1 Hutchinson on Carriers 426.

A contract for lower freight in consideration of lower valuation of goods shipped, is valid, unless void for fraud, or grossest and most wilful negligence. Hart v. Penn. Ry. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151; Smith et al., v. Waalkes, 66 N. W. 479; Coupland v. Housatonic Co., 23 Atl. 870-3; Muser v. American Express Co., 1 Fed. 382; Pacific Express Co., v. Foley, 46 Kan. 457, 26 Am. St. Rep. 107; Hill v. Boston Ry Co., 144 Mass. 284, 28 A. & E. Ry. Cas. 87; J. J. Douglas Co. v. Minn Tr. Ry. Co. 62 Minn, 288, 64 N. W. 899; Duntley v. Boston Ry. Co., 66 N. H. 263; Durgin v. American Exp Co., 66 N. H. 277; Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881; Johnstone v. Richmond R. Co., 39 S. C. 351; Starnes v. Louisville Ry. Co., 91 Tenn. 516, 19 S. W. 675; Richmond D. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749.

Frich & Kelly, for respondent.

Contracts exonerating common carrier from liability for gross negligence, fraud or willful wrong of himself or his servants, are void, Rev. Codes 1905, Sec. 5678; Ry. Co. v. Beasley, 3 L. R. A. (N. S.) 183; McCune v. The B. C. R. & N. Ry. Co., 3. N. W. 615; Davis v. Chicago R. I. & P. Ry. Co., 49 N. W. 77; Brush v. Ry. Co., 43 Ia. 554; Lucas v. Burlington C. R. & N. Ry Co., 84 N. W. 673; Express Co. v. Owens, 8 L. R. A. (N. S.) 369, 41 S. 752; Railway Co. v. Wynn, 14 S. W. 311; Express Co. v. Backman, 28 Ohio St. 156; Hutchinson on Carr., Sec. 250.

Where the actual and contract values are grossly disproportionate, such agreements are void. Liverpool & G. W. Steam Co. v. Insurance Co. of North America, 9 Sup. Ct. Rep. 469; Moulton v. St. P. M. & M. Ry. Co., 16 N. W. 497; Railway Co. v. Hall, 4 L. R. A. 898, 52 S. E. 679; Kansas City St. J. & C. B. Ry. Co.,

v. Simpson, 2 Pac. 821; Everett v. Railway Co., supra; Black v. Goodrich Transportation Co., 13 N. W. 244; O'Mally v. Gt. N. Ry. Co., 90 N. W. 974; Railway Co. v. Hughert, 8 So. 62; Rosenfeld v. D. & E. R. R. Co., 2 N. E. 344; Railway Co. v. Murphy, 53 L. R. A. 720; Central Georgia Railway Company v. Murphy & Hunt, 53 L. R. A. 720; Chicago & N. W. Ry. Co. v. Chapman, 24 N. E. 417.

Where a carrier of goods under a special contract limiting its liability, it is liable as insurer by abandoning the shipment at a point short of its destination. 6 Cyc. 384, 397; Pavitt v. Railway Co., 25 Atl. 1107; Seavey v. Union Transit Co., 82 N. W. 285; Ry Co. v. Allison, 59 Tex. 193, 12 A. & E. Ry. Cas. 28; Ry. Co., v. Davis 2 Willson 195; Stewart v. Railway Co., 47 Iowa 229; Robinson v. Merchant's Disp., 45 Iowa 470; Disp. Co. v. Johnson, 11 S. W. 441; Rawson v. Holland, 59 N. Y. 611; Maghee v. Railroad Co. 45 N. Y. 514; Condict v. Railroad Co., 54 N. Y. 500, and cases cited; Cassilay v. Young, 39 Am. Dec. 505.

FISK, J. Plaintiff had judgment in the court below pursuant to a verdict directed by the court, and this appeal is from such judgment and from an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial.

The facts are not seriously in dispute, and are substantially as follows: Plaintiff, being the owner of certain household goods, a list of which appears in the complaint, had the same taken from his home in Minneapolis by Boyd Storage & Transfer Company, and by them packed and crated for shipment and shipped to him at Tolna, N. D. He paid them a lump sum of $23 for packing, hauling, shipping, and freight charges. The storage company's drayman delivered the goods to the Minneapolis freighthouse of the defendant for shipment to Hanson at Tolna. The goods were weighed, weighing 1,540 pounds as packed. Anderson, the teamster for the Boyd Company, caused the shipment to be made in the name of Boyd Transfer & Storage Company, as consignor, to T. M. Hanson, as consignee. At that time the regular freight rate on goods of this class from Minneapolis to Tolna was 1½ times first class, of $1.41 per 100 pounds. Defendant also had a special western rate, called the "emigrants' movable rate," from Minneapolis and other specified points to North Dakota, on household goods of intending settlers, when the shipment is made at the

owner's risk, and at a declared valuation of $5 per 100 pounds; this rate being only 35 cents per 100 pounds. The goods were shipped at the declared valuation of $5 per 100 pounds, and at the rate of 35 cents per hundredweight. In addition to the ordinary freight receipt, a special contract was prepared by defendant's agent and executed by Anderson, the drayman, which special contract is hereafter set out in full. Plaintiff proved a failure on defendant's part to deliver the goods, an seeks to recover for breach of the contract of shipment, alleging the value of the goods to be $782.67 instead of $77, the value declared in the special contract. At the close of the trial, defendant tendered judgment for $77, and the trial court, on plaintiff's motion, directed a verdict for $759,77, being the actual value testified to by plaintiff.

Appellant's counsel have assigned numerous alleged errors of law which they ask this court to review, but it will not be necessary to notice them in detail. As we view the questions involved, they may be classified into three propositions, as follows: (1) Is plaintiff legally bound by the action of the Boyd Transfer & Storage Company through its employe, Anderson, in entering into the special contract limiting the common carrier's liability? (2) Conceding Anderson's implied authority to make the same, is said special contract valid? (3) Under the facts has defendant forfeited its right to rely upon and enforce the provisions of such special contract?

If the second proposition is decided in the negative, such decision will obviate the necessity of passing upon the other propositions. Hence, we will proceed to consider the validity of this special contract. The same was entered into in the state of Minnesota and, under the weight of authority, is governed by the law of that state. Liverpool, etc., Steam Co. v. Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, and numerous other cases cited in note on pages 125, 126, 88 Am. St. Rep. Notwithstanding this fact, however, we understand the rule to be that the same will not be given effect in the courts of this state if it is against the established public policy here. 11 Cur. Law, 529, citing Carter v. Southern R. Co., 3 Ga. App. 34, 59 S. E. 209; Atlanta, etc., R. Co. v. Brooms, 3 Ga. App. 641, 60 S. E. 355; International, etc., R. Co. v. Van Devanter, 107 S. W. 560. It does not appear that a statute exists in Minnesota relating to the right of a common carrier to limit its common-law liability in case of loss or damage to property in its cus-

tody. Hence it is presumed that the common-law rule is in force there. Rev. Codes 1905, § 7317, subd. 41. What is the public policy in North Dakota with reference to such contracts?

In many jurisdictions it is necessary to look to the decisions of the courts to ascertain its public policy, as they have no legislative declaration with reference thereto. Not so here, as the Legislature has seen fit to settle the question by express statute. See chapter 59 of the Civil Code, being sections 5672 to 5701, inclusive, Rev. Codes 1905. Section 5677 provides: "The obligation of a common carrier cannot be limited by general notice on his part but may be limited by special contract." The next section provides: "A common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence, fraud or willful wrong of himself or his servant." This section was amended in 1907 by eliminating the word "gross." See chapter 57, p. 83, Laws 1907. Such amendment is not material, however, as plaintiff's cause of action arose prior to its enactment. And the following section provides: "A passenger, consignor or consignee by accepting his ticket, bill of lading or written contract for carriage with knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same." These sections were taken from the original Field Civil Code and were intended to provide a settled rule of construction upon this subject, the decisions respecting which were theretofore apparently in hopeless conflict. As said by Chief Justice Tripp in Hartwell v. Northern P. E. Co., 5 Dak. 473, 41 N. W. 735, 3 L. R. A. 342; "The decisions of the courts have varied, and are now conflicting, as to whether the common-law liability of the carrier may be limited; (1) By notice brought home to the party; (2) by special acceptance of goods for carriage; (3) by express contract between the parties. There is much diversity of opinion of the courts how far such liability may be restricted or limited on grounds of public policy. Our statute has aimed to settle these conflicting decisions." After quoting the foregoing sections, the opinion continues: Section 1263 (section 5679, Rev. Codes 1905), supra, supplements and makes clear section 1261 (section 5677, Rev. Codes 1905). Section 1261 is founded upon the common-law doctrine as announced by Justices Bronson and Cowan in Hollister v. Nowlen,

19 Wend. (N. Y.) 234, 32 Am. Dec. 455, and Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470, and denies the right of a common carrier to limit his liability by a general notice. It adopts the decision of Dorr v. Navigation Co., 11 N. Y. 485, 62 Am. Dec. 125, in so far as it promulgates the rule of allowing the carrier to limit his liability by special contract; but it limits and qualifies that case in so far as it applies to a case of bill of lading accepted by the shipper by providing in section 1263 that the shipper who does not sign the bill of lading or contract of carriage consents only, by accepting it, to the rate of hire, time, place and manner of delivery. If the carrier desires him to assent to any modification of his common-law liabilities contained in such instrument beyond this, he must require it to be signed by the shipper; in other words, passenger tickets, bills of lading, and written contracts for carriage are not 'special contracts' within the meaning of section 1261, that can limit the obligations of the common carrier, unless they are signed by the passenger, consignor, or consignee. These two sections prescribe the manner in which the liability of the common carrier may be limited and section 1262 (section 5678, Rev. Codes 1905) prescribes the extent to which that liability may be limited. It limits the right of parties in advance of carriage to agree to exonerate from liability for gross negligence, fraud, or willful wrong of the carrier of his servant. All contracts to relieve from gross negligence, fraud, or willful wrong on the part of the carrier or his servants are, by the terms of this statute, expressly prohibited. The object of this section is obvious. They settle for this territory the conflicting decisions of the common law. They make unnecessary any discussion of the better rule, worked out by the learned decisions, to meet a fancied necessity for modification of that laid down by the older cases."

We have thus quoted at length from the foregoing opinion as the same clearly sets forth our views as to the proper construction of the provisions of our Code, supra, and nothing need be added by us. The state of California has similar statutory provisions, and the Supreme Court of that state, in the very recent decision of Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, gave expression to the same views. We quote: "At common law a common carrier might make any other contract relative to the carriage of property intrusted to it, save one exempting it from liability for any kind of negligence. This rule was

founded upon considerations of public policy; it being deemed derogatory thereto to allow a common carrier to contract against its own negligence, because to permit this had a tendency to promote negligence. But, as far as ordinary negligence is concerned, the rule at common law has been abrogated by our Civil Code (section 2174) to the extent that the shipper and carrier may make a contract for the purpose of limiting the liability of the latter therefor The prohibition of the common law against a carrier limiting his liability for any kind of negligence in declared in this state by section 2175 only to apply to the limitation for gross negligence; but, in so declaring, our statute has added nothing to the restrictive force of the common-law rule. Declaring the same rule as it existed at common law, and nothing more, the section should not be construed as restricting the right of contract to any narrower compass than the common law restricted it." The court then holds that section 2175 of the California Civil Code, which is the same as section 5678 of the Revised Code to this state for 1905, should not be construed as restricting the right of contract as to an agreed valuation of property for the purpose of fixing responsibility any further than it was restricted under the rule at common law, and that at common law such agreed valuation was not considered a limitation of liability for either ordinary or gross negligence. Upon this question it is said: "In jurisdictions in this country, where the common-law rule obtains, it is the prevailing doctrine that there is a wide distinction between a contract by a carrier providing for exemption from liability for its negligence, and a contract fairly entered into whereby, in consideration of a reduced rate of compensation for the transportation, the shipper and carrier agree upon a fixed valuation therefor under which the responsibility of the carrier in case of loss shall be measured." Numerous authorities are cited and reviewed by the court, but we deem it unnecessary to collate them in this opinion.

The contract in question, therefore, in so far as it does not attempt to limit defendant's liability for loss or damage occasioned by gross negligence, fraud, or willful wrong of itself or its servants, is not contrary to the public policy of this state as expressed in the provisions of the Code above cited; but to the extent, if any, that it attempts otherwise to limit such liability, the same will not be enforced by the courts of this state. The so-called "special contract" is as follows: "Property Release. Consignee and destination, Theo. M. Hanson, Tolna, N. D. Description of Articles. 1

lot H. H. goods O. R. Val. Rel. to $5.00 per cwt. In consideration of the Great Northern Railway Company having received the above property from Boyd Trf. & Stg. Co., consigned to Theo. M. Hanson for transportation on their line from Mpls. station to Tolna, N. D. I do hereby release the said company, * * * from all liability from * * * loss or damage of whatever kind except such as may occur from negligence of the company by collision of trains or by cars being thrown from the tract in course of transportation. And for the further consideration of the lower rate hereby secured I do hereby declare the value of all property and goods shipped under this contract to be $5.00 per cwt., said lower rate being given by the G. N. Ry. Co. solely upon the basis of said valuation. And in consideration of said reduced rate, I further agree that, in case of loss or damage to said property, or to any part thereof, my recovery for such loss or damage shall not exceed the above valuation. I do also release said company from all loss or damage that may occur to any freight shipped by me, above entered, after it has been unloaded from the cars at Tolna station on their line. [Signed] Boyd Transfer Co., by Anderson."

It is entirely clear that the first paragraph of said contract, which attempts to exonerate the company from all liability for loss or damage of every kind, except such as may occur from negligence of the company by collision of trains or by cars being thrown from the track, is void both under the common-law rule and the statute of this state, and this is also true with reference to the third paragraph. It remains to consider the validity of that portion of the contract whereby a declared valuation of $5 per hundredweight of the goods in question is set forth, with the agreement that in case of loss or damage to said property a recovery therefor shall not exceed such declared valuation.

Respecting the validity of such agreed valuation stipulations, there is much diversity of opinion among the courts of this country; but by the weight of authority such stipulations are upheld, provided the same are reasonable in the eyes of the law and are fairly and honestly made as a basis for the carrier's charges and responsibility, even where the loss is caused by the negligence of the common-carrier; the theory of such decisions being that such a stipulation or agreement is a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against ex-

travagant and fanciful valuations. It is said that such limitations of value in no way exempt the carrier from or limit his liability for negligence; their only effect being to liquidate the amount for which the carrier, in case of loss shall be answerable, whether through his negligence or otherwise. The leading case upon this subject is Hart v. Penn. R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, in which Mr. Justice Blachford used the following language: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to an agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss, and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume." The other authorities following the rule of the federal court are too numerous to cite. The following are a few of them: Cau v. Tex. Pac. R. Co., 194 U. S. 427, 24 Sup Ct. 663, 48 L. Ed. 1053; Donlon Bros. v. Southern Pac. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811; Coupland v. Hous. R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A., 534; Central R. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; Rosenfeld v. Peoria, etc., Ry. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Pacific Express Co. v. Foley, 46 Kan. 457, 26 Pac. 665, 12 L. R. A. 799, 26 Am. St. Rep. 107; Hill v. Boston, etc., R. Co., 144 Mass. 284, 10 N. E. 836; Graves v. Exp. Co., 176 Mass. 280, 57 N. E. 462; Smith v. Am. Exp. Co., 108 Mich. 572, 66 N. W. 479; Alair v. N. P. R. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; Murphy v. Wells Fargo & Co. Exp., 99 Minn. 230, 108 N. W. 1070; Starnes v. Louisville, etc., R. R. Co., 91 Tenn. 516, 19 S. W. 675; Richmond, etc., D. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; Ullman v. Chicago, etc., Ry Co., 112 Wis. 15, 88 N. W. 41, 88 Am. St. Rep. 949. The rule is announced in many of said authorities that such limitations, in order to be valid, must be made with reference to a value to which the charges and responsibilities of the carrier shall be proportioned. Mere arbitrary limitations or stipulations are not upheld. If it appears that the object of such stipulations is to secure a fair and reasonable value upon

which to base the terms of the contract of shipment, they will be sustained; but, on the contrary, if it appears that the purpose was merely to place a limit to the carrier's liability in case of loss or damage to the goods, the same will be held void. Such agreements entered into for the former purpose are held reasonable, but unreasonable if for the latter purpose. The latter is a mere attempt on the part of the carrier to limit his liability for losses caused by his own negligence, and as to losses so caused such agreements are held unreasonable and void on account of such attempted limitation of liability. Alair v. N. P. Ry. Co., 53 Minn, 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; Ullman v. Chicago, etc., Ry. Co., 112 Wis. 15, 88 N. W. 41, 88 Am. St. Rep. 949; Donlon Bros. v. Southern Pac. Co. 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811: See, also, Chicago N. W. Ry. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. Rep. 587; Rosenfeld v. Peoria etc., Ry. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Gardner v. Southern Ry. Co., 127 N. C. 293, 37 S. E. 328.

The courts are not agreed regarding the test to be applied in determining the validity of such contracts or stipulations; some holding a stipulation void which merely fixes a maximum value on the property limiting recovery in case of loss to the sum not exceeding such amount, upon the ground that a stipulation of this kind is a mere attempt to limit the carrier's liability, and hence is solely in the interest of such carrier. Other courts hold that there is no distinction on principle between such a stipulation and one by which the parties expressly agree to a certain fixed valuation. Among those holding to the former rule are Conover v. Pac. Exp. Co., 40 Mo. App. 31; Kellerman v. Kans. City, etc., Co., 68 Mo. App. 255; St. Louis, etc., R. Co. v. Sowell 90 Tenn. 17, 15 S. W. 837; Eells v. St. Louis Ry. Co., (C. C.) 52 Fed. 903. Among those holding to the latter rule are Alair v. N. P. R. Co., 53 Minn, 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; Ullman v. Chicago etc., Ry. Co., 112 Wis. 15, 88 N. W. 41, 88 Am. St. Rep. 949.

While there is some contrariety of opinion also on the question of the validity of such stipulations depending upon whether the value is fixed by the shipper himself or inserted by the carrier under the prevailing rule no such distinction is drawn. The true test seems to be whether the stipulation was inserted and agreed to in the interest of the carrier for the mere purpose of limiting his liability in case of loss or damage, or whether it was inserted for the purpose

of fixing the rate of compensation for the carriage of the property and the proportionate responsibility of the carrier in the performance of the contract of carriage. The Alabama court has adopted another test as to the validity of such stipulations, which is that the value stipulated or agreed upon must not be disproportionate to the actual value of the property. Speaking upon this question in the recent case of Southern Ry. Co. v. Jones, 132 Ala. 437, 31 South. 501, Chief Justice McClellan says: "In determining whether a stipulation is void as being against public policy, there is no room for inquiry into the knowledge, information, or intention of the parties. The question is not what the parties knew or intended, but what is the effect of the stipulation; not whether the parties intended evil or knew their act was hurtful to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and the duty of the government to protect them. So it is immaterial, when a carrier has stipulated for the limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good in respect of a governmental concern that he should be allowed to make such stipulation under any circumstances, and to allow it to stand in any instance or upon any consideration would be to emasculate the principle of public policy obtaining in the premises, and to leave the public exposed to all the uncertainties incident to inquiries into what carriers intended, or knew or had been informed as to the real value of the property transported by them." See, also, to the same effect, the very recent case of South. Exp. Co. v. Owens, 412, 41 South. 752, 8 L. R. A. (N. S.) 369, 119 Am. St. Rep. 41, where the same court reviews the authorities at length and announces the better doctrine to be that a carrier cannot, by a contract fixing the value of the property carried in relation to the amount of freight paid, limit its liability pro tanto for losses caused by its own negligence.

The doctrine thus announced, however, seems to be opposed to the weight of authority, and we think the sounder rule is that announced in Alair v. N. P. R. Co., 53 Minn, 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; Donlon Bros. v. So. Pac. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, and other cases above cited, holding in effect that a mere difference between

the value as agreed upon and the actual value of the property, however wide such difference may be, is not a controlling test as to the validity of such stipulations, and that the true test is whether the stipulation was fairly entered into and is "just and reasonable in the eye of the law." The fixing of a mere arbitrary sum, without any reference to the real value, and merely for the purpose of fixing the limit of the carrier's liability, will not ordinarily be held to be "just and reasonable in the eye of the law." The facts in each case must be looked to to determine whether the object of such stipulation was merely to place a limit on the carrier's liability, and therefore invalid, or whether the object was, as before stated, to fairly and honestly fix a value as a basis of the carrier's charges and responsibility, and hence valid as a "reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

Another line of very respectable authorities adhere to the rule that the carrier will not be permitted, by any contract with the shipper to limit his liability for loss caused by his negligence to anything less in amount than the actual damage suffered by the shipper. Among the courts so holding are Illinois, Kentucky, Mississippi, Nebraska, Ohio, Pennsylvania, Tennessee, and Texas. The following are a few of the cases: Chicago, etc., Ry. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. Rep. 587. Chicago, etc., Ry. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68 (containing a very valuable and exhaustive note covering every phase of the subject of the limitation of a carrier's liability); Chicago, etc., Ry. Co. v. Witty, 32 Neb. 275, 49 N. W. 183, 29 Am. St. Rep. 436; U. S. Exp. Co. v. Backman, 28 Ohio St. 144; Adams Exp. Co. v. Holmes (Pa.) 9 Atl. 166; Houston, etc., Ry. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308. For other cases so holding, see above note in 88 Am. St. Rep., at page 112.

We are not required in the case at bar, to express our views as to which rule announced by the foregoing two lines of authorities is the sounder, for we are agreed that, applying the test adopted by the courts holding to the first rule above stated, the stipulation in question is not "just and reasonable in the eye of the law," and hence is not only contrary to the public policy of this state, but is also contrary to the well-established rule of the common law, and

will not be enforced. In the Hart Case, supra, it was said: "The agreement as to value in this case stands as if the carrier had asked the value of the horse, and had been told by the shipper, the sum inserted in the contract." When tested by the rule announced in the Hart Case and other cases holding to the same doctrine, it is apparent that the contract in question cannot be sustained. In the first place, the property consists of household goods, and there is not a scintilla of testimony in the record tending to show their actual value, aside from the plaintiff's testimony at the trial. The cartman in the employ of the storage and transfer company is not shown to have possessed any knowledge of their value whatsoever, nor does it appear that his employer or any of the members of the storage company possessed any such knowledge. It is not contended that either of the parties who were instrumental in making or causing such special contract to be made had any knowledge whatsoever upon the subject of the actual or supposed or the approximate value of the property. The carrier's servant who prepared said contract inserted a mere arbitrary sum of $5 per hundredweight as the value without any inquiry from anyone, or without any investigation with the view of determining the approximate value thereof. It cannot be said respecting household goods, as was said by Judge Mitchell in the Minnesota case, supra, regarding horses, that "every one may be presumed to know approximately the average value." We cannot say, as was said by Judge Mitchell in said case, that we are justified in taking judicial notice of the fact that the maximum value placed by this contract upon these goods is approximately that of average household goods. In view of these facts, how can it be contended that such stipulation is "just and reasonable in the eye of the law?" The most that can be said of it is that it is a mere arbitrary fixing of value by the carrier's servant acquiesced in by the transfer company's drayman, who had no knowledge as to the value nor any specific instructions from his employer with reference to fixing value—facts which were or should have been within the knowledge of the defendant's servant.

Our conclusion is that such special contract, under the facts in the case at bar, is void in its entirety, both at common law and under the established rule of public policy of this state, and hence the same cannot avail defendant as a defense to plaintiff's cause of

action. This being true, we are not required to notice the other questions raised by appellant.

The judgment and order appealed from are correct, and are, accordingly, affirmed. All concur.

(121 N. W. 78.)

L. D. GOOLER AND R. GOER *v.* A. N. EIDSNESS.

Opinion filed April 14, 1909.

Rehearing denied May 15, 1909.

Appeal and Error — Questions Not Considered Below.

1. The record showing that the answer was not demurred to, and that it was at no time suggested to the trial court that it was insufficient, and the trial in the district court having proceeded upon the theory that issue was joined, this court will not pass upon the sufficiency of the answer.

Appeal and Error — Objections Not Taken Below.

2. Section 7325, Rev. Codes 1905, reads: "When an order of the district court is made, which under the laws regulating appeals to the Supreme Court is an appealable order, such order shall upon its face by apt words briefly describe the affidavits, documents, papers and evidence upon which the order is made and the judges may at their discretion refuse to sign orders not so framed and the Supreme Court may at its discretion dismiss any appeal from an order which is not framed substantially in accordance with the requirements of this section." *Held*, that objection taken for the first time in this court to the order of the district court granting a new trial, such objection being upon the ground that the order does not enumerate the evidence and papers upon which it was granted, will not be considered by this court.

Same — Dismissed.

3. Penalties provided by section 7325 are not applicable to the facts of this case.

Same — New Trial — Affirmance.

4. When a new trial is granted by the district court, its order will be affirmed if any ground for sustaining it is found in the record.

Directed Verdict — Motion by Both Parties — Waiver of Finding by the Jury.

5. Where both parties submit a motion for a directed verdict, and the one against whom the verdict is directed requests that any question of fact be submitted to the jury, the party making the request does not thereby waive findings by the jury.

Same — Conflict of Testimony.

6. The evidence in this case shows a decided conflict on material questions. Hence the directing of a verdict for appellant was error, and the district court was justified in granting a new trial.

Sufficiency of Evidence.

7. Even if the merits were with the appellants, the evidence was too uncertain to enable the jury or the court to fix the amount which plaintiff is entitled to recover.

Appeal and Error — Service of Notice of Appeal — "Process."

8. Section 6738, Rev. Codes 1905, defines "process" as a writ or summons issued in the course of judicial proceedings. *Held*, that the notice of appeal is not a writ or summons, and is therefore not "process," and need not be served in the same manner in which "process" is required to be served.

Same — Service of Notice of Appeal by Mail.

9. Section 7205, Rev. Codes 1905, provides that an appeal must be taken by serving a notice in writing, etc., and by filing the same in the office of the clerk of court. Section 7332 provides for service of notice by mail when the person making the service and the persons upon whom is it made reside in different places between which there is a regular communication by mail. *Held*, that notice of appeal is included in the sections referred to, and service by mail, when the facts specified exist, is valid service if other requirements are obesrved.

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

Action by L. D. Gooler and another against A. N. Eidness. There was a judgment for plaintiffs, and from an order setting the same aside and granting a new trial plaintiffs appeal.

Affirmed.

Gooler & Goer and *Burke & Middaugh*, for appellants.

Christianson & Weber, for respondent.

SPALDING, J. Appeal from an order granting a new trial. The action was brought to recover compensation from the respondent for

negotiating a sale of his farm for a stock of merchandise. The trial court directed a verdict in appellants' favor. Judgment was entered thereon. On respondent's motion for a new trial, the judgment was vacated and a new trial granted. Error is assigned on the claim that there was no issue of fact presented by the answer for the jury to try. It appears from the record that the action was tried upon the theory that the pleadings presented issues of fact, and we do not find that it was anywhere suggested to the trial court that the answer was insufficient. Having been tried upon the theory that it was adequate, and the question not having been suggested to the trial court, it cannot be considered by this court on appeal. This has been so often passed upon that it is unnecesary to cite authorities to support it.

Appellant complains that in the order granting the new trial the court did not enumerate the papers and documents and evidence upon which the order was made. This objection is based upon section 7325, Rev. Codes 1905, which reads: "When an order of the district court is made, which under the laws regulating appeals to the Supreme Court is an appealable order, such order shall upon its face by apt words briefly describe the affidavits, documents, papers and evidence upon which the order is made, and the judges may at their discretion refuse to sign orders not so framed and the Supreme Court may at its discretion dismiss any appeal from an order which is not framed substantially in accordance with the requirements of this section." We are of the opinion that this objection is not well taken under the circumstances. It will be noted that the section quoted permits judges in their discretion to refuse to sign orders not so framed, and that the Supreme Court may in its discretion dismiss any appeal from an order which is not framed in accordance with the provisions of that section. The penalties provided by the section are not applicable to the facts and circumstances of this case. Furthermore, the record fails to disclose that the attention of the trial court was called to any defect of this nature in the order, and that the court was given no opportunity to correct its order if defective. While it would often save this court much unnecessary labor if trial courts designated the grounds on which they grant a new trial, yet we know of no rule which would justify this court in overruling an order granting a new trial and in affirming a judgment simply because the trial court failed to state the evidence or papers upon which it rested its order

granting the new trial. In fact it is well established that the order granting the new trial should be affirmed if any ground for sustaining it is found in the record. In the case at bar we find ample grounds for affirming the order. While both parties, when the defendant rested, submitted motions to direct a verdict, the respondent objected to the court finding the facts and insisted that they be submitted to the jury if his motion was overruled. This objection and request take the case out of the rule that where both parties submit motions for a directed verdict, without any request that any question of fact be submitted to the jury, they thereby waive findings by the jury. Hence the court was not justified in directing a verdict if any substantial conflict existed in the evidence on any material issue.

We find from an inspection of the evidence contained in this record a direct conflict as to whether a sale of the land in question was consummated and as to whether the respondent was justified in rejecting the terms offered. There is much evidence showing the negotiations of the parties, but as to the sale being completed, and as to the character of the merchandise which was offered for the respondent's land, being the same as contemplated by his contract with appellants, the evidence is in conflict in so far as evidence was received.

Appellants had entered into a contract with defendant, whereby he agreed to pay them 5 per cent. commission in case they found a purchaser for his farm, and to give them all in excess of $8,000 received for it on any sale which they might effect; such sale to be for cash or general merchandise. Evidence was offered tending to show that the stock offered in exchange for the farm included articles of considerable value which could not be classed as general merchandise in the locality where the trade was being negotiated and the contract of agency was made. Another point is clear, namely, the verdict was directed in favor of appellants for $4,400. This was on the supposition that they were getting 5 per cent. on $8,000 and that the stock of goods was worth $12,000, as listed in the book received in evidence; but sales in large amounts had been made from the stock for some time after the list was prepared and before this negotiation took place. It was not shown what such sales amounted to. It therefore appears that the trial court was without evidence upon which to determine the exact excess over $8,000 of the value of the stock, and therefore a verdict for the

full amount to which plaintiff would have been entitled had no sales been made, even if the evidence justified the conclusion that there had been a sale or a customer produced, was excessive.

For these reasons the order of the district court must be affirmed.

Before argument of this appeal on its merits, respondent submitted a motion for dismissal. The service of notice of appeal was made by mail, and the ground of respondent's motion was that no appeal had been taken, and that the notice of appeal is process and can be served only in the manner required by the Code for the service of a summons. On the argument we denied respondent's motion. It becomes necessary to briefly state our reasons for doing so. Section 6738 Rev. Codes 1905, says: "The word process signifies a writ or summons issued in the course of judicial proceedings." A notice of appeal is not a writ or summons, and is therefore not process. Section 7205, Rev. Codes 1905, specifies that an appeal must be taken "by serving a notice in writing signed by the appellant or his attorney on the adverse party, and by filing the same in the office of the clerk of court in which the judgment or order appealed from is entered. * * * The appeal shall be deemed taken by the service of a notice of the appeal and perfected on service of the undertaking for costs, or the deposit of money instead, or the waiver thereof as hereinafter prescribed." This section harmonizes with other references in the statute to the taking of appeals. Appeals are taken by serving and filing a notice, not by issuing and serving process. Respondent cites several authorities in support of his argument, but they come from states where the procedure in taking an appeal differs materially from that provided in this state. Section 7331, Rev. Codes 1905, specifies the requirements necessary to making a valid service of notice in certain instances. Section 7332 provides for service of notice by mail when the person making the service and the person upon whom it is to be made reside in different places between which there is a regular communication by mail. The notice of appeal in this case was served by mail, and being a notice as we have held, and the attorneys serving and served residing in different places between which there is a regular communication by mail, it can be legally so served, and this court, if the other prerequisites were observed, acquired jurisdiction of the appeal by such service. All concur.

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

(121 N. W. 83.)

TAYLOR-BALDWIN CO. v. NORTHWESTERN FIRE & MARINE INSURANCE COMPANY.

Opinion filed July 1, 1909.

Insurance — Policy — Waiver of Conditions.

Plaintiff, Taylor-Baldwin Company, a corporation, was the owner of a building and stock of goods located in what is called the old town of G., which it insured in defendant company. Afterwards, and contrary to the provisions of the policy it removed the property insured to the new town of G., four miles distant, obtained additional insurance, and installed a gasoline lighting plant. After the removal to the new location, the plaintiff delivered the policy to one Robinson, who was the legal soliciting agent of defendant, and requested him to have the insurance company make an indorsement on the policy to cover the property at its new location. Through a misunderstanding, Robinson sent the policy to defendant at its home office, with the written request that it cancel the same, which the company did, and retained the policy, but did not notify the plaintiff. The building and stock of merchandise were afterwards destroyed by fire caused by the gasoline lighting plant. The plaintiff made proofs of loss and sent them to defendant. The proofs showed that the property was destroyed at its new location, the amount of additional insurance obtained, and that the fire was caused by a defective gasoline lighting plant. The company returned the proofs with a letter denying any liability on the ground that the policy had been canceled before the fire.

Held, that the rejection of the claim on the ground stated in defendant's letter did not constitute a waiver of the conditions of the policy.

Appeal from District Court, Grand Forks county; *Chas. F. Templeton*, J.

Action by the Taylor-Baldwin Company against the Northwestern Fire & Marine Insurance Company. Judgment for Plaintiff, and defendant appeals.

Reversed.

Ball, Watson, Young & Hardy, for appellant. *W. S. Stambaugh*, for respondent.

CARMODY, J. This action is based upon a fire insurance policy. The case was tried by the court without a jury. The facts are substantially as follows: The plaintiff is a corporation and as such was engaged in the mercantile business at the old town of Garrison, in McLean county, until September 1, 1905, and thereafter at

the new town of Garrison, four miles distant therefrom. The defendant is a corporation engaged in fire insurance business. In April, 1905, the plaintiff owned a frame store building and a stock of merchandise contained therein, all situated in the old town of Garrison. On April 17, 1905, the defendant issued its policy of insurance on said property for one year for $2,300, to wit, $2,000 on the merchandise and $300 on the building. The insurance was solicited by D. P. Robinson, who was defendant's local soliciting agent at Coal Harbor. In August and September, 1905, the store building and merchandise were moved to a point four miles distant, to what is called the "new town of Garrison," and the store building and stock were located at that point upon lots 11 and 12, in block 11; the merchandise being in part in the old store building and in part in a new store building adjacent thereto. On November 14, 1905, after its removal to the new town of Garrison, the store building and stock of merchandise were destroyed by fire caused by a defective lighting plant which plaintiff had installed upon the premises, and which was used for lighting the building. The defendant's policy of insurance described the location of the property insured at the old town of Garrison and insured the plaintiff on said property "while located and contained as described herein and not elsewhere." The property in fact was destroyed at the new town of Garrison, four miles distant. The policy contained a provision which rendered it void in case the defendant took out additional insurance, or if illuminating gas or vapor was generated in the building or adjacent thereto for use therein. Gasoline was generated for use in the building at its new location and was the cause of its destruction. The plaintiff also took out additional insurance. No permit therefor was obtained, and no permission was obtained for the use of gasoline. On October 3, 1905, the plaintiff delivered the policy to Robinson for transmittal to the defendant at its home office. It was its purpose to have Robinson request an indorsement to cover the property at its new location; but Robinson understood that the plaintiff desired to have the policy canceled, and that it intended to take out other insurance at a later time. On October 15, 1905, Robinson sent the policy to the defendant at its home office, with a written request that the defendant cancel the same. On October 18, 1905, the defendant complied with such request and canceled the policy and entered a record of its cancellation upon its books, and made out a statement of the return premium, and has since said date had such

canceled policy in its possession. Thereafter, and subsequent to the fire, it sent to Robinson the amount of the return premium, and the same was tendered to plaintiff. On January 9, 1906, the plaintiff sent a written proof of loss to the defendant. Said proof of loss contained a statement that at the time of the fire there was additional insurance upon said property in the Home Insurance Company of New York, in the sum of $1,500 on the building, and in the sum of $3,600 on the stock of merchandise. That in said proof of loss was contained the following statement: "Building and stock moved to lots 11 and 12, block 11, Garrison, McLean county, N. D., and agent of company notified on or about October 3, 1905." And also the following in reference to the fire: "Fire occurred on the 14th day of November, 1905, about the hour of 7 o'clock p. m. Cause of fire defective gasoline lighting plant." Defendant immediately returned said proof of loss with a letter stating that it denied "any liability under the policy, as same was canceled on October 18, 1905, and the fire occurred on November 14, 1905." The plaintiff did not request Robinson to alter the policy so as to cover the property at its new location, and he had no authority to make such alteration. No change in the policy as originally issued was ever made. From the foregoing facts the court concluded as matter of law that the defendant was liable and directed the entry of judgment, from which this appeal was taken.

The only question is: Do the facts herein stated sustain the judgment? Respondent contends that defendant, by returning to plaintiff its proof of loss stating that it denied any liability under the policy, as the same was canceled on October 18, 1905, and the fire occurred on November 14, 1905, waived the following defenses: "First that the insured property was removed to the new town of Garrison, a distance of four miles, and no permit or indorsement upon said policy was obtained from the defendant providing that said policy should cover the risk in the new location. Second, that the fire which destroyed the property was caused by a defective gasoline lighting plant, which plaintiff had installed upon the premises upon which the store building was situated, and which was used by the plaintiff in lighting said building; that the use of such lighting plant was prohibited by the provisions of the policy, and no permission for this use was obtained from the defendant or indorsed on the policy sued on. Third, that the plaintiff had obtained other insurance upon the property, without notice to the defendant and

without permission so to do from defendant indorsed upon the policy." And the only defense available to defendant was that the policy had been cancelled before the fire, and says: "It may be conceded that, unless defendant has waived and is estopped to plead the defenses, each of them is a complete defense to an action on the policy." And contends that if an insurance company, with knowledge of all the circumstances attending a loss, undertakes to give specific reasons for denying liability, this will operate as a waiver of, or estop the company to assert, other causes of complaint, and the company cannot, when sued on a policy, set up any additional grounds of defense than those specified. Thus, if a company sets up one ground of forfeiture as a defense to an action on a policy, and denies liability on this ground alone, it thereby waives all other known grounds of forfeiture or breaches of the conditions of the policy, and cites the following cases to sustain its contention: Brink v. Insurance Co., 80 N. Y. 108; Titus v. Insurance Co., 81 N. Y. 410; Kiernan v. Insurance Co., 150 N. Y. 190, 44 N. E. 698; Smith v. Insurance Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; Douville v. Insurance Co., 113 Mich, 158, 71 N. W. 517; Western & Atlantic Pipe Lines v. Insurance Co., 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703; Geo. Home Ins. Co. v. Allen, 128 Ala. 451, 30 South. 537; Moore v. Insurance Co., 38 Wash. 31, 80 Pac. 171; McCormick v. Insurance Co., 163 Pa. 184, 29 Atl. 747; Johnson v. Insurance Co., 1 N. D. 167, 45 N. W. 799.

We think most of these cases are distinguishable from the case at bar. In Brink v. Insurance Co., supra, defendant received the proofs of loss without objection, retained them, examined the insured in respect to them, and refused to pay the loss on the ground of fraud, and so declared to the insured. Thereupon an action was commenced. At the trial the company failed to prove the charge upon which it relied, and then sought to raise the question of the time of filing the proofs of loss. The court held it was estopped from so doing, and used the following language: "They may refuse to pay without specifying any ground, and insist upon any available ground; but if they plant themselves upon a specified defense, and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expense in consequence of it. If a company intends to avail itself of the technical objection that the proofs are not filed in time, common fairness requires that it should refuse to receive them on that

ground, or at least promptly notify the assured of their determination; otherwise the objection should be regarded as waived."

In Titus v. Insurance Co., supra, there was a mortgage on the premises payable to plaintiff, who, without the knowledge of the ininsured, procured additional insurance. There was also a small judgment against the insured which was not disclosed in the application. The policy contained a provision that it should be void if foreclosure proceedings should be commenced against the insured property. The policy contained provisions for its renewal. After the policy was issued, and before its renewal, the judgment was paid. The policy contained a provision that the insured should, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe to such examinations when reduced to writing. The mortgagee commenced foreclosure proceedings. The court used the following language: "After the fire, and after the defendant had notice of the proceedings, it required the insured to appear before a person appointed by it for that purpose, to be examined under the clause in the policy hereinbefore mentioned, and he was there subjected to a rigorous inquisitorial examination. It had the right to make such examination only by virtue of the policy. When it required him to be examined, it exercised a right given to it by the policy. It then recognized the validity of the policy and subjected the insured to trouble and expense, after it knew of the forfeiture now alleged, and it cannot now therefore assert its invalidity on account of such forfeiture. * * * But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived."

In Kiernan v. Insurance Co., supra, the court said: "An election by the company to insist upon the forfeiture of a fire insurance policy for a breach of its conditions must be asserted within a reasonable time after acquiring knowledge of the breach." In this case there was a chattel mortgage on a portion of the property. After the fire, with full knowledge of the chattel mortgage, the insurer had an appraisement made which the insured refused to accept and brought an action on the policy. The court held the insurer could not set up the chattel mortgage as a breach of the contract. The

negotiations covered considerable time. The defendant made an appraisement of the property destroyed, made proofs of loss, and asked plaintiff to swear to them, which he refused to do, and he himself made proofs of loss which he delivered to the defendant, who retained them several months, made offers of settlement to the plaintiff, and raised no question whatever as to the chattel mortgage. The court said: "If the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it intended to 'abandon or not to insist upon the particular defense afterward relied upon,' a verdict or finding to the effect establishes a waiver, which, if it once exists, can never be revoked. During all the negotiations, there was neither act done nor word spoken by any officer or agent of the company indicating an intent to rely upon the breach of warranty, or discriminating in any way against the property to which the warranty related. The policy was treated as valid in every respect, and the only questions raised related to values. The preparation by the defendant of proofs of loss, based upon the award and including the mortgaged property, showed an intention to waive the forfeiture and to rely upon the appraisal. There was no condition suggested, nor right reserved, nor even an allusion made to the possibility that the company might refuse to pay anything on account of the property in the mortgage. It did not deny its liability to pay for that property until after all negotiations had ceased, and this action was about to be commenced. The officer who prepared and tendered the proofs of loss represented the company, and what he intended at the time the company is presumed to have intended. Unless his intention was to pay the loss on the mortgaged property as well as the rest, why did he insert it in the proofs of loss? Why did he ask the plaintiff to swear to a loss upon property that he did not intend to pay for? Why did he treat one kind of property the same as another, unless he intended to waive the breach of warranty? The rejection of the proofs of loss solely for the reason that they were not based upon the award, without saying anything about an intention to forfeit, indicates that no such intention existed."

In Smith v. Insurance Co., supra, the policy provided that it would be forfeited if mechanics be employed in building, altering, or repairing the within-described premises for more than 15 days at any one time, or if there be kept, used, or allowed on the above described premises benzine, naphtha, or other explosives. Painters

were employed to paint the building and used gasoline torches to burn off the old paint. The gasoline used in these torches was kept in a five-gallon can in the building. After the fire and proofs of loss the defendant refused to pay on account of the storage of gasoline in the building. On the trial the defendant attempted to set up an additional defense that mechanics were employed in repairing the building at the time of the fire in violation of the conditions of the policy. The court held it was estopped, and said: "Common painters are not 'mechanics' within the meaning of such word in a policy which provides that the policy shall be void if 'mechanics' be employed in repairing the building for over a certain length of time without the consent of the insurer. * * * Where the insurer, after thoroughly examining the loss, and being aware at the time of the loss that painters were at work on the building, denies its liability solely on the ground that gasoline was stored in the building without its consent, it cannot set up as a defense that the policy was avoided by permitting painters to work on the building without its consent, in violation of the condition in the policy." The court further held: "The storage of gasoline in the building for the purposes aforesaid was not a violation of the conditions of the policy." Hence it was not necessary to a decision of the case to hold that the company waived the defense that mechanics were employed on the building, and it is at most only a dictum.

In Douville v. Insurance Co., supra, the defendant pleaded the general issue, and gave notice that plaintiff was not the owner of the property described in the insurance policy; second, that said policy had been cancelled; third, that the policy of insurance contained a statement that there was no incumbrance upon the property, when, in fact, there was an incumbrance of $500. The court held that the policy had been cancelled and the defendant was not liable, but further said: "The record discloses very clearly that, whenever anything was said to any of the officers of the company about settling or adjusting the loss, they insisted the company was not liable, and assigned as a reason why it was not liable that the policy had been cancelled, and were estopped from asserting any other defense." And said: "Generally, a refusal by the company to pay, or a denial of its liability, before any preliminary proofs are made, as required on the face of a policy, whereby the insured is induced not to comply with the conditions of the policy in that respect, is in law a waiver of the conditions of the policy requiring such proofs to be

made." It will be readily seen from the foregoing language that it has no application to the case at bar.

In Western & Atlantic Pipe Lines v. Insurance Co., supra, the company insured oil in an iron tank on the premises of the plaintiff which was removed a distance of 300 or 400 feet by a flood. The insurer resisted payment on the ground that the oil was not insured at the place it was destroyed. On the trial it attempted to introduce another defense that the plaintiff was not the owner of the oil. The court said: "The supplemental defense, afterwards sprung upon the plaintiff, that it was not the owner of the oil, might well be disposed of by saying it came too late; but it was not necessary to decide that question, the jury having found that plaintiff was the owner of the oil."

In Georgia Home Ins. Co., v. Allen supra, the defendant pleaded a so-called "iron-safe clause," requiring the assured to keep a set of books and inventory securely locked in a fireproof safe at night and at times when the store was not actually opened for business. The court said: "An iron-safe clause in a policy of insurance, requiring the assured to keep a set of books and inventory of the stock, which shall be kept locked in an iron safe at night and at other times when the store is not open for business, is a valid condition and binding upon the assured, the breach of which will avoid the policy unless it is waived by the insurer." And further said: "An adjuster of an insurance company, with full power to make examinations, investigations, and adjustments of a loss, has authority to waive the conditions of the policy; and if such adjuster, with full knowledge of the breach of the conditions of the policy of the insured, enters upon the investigation and adjustment of the loss, and treats the policy as valid and subsisting, any defense the insurance company had to the policy, by reason of the breach of the conditions, will be deemed to have been waived."

Moore v. Insurance Co., supra, was an accident policy. The company refused to recognize the claim on the ground that the insured did not notify it of the injury within 10 days, as provided in the policy. The company resisted payment, and nonsuit was granted on the ground that the insured did not furnish proofs of his injury within the time limited after giving notice to the company that he had received an injury. There was evidence introduced at the trial tending to show that the notice was furnished. Letters written by the company were introduced denying liability solely on the ground

that notice was not given of the accident. Held, defendant was estopped from urging the defense that the plaintiff did not furnish proofs of his injury within the period limited after giving notice to the company that he had received an injury. While this case sustains somewhat the contention of the plaintiff, we think it is distinguishable from the case at bar, as, by the terms of the accident policy, proofs of injury were to be furnished after the insured gave notice to the company of his injury. He claimed to have given such notice. The company denied having received it and refused payment on that ground. Hence giving proofs of the injury when the company denied receiving any notice of it would have availed nothing.

In McCormick et al. v. Insurance Co., supra, the policy provided that the lumber covered by the insurance should not be kept within 300 feet of a mill. After the fire defendant's adjuster visited the premises and attempted to make a settlement with the insured, stated that he was satisfied that the lumber was kept 300 feet from the mill, but suggested that there was little if any lumber in the yard at the time the fire occurred. That thereafter defendant's general agent wrote plaintiffs saying he could prove that none of the lumber destroyed was plaintiffs'. That plaintiffs, in answer, wrote that defendant's adjuster had waived formal proofs of loss, and, if defendant was not satisfied with his action, to say so now, so that plaintiffs might put themselves in proper shape. And that the general agent replied that he was satisfied plaintiffs had no lumber among that burned and that they might sue at once. Held, a waiver of the space clause as a defense. Judge Mitchell, of the Pennsylvania court, dissented from so much of the opinion as implied there was any sufficient evidence of waiver.

Johnson v. Insurance Co., supra, was a hail insurance policy. It provided, among other things, that no payment would be made until requisite proofs, duly sworn and certified to by the assured and one disinterested party, were received at the office of the company. The plaintiff sent to defendant by registered mail a statement of his losses, asked to have the loss submitted to appraisers, as provided in the policy; but the defendant neglected to do so. The policy was in force for six months. Not having received any answer to his letter notifying the company of his loss, he caused the letter marked "Exhibit A" to be written, to which the letter marked "Exhibit B" is an answer. They are, respectively, as follows:

Exhibit A: "Larimore, Dakota, Dec. 16, 1885. The Dakota Fire & Marine Insurance Co., Chamberlain—Gentlemen: At the instance of Mr. W. E. Johnson, I write you in reference to his policy No. 514 for hail insurance in your company. Mr. Johnson has complied with the conditions imposed by your agent when here, and sent in his papers quite a long time ago. He also saw your general manager, Mr. English, in Grand Forks, about November 10th last, who promised to let him hear from the company upon his return. No word has yet been received by Mr. J., and the time, December 1st, wherein the policy promised final settlement for any loss shall be made, has passed. Mr. Johnson is thus kept in ignorance of your intentions, and is without a word of any kind from you. He desires me to say, if settlement for his loss is not made before January 1st prox., he will enter suit to bring about the same. Very respectfully, W. N. Roach."

Exhibit B: "Chamberlain, Dak., Dec. 22, 1885. W. N. Roach, Esq., Larimore, Dakota—Dear Sir: Replying to yours of the 16th inst. in regard to loss under policy 514, issued to W. E. Johnson, we beg to say we are in possession of some facts in regard to this insurance which, unexplained, would lead us to reject the loss, and resist its payment in court, if necessary, though this position we do not yet take, and hope we shall not be compelled to. Will give you definite answer as soon as, in due course of mail, we can receive answer to letter already written for further information in reference to this case. We do not ask you to wait on us but suggest that, upon receipt of information above referred to, if our attorney advises us that we are probably liable, or even that he is in doubt as to our liability, we shall at once adjust and pay the loss. Yours truly, A. G. Kellam."

The defendant did nothing further, and, on suit being brought, set up as defense failure to make proof of loss. Held, the letter of December 22d, marked "Exhibit B," was a waiver.

We think the correct rule is laid down in Cooley's Briefs on Insurance, vol. 3, p. 2681, Judge McClain on Fire Insurance, and Kerr on Insurance, as hereinafter quoted: "As stated, it is essential that an insurer shall have knowledge of the grounds of forfeiture not relied on in denying liability on specified grounds, if the action of the insurer is to be regarded as a waiver of the unassigned grounds. And it is also essential that the unassigned grounds be such that they could have been remedied or obviated had the insured known that

the insurer intended to rely thereon, and that the insured was so far misled or lulled into security by the silence as to such grounds that to enforce them subsequently would be unfair or unjust, as the whole doctrine depends on estoppel, the important feature of which is loss or injury to the other party by the act of the party to be estopped." Judge McClain, of the Iowa Supreme Court, says in his article on Fire Insurance (19 Cyc. 793): "It has been generally held that if the insurer, after a loss has occurred, claims a forfeiture for non-compliance with certain conditions of the policy, it cannot be heard afterward to assert further or different breaches as a defense. The authorities are by no means unanimous. Other holdings are more in accord with general principles of contract and estoppel in holding that the assertion of a forfeiture upon one ground does not, in the absence of an affirmative statement that other breaches are not claimed, amount to a waiver of a right to set up such further breaches." Kerr on Ins. 706 says: "The doctrine of waiver, as asserted against insurance companies, in connection with insurance contracts, to avoid the strict enforcement of conditions contained in their contracts, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce an action in reliance upon it and where it would operate as a fraud upon the assured if they were allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the party sought to be estopped from denying the waiver claimed, should be shown to have been appraised of all the facts, prior to or at the time of the alleged waiver." The following are some of the authorities that tend to sustain this rule: Northern Ins. Co. v. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; Smith v. Continental Ins. Co., 6 Dak. 433, 43 N. W. 810; Hubbard v. Mutual Reserve Life Ins. Co. (C. C.) 80 Fed. 681; Insurance Co. v. Wolff, 95 U. S. 326, 24 L. Ed. 387; St. Onge v. Insurance Co. (C.C.) 80 Fed. 703; Devens v. Insurance Co., 83 N. Y. 168; Weed v. Insurance Co., 116 N. Y. 106, 22 N. E. 229; Gibson Electric Co. v. Insurance Co., 159 N. Y. 418, 54 N. E. 23; Everett v. Insurance Co., 142 Pa. 332, 21 Atl. 819; McCormick v. Insurance Co., 163 Pa. 184, 29 Atl. 747; Cassimus v. Insurance Co., 135 Ala. 256, 33 South. 163; Robinson v. Insurance Co., 135 Ala. 650, 34 South. 18; Thompson v. Insurance Co., 11 N. D. 274, 91 N. W. 75, s. c. 13 N. D. 444, 101 N. W. 900; Vandervolgen v. In-

surance Co., 123 Mich. 291, 82 N. W. 46; Keet-Rountree Dry Goods Store v. Insurance Co., 100 Mo. App. 504, 74 S. W. 469; Kerr on Ins. pp. 714-716 and cases cited; Clements on Ins. pp. 436, 437. Kerr on Insurance p. 715 supra, says: "The rule is that, when an insurance company becomes aware that all rights under a policy have been lost, it cannot, for an indefinite period, disguise its purpose to resist payment of the loss by affirmative action which would lead the insured to believe that it admits its liability, and intends to discharge it. Thus an adjustment of a loss with full knowledge by the insurer of the violations of a condition of the policy, and without notifying the insured of an intention to insist upon the forfeiture, is a waiver of its rights to assert the forfeiture; and the collection of a premium for the insurance covering the loss; and the requirement of original proofs of loss, or the amendment of defective proofs; and a demand for arbitration."

In Insurance Co. v. Wolff, supra, the United States Supreme Court, through Mr. Justice Field, said: "The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions."

In Devens v. Insurance Co., supra, there was insurance on a boat. There was a breach of warranty, in that the owners kept it at a different place than that specified in the policy. The captain, while heating pitch, set the boat on fire. When proof of loss was presented to the defendant, it refused to pay on the ground that the fire was caused by the carelessness of the captain of the boat. On the trial it relied on the breach of warranty. Held, not an estoppel. In speaking of Brink v. Insurance Co., cited by respondent, Judge Andrews said: "The doctrine of waiver was, we think, properly applied in that case; but it should not be extended as to deprive a party of his defense, merely because he negligently or incautiously when the claim is first presented, while denying his liability, omits to disclose the ground of his defense or states another ground than that upon which he finally relies. There must in addition be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to

abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."

In Cassimus v. Insurance Co., supra, the insurance was on a stock of merchandise. The policy provided, among other things, that, if gasoline was stored in the premises, it vitiated the insurance, or if anything was kept on the premises that tended to increase the hazard. Upon receipt of proof of loss, the company denied liability on one ground, and when suit was commenced defended on two. The Supreme Court of Alabama said: "The fact that the defendant, upon the receipt of notice and proof of loss, denied any liability under the policy, stating at the time wherein its conditions had been violated in only one particular, did not prevent it from afterwards setting up in defense other and different breaches of the conditions of the policy, when it is not shown that the plaintiff was misled to his injury by the claim of non-liability on the particular ground stated."

Thompson v. Life Ins. Co. supra, was an action on a life insurance policy. The court said: "Waivers are sustained because the insured has been misled to his prejudice."

In most of the cases cited by respondent, the insurance companies, after the fire, by their acts led the insurer to believe that they were liable and intended to pay the loss. The case of Smith v. Insurance Co. tends to sustain respondent's contention; but, as hereinbefore stated, it was not necessary to decide the question of estoppel in that case, and it seems to have been at least partially overruled by the later case of Vandervolgen v. Insurance Co., 123 Mich. 291, 82 N. W. 46. It is plain to us that the plaintiff cannot prevail in this action. It could not have been misled by the letter of the defendant. Its position was in no way changed by such letter. The plaintiff previously procured the additional insurance, had removed the property, and installed the gasoline plant, which caused the fire. Defendant at the time it wrote the letter assumed that the policy had been cancelled, and, if it had been, of course, it was not liable. At the commencement of this action it appeared from the complaint that the plaintiff had no knowledge of the cancellation or attempted cancellation of the policy of insurance by defendant. This the defendant was not aware of at the time it wrote the letter returning the proofs of loss. Hence it was not estopped from pleading its other

defenses which the plaintiff concedes made the insurance void, but insists that defendant is estopped from making these defenses by reason of the letter hereinbefore mentioned. We think not. It at all times denied its liability, and plaintiff has in no way been misled by any act or statement of the defendant. It has done nothing under the policy; has exercised no right by virtue of it; nor has it required the plaintiff to perform any act which it was required by virtue of the policy to perform. The policy was void before the fire occurred, and was void by acts knowingly committed by plaintiff; and the letter of defendant denying liability on the ground that the policy had been cancelled did not revive it. If D. P. Robinson had carried out the instructions of the plaintiff and obtained from the defendant an indorsement on the policy, consenting and providing that the said policy of insurance should cover the building and personal property therein described, at its then location on lots 11 and 12, in block 11, of the new town of Garrison, would not have helped the plaintiff in this action, as the plaintiff never asked for any permission to obtain additional insurance or to use the gasoline lighting plant, which caused the fire. If the defendant had made the indorsement as the plaintiff intended it should, it would have known that the policy was not cancelled, and could, if it desired, have defended any action brought against it on the ground that it had not given plaintiff permission to obtain additional insurance or install the gasoline lighting plant.

The district court of Grand Forks county will reverse its judgment and enter a judgment dismissing the complaint. All concur.

Morgan, C. J., not participating. Chas. A. Pollock, Judge of the Third Judicial District, sitting by request.

(122 N. W. 396.)

THE STATE OF NORTH DAKOTA v. HORACE G. RUSSELL.

Opinion filed June 24, 1909.

Criminal Law — Jurisdiction of Police Magistrates — Waiver of Objection.

Whether a police magistrate of a city in a county wherein the county court has been given increased jurisdiction still retains jurisdiction to try and determine charges of misdemeanor is not decided; but, assuming for the purpose of this case that such jurisdiction had ceased on the granting of increased jurisdiction in the county court, it is *held*, that by failing to make objection to the jurisdiction of the magistrate, and by appealing from the judgment of the police court to the district court and participating in the trial in the district court and making no objection to its jurisdiction or to the jurisdiction of the police magistrate until after a verdict of guilty, the defendant waived all questions of jurisdiction not raised, and that it was error in the district court to grant a motion in arrest of judgment and discharge the defendant.

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

Horace G. Russell was convicted of assault. From an order granting a motion in arrest of judgment and discharging the defendant, the State appeals.

Reversed and remanded.

Seth W. Richardson and *W. H. Barnett*, for appellant.

Where a committing magistrate does not commit, but proceeds to try in matters where he has no jurisdiction to try, an appeal from his judgment of conviction gives jurisdiction to the appellate court. State v. Schuerman, 52 Mo., 165; State v. McCombs, 13 Ia., 426; Commonwealth v. Whalen, 17 N. E. 881; Commonwealth v. Tipper 58 Ky. 6; State v. McEvory 27 N. W. 273; Commonwealth v Harvey, 11 Mass. 420.

Jurisdiction of person can be had by consent of party; and appearing and contesting in a case in a court having jurisdiction of subject matter, confers full jurisdiction. Ledgerwood v. State, 33 N. E. 631; In re Blum, 30 N. Y. Supp., 396; State vv. Fitzgerald 51 Minn. 534, 53 N. W. 799, 12 Cyc. 196; State v. McEvory, 27 N. W., 273; State v. Reeves, 11 So., 296.

Appearance and answering charge waives objection to the jurisdiction of person. Aderhold v. Mayer, 12 So., 472; Comm. v. Herny, 61 Mass., 512; State v. Allison, 24 Pac. 964; Junction City

v. Keefe, 19 Pac. 735, State v. Kinney, 41 Ia., 424; Perteet v. People, 70 Ill., 171; State v. Meader, 47 Vt., 78.

No appearance by defendant.

SPALDING, J. This is an appeal by the state from an order granting respondent's motion in arrest of judgment on conviction of assault and discharging respondent. The record discloses that Martin Ryan was, at the time the proceedings involved in this appeal were had, the duly elected and acting police magistrate in and for the city of Fargo. The respondent, Russell, was complained against and charged with committing the crime of assault and battery. Upon the complaint filed with him, Ryan issued a warrant for the arrest of respondent, who was arrested thereon. The case was tried on the 10th day of April, 1908; both parties submitting their evidence without objection or motion of any kind with respect to the jurisdiction of said court. The respondent was found guilty of the crime charged and fined $25 and costs. He thereupon gave notice of appeal and duly filed such notice and the usual undertaking. The next succeeding term of district court at which a jury was in attendance was the general term which began on November 4, 1908. At such term the state's attorney moved the trial of the case at bar. Both parties appeared, and, without motion or objection touching the jurisdiction of the court to hear and determine the issues, the action was submitted to a jury, which thereafter returned its verdict finding respondent guilty of the crime of assault. After the filing of such verdict, respondent, by his attorneys, orally informed the court that he would move in arrest of judgment upon jurisdictional grounds, and upon the 25th day of November, 1908, such motion was made and filed, and the court, by an order entered on December 5, 1908, granted respondent's motion for arrest of judgment and discharged respondent. From this order the state duly appealed to this court. Respondent filed no brief and is unrepresented. The order held the police magistrate without jurisdiction for the reason that the county court of Cass county has increased jurisdiction, and that, under section 111 of the Constitution, the jurisdiction possessed by police magistrates, in cases of misdemeanors where county courts have not increased jurisdiction, had ceased, and that therefore the police magistrate proceeded without jurisdiction over the defendant, and that none was conferred upon the district court by appeal.

It cannot be controverted that the district court had jurisdiction of the subject-matter—that is, of the offense charged—and the only question necessary to be determined on this appeal is whether the proceedings were such that the district court acquired jurisdiction of the person of the respondent. Section 103 of the Constitution grants the district court original jurisdiction of all causes both at law and equity. Section 9561, Rev. Code 1905, grants the district court common-law jurisdiction and authority for the redress of all wrongs committed against the laws of the state. Section 9564, Rev. Code 1905, gives the district court power to hear, try, and determine, upon information or indictment of the offender as provided by law, prosecutions for crimes or public offenses against the laws of this state, and upon conviction to impose punishment, etc. These provisions give the district court original jurisdiction of misdemeanors. State v. Finder, 10 S. D. 103, 72 N. W. 97. The respondent did not raise the question of jurisdiction in the police court, neither did he suggest it in the district court pending or during the trial. It is well established that jurisdiction of the person, in both civil and criminal cases, may be obtained by consent of the defendant, and that by being present in person and contesting the issues arising in the case, whether civil or criminal, jurisdiction is conferred upon the court of the person, regardless of previous irregularities of process or in the method by which defendant is brought into court; that jurisdiction is conferred by the defendant's presence and participation in the trial, unless special objection is made thereto. Such objection must be seasonably made or he is held to have waived it. It is held in Ledgerwood v. State, 134 Ind. 81, 33 N. E. 631, that jurisdiction over the person is complete when the appellant comes into court, on being arrested, and voluntarily pleads guilty. In Re Blum, 9 Misc. Rep. 571, 30 N. Y. Supp. 396, the court holds that defendant, having demanded and stood trial without objection, he cannot be heard, after conviction, to claim the court had no jurisdiction of his person. See State v. Fitzgerald, 37 Minn. 26, 33 N. W. 788; 12 Cyc. 196; State v. McEvoy, 68 Iowa, 355, 27 N. W. 273; State v. Sarratt, 14, Rich. Law (S. C.) 29; State ex rel. Poul v. McLain, 13 N. D. 368, 102 N. W. 407; State v. Kinney, 41 Iowa, 424; Perteet v. People, 70 Ill. 171; State v. Meader, 47 Vt. 78; State v. Watson, 30 Kan. 281, 1 Pac. 770.

The other questions raised in this case are of great importance to those counties in which the county courts have been given increased jurisdiction. We deem it inadvisable, in view of the fact that no argument was made or brief submitted in the case at bar on behalf of the defendant to determine whether a police magistrate loses jurisdiction to act as a committing magistrate, or to try misdemeanors, in such counties. It is enough for the purposes of this case to decide the one question we have passed upon and leave the more important question for consideration after it has been fully presented by both sides, if it should ever be raised again. We are satisfied that, even though the police magistrate may not have had jurisdiction to try this respondent, the respondent is in no position to raise the question of jurisdiction at this time, that by his course of procedure he waived his right to do so, and that the district court, having jurisdiction of the subject-matter, obtained by respondent's conduct complete jurisdiction to try and determine the case.

The order appealed from is reversed, and the case remanded for further proceedings in the district court in accordance with law. All concur, except Morgan, C. J., not participating.

(121 N. W. 918.)

CHRIST J. ZELLMER, *v.* ASA T. PATTERSON AND SMITH LAND COMPANY, (INCORPORATED).

Opinion filed June 26, 1909.

Specific Performance — Pleading — Actions — Defense — Demurrer.

This action was brought for specific performance of a contract to secure title to forty acres of land through the location of government scrip, and to enjoin the defendant Patterson from conveying any part of the forty acres to the defendant Smith Land Company, and to cancel a contract alleged to have been made by him to convey some portion of such tract of land. The complaint alleges that he was employed to secure and locate scrip for plaintiff, and that he agreed to have the power of attorney which went with the scrip, authorizing the holder of the power to sell and deed, run to plaintiff, but that in violation of the contract he had taken it to himself. To a defense which stated that defendant Patterson had conveyed by warranty deed to the plaintiff thirty-seven acres of the forty, and that such deed conveyed title in fee simple to the plaintiff, and had been accepted by him, and setting forth a contract

executed by plaintiff and defendant Patterson, wherein plaintiff acknowledged payment by Patterson for three tracts of one acre each in such forty acres, and agreed to convey the same to Patterson, plaintiff demurred. *Held*, that the allegations of the answer referred to standing admitted on demurrer thereto show title in plaintiff to all that part of the forty-acre tract belonging to him, and that (as far as the pleadings show) his only ground of complaint is that he received title through Patterson instead of direct from the vendor of the scrip, and, further, that a court of equity, looking to substance rather than to form, will not take cognizance of this variance in the method of obtaining title from that alleged to have been agreed upon, and the part of the answer demurred to states a defense.

Specific performance by Christ J. Zellmer against Asa T. Patterson and another. From an order sustaining a demurrer to a paragraph of the answer of the defendant Patterson, he appeals.

Reversed.

Newton & Dullam, for appellant. *Nels Larson* and *W. F. Corrigan*, for respondent.

SPALDING, J. This is an appeal from an order sustaining a demurrer to one paragraph of defendant's answer. Both the complaint and the answer are of great length. To a complete understanding of the case, it would be necessary to set them forth in full, but its importance does not warrant doing so. The complaint alleges the employment of the defendant as an attorney to procure and locate scrip upon 40 acres adjoining the townsite of Gackle. This 40-acre tract had already been platted. It attempts to detail the reasons why the respondent platted it and wished to obtain title, and charges knowledge on the part of the defendant of such reasons. It alleges the payment to appellant of $500 with which to purchase the scrip and to pay in full for his legal services pertaining to the purchase and location, and alleges that appellant purchased the scrip and located it upon such 40 acres about the 2d day of July, 1904, but that he was negligent in performing the duties for which he was employed, and did not attend to having the scrip forwarded to the General Land Office in Washington or getting a patent issued, by reason of which negligence respondent was compelled to employ other attorneys at great expense; that the scrip was obtained from one Frank C. Reid; and that in connection with the scrip were two powers of attorney, one authorizing the location of the scrip and the other authorizing the attorney in fact to take

possession of the land on which the scrip was located and sell and convey the same, and do all other acts which the principal could do had the power not been given, and to do other things usually authorized in such powers of attorney. It is also alleged that the name of the attorney in fact was left blank in the last-named power of attorney, and that it was understood between respondent and appellant that respondent's name should be inserted therein as attorney in fact for Reid; that, in violation of his agreement, appellant inserted his own name in such power of attorney, and refused to deliver the papers relating to such transaction to respondent, and recorded such power of attorney in the office of the register of deeds in Logan county, and entered into a contract with the defendant Smith Land Company, whereby he agreed to sell part of such tract of land to said company, and that said company has, or claims to have, some right, title, or interest therein which is junior, inferior, and subordinate to the rights of the respondent. The prayer for relief is as follows: "Wherefore the plaintiff demands judgment against the defendant Asa T. Patterson, decreeing the specific performance of the contract entered into between said plaintiff and the defendant Asa T. Patterson on the 28th day of June, 1904; that the said power of attorney, placed on file and of record in the register of deeds' office in and for the county of Logan and state of North Dakota, on the 9th day of October, 1906, at 3:30 o'clock p. m., which is referred to in this complaint as 'Exhibit G,' be adjudged and decreed to be void and of no force and effect, and that all deeds, instruments, contracts of every kind, name or nature which have been signed, executed, or delivered by the said defendant Asa T. Patterson, or any one acting under or through him, and for a further order and decree that said plaintiff's right, claim, and title to said premises is first and superior to that of the defendant the Smith Land Company, together with the costs and disbursements of this action, and such other relief as may be just and equitable." The answer of the appellant admits the employment, but denies that he was ever employed in the premises as an attorney at law, and asserts that he was employed only to purchase and locate the scrip as a dealer therein; denies that there was ever any understanding that respondent's name should be inserted in the power of attorney; admits many of the allegations, but contains a general denial as to all things not admitted, specifically denied or qualified; denies that he in any way has neglected to carry out the arrangement between

him and respondent, and alleges that the scrip was purchased and received by him in trust, not for the use of respondent alone, but for the benefit of all persons interested in the 40-acre tract, including himself to the extent of three tracts of one acre each; and alleges that he was authorized to insert his own name in the power of attorney mentioned. Appellant in his answer also admits that he was paid by cash and check $500, the purchase price of the scrip and for his services in procuring and locating it, and that he has contracted to sell to the Smith Land Company three tracts of one acre each of said 40 acres.

Paragraph 13 of the answer reads as follows: "Alleges: That on the 28th day of June, 1904, at Bismarck, the plaintiff and this defendant entered into an agreement in writing, in the words and figures following, to wit: 'For value received, I, C. J. Zellmer, of Kulm, N. D., hereby sell and agree to convey to A. T. Patterson, of Bismarck, N. D., three one acre tracts in such location as A. T. Patterson may select out of the Northeast quarter of the Southeast quarter of Section six (6) in Township One Hundred Thirty-six (136), North of Range Sixty-seven (67), West of the 5th P. M., provided that such selection shall not be made for lands now occupied by buildings. Dated June 28, 1904. [Signed] C. J. Zellmer. [Signed] A. T. Patterson.' Which said instrument was then and there duly acknowledged before M. P. Skeels, Esq., a notary public, and that, by virtue of the provisions of the said agreement, this defendant on or about the 23rd day of June, 1906, made a selection in writing of the said tracts mentioned in said contract, and in accordance with the terms thereof, and then and there duly acknowledged the same so as to entitle it to be recorded, and thereafter, on the 6th day of June, A. D. 1906, the same was duly recorded in the office of the register of deeds for Logan county, N. D., and a true copy thereof duly delivered to the plaintiff on the 7th day of July, 1906. That thereupon, on the 24th day of October, 1906, this defendant duly conveyed by a deed of warranty to the plaintiff as grantee all of said land upon which said scrip had theretofore been located, except the three tracts of one acre each, as designated in the agreement as hereinbefore set forth relating thereto, and mentioned and described in this defendant's selection made in pursuance of such agreement, and that the plaintiff then and there received and accepted the same and since said time has retained said deed, and that said deed fully invested the fee-simple title to the land

therein described and conveyed in the plaintiff. That, by reason of the premises and the facts hereinbefore set forth and shown, the plaintiff is estopped from in any way claiming or asserting title to the said three tracts belonging to this defendant, and hereinbefore described." To paragraph 13 respondent interposed a demurrer on the ground that said part of said answer is insufficient in law upon the face thereof to constitute a defense to the complaint herein. This demurrer was sustained. From the order sustaining it defendant appeals. There is much unnecessary matter in the complaint and likewise in the answer. Many of the allegations in the complaint would be proper in pleadings in an action for damages for breach of contract, but seem to us to have no place in this action when read in the light of the prayer for relief. From the answer as a whole we are unable to determine whether paragraph 13 was intended as a part of one defense or as a separate defense distinct from the remainder of the answer. Unquestionably its allegations would have been properly included as a part of one defense with the balance of the answer; but inasmuch as it has been treated by respondent, and evidently by the trial court, as a separate defense, we shall treat it as though specifically so pleaded. It may be noted that the demurrer raises the broad question of a defense, and not simply the question as to whether the facts pleaded constitute an estoppel.

Let us inquire what the respondent was seeking to secure if we can determine this from the pleadings. He first asks for "specific performance." We are not perfectly clear as to what he means by this demand; but, when read in connection with all the facts pleaded and the remainder of his prayer, we think this part of the prayer is limited by the remaining portions of the prayer, and that he is seeking to get the title to the 40 acres described, and that he considers it necessary, in order to do so, to have the power of attorney which has been recorded adjudged void, and that appellant deliver to him another in its place. He does not charge appellant with having given deeds or conveyances of any kind to any part of the premises except one to the Smith Land Company. We therefore interpret his prayer that all deeds, instruments, and contracts, of every name, nature, and description, which may have been signed, executed, or delivered by defendant Patterson be declared void and of no effect, to refer to the contract which he charges Patterson with having entered into to convey a portion of the 40 acres to the Smith Land

Company, and that he means thereby to secure the cancellation of that contract. He next prays that the defendant, by which we suppose he means Patterson, execute and deliver such instrument, or instruments, as may be necessary to remove any cloud upon the said premises, caused by his acts. The contract to the Smith Land Company must be meant by this also, because he pleads no facts showing any cloud upon any part of the premises, except the contract to the Smith Land Company already referred to. The final prayer that his title to the premises be decreed to be superior to that of the Smith Land Company is in harmony with his prayer that the contract with it be adjudged void. These separate parts of the prayer for relief simply go toward the general object sought of securing title to the 40 acres which respondent claims belongs to him under the contract. How are these facts and the prayer for relief met by the allegations of paragraph 13 of the answer?

1. A contract is set out as entered into by and between the appellant and respondent, not alleged to be any part of the consideration for appellant's services—in fact, any such claim is negatived by the pleadings—but wherein respondent acknowledges payment for three tracts of land of one acre each included in the 40 acres, and agrees to convey the same to appellant, and appellant alleges that he has selected the same in accordance with the terms of the contract. On demurrer these allegations stand admitted.

2. It alleges that appellant has executed and delivered to respondent a valid warranty deed conveying by title in fee to respondent the remaining 37 acres, and that respondent has received, accepted, and retained the same. He accounts for the title to the whole 40-acre tract by showing that he has retained three acres to which he himself was entitled under the contract, and that respondent has acquired and accepted title to 37 acres; that being all that belonged to him or in which he has any interest. These facts all stand admitted by the demurrer, and it is thereby also admitted that such deed fully invested the fee-simple title to the 37 acres described in the respondent. The respondent was in no way interested, legally at least, by reason of any facts shown in the pleadings, in these three tracts of one acre each. He had no ground for complaint because the deed did not come directly from Reid to him so as to admit of his redeeding the three acres to Patterson. If Patterson was satisfied with the title which he acquired, or may acquire,

to the three acres in this manner, Zellmer has no reason to complain; neither had he, as far as the pleadings show, of his title to the 37 acres. All he shows in his complaint is that he has a right to the title to the 40 acres. Paragraph 13 shows that he has received the title, and accepted it, to 37 acres, and that he is no longer interested in the other three acres, and has no equitable right to the title thereto. The whole case therefore resolves itself down to this: That respondent claims that the power of attorney should have been filled in with his name as attorney in fact for Reid; that it was completed by inserting Patterson's name as attorney in fact for Reid; and that, by reason of the latter fact, Patterson will, if he has not already done so, perfect his title to the three acres by a deed from Reid by Patterson, as Reid's attorney in fact, to Patterson as grantee, or to Patterson's assignees if he has assigned the contract. Whereas, if Zellmer's version of the transaction is correct, Reid, as grantor, would have deeded by Zellmer, his attorney in fact, to Zellmer as grantee, 37 acres, and in the same manner, Reid by Zellmer, as grantor, would have deeded the three acres to Patterson as grantee. This variance, however, is one of form rather than of substance, and as far as the pleadings show, does not make the slightest difference in the character or quality of the title or the quantity of land obtained by Zellmer. We are unable to see that Zellmer has been deprived of any substantial rights such as a court of equity can restore to him, and we are of the opinion that paragraph 13 states a defense to the respondent's complaint. If plaintiff has a cause of action against Patterson for damages for breach of contract or duty as an agent or attorney, he can seek relief in an appropriate action, and, if he desires to controvert the allegations of the answer, including paragraph 13, he still has the opportunity to do so. Our decision does not stand in his way.

The order of the district court appealed from is reversed. All concur.

MORGAN, C. J., not participating.

(122 N. W. 381.)

GEORGE E. KUNKEL ET AL. v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Opinion filed April 29, 1909.

Rehearing June 12, 1909.

Railroads — Death of Person on Track — Licensee.

1. In an action to recover damages for death of plaintiff's father, caused by a train on defendant's track backing against him while he was on its right of way or track, it is *held*, under the evidence, that deceased was not a trespasser and defendant owed him the duty of ordinary care and diligence to avoid injuring him.

Same — Death of Person on Track — Contributory Negligence — Question for Jury.

2. *Held*, further, that the questions of the negilgence of defendant and the contributory negligence of the deceased were, under the evidence in this case, for the jury.

Negligence — Evidence — Presumption of Due Care by Decedent.

3. The law, out of regard to the instinct of self-preservation, will presume, prima facie, that a person who has suffered death by accident was, at the time, in the exercise of ordinary care and diligence, and this presumption is not overcome by the mere fact of the accident, even though no person saw it.

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

Action by George E. Kunkel and others against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Lee Combs, George K. Shaw, and *Alfred H. Bright*, for appellant.

One walking along a railroad track with the railroad company's invitation as others are permitted to so walk, is a licensee, for whose injury recovery cannot be had unless caused wilfully or by negligence so gross as to imply wilfulness. Heiss v. C. R. I. & P. Ry. Co., 72 N. W. 787; C. C. C. & St. L. Ry. Co. v. Tartt, 64 Fed. 823, 827; Johnson v. B. & M. R. R. Co., 125 Mass. 75; Wright v. B. &. M. R. R. 129 Mass. 440; Wright v. B. & M. R. R., 142 Mass. 296, 300; Sutton v. N. Y. C. & H. R. R. R. Co., 66 N. Y. Rep. 243; Atchison, Topeka & Santa Fe R. R. Co. v. Silas D. Parsons,

42 Ill. App. Ct. 93; Chenery v. Fitchburg R. R. Co., 160 Mass., 211; 22 L. R. A. 575; Daniels v. N. Y. & N. E. R. R. Co., 13 L. R. A. 248; Sheehan v. St. P. & D. Ry. Co., 76 Fed. 201; Ward v. So. Pac. Ry. Co., 25 Or. 433; 36 Pac. 166; Richards v. C. St. P. & K C. Ry. Co., 81 Ia. 42; 47 N. W. 63; Lingenfelter v. Baltimore & C., 154 Ind. 49; Burg v. C. R. I. & P. Ry., 57 N. W. 680.

Conjecture is not evidence. Marvin et al. v. Chicago M. & St. P. Ry., 47 N. W. 1123; Megow v. Chicago M. & St. P. Ry. Co., 36 N. W. 1099; Searles v. Manhattan Ry. Co., 101 N. Y. 661; 5 N. E. 66; Grant v. Penn. & N. Y. Canal & Ry. Co., 133 N. Y., 657; 31 N. E. 220; Taylor v. City of Yonkers, 105 N. Y. 202; 11 N. E. 647; Babcock v. Fitchburg Ry. 140 N. Y. 308, 319; 35 N. E. 596; Orth v. St. P. M. & M. Ry. Co., 50 N. W. 363; Thomas, Negligence, p. 582; The Nellie Flagg, 23 Fed. Rep. 671; Kaveny v. The City of Troy, 15 N. E. 726; Asbach v. Chicago B. & Q. R. R. Co., 37 N. W. 182.

Where the facts and conditions show, that if one had stopped to look with the care that the law imposes, he could have seen the approaching train, the presumption that the injured person, being dead, did his duty, is overcome. P. H. West v. N. P. Ry., 13 N. D. 221; 100 N. W. 254; C. R. I. & P. R. R. Co. v. Houston, 24 U. S. 542; Shalto v. Erie Ry Co., 121 Fed. 678; Freeman v. N. P. Ry. Co., 174 U. S. 763; C. R. I. & P. v. Still, 19 Ill. 508; C. & G. W. Ry. Co. v. Smith, 141, Fed. 930; Guhl v. Whitcomb, Recvr., 85 N. W. 142; Bertelson v. C., M. & St. P., 40 N. W. 531; Reynolds v. G. N. Ry. Co., 69 Fed. 809; Steves v. Oswego & Syracuse Ry. Co., 18 N. Y. 422; Durbin v. Oregon & Nav. Co. Ry., 17 Pac. 5, Atchison, T. & S. F. Ry. Co. v. Withers, 77 Pac. 542; Van Winkle v. N. Y. C. & St. L. Ry., 73 N. E. 157; Morford v. C. I. & L. Ry. 63 N. E. 857; Rollins v. C., M. & St. P. Ry. Co., 139 Fed. 639; Carleson v. C. & N. W. Ry. Co., 105 N. W. 555.

Where there are two ways, one safe the other hazardous, to choose the latter is negligence. Gulf & C. R. Co., v. Mathews. 15 Tex. Ct. Rep. 957; 93 S. W. 1068; Coy v. Mo. Pac. Ry. Co., 96 P. 468.

J. J. Youngblood and *George A. Bangs,* for respondent.

If a railroad company permits the use of a path across its tract for years, it assumes the duty of reasonable care in the operation of its trains up to and over such track, including such signals and

watchmen as might be reasonably necessary. Union Pacific Railway Co. v. Connolly, 109 N. W. 368; Bishop v. C. M. & St. P. Ry. Co., 4 N. D. 536; 62 N. W. 605; Coulter v. Gt. N. Ry. Co., 5 N. D. 568; 67 N. W. 1046; Johnson v. Gt. N. Ry. Co., 7 N. D. 284; 75 N. W. 250; Reifsnyder v. C. M. & St. P. Ry. Co., 57 N. W. 692; Schindler v. Co., 49 N. W. 670; Barry v. Milwaukee L. & S. V. W. Ry. Co., 92 N. Y. 289; 13 A. & E. R. Cas. 615; Byrne v. New York Cent. & H. R. R. Co., 10 N. E. 539; Swift v. Staten Island R. T. R. Co. 123 N. Y. 645; 25 N. E. 378; Troy v. Cape Fear & Y. V. R. Co., 99 N. C. 298; 6 S. E. 77; 6 A. S. R. 521; 34 A. & E. R. Cas. 13; Harriman v. Pittsburgh C. & L. R. Co., 45 Oh. St. 11; 12 N. E. 451; 4 A. S. R. 507; 32 A. & E. R. Cas. 307; Taylor v. Co., 8 Atl. 143; 57 A. R. 446; 28 A. & E. R. Cas. 656; Kay v. Co., 65 Pa. St. 269; 3 A. R. 628; O'Connor v. Co. 155 Mass. 52; 15 A. & E. R. Cas. 362; Co. v. Trautman (Pa.) 6 A. & E. R. Cas. 117; Kelly v. Southern Minn. R. Co., 28 Minn. 98; 9 N. W. 588; Indiana B. & W. Ry. Co., v. Barnhart, 16 N. E. 121.

Backing a train over a railroad crossing without signals where there are a fierce raging blizzard and flying snow is negligence. Bailey v. Co., 107 Mass 469; Co. v. Rice, 10 Kan. 426; Co. v. Proctor, 14 Kan. 37; McWilliams v. Co., 31 Mich, 274; Robinson v. Western Pacific Ry. Co., 48 Cal. 409; Linfield v. Co., 10 Cush. 564; Co. v. Garry, 58 Ill. 85; Co. v. Ebert, 74 Ill. 399; Eaton v. Erie Railway Co., 51 N. Y. 544; Barry v. Co. 92 N. Y. 289; MaGinnis v. The New York C. & H. R. Ry. Co. 52 N. Y. 215; McGovern v. The N. Y. C. & H. R. Ry Co., 67 N. Y. 417; 2 Thompson on Negl., Sec. 1571.

The law presumes that one, who suffered death by a railroad accident was at the time of it in the exercise of due care. Cameron v. Gt. N. Ry. Co., 8 N. D. 124; 77 N. W. 1016; Co. v. Landrigan, 191 U. S. 461; Cooley on Torts (3rd Ed.) 1428, et seq; McWilliams v. Co., 31 Mich. 274; Tiepel v. Hilsendegen, 44 Mich. 462, 7 N. W. 82; Atchison, T. & S. F. R. Co. v. Morgan, 22 Pac. 995; Shaber v. St. Paul, Minn. & M. Ry. Co., 9 N. W. 575; Salter v. The Utica and Black River R. R. Co., 59 N. Y. 631; Mares v. N. P. R. Co., 3 Dak. 336, 21 N. W. 5; Johnson v. The Hudson River Ry. Co., 20 N. Y. 65, 75 A. D. 375; Co. v. Spike, 121 Fed. 44, 57 C. C. A. 384; Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270; Ill. Cent. R. Co. v. Nowicki, 46 Ill. App. 566; 148 Ill 29; Schum v. Co., 107 Pa. St. 8, 52 A. R. 468; Cox v. Co., 123 N. C. 604, 31 S.

E. 848; Cox v. Wilmington, 74 Pen. 162, 53 Atl. 569; C. B. & Q. R. Co. v. Gunderson, 174 Ill. 495, 51 N. E. 708; B. & O. S. W. Ry. Co. v. Then, 159 Ill. 535; Chicago City Ry. Co. v. Fennimore, 99 Ill. App. 174, 199 Ill. 1, 64 N. E. 985; Steele v. N. P. Ry. Co., 57 Pac. 820; Dalton v. C. R. I. & P. Ry Co., 73 N. W. 349; Little v. Grand Rapids St. Ry. Co. 44 N. W. 137; Keim v. Co., 90 Mo. 314, 2 S. W. 427; 7 West. Rep. 144.

Circumstantial evidence is sufficient if it establish the probability of Plaintiff's theory. 1 Greenleaf on Ev. 13a; U. S. Y. Co., v. Conoyer, 59 N. W. 950; Affirming Same Case, 56 N. W. 1081; Co. v. Cox. (Tex.), 55 S. W. 354, re-hearing denied in 56 S. W. 97; Co. v. Kine (Tex.) 54 S. W. 240; Hughes v. Co., 104 Ky. 774, 48 S. W. 671; Norfolk Beet Sugar Co, v. Burnett, 75 N. W. 839; Duerst v. Co., 63 S. W. 827; Union Bridge Co. et al., v. Teehan, 60 N. E. 533.

CARMODY, J. This is an action brought by minor children, who are represented by a guardian, and by adult children to recover damages for the death of their father, Wm. A. Kunkel, whom it is claimed was negligently struck and fatally injured by one of defendant's trains. The trial court denied defendant's motion for a directed verdict, and submitted the question of its liability to the jury. There was a verdict for plaintiffs, and judgment accordingly. The court denied defendant's motion for a judgment notwithstanding the verdict. Thereupon judgment was duly entered in favor of plaintiffs and against the defendant. From which judgment this appeal was taken.

The defendant's main track passes through the city of Fessenden in a general east and west course, the depot being situated on the north side thereof and about the center of the city. Next south of the main track is the passing track, and south of that the house track. The depot and most of the platform is situated between Fifth and Sixth avenues, which are located north of the track. The residence portion of the city is mostly northeast of the depot, and constitutes what is called the "North Side." The business portion of the city is mostly southwest and on the south side of defendant's tracks, and constitutes what is called "South Side." The streets of the city run east and west parallel with defendant's tracks and the avenues north and south. The highway running at right angles and about 125 feet west of defendant's depot is Fifth avenue and

Maple avenue, one being a continuation of the other; the part north of the railroad tracks is called "Fifth Avenue," and the part south of said tracks is called "Maple Avenue." These two avenues are connected across defendant's tracks and right of way, and the crossing kept open. This is the main business street of the city. The depot grounds are 300 feet wide, and on either side running east and west is a street known as "Railway Street." About four or five years ago the road supervisor built a walk, bridge, or stile from the northeast or residence portion of the city nearly along the east line of Sixth avenue where the same intersects Railroad street, crossing a piece of low ground to the east end of the depot platform and mostly on defendant's right of way. It was mostly used by pedestrians passing between the depot and the residence portion of the city.

The public generally for several years previous to the time the accident occurred had traveled daily across and along the defendant's tracks or right of way in said city of Fessenden; the usual route being about as follows: From the east line of Sixth avenue where the same intersects Railroad street across the stile or bridge hereinbefore mentioned across the right of way to a point near the east end of the depot platform; thence west along the platform to some point west of the depot; thence diagonally across the tracks and depot grounds to the northeast corner of Maple avenue. Sometimes they would walk west a short distance, from 12 to 50 feet, on the main track, and thence diagonally across the depot grounds to Maple avenue. This route for the most part was used by people who went from the residence portion on the North Side to the post office and business places on the South side and vice versa. The depot platform extended west of the depot about 25 or 30 feet. There were no steps on the south side or west end of the platform. At the west end of said platform there was an apron sloping to the ground, from which there was at the time of the accident a fairly well-defined path, on the north side of the main track west to Fifth avenue, over which people sometimes traveled to the sidewalk on Fifth avenue; thence south across the tracks to Maple avenue or north to their destination, as the case might be. Deceased sometimes traveled that route in going to the post office or business portion of the city on the South Side. There was at the time of the accident a path, though not very well defined, across the main track from the north rail, and crossing the south rail at the place where deceased was found after the accident.

The defendant had never objected to the use of its right of way, depot ground, and railway tracks, and never took any steps to prevent it. There was a walk on the east side of Maple avenue, but no connection except a pathway between that walk and the west end of the depot platform. The post office was located south of the tracks on the east side of Maple avenue. Deceased frequently visited the depot. He had knowledge of the trains, the time they were due, was thoroughly familiar with the locality and all the conditions. On Sunday, November 18, 1906, there was a severe and blinding snowstorm. The wind was strong and blowing from the northwest. It blew in gusts, sometimes stronger than at other times. Passenger train No. 105, which was a mail train going west, arrived at the depot at 1:15 o'clock and left at 1:17 o'clock in the afternoon. At about 1:20 or 1:25 o'clock p. m. deceased came into the depot and inquired if train No. 105 was in, and the operator answered, "Yes; it has gone." Whereupon deceased said "All right," and went out of the depot. At 1:30 or 1:35 o'clock p. m. he was found at a point about 48 feet from the west end of the depot platform, and about 52 feet east from the railroad crossing on Maple and Fifth avenues. He was found lying on the south rail of the main track with his legs over the rail, facing up and straight away from the track. One leg was cut off and left near the north rail; the other was almost cut in two. He had on no cap. It had rolled off. He had on a fur or fur-lined overcoat, and the collar was turned up around his ears. There was no obstruction whatever between the crossing on Maple and Fifth avenues and the east end of the yards. At the time train No. 105 going west was at the depot, there was an extra freight train on the passing track going east. After train No. 105 passed, the freight train pulled up to the east end of the yards, and part of it, consisting of the engine and 12 cars, backed west down the main track, passing the depot just after deceased went out, and passed the spot where he was found. The evidence does not show whether there was a lookout or brakeman on the back end of the freight train. The freight train as it was backing up was seen and heard by at least four persons—the operator, Mr. Ritt, and the agent, Mr. Gordon—who were in the depot at the time it passed by, and Wm. Jackson, who was going down Sixth avenue. He saw it first when he was on the north side of Railway street, a distance of about 150 feet from the tracks. He walked up closer to the track,

and waited until the train backed out of his way, and then crossed the track at the east end of the depot platform and went to the post office. He could see the train when it passed to the west end of the yards, but heard no signal of any kind. Fred Kortbin, who was walking south on Fifth avenue toward the railroad tracks, also saw the freight train backing up when he was at the telephone office, a distance of 336 feet north of the tracks. After it had backed past the crossing 100 feet or so it stopped, and a brakeman ran to the place where Mr. Kunkel was lying. The witnesses heard no whistle or bell ring or signal of any kind. Witness Kortbin heard the train running when he was at the telephone office, and said it must have been going four, five, or six miles an hour. Wm. Jackson said he thought it was running five or six miles an hour. Mr. Ritt, the telegraph operator, said it was running about three miles an hour. The injured man was taken to the office of Dr. McGregor, and died in about three-quarters of an hour after he was taken there. On examination it was found that one of his feet was cut off and the other almost severed. The upper parts of his legs were broken and crushed, and there were numerous lacerations. The wounds were more prominent, and more readily distinguishable, on the front side of the body than on the rear. The theory of the plaintiffs is that while deceased was walking upon the main track—probably crossing it—he was struck by the backing train which was going in the same direction he was, and that he fell to the track and was run over.

The theory of the defendant is that the company is not liable: "(1) Because the evidence in this case fails to show that there was a pathway traveled, or other passageway, as alleged in the complaint, either established by, or suffered and permitted by, the defendant, and upon which the deceased was either impliedly or expressly, invited to pass at the time of his injury, and that from the facts in this case it appears that he was upon the railroad track of the defendant as a trespasser to whom the defendant owed no duty, except that of not willfully injuring him, of which willful or reckless injury there is no claim in the complaint nor proof in the evidence. (2) Because it appears from the evidence that if the deceased was rightfully upon the right of way or railway track of the defendant at the time declared in the complaint, or at the time he was injured, he was there as a mere licensee, since the place was not, as shown by the evidence, a public highway, and the defendant owed him no duty except that of not willfully or recklessly injuring him, because

the evidence shows he was upon business of his own, or there for his own convenience, and there is no evidence tending to show that he was there for the purpose of transacting business with the defendant company, and since there is no allegation of willful or reckless injury, or proof of such facts, no recovery can be had. (3) Because all the evidence in this case shows as a matter of law that the deceased was guilty of contributory negligence, which precludes a recovery on behalf of plaintiffs in this case, and because the plaintiffs have failed to show by the evidence any negligence on the part of the defendant which would entitle the plaintiffs to recover." And because the evidence as to how the accident occurred is in the field of conjecture.

If any of the defendant's contentions is sustained, then the judgment appealed from must be reversed. If the deceased was a trespasser on its tracks, or right of way, the defendant owed him no duty except not to willfully, wantonly, or recklessly injure him, and there is no allegation or proof of such willful or reckless injury.

It is plain that deceased was not a trespasser. The uncontradicted testimony is to the effect that for many years immediately preceding the accident it had been the custom of people proceeding from the north to the south side of defendant's tracks in the city of Fessenden, and vice versa, to use the right of way, platform, and tracks as a footpath, and that a large number of people passed that way daily. This custom was known to appellant, and it made no objection. About four or five years before the accident, the road supervisor built a walk, bridge, or stile from the northeast or residence portion of the city along the east line of Sixth avenue, where the same intersects Railroad street to the east end of the depot platform, and mostly on its right of way. This walk, bridge, or stile was largely used by pedestrians who also crossed at other places nearby, and who also walked along the track where deceased was injured. The deceased, who resided in the northeast part of the city, was in the habit of passing daily across this stile or bridge and over defendant's platform, right of way, and along and over its tracks to the post office and places of business on the South Side, and back to his residence. The defendant having knowledge of the use of this route, and of the building of the bridge, or stile, and of persons passing over it, and having made no objections thereto, will be presumed to have assented to it, thus giving to all who traveled this route license therefor. Deceased, therefore, was not

a trespasser upon the railroad track, and was entitled to all the rights and protection of one rightfully upon it, with license of the defendant. The plaintiffs can recover for his death if it was caused by injuries resulting from defendant's want of ordinary care if deceased did not contribute thereto by his own negligence. In support of these views, see the following cases: Swift v. Staten Island R. R. Co., 123 N. Y. 645. 25 N. E. 378; Taylor v. Del. Canal Co., 113 Pa. 162, 8 Atl. 43, 57 Am. St. Rep. 446; O'Connor v. B. &. L. R. R. Corp., 135 Mass. 352; Ry. Co. v. Troutman, 6 Am. &. Eng. Ry. Cas. 117; Harriman v. Ry. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Byrne v. N. Y. Cent. R. R. Co., 104 N. Y. 362, 10 N. E. 539. 58 Am. St. Rep. 512; Barry v. N. Y. Cent. Ry. Co., 92 N. Y. 289, 44 Am. Rep. 377; Schindler v. Mil. Ry. Co., 87 Mich. 400, 49 N. W. 670; Clampit v. Chicago & R. I. Ry. Co., 84 Iowa, 71, 50 N. W. 673; L. & N. Ry. Co. v. Schuster (Ky.) 7 S. W. 874; Kay v. Pa. Ry. Co., 65 Pa. 269, 3 Am. Rep. 628; Troy v. Cape Fear Ry. Co., 99 N. C. 298, 6 S. E. 77, 6 Am. St. Rep. 521; Reifsnyder v. R. R. Co., 90 Iowa, 76, 57 N. W. 692; Davis v. Chicago Ry. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; Ahnefeld v. Wabash R. R. Co., 212 Mo. 280, 111 S. W. 95; Calwell v. Mpls. & St. Louis Ry. Co., 138 Iowa, 32, 115 N. W. 605; Mo. K & T. Ry. Co. v. Malone (Tex. Civ. App.) 110 S. W. 958; Fuller v. R. R. Co., 78 Mich. 36, 44 N. W. 1085; Roth v. Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855; Kelly v. R. Co., 28 Minn. 98, 9 N. W. 588.

In Swift v. Ry Co., supra, the court of Appeals of New York lays down the following rule: Where the public have for a long time, notoriously and continuously, been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains so as to protect them from injury.

In Clampit v. Ry Co., supra, the plaintiff, a carpenter, in going from his house in Des Moines to the place where he was employed in the same city was accustomed to cross defendant's railway. The crossing of the railway was at a place much used by pedestrians, just at the foot of a bluff or bank which was approached by a stairway constructed by persons using the footway. While crossing the railway when going to his work, according to his custom, he was

struck by an engine and seriously injured. There was a ditch between the stairway and the track over which were railroad ties. Pedestrians also crossed at other places. Chief Justice Beck of the Iowa Supreme Court said: "The stairway and the ties crossing the ditch, as well as the path made by footmen, prominently advertised the place as a crossing used by pedestrians." We have carefully examined the cases cited by appellant, and the majority of them we think can be easily distinguished from the case at bar. In most of them the injury was caused by the passive negligence of the defendant, or by its omission to perform or act; as for example, in Sutton v. N. Y. Cent. & Hudson River Ry. Co., 66 N. Y. 243. The deceased was employed in the carpenter shop of the Clinton foundry situate west, and adjacent to defendant's tracks and roadway in the city of Troy, and was in the habit, with other employes, of crossing defendant's tracks, over which there was a regular beaten path. He started out of the carpenter shop with a pail to go to a well across the tracks for some water. As he went out of the door, 5 cars passed northward on the west track—nearest the shop. These cars had been disconnected from a train of 10 cars; the engine and other cars, giving them, as they were disconnected, a "shove" or "kick," which sent them north so far that the south car was nearly opposite the door of the shop where they stopped. Sutton then started across the track. He crossed the west track, but was stopped by the approach of a train on the east track, and, looking to the east, he stepped backward upon the track he had just crossed. At that point there was a slight down grade in the tracks toward the south. The five cars had in consequence, after stopping, started back slowly of themselves to the southward, and, as Sutton stepped backward, they struck and killed him. There was a brakeman on the five cars, as they passed, who attempted to apply the brake, but failed to set it so as to arrest the motion of the cars. When they stopped he left the cars, and there was no one in charge of them when they moved backward. It had been defendant's daily custom for years to back up and shove cars on the west track in the same way. The brake was usually applied to such disconnected cars. No instance had ever been known before of their thus running backward of themselves. The court, speaking through Judge Andrews, said: "I think that the evidence did not establish a cause of action against the defendant; that, although Sutton was a licensee, the defendant was not liable for the omission of the brakeman to

adjust the brake before leaving the car. He could not have anticipated danger to life from the slow movement of the cars a few feet down the grade. In most of the other cases cited by appellant the party injured was either a trespasser or was guilty of contributory negligence, and, in some of the cases, of gross negligence. Under the evidence in the case at bar, we deem the question of defendant's negligence, and plaintiff's contributory negligence, was for the jury."

It is contended by appellant that, under the evidence, the deceased was, as a matter of law, guilty of negligence which bars recovery in this action. It contends that, from the evidence, it is clear that he could have seen the train if he had looked along the track from the depot platform, and that it was his absolute duty to do so. No person saw the accident. The deceased, a very short time before the accident, stepped into the depot, and inquired if train No. 105 had gone, and was told that it had. He then left the depot, and started in a westerly direction along the path or right of way, and a short time after was found at a point where a path used by pedestrians crossed the south rail of defendant's main track. The day was stormy. He was facing the storm. The train backed down the main track in the center of the city towards the only public crossing through a blizzard and storm, with a heavy snow falling and a high wind, such as would undoubtedly obstruct the vision and hearing of any one upon the track or crossing, and such as would also tend strongly to deaden and muffle the sound of wheels, and as far as the evidence shows, without giving any signal, and without any brakeman or lookout on the back end of the cars. If the defendant had had some one on the train on top of the back end of the cars, or upon the ground, to warn persons on the track or crossing of its approach, the accident might not have happened.

If there is any substantial conflict in the testimony in a negligence case either as to defendant's negligence, or as to the contributory negligence of the person killed or injured, and where different minds might reasonably draw different conclusions as to these questions from the evidence, the case must go to the jury. In this case the jury must have found that defendant was negligent, and there is sufficient evidence to sustain such finding. Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 489; Ry. Co. v. Lowell, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 136; Jones v. Ry. Co., 128 U. S. 433, 9 Sup. Ct. 118, 32 L. Ed. 480; Dunlop v. Ry Co., 130

U. S. 652, 9 Sup. Ct. 647, 32 L. Ed. 1058; Richmond Ry. Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; R. R. Co. v. Landrigan, 191 U. S. 461, 24, Sup. Ct. 137, 48 L. Ed. 262; Hendrickson v. G. N. Ry. Co., 49 Minn. 245, 51 N. W. 1044, 16 L. R. A. 261, 32 Am. St. Rep. 540; Ill. Cent. Ry. Co, v. Ebert, 74 Ill. 399. The jury having found the accident was caused by the negligence of the defendant, it must bear the consequence, unless deceased was guilty of contributory negligence. Schwananfeldt v. C., B. & Q. Ry. Co., 80 Neb. 790, 115 N. W. 285; Coulter v. G. N. Ry. Co., 5. N. D. 568, 67 N. W. 1046; Ry. Co. v. Ebert, 74 Ill. 399; Pendroy v. G. N. Ry. Co. 17 N. D. 433, 117 N. W. 531.

In Ry. Co., v. Ebert, supra, the accident happened on the grounds of the company, on a cold, blustering, snowy day in January—a day on which one exposed to its blasts would use all the expedients at his command to ward off, or at least temper, its severity. Ebert was employed hauling ice, and was muffled up to protect himself from the cold, going along at a slow pace with his load. On his route were several tracks of the defendants, which it was necessary for him to cross. These tracks, or some of them, ran into Buckingham's elevator, and as he was about crossing track No. 2, so-called, about 40 feet from the elevator, a train of cars, not drawn, but propelled from the rear by an engine, ran into the wagon, pushed the horses and plaintiff into the elevator, killing the horses, and seriously injuring the plaintiff. There was no outlook upon the train, no flagman at the crossing, and no means used by the servants of the company to apprise plaintiff of the approach of the train, though one or two witnesses testified the bell was rung. It does not appear that plaintiff made any special effort to see if any train was approaching on that track. He says he saw cars on it, but they were not in motion. The Supreme Court of Illinois said: "It was great negligence of the company in failing to have some person on the train on top of the forward cars, or upon the ground in front. It is no excuse that the day was cold and stormy, and that a person posted on the top of the cars would be exposed to danger. It is the duty of the servants of the company to expose themselves to danger when necessary, not to rush into danger recklessly, but to maintain their post, let what may happen. Had a vigilant man been on the front car, it is not at all probable this accident would have occurred. Indeed, it is quite certain it would not. The accident, then, having been occasioned by the negligence of the com-

pany, they must bear the consequences—they must respond in damages."

In Pendroy v. G. N. Ry. Co. (N. D.) 117 N. W. 531, supra, the defendant backed one of its trains against plaintiff's automobile at a public crossing in the city of Towner. The testimony tends to show that plaintiff and his party had been riding around Towner during the evening, and did not see any train or engine; that, as they came down Main street to a point where they could view the track between the two elevators, they looked and saw no train coming; that as they approached the track, and when about 10 feet south of the southerly track, the gear of the automobile was changed from high speed to low speed, and at this time they were listening for any sound of the train. The driver of the automobile said that she neither saw nor heard any signs of the train, and proceeded to cross the track. This court, speaking through Judge Fisk, said: "We believe that, under the weight of authority and the better considered cases, that they cannot be held guilty of contributory negligence as a matter of law merely because they did not stop and listen before crossing the defendant's tracks. A person is bound to use care commensurate with the known or reasonably apprehended danger; but it is only in exceptional cases that the trial court is justified in taking from the jury the question of the exercise of such care. The fact that, if the automobile had been stopped, the occupants might have heard the approaching train, and thus have avoided the accident, is not decisive of their negligence. Fair-minded men might honestly differ, under all the facts as disclosed by the evidence, whether the exercise of such precaution was exacted of them." The court further said: "That it was within the province of the jury to say whether plaintiff and his daughter, at and just prior to the accident, were in the exercise of such care as an ordinarily prudent person would be expected to exercise under the like circumstances. In other words, it cannot be said as a matter of law that they, or either of them, were guilty of contributory negligence."

In B. & P. Ry. Co. et al. v. Landrigan, supra, the plaintiff's intestate, Thos. Landrigan, was going through the yards of the defendant company in the city of Washington, D. C., between 11 and 12 o'clock at night. No person saw the accident. There were four tracks through the yard. Just after a Pullman car passed over the

crossing, a party came right along behind the car, and saw the deceased lying on the south side of the outside rail of the most southerly track. He had both legs cut off, and death resulted a short time afterwards. Defense was contributory negligence. The Supreme Court of the United States, speaking through Mr. Justice McKenna, said; " In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and, if they find that they do, they should find that he did not stop and look and listen; but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary." "There was no error in instructing the jury in the absence of evidence to the contrary. There was a presumption that the deceased stopped, looked, and litsened. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation; none that so insistently urges us to guard against injury."

Under the facts in this case, the question of the negligence of the deceased contributing to the accident was clearly for the jury, as the burden is upon the defendant to prove that the negligence of the deceased contributed to the accident. The law, out of regard to the instinct of self-preservation, will presume, prima facie, that a person who has suffered death by accident was at the time of the accident in the exercise of ordinary care and diligence, and this presumption is not overcome by the fact of the accident even though no person saw it. Ry. Co. v. Landrigan, supra; Flynn v. Ry. Co., 78 Mo. 195, 47 Am. Rep. 99; T. & P. Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; Ry. Co. v. Morgan, 43 Kan. 1, 22 Pac. 995; Teiple v. Hilsendgen, 44 Mich, 462, 7 N. W. 82; Adams v. Iron Cliff Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441; R. R. Co. v. Nowicke, 46 Ill. App. 566; Ry. Co. v. Gunderson, 174 Ill. 495, 51 N. E. 708; Dalton v. Ry. Co., 104 Iowa, 26, 73 N. W. 349; Keim v. Ry Co., 90 Mo. 314, 2 S. W. 427; Phillips v. Ry. Co., 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521.

There was no error in submitting the question of defendant's negligence and deceased's contributory negligence to the jury. To discuss the authorities cited by appellant on the question of contributory negligence would extend this opinion to an unwarranted length, and would serve no good purpose. We have examined all of them, and cannot see that they are applicable to the facts in this case. From what we have already stated in this opinion it is apparent that there is no merit in appellant's contention that as to how the accident occurred is in the field of conjecture. We, however, cite on that question Union Stock Yards v. Conoyer, 41 Neb. 617, 59 N. W. 950; Phillips v. R. R. Co., supra, 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521; Lillstrom v. R. R. Co., 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587.

Dr. McGregor stated in his testimony: "I have in my experience examined wounds upon men which I knew to have been inflicted by being crushed or run over by a car, and these were just such wounds as are inflicted by car wheels. These wounds were inflicted by an injury which required great force." These must have been inflicted from behind, and it required great force to inflict them. "There would be one cut here, another cut here (indicating), and part of the flesh crushed in places and flattened out where the bones protruded; you could feel they were crushed underneath and broken in numerous places. These wounds were such as I have seen caused by car wheels."

We fail to find any prejudicial error in the record. The order denying defendant's motion for a judgment notwithstanding the verdict was properly denied. The judgment appealed from is affirmed.

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

SPALDING, J. (dissenting.) As a general proposition I have no quarrel with the statement of the rule as contained in the third paragraph of the syllabus, namely, that the law, out of regard to the instinct of self-preservation, will presume that the person who has suffered death by accident was, at the time, in the exercise of ordinary care and diligence, and this presumption is not overcome by the mere fact of the accident, even though no person saw it. But under the facts disclosed by the evidence in the case at bar, I am satisfied that this rule is not applicable in the present instance.

Several witnesses testified as to the severity of the storm at the time the accident occurred. The train which killed the deceased could be seen for some distance. One witness testified that he saw it 336 feet distant. Another saw it at a distance of 150 feet at the exact time of the accident. Others testified in a general way that they could see acress the street, and others greater distances. That it was incumbent upon the deceased to exercise care proportionate to the atmospheric and other conditions cannot be questioned. Did he do so? It is clear to me that the evidence establishes beyond question that he cannot have done so. It was his duty to look and listen even though he had been on the highway. If he had looked and listened it is obvious that he could have seen the train, and, at the rate of speed at which it was moving, could either have avoided stepping on the track, or, if on it, could have got off. The fact that he was killed under the circumstances disclosed by the evidence makes it apparent that he did not look and listen, or use ordinary precaution or such care as was incumbent upon him to use, and therefore I am of the opinion that the evidence discloses affirmatively that he was guilty of contributory negligence, as a matter of law.

I therefore dissent.

ON REHEARING.

CARMODY, J. A rehearing was granted in this case, and elaborate and exhaustive oral arguments were made on both sides. It was strenuously contended by the appellant that the deceased was as a matter of law guilty of contributory negligence. After carefully reconsidering the case, we adhere to our former opinion. We think, under the facts, the question of the negligence of deceased contributing to the accident was clearly for the jury. It is true that two witnesses saw the train a few minutes previous to the accident —one of them at a distance of 150 feet, and the other one at a distance of 336 feet. Both of them were looking at the train broadside and from the north, while the storm was from the west, and deceased was facing it. The evidence also showed that the snow came in gusts, sometimes stronger than at other times. In Re St. L. & San Fran. R. R. Co. v. Cundieff, 171 Fed. 319, Judge Amidon well says: "The rule which declares that when the 'physical facts' show that the traveler must have discovered the train if he had looked and listened his negligence becomes a matter of law can properly

be applied only when the physical facts are themselves unambiguous."

The train was backing down through the city, in a snow storm, toward a public crossing. No bell was rung or whistle sounded. There was no lookout on the back end of the train, and no flagman near the crossing. The defendant was, under the evidence, clearly negligent. Deceased had a right to presume that warning of the approaching train by ringing the bell, sounding the whistle, or by a lookout would be given to pedestrians. As stated in our former opinion, no one personally witnessed the accident, and the presumption is that the deceased used all ordinary care. The burden of proof is on the defendant to show that he did not. No exceptions were taken to the instructions of the court, so it is presumed that proper instructions were given. In Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403, the court says: "It is the duty of railroads to notify the public by some warning of the approach of their trains to crossings, and that if no warning is given which appeals clearly either to the eye or ear, the traveler cannot be held guilty of contributory negligence in failing to discover the train."

In addition to the cases cited in the original opinion we cite the following: Texas & Pac. Ry. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; B. & O. R. R. Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; D., L. & W. R. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; C., R. I. & Pac. R. R. Co., v. Sharp, 65 Fed. 532, 11 C. C. A. 337; McGhee v. White, 66 Fed. 502, 13 C. C. A. 608; C., M. & St. P. Ry. Co. v. Donovan, 160 Fed. 826, 87 C. C. A. 600; Henavie v. N. Y. C. & H. R. Ry. Co., 166 N. Y. 281, 59 N. E. 901; Judson v. Cent. Vt. R. R. Co., 158 N. Y. 597, 53 N. E. 514; Zwack v. N. Y., L. E. & W. R. R. Co., 160 N. Y. 362, 54 N. E. 785; Smedis v. R. R. Co., 88 N. Y. 13; French v. R. R. Co, 116 Mass 537; Canning v. R. R. Co., 168, N. Y. 555, 61 N. E. 901. The foregoing authorities sustain our views herein expressed.

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

SPALDING, J. I find no reason to change my dissent filed with the original opinion.

(121 N. W. 830.)

E. ASHLEY MEARS AND MARGARET B. MEARS, AS SOLE HEIRS AT LAW OF ASHLEY E. MEARS, DECEASED, FOR THE USE AND BENEFIT OF C. W. BRAUER AND T. P. KULAAS, v. SOMERS LAND COMPANY, OF DEVILS LAKE, NORTH DAKOTA, A CORPORATION, AND EVERETT P. RUSSELL, AS TRUSTEE OF GEORGE GLOVER, AND BANK OF MINOT, A CORPORATION, A. B. GUPTILL AS RECEIVER OF THE BANK OF MINOT, UNITED STATES SHEEP COMPANY, A CORPORATION, GUARANTEE COMPANY OF NORTH DAKOTA, A CORPORATION, GARETT P. RUSSELL, TRUSTEE, B. S. BRYNJOLFSON, C. H. MEARS, PETER EHR, AND ALL OTHER PERSONS UNKNOWN CLAIMING ANY ESTATE OR INTEREST IN, OR LIEN OR INCUMBRANCE UPON THE PROPERTY DESCRIBED IN THE COMPLAINT, AND THEIR UNKNOWN HEIRS.

Opinion filed June 1, 1909.

Adverse Possession — Mortgagee in Possession — Void Foreclosure — Statute of Limitations.

1. In an action to quiet title, which action is in the Supreme Court for trial de novo, evidence examined and *held* to establish that appellant, S. L. Co., and its grantor were, for more than ten years immediately prior to the commencement of such action, mortgagees in possession, with the implied knowledge and consent of, and holding adversely to, the fee owners; and, following the rule announced in Nash v. Northwest Land Company, 15 N. D. 566, 108 N. W. 792, it is *held* that the remedies of such fee owners to recover such possession, or to assert their rights, became barred by the statute of limitations, and such bar operated to divest them of all title, and vest the same in such adverse occupant.

Same — Possession Under Void Foreclosure.

2. *Held*, further, that appellant, S. L. Co., and its grantor, became mortgagees through an equitable assignment of a mortgage on the property as the result of a defective foreclosure by advertisement, at the abortive foreclosure of which such grantor became the purchaser, securing a certificate of sale and sheriff's deed, and thereafter deeding the premises to the S. L. Co. For a period of over eleven and one-half years after such abortive foreclosure sale the fee owners paid no taxes, and exercised no acts of ownership over the property, while during all such time the purchaser and his grantee, the S. L. Co., paid the taxes, and for over ten years prior to the commencement of this action they in good faith asserted a claim thereto, hostile and adverse to the fee owners, with their implied knowledge and consent, during which time they had such actual possession as, in view of the nature of the property and all the circumstances disclosed by the evidence, was essential to constitute them adverse occupants.

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

Action by E. Ashley Mears and others against the Somers Land Company and others. Judgment for plaintiffs, and defendants appeal.

Reversed, and judgment directed for the Somers Land Company.

James Johnson and *Guy C. H. Corliss,* for appellants.

Where the statute requires an instrument to be subscribed, it means at the end thereof. James v. Patten, 6 N. Y. 9-12; McGivern v. Fleming, 12 Daly 289; Davis v. Shields, 26 Wend. 241-351; Coon v. Rigden, 4 Colo. 275-282; Commonwealth v. Barheight, 6 Gray 113; Stone v. Marvel, 45 N. H. 481; Am. Surety Co. v. Warcester & Co., 100 Fed. 40; Lawson v. Dawson, 53 S. W. 64; In re Strong, 16 N. Y. Supp. 104; Miller v. Pelletier, 4 Edw. Ch. 102.

But where the statute requires the instrument to be in writing and signed, signature may be anywhere, if it is apparent that the signers meant to execute it. In re Guilfoyle, 31 Pac. 553; 20 Cyc. 274; 30 Enc. L.582; Newton v. Emerson 18 S. W. 348; Smithdeal v. Smith, 64 N. C. 52; Lawson v. Dawson, 53 S. W. 64. Penniman v. Hartshorn, 13 Mass. 87-90; James v. Patten, 6 N. Y. 9; Drury v. Young, 58 Md. 546-553.

Ten years of adverse possession and payment of taxes, by a mortgagee in possession vests title in the latter. Nash v. N. W. Land Co. 15 N. D. 566; 108 N. W. 792; 1 Cyc. 999.

John E. Green (*R. H. Bosard, of counsel*), for respondent.

Want of signature is fatal to an acknowledgment. Clark v. Wilson 127 Ill. 449 (11 Am. St. Rep. 143); Hout v. Hout, 20 Ohio St. 119; Andrews v. Marshall, 26 Texas 212; Clark v. Wilson, 27 Ill. App. 610; 1 Cyc. 577; Johns American Notaries, Sec. 171; Willard V. Cramer, 36 Iowa 22. Curative statutes do not apply to absolute want of acknowledgment. Armijo v. New Mex. Town Co., 5 Pac. 709; Short v. Conlee, 28 Ill. 219, 1 Cyc. 612.

Curative acts do not validate void acts, such as defective acknowledgment. Cooper v. Harvey, 113 N. W. Rep. 717; Dever v. Cornwell, 86 N. W. Rep. 227; 10 N. D. 123; Evans v. McFadden 105 Fed. 293; Nash v. Northwest Land Company, 108 N. W. 1 A. & E. Enc. Law 831; Miller v. Davis, 64 N. W. 338; Thompson v. Burhams, 61 N. Y. 52; 1 Cyc. 997, 999.

Open, visible and notorious possession must be of such a nature as to apprise the owner that there is an adverse possession designed to make title against him. Bates v. Norcross, 14 Pick. 224; Coburn v. Hollis, 3 Met. 125; Roberts v. Richards, 84 Me. 1; Brown v. Rose, 55 Iowa, 734, 7 N. W. 133; Fuentes v. McDonald, 85 Tex. 132; Seelman v. Harden, 58 Tex. 86; Lambert v. Stees, 47 Minn. 141; 1 Cyc. 999; J. B. Streeter & Co. v. Frederickson, 11 N. D. 300; 91 N. W. 692.

FISK, J. This is an action to quiet title to certain real property in Ward county. It is conceded that one Smith Wheeler was the owner thereof on and prior to June 20, 1888. Plaintiffs trace their claim to title through mesne conveyances as follows: Quit-claim deed from Wheeler to Ashley E. Mears, Ashley E. Mears to E. Ashley and Margaret B. Mears by inheritance, and the latter parties quitclaimed to C. W. Brauer who in turn quitclaimed to his co-plaintiff, T. P. Kulaas, an undivided one-half interest therein. Defendant Somers Land Company claims title through a conveyance from one Russell, whose title depended upon the validity of certain alleged foreclosure proceedings, under a power of sale contained in a mortgage claimed to have been executed and delivered by Wheeler to the bank of Minot and foreclosed by advertisement; the said Russell having acquired a sheriff's deed to the land pursuant to such foreclosure. The entire controversy is due to the fact that the notary public omitted to affix his signature to the certificate of acknowledgment to the said mortgage. Such certificate was filled out, and was complete in all respects, except as above stated, even to the affixing of the notarial seal. The mortgage, together with such defective certificate of acknowledgment, was in fact recorded at length in the office of the register of deeds of Ward county on June 30, 1888. Respondents' main contention is that such foreclosure was a nullity, for the reason that the mortgage was not entitled to record, and hence no title was obtained through the sheriff's deed based on such foreclosure sale. There is a dispute as to what the record discloses regarding certain facts. Respondents contend that there is no proof that Smith Wheeler executed and delivered the mortgage and note in question, but the record discloses that the original mortgage was offered in evidence, and the only objection urged to its introduction in evidence was "that the same is incompetent, for the reason that it appears on the

face of the instrument that it was never acknowledged by the grantor, and the record of the instrument can furnish no foundation for foreclosure." And this same objection was urged to the offer of the note in evidence. Such objection was entirely insufficient to put appellants to their proof as to the execution and delivery of these instruments. The point of the objection is that, because the certificate of acknowledgment was not complete, such mortgage was not entitled to record so as to justify its foreclosure by advertisement. Furthermore, at the commencement of the trial the parties entered into a stipulation which expressly recognized the fact that this mortgage was given by the said Wheeler. The record discloses that later in the trial a controversy arose between counsel as to the genuineness of the signature of Smith Wheeler to the mortgage, and appellants' counsel asked for time in which to furnish proof thereof. Conceding that this had the effect of destroying the proof of such mortgage theretofore made, by not only its introduction in evidence without objection upon such ground, but by the stipulation aforesaid, still we are entirely satisfied that the testimony thereafter produced was amply sufficient to prove the execution of such mortgage by the said Wheeler.

Assignments of this mortgage from the bank of Minot to Enos Arnold, dated September 1, 1888, and from Arnold to Russell, dated March 6, 1893, both of which were of record in the office of the register of deeds, were offered in evidence, and the only objection made to such offers was that they were "incompetent, irrelevant, and immaterial." Such objections were too general, and hence can be given no force or effect. A similar objection was made to defendants' offer of the record of the foreclosure sale, consisting of the affidavit of publication, attorneys' affidavit, sheriff's affidavit and certificate, also sheriff's deed to Russell pursuant to such foreclosure sale, all of which were of record in the office of the register of deeds of said county.

It is appellants' contention: (1) That the notary sufficiently "affixed" his signature to the certificate by signing his name just above such certificate as a witness to the signing and delivering of such mortgage by the mortgagors; (2) that the defect, if any, in the certificate of acknowledgment was cured by chapter 2, p. 6, Laws 1901; (3) that Russell, the purchaser at the foreclosure sale, and his grantee, the Somers Land Company, had been in possession

of the land for a period of more than 10 years before the commencement of this action, paying taxes thereon and hence the title became vested in the Somers Land Company; and, (4) at the time Mears and wife executed the deed to Brauer they had no power to convey the land, as the title had previously vested in a receiver theretofore duly appointed by the district court of Cass county. The view which we take of the third proposition renders it unnecessary to determine the other very interesting points raised in appellants' brief. After mature deliberation we are convinced that, under the facts, conceding the invalidity of the foreclosure sale and the sheriff's deed thereunder, and also that the curative act relied on was ineffectual to validate such void foreclosure, the rights of the Somers Land Company, prior to the commencement of this action ripened into a perfect title by lapse of time. In other words, the Somers Land Company and its grantor, Russell, for over 10 years prior to the commencement of this action, asserted a hostile claim to the land through the sheriff's deed, with the full knowledge and implied acquiescence of Mears and wife, and we think that during all such time the land company and its grantor had such possession as was necessary to constitute them mortgagees in possession and within the rule announced in Nash v. Northwest Land Company, 15 N. D. 566, 108 N. W. 792, the title became vested in the land company at the expiration of the period of 10 years, during which the mortgagor or his grantees were permitted to institute an action to redeem.

The record discloses that the beneficial plaintiffs had actual knowledge that the mortgage was transcribed upon the public records at the time they obtained their deeds of the land. Finding 12 of the trial court is to this effect. This was sufficient to put them upon inquiry. Furthermore, they had actual notice, before they purchased, that the Somers Land Company claimed to own said land, as the correspondence in evidence discloses. Not only this, but they, in fact negotiated with said company for the purchase of such land, and actually accepted an offer to purchase the same upon specified terms, which they afterwards repudiated. Such correspondence was, we think, clearly admissible. In the light of these facts plaintiffs stand in no more favorable position in a court of equity than would their grantors. Such grantors inherited the property from their son, Ashley Mears, on January 20, 1890, and during all the time between the date of the foreclosure sale in May, 1894, and No-

vember 24, 1905, when they quitclaimed the premises to Brauer—over 11½ years—they paid no taxes on the land, nor in any manner, so far as the record discloses, asserted any claim whatever to the same, during all of which time Russell and his grantee, the Somers Land Company, asserted title thereto, and the latter paid the taxes each year, with the exception of the year 1905, the taxes for which it tried to pay, but they were paid by Brauer and Kulaas previous to the time the land company offered to pay the same. We think the evidence fairly tends to show that Mears and wife wholly abandoned such land at or prior to the foreclosure sale, and that they knew, and, at least, impliedly consented to and acquiesced in appellants' hostile claim of title under the foreclosure proceedings. These facts, we think, were sufficient to start the statute running, over 10 years prior to the commencement of this action, against any remedy which the Mears may have had to recover such property, or to redeem from such mortgage. It was not necessary that Russell and the land company should have been in the open, visible, and notorious possession of the land, sufficient to raise a presumption of notice to Mears and wife that their rights were invaded by them with a purpose to assert an adverse claim of title thereto, as the evidence clearly discloses that Mears and wife, by their conduct, must have had actual knowledge of appellants' hostile claim. This rule is supported by 1 Cyc. 997, and cases cited. There is no pretension that Mears and wife, after the foreclosure, and up to the time they gave the quitclaim deed on November 24, 1905, ever, at any time, assumed to exercise any dominion over the property, or discharge any of the duties of owners. For over 11½ years after the foreclosure sale they appear to have completely abandoned all connection with such property, permitting the purchaser at such sale and his grantees to pay the taxes thereon, and to exercise the unmolested right of ownership therein. We are agreed that, in the face of the foregoing facts, the possession of the purchaser at the sale and his grantees was sufficient to bar any remedy on November 24, 1905, which Mears and wife may have had prior thereto, and hence the quitclaim deed given by Mears and wife to Brauer on said date was ineffectual to transfer any title to such grantee. Nash v. Land Company, supra, and cases cited.

Respondents' counsel assert that Russell never had possession of such land, but the evidence discloses that he paid the taxes thereon until he "turned it over to the Somers Land Company—gave them a

deed of it." While the mere payment of taxes is not sufficient to prove an actual adverse possession of the land, we think possession in him may be fairly inferred under all the evidence, and that he delivered such possession to his grantee under his deed. It appears from the testimony of the witness Johnson that the Somers Land Company have been in possession ever since such deed was given, and the natural inference, deducible therefrom, is that it acquired such possession from its said grantee.

It follows that the judgment of the district court quieting the title to such land in plaintiffs was erroneous, and the same is accordingly reversed, and that court is directed to vacate such judgment, and enter a new judgment consistent with the foregoing opinion, quieting such title in appellant the Somers Land Company. All concur, except MORGAN, C. J., not participating.

(121 N. W. 916.)

THE FIRST NATIONAL BANK OF CASSELTON, NORTH DAKOTA, v. ARTHUR G. LEWIS, AS COUNTY AUDITOR OF CASS COUNTY, NORTH DAKOTA, AND THE BOARD OF COUNTY COMMISSIONERS IN AND FOR CASS COUNTY, NORTH DAKOTA.

Opinion filed May 25, 1909.

Taxation — County Boards of Review and Equalization — Powers.

1. The county board of review and equalization acts in a dual capacity: First, as a board of review to review and adjust assessments in districts having no local board of review; and, second, as a board of equalization to equalize the assessments merely between the various assessment districts. As a board of review, it may raise or lower valuations upon classes of property, and also upon individual property; but as a board of equalization, it may raise or lower the valuation of classes of property only so as to equalize the assessments as between the assessment districts. (Ellsworth J., dissenting.)

Same.

2. Prior to the amendment of the revenue law in 1897 (Laws 1897, page 256, chapter 126), such board had the power, and it was its duty, to equalize assessments throughout the county by raising or reducing valuations upon classes of property, and also by changing indivdual assessments, but by such amendment it was the legislative intent to adopt a scheme or system whereby the local boards of review, where there are such boards, shall equalize the assessments as between individual taxpayers, the county board of equalization as between the

several assessment districts, and the state board as between the several counties. The old system was retained to the extent only of permitting the county board to act as a board of review in districts having no local board of review. (Ellsworth, J., dissenting.)

Taxation — Statutes — Repeal by Implication.

3. In makng such change, certain provisions of the old statute, which are inconsistent with the law as amended were continued and re-enacted in the law of 1897 (Laws 1897, page 256, chapter 126); and, in so far as such inconsistent provisions cannot be harmonized with the statute as amended, they are deemed repealed by necessary implication. (Ellsworth, J., dissenting.)

Taxation — County Board of Review and Equalization — Powers.

4. Section 2722, Rev. Codes 1905, which expressly provides that no changes shall be made in individual assessments as returned by the city board of equalization, by the county board, was not repealed by the amendment made in 1897 (Laws 1897, page 256, chapter 126), but is still in full force and effect. (Ellsworth, J., dissenting.)

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

Action by the First National Bank of Casselton against Arthur G. Lewis, as County Auditor of Cass county, and the Board of County Commissioners of that county. Judgment for plaintiff, and defendants appeal.

Affirmed.

Stambaugh & Fowler, for appellants. *Engerud, Holt & Frame*, for respondent.

FISK, J. The sole question requiring our decision on this appeal is whether the county board of equalization has authority to raise individual assessments on property in an organized city, after the same have been equalized by the city board of review. The learned trial court answered such question in the negative, and we believe correctly so. Our reasons for this conclusion will be briefly stated. The various provisions of our revenue laws relative to the review and equalization of assessments for the purpose of taxation, as they were amended and re-enacted in 1897, as hereinafter stated, very clearly disclose that the legislative intent was to adopt a scheme or system whereby the local boards of review, where there are such boards, shall equalize the assessments as between individual taxpayers, the county board of equalization as between the several assessment districts, and the State Board of Equalization as between

the several counties. There are no local boards of review in certain assessment districts, to wit, those districts not embraced in incorporated cities, towns, villages, or organized civil townships, and hence it was necessary, in making such change, to provide for a local board of review as to assessments therein, or in other words to retain, to this extent, the old system. This was done by the first portion of section 1528 Rev. Codes 1905, which expressly confers such power on the county board. The following portion of said section expressly confers upon such board the power, and imposes the duty, to examine and compare the assessments returned by the assessors of all the districts within the county, and to equalize the same throughout the county between the several assessment districts. It is thus apparent that the county board acts in a dual capacity; i. e., as a board of review as to certain assessments, and as a board of equalization for the sole purpose of equalizing as between the several districts. As to individual assessments passed upon by the local boards of review, their action was intended, by the provisions of section 1528 aforesaid, to be final; but, by the rules embraced in subdivisions 1 to 5, inclusive, of said section, and also by certain provisions of section 1523, it is provided, in effect, that the county board shall hear and act on complaints of all individuals in respect to assessments, except the complaints of residents of the districts as to personal property assessments. In so far as the latter section confers upon the county board the power of acting on individual assessments is concerned, it conflicts with the other section, but, to the extent that it deals with personal property assessments of individuals who are residents, it is in harmony therewith. The same may be said of the rules aforesaid. This conflict arises by reason of careless legislating. By chapter 132, p. 376, Laws 1890, the Legislature enacted a complete revenue statute, which is substantially a verbatim copy of the Minnesota revenue law as contained in chapter 11, Gen. St. 1878. Under section 44 of the act of 1890 aforesaid, which corresponds to the same numbered section in the Minnesota act, the county board of equalization was given the power, and it was made a duty, to equalize the assessments of the property throughout the county; their powers being in no way restricted to equalizing as between the various districts. Hence the rules embodied in the subdivisions contained in said section were in harmony with the body of the section, and, for the same reason, section 1523 was in harmony therewith. In 1897 another complete

revenue law was enacted (chapter 126, p. 256, Laws 1897), which in the main is a re-enactment of the 1890 statute. Certain changes were made in the old law, and notably the section pertaining to the duties of the county board of equalization, which is found in section 45 of the new law, being section 1528, Rev. Codes 1905. By this change the Legislature evidently intended as heretofore stated, to depart from the old system of permitting the county board to review individual assessments throughout the county so as to permit them to act as a board of review only as respects assessments in districts not embraced in an incorporated city, town, or village, or organized civil township having a local board of review, and as to all other assessments they were to equalize the same only between the several assessment districts. The whole difficulty in construing this section as thus amended is occasioned by the fact that the rules embraced in subdivisions 1 to 5, inclusive, found in said section as well as the provisions in section 1523 relating to local boards of review, are retained without material change, although some of the provisions of such rules, and of section 1523, are obviously inconsistent with the section as thus amended.

It is elementary that our duty, so far as possible, is to harmonize the various provisions so as to give effect to the legislative intent. This can be done only by holding that such rules in so far as they are applicable to the duties of the county board as a board of review, shall be construed as referring merely to the discharge of such duties, and that those rules which are applicable to the duties of the board when acting either as a board of review, or as an equalization board for the purpose of equalizing between the districts, shall have the same application as they had under the prior statute. In no other way can we give effect to the clear legislative intent to restrict the power of the county board to that of equalizing merely between the various districts, except in districts having no local board of review. This construction is not a strained one, and is fully justified by the well-settled rules of statutory construction. Furthermore it harmonizes section 1528 with section 2722, Rev. Codes 1905, which latter section expressly provides that no individual assessment in cities shall be changed by the county board. Section 2722 is a mere continuation of such section as enacted by chapter 33, p. 110, Laws 1893, but its enactment in 1893 operated as an implied repeal of section 1528 as that section stood under the 1890 statute, in so far as it conflicted therewith, and the re-enactment of section 1528

by Acts 1897, p. 272, c. 126, § 45, not being inconsistent thereto, but in strict harmony therewith, did not have the effect of impliedly repealing section 2722. As to certain provisions in section 1523 they cannot be harmonized with section 1528, and hence, under well-settled rules of statutory construction, the amended section, being the latest expression of the legislative will, must control, and the inconsistent provisions of the other section must be deemed to be repealed by necessary implication. It will be noticed that section 1523 is a mere continuation of the same section found in the 1890 act. 26 Am. & Eng. Enc. of Law, 713, and cases cited.

Our conclusion, therefore, is, that the county board acts in a dual capacity: First, as a board of review to review and adjust assessments in districts having no local board of review; and, second, as a board of equalization to equalize the assessments merely between the various assessment districts; that as a board of review it may raise or lower valuations upon classes of property, and also upon individual property, but as a board of equalization it may raise or lower the valuation of classes of property only so as to equalize the assessments as between the districts. The property in question being within the city of Casselton, the action of its local board of review was final, and hence the county board had no power to raise plaintiff's assessment.

Judgment affirmed.

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

ELLSWORTH, J. (dissenting). I am unable to agree with the construction placed by my associates upon section 1528, Rev. Codes 1905, in any of the points presented by the majority opinion. It is apparent that section 1528 is somewhat carelessly drawn, and its parts loosely connected. Preserving the arrangement of parts made by the legislature, however, and giving the words their usual and ordinary meaning, a certain purpose is clearly evident. This being true, it is not our duty to wrest words and phrases of the statute from the grammatical and rhetorical construction given them by the Legislature, in an attempt to harmonize its provisions with a conjectural general intent that appears very obscurely at best, and may be entirely fanciful.

In all enactments prior to the passage of section 1528 as part of the revenue law of 1897 the power of county boards of equalization to raise or lower an individual assessment, made in any part of the county, was unquestioned and very broad. Section 1584, Comp. Laws 1887; section 44, p. 392, c. 132, Laws 1890; sections 1213, 1214, Rev. Codes 1895. The only evidence of a legislative intent to adopt a general scheme or system, in the operation of which the powers of county boards is confined exclusively to the equalization of assessments between the different districts of the county appears, upon the adoption in 1897 of section 1528, in words to the effect that the county board, after examining and comparing the assessments returned by the assessors of all districts in the county, shall "proceed to equalize the same throughout the county between the several assessment districts." This duty is to be performed, however, expressly, "subject to the following rules." Then follows four rules which in the plainest expressions possible empower the county board in the exercise of its duties to raise or lower the value of individual assessments.

In view of the majority of this court these rules are meant by the Legislature to apply to the duties of the county board only while acting as a board of review in correcting assessments made in districts having no local board. If such was the intent of the Legislature, it is certainly remarkable that it should have chosen language which expresses an exactly opposite purpose. It may be said that, by striking out the words "subject to the following rules" in the place where they are now found in the statute, and transposing them to the beginning of the sentence in which they appear, so that it will read "subject to the following rules, such board shall perform the duties perscribed by section 1523," etc., an intent, as declared by the majority opinion, clearly appears. It is only by means of some such rearrangement as this of the language of the statute that any color can be given to the interpretation placed upon it by the majority opinion. It is equally true, however, that by the transposition and elimination of one or more words almost every sentence in the statute could be made to express an exactly opposite meaning to that which it now conveys. A construction which requires that we should thus do violence to the plain rhetorical construction of the statute is, in my opinion, not permissible. "We are not at liberty to imagine an intent, and bind the letter of the act to the intent; much less can we indulge in the license of striking out

and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not evidence." Sutherland on Statutory Construction, § 237. Alexander v. Worthington, 5 Md. 485.

Under no construction, except one so strained and distorted as to fall without the sanction of any well-recognized principle, can it be said that the four rules contained in subdivisions 1 to 4 of section 1528 do not authorize the county board to raise and lower individual assessments in all the assessment districts of the county. The plain wording of the statute makes these rules applicable only to the county board in the discharge of its duty as a board of equalization. If they may be said to be also, though much more remotely, applicable to the discharge of the duties of the county board while acting as a board of review, then it can be claimed only that they apply to both the functions of review and of equalization. If it be conceded that they apply in any degree whatever to the function of equalization, it inevitably follows that the county boards are authorized to raise and lower individual assessments in all the districts of the county.

Section 2722, Rev. Codes 1905, was passed in 1893 as part of an act providing for the government of cities. That part of this section which provides that no individual assessment of taxable property shall be changed by the county board is in direct conflict with the provisions hereinbefore referred to of section 1528, which, being a later expression of the legislative will, operates to impliedly repeal that part. Notwithstanding this implied repeal of a single clause, section 2722 was still in substance an "existing statute," and cannot be regarded as a new enactment when passed as part of the general law relating to the government of cities in 1905. The duties of the county board at the present time are therefore, in my opinion, entirely unaffected by that part of section 2722 which prohibits the changing by it of an individual assessment made in an incorporated city.

While, therefore, isolated clauses of the statutes, referred to may afford some evidence of a general plan or scheme in the operation of which the county boards shall deal only with classes of property and not with individual assessments, the plain rendering, according to the usual and general signification of the words and phrases of section 1528, Rev. Codes 1905, confers authority upon the county board to change an individual assessment in any district of the

county; and in my opinion the county board of equalization of Cass county was authorized to increase the assessment of respondent's bank stock, if there was reason to believe that the amount returned by the city assessor was not in accordance with the value of the property.

(121 N. W. 836.)

THOMAS H. DEAN v. B. W. DIMMICK ET AL.

Opinion filed October 27, 1908.

Rehearing June 29, 1909.

Constitutional Law — Mandamus — Location of County Seat.

In a mandamus proceeding, instituted by a private party against county officers to compel them to change the location of their offices as such officers, such proceeding not being maintained in the name of the state, or on behalf of the citizens of such county, the court will not determine the constitutionality of an act of the legislature providing for a vote upon the relocation of the county seat.

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

Application by Thomas H. Dean for writ of mandamus against B. W. Dimmick, County Auditor, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Engerud, Holt & Frame, for appellant.

Omission of name of state was a formal defect only to be cured by amendment. Rev. Codes 1905, Secs. 6883, 6885; Rev. Codes 1905, Sec. 7840; Morgridge & Merrick v. Stoeffer 14 N. D. 430; Merrill on Mandamus, Sec. 264.

T. S. Becker and *Geo. A. Bangs*, for respondent.

A private citizen cannot apply for mandamus unless he has a special interest in the fulfillment of an official duty as does not pertain to other citizens. People v. Green, 29 Mich. 121; Smith v. Mayor, 45 N. W. 964; Thomas v. Hamilton, 59 N. W. 659; Mitchell v. Boardman, 79 Me. 469; 10 Atl. 452; Chapman v. People, 48 Pac. 153; Linden v. Board, 45 Cal. 6; Marini v. Graham, 7 Pac. 442; Colnon v. Orr, 11 Pac. 814; Ashe v. Supervisors, 16 Pac. 783; People

v. Budd 47 Pac. 594; Fritts v. Charles 78 Pac. 1057; Doolittle v. Supervisors of Broome county, 18 N. Y. 155; Ramford v. Hollinshed, 47 N. J. L. 439; Moon v. Carl, 43 Iowa, 503.

Mandamus will not issue to determine the constitutionality of a legislative act. Peo. v. Supervisors, 20 Cal. 592; Frazer v. Freelon, 53 Cal. 644; Davis v. Court, 63 Cal. 581; State v. Douglas Co., 26 N. W. 315; Co. v. Hagood, 9 S. E. 686 at 688; Wright v. Kelly, 43 Pac. 565; Smythe v. Titcomb, 31 Me. 272; Inhabitants v. Clark, 33 Me. 482; Maxwell v. Burton, 2 Utah, 595 at 599.

SPALDING, J. This proceeding was instituted by the plaintiff, a private party, by the service upon each of the defendants of the petition and notice of application to the district court for an order directing the issuance of a peremptory writ of mandamus, commanding the defendants to forthwith remove their respective offices, namely, the offices of judge of the county court, register of deeds, and auditor of McKenzie county, from Schafer to Alexander in said county. The petition set out the holding of an election under the provisions of chapter 77, p. 159, Laws 1905, and that at such election Schafer received a majority of the votes cast, and was duly declared to be the county seat of said county by the issuance and publication of a proclamation by the county commissioners, as required by said chapter. It further alleges that said officers removed their said offices to Schafer, and still continue to maintain them at that place. We are asked to decide on the constitutionality of said chapter. The petition was demurred to by the defendants, and the district court sustained such demurrer, and it is in this court by appeal.

We are met by several claims of error. The decision of one of such claims will dispose of the appeal. The proceeding is not instituted by or on behalf of the state, either on the relation of the Attorney General, or of any citizen of McKenzie county, and it is not alleged that any application was made to the Attorney General for leave to proceed in the name of the state. It is contended that the proceeding cannot be maintained by a private individual, and that the constitutionality of a law will not be determined upon an application for a writ of mandamus made by, and in the name of, a private party, when the subject-matter is one of a public nature. On the other hand, it is maintained that such doctrine applies only to the writ when issued, and that, preliminary to the issuance of a

writ, it is unnecessary to entitle the proceedings, and that the constitutionality of a law can be questioned in any proceeding. We have given the question involved very careful consideration, and while its proper solution is not without doubt, have arrived at the conclusion that the plaintiff has not placed himself in a position to demand this writ. The question is one of public concern, in which all the citizens of McKenzie county are interested. The plaintiff shows no interest further or other than that possessed by all citizens of the county. While the mere entitling of a proceeding may be a matter of slight importance, and in some cases a formality, yet in this proceeding the title is used to indicate who the moving party is, and, having been used, it shows that the move is not being made by the public, and the petitioner does not even allege that it is made on behalf of other citizens similarly situated.

In State ex rel Dakota Hail Ass'n v. Carey, 2 N. D. 36, 49 N. W. 164, it is said that the required affidavit may be properly made by any citizen of the locality affected, where the controversy does not concern the state as such, but does concern a large class of citizens in common. This statement, however, refers only to the competency of a private individual to make the affidavit, and does not determine who may institute the proceeding, or in whose name it may be brought. It is said in the same case "that the name of the state should be inserted in the writ, in connection with the name of the relator, in all cases, whether the matter is one in which the state as such is strictly a party in interest or not, or whether the question is one of public concern or purely private dispute." But in this proceeding it is not attempted to show that the right which the petitioner seeks to secure is one which affects him in any way peculiar to himself and from the nature of the controversy we must assume that it only affects him in the some manner as it affects all other taxpayers and citizens of the county, all of whom are interested in the location of the county seat. In such a case we think the matter should not be litigated in this manner. The public has a right to be heard; and, if we were to determine the constitutionality of the statute in question, and on which the result may depend, we should have to pass upon the rights of the public at the instigation of a private citizen, in his personal capacity as a private suitor. In the meantime other proceedings, by other private individuals, might be instituted, the rights of none of whom would be settled by the decision in this case. Each citizen of the county

might see some additional reason why the law should be held constitutional or unconstitutional, and desire to present it to the court. Several authorities are cited on this and analogous questions, which we consider as not being in point.

It is contended that mandamus proceedings cannot be maintained in any case to determine the constitutionality of a law. This does not follow from our holding in this case, and there are few, if any, of the authorities cited which on close analysis sustain this principle. Most of them are to the effect, when closely scrutinized, that courts will not entertain an application for a writ of mandamus for the purpose of testing the constitutionality of a statute when not presented to the court long enough before action is necessary to give it an opportunity to thoroughly consider the question involved. This we think is a very sound rule, but it is not applicable to the proceeding at bar.

In addition to the authority from our own court which we have cited, we call attention to Fraser et al. v. Freelon, Judge, 53 Cal. 644, and Davis v. Superior Court, 63 Cal. 581.

The appellant asked leave, on hearing in the district court, to amend forthwith by substituting the state as plaintiff. Permission to do so was denied for the time being, but in the order sustaining the demurrer permission was granted to amend on payment of costs. Appellant declined to comply with the terms imposed, which, in our judgment, were reasonable under the circumstances.

By reason of the foregoing conclusion, it would be improper to pass upon the question raised by the respondent as to the effect of delay in commencing the proceeding.

The order of the district court is affirmed.

MORGAN, C. J., concurs.

FISK, J. (concurring specially). I concur in the conclusion arrived at in the majority opinion that the order appealed from should be affirmed, but I desire to place my decision upon the ground that the demurrer was properly sustained for the reason that relator fails to show a clear legal right to the writ. His right depends on a holding that chapter 77, p. 159, Laws 1905, is unconstitutional. Under the provisions of said statute the electors of McKenzie county, assuming the validity of such law, held an election for the purpose of permanently locating the county seat, which election resulted in favor of the village of Schafer. A proclamation was issued

and published by the commissioners pursuant thereto, declaring Schafer to be the county seat. Respondents, who are mere ministerial officers, acted in accordance with such proclamation by removing their offices to Schafer. Therefore, in maintaining their offices at the latter place, they acted under color of legal authority conferred and duly imposed by a statute presumed to be valid. Schafer has been recognized by the people of that county as the county seat, and, under the foregoing facts, it is, and has been since such proclamation was issued and published, at least the de facto county seat of the county, and in my opinion a writ of mandamus ought not to issue on the application of a private relator to compel them to remove their offices to another place claimed by the relator to be the de jure county seat, when the correctness of such contention depends wholly upon the question whether a certain act of the Legislature is or is not constitutional. In support of my views see 19 Am. & Eng. Enc. of Law, 763, 26 Cyc. 156, and cases cited, where the rule is announced as follows: "It is rarely, if ever, proper to award mandamus in a case in which it can be done only by declaring an act of the Legislature unconstitutional."

ON REHEARING.

SPALDING, J. A reargument was granted in this case. We have carefully considered the argument so made, and find few, if any, of the authorities cited in point. The appellant strenuously insists that a decision ought to be had on the merits to end litigation. There would be more force in this suggestion if it were likely to do so, but, for the reasons above suggested, it cannot be assumed that a different decision would result in ending litigation over the county seat. We find no reasons for changing our decision. In this connection, for information of the bar of the state, we desire to call attention to rule 32 of this court, found in 10 N. D. lvi, 91, N. W. xii, prescribing the practice relating to applications for rehearings. In nearly every instance attorneys so applying overlook the rule, or disregard it, and submit arguments of the questions already considered and determined and new briefs. It is not intended to provide for a reargument of the whole case on a petition for rehearing, but only that counsel may show 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 on the original brief of oral argument, or which has been overlooked by the court; and arguments and briefs are prohibited. Many attorneys have adopted the custom of submitting in a petition for rehearing a complete brief of all the questions originally raised. This compels the court either to ignore the petition entirely, or to re-examine the questions previously submitted and passed upon. This practice is contrary to the purpose of the rule.

All concur.

MORGAN, C. J. not participating.

(122 N. W. 245.)

THE STATE OF NORTH DAKOTA ON THE RELATION OF NEHEMIAH DAVIS, AS COUNTY JUDGE OF WARD COUNTY, NORTH DAKOTA, v. J. W. FABRICK, AS AUDITOR OF WARD COUNTY, NORTH DAKOTA.

Opinion filed January 16, 1909.

Rehearing denied May 14, 1909.

County Courts — Increased Jurisdiction — Election — "Majority Vote."

1. Section 111 of the constitution provides that county courts shall have jurisdiction of certain civil and criminal causes "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 that court increased." *Held,* that the words "majority vote" mean a majority of all votes cast on the question of increased jurisdiction, and not a majority of all the votes cast at the election.

County Judges — Salaries.

2. Chapter 68, page 81, Laws 1899, section 6615, Rev. Codes 1899, and chapter 78, page 160, Laws 1905, construed, and *held* to limit the maximum salary of county judges in counties having increased jurisdiction to the sum of $2,500.

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

Mandamus by the State, on the relation of Nehemiah Davis, as County Judge of Ward county, against J. W. Fabrick, as Auditor of that county. Judgment for defendant, and relator appeals.

Affirmed.

John E. Greene, for appellant.

George A. McGee, State's Attorney, and *Francis J. Murphy,* for the State, attorneys for respondent.

MORGAN, C. J. The relator seeks to compel the respondent, the county auditor of Ward county, by a writ of mandamus, to issue to him a warrant for salary as county judge of said county. He was elected to that office in 1904, and has held the same by successive elections ever since. He claims that there is due him the sum of $3,800, over and above all sums that have been paid to him for salary. He claims that said sum is due him by reason of the alleged fact that the county court of Ward county is one having jurisdiction of certain civil and criminal causes by virtue of an election in said county whereby such increased jurisdiction was granted to that court. The district court refused to grant the writ and dismissed the proceeding. In this court the respondent advances two objections to the granting of the relator's contention, which are as follows: (1) That the county court of Ward county is not a court having jurisdiction over any matters save probate and guardianship matters. (2) That the relator has been paid all sums due him as such county judge, conceding that increased jurisdiction has been conferred upon said court. The validity of the first objection rests upon the construction to be given to section 111 of the Constitution, and the validity of the second objection rests upon the construction to be given to the various legislative enactments in force during relator's incumbency of said office, which enactments will be herein set forth in detail.

Pursuant to chapter 60, page 70, Laws 1903, the question was submitted to the voters of Ward county at the general election of 1904 whether that court should have jurisdiction over civil and criminal causes, and at such election county and state officers were also voted for. The proposition to increase the jurisdiction of the county court did not receive a majority of all the votes cast at that election for certain officers; but it did receive a majority of all the votes cast at said election upon the proposition whether the jurisdiction of said court should be increased. Section 111 of the Constitution, which authorizes the submission of that question to the voters of the county, is as follows, so far as material: It provides that said court shall have jurisdiction in probate, testamentary, and guardianship matters, "provided, that whenever the voters of any county * * * shall decide by a majority vote that they desire

the jurisdiction of said court increased above that limited by this Constitution, * * * and in case it is decided by the voters of any county to so increase the jurisdiction of said county court. * * * In case the voters of any county decide to increase the jurisdiction of said county courts. * * *" It is apparent that the issue on this question must be determined by the meaning to be given to the words "whenever the voters of any county * * * shall decide by a majority vote." As ordinarily understood, do the words "a majority of the voters of any county" mean a majority of the votes cast at that election for any purpose, or a majority of the votes cast upon the precise proposition to be submitted under that section of the Constitution?

The proposition in question was submitted to a vote at a general election, although the county commissioners could lawfully have submitted it to a vote at a special election called for that purpose. The Legislature empowered the commissioners to submit the question at a special or at a general election. The question whether the proposition to increase the jurisdiction of the county court was legally adopted should be determined from the language of the section without regard to the question whether it was submitted at a special or general election, inasmuch as the language of the section is general and contains nothing to indicate that a different rule should be applied in canvassing the vote depending upon whether the election is special or general. It is a principle applicable to such questions that a majority of the votes cast upon a submitted proposition is sufficient to carry it, unless the constitutional or statutory provision under which the proposition is submitted clearly shows that it was the intention that a different rule or principle should apply. As said in State v. Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723: "The general policy of the American people is to test the sufficiency of any vote by the vote on that particular question, and not by the vote on some other question. Unless the language is free from doubt, we have no right to spell out of the statute by any far-fetched inference a purpose to depart from this general policy." That was a case involving the construction of the statute relating to the relocation of county seats. Before the change became effective, "two-thirds of the votes polled" must have been cast in favor of one place. This court construed the provision to mean that only two-thirds of the votes cast upon the proposition was necessary to secure the removal of the county seat, and not two-

thirds of all the votes cast at the election. In that case the court said: "The plain meaning of the statute is that the place having two-thirds of the votes polled on the particular question of relocation shall be the county seat. There is nothing in the statute indicating that to work a change of the county seat any one place must receive a vote of two-thirds of all the voters of the county. Ample authority sustains our decision. * * * When a majority of the electors is spoken of, the highest number of votes cast at the election must furnish the standard for determining whether the particular measure which must have such a majority has been carried."

Although the language of the statute construed in that case is not identical with the section of the Constitution under consideration, we think that case decisive of the case at bar. Section 111 of the Constitution applies only to elections on the question of increasing the jurisdiction of county courts. The words by "a majority vote" mean more than one-half of the voters voting upon that question. If it was the intention that a majority of the electors of the county should vote in favor of increased jurisdiction, language expressive of that intention could easily have been found. The words "majority vote" clearly imply that there are votes for and against the proposition. The language clearly indicates a purpose to test the question whether the proposition covered by the section has carried by the votes cast on that question alone, and not by the number of votes upon some other question, or for some candidate. We think it would be an unnatural and strained construction to say that the words "majority vote," as used in said section 111, mean a majority of the votes on some question not referred to in that section at all. Adhering to the principle that a majority of the voters voting on a particular question governs, unless a different construction is forced by the language of the Code or Constitution, we are convinced that a majority vote on the question covered by said section 111 is sufficient. The section refers to a special subject or matter. The general words of the section must receive the construction limiting their meaning to the subject to which the section refers. The words "voters" and "majority vote," as used in that section, should be limited under that principle to refer only to the voters voting on the subject-matter of the section. We think this construction is emphasized as proper by the legislative enactments passed to carry the provisions of said section 111 into effect. The Legislature of 1903 provided for the submission of the question

of increased jurisdiction of county courts to the "voters of the county," and provided that the same could be done at either general or special elections at the discretion of the county commissioners. This chapter is silent as to the manner of voting or canvassing the vote upon the question. Hence the same must be governed by the existing statute covering that question, being section 491 of the Revised Codes of 1899. This section provides for "votes for" and for "votes against" all special questions submitted thereunder. In other words, the affirmative and negative votes are to be counted. If it was intended that a majority of all the votes cast at the election for any measure or candidate must be in favor of increased jurisdiction, it is not apparent, and no plausible reason exists why the negative votes must be counted at all. Besides the cases cited with approval in State v. Langlie, supra, the following authorities sustain the construction adopted by us as the proper one under similar enactments: South Bend v. Lewis, 138 Ind. 512, 37 N. E. 986; State v. Eckols, 41 Kan. 1, 20 Pac. 523; In re Davis, 62 Kan. 231, 61 Pac. 809; Smith v. Proctor, 130 N. Y. 319, 29 N. E. 312, 14 L. R. A. 403; State v. Pool, 20 Or. 150, 25 Pac. 375; Walker v. Olswood, 68 Md. 146, 11 Atl. 711; Howland v. Commissioners, 109 Cal. 152, 4 Pac. 864.

We will now consider the salary question. That question involves the construction of the several statutes fixing the salary of county judges in counties having increased jurisdiction, and the construction of other statutes fixing the salary of county judges in counties not having increased jurisdiction. The issue between the parties is whether county judges in counties having increased jurisdiction are entitled to the salary provided for by section 6615 Rev. Codes 1899, and in addition thereto the salary provided for by chapter 68, page 81, Laws 1899, fixing the salary of county judges in counties not having increased jurisdiction. Chapter 62, p. 72, Laws 1899, being amendatory of section 6615, Rev. Codes 1895, reads as follows: "As compensation for their services under this act, there shall be allowed and paid to judges of county courts having civil and criminal jurisdiction (in all counties having a population of 18,000 inhabitants) the sum of two thousand and five hundred dollars ($2,500.00) per annum, and in counties having less than 18,000 inhabitants the sum of $1,000 per annum, payable monthly by such county, which sums cover all services under the prohibition law."

This section is the same as section 6615, Rev. Codes 1899. Chapter 68, p. 81, Laws 1899, reads as follows: "As compensation for his services, the county judge shall be paid in all counties an annual salary based on the assessed valuation as follows: In counties having a valuation of * * * over four million, five hundred thousand dollars, and under seven million dollars, fourteen hundred dollars, * * * and no more for his personal services; provided that the salary of county judge in counties having increased jurisdiction shall not be affected by the provisions of this act." These two sections govern as to the salary of appellant for the years 1905 and 1906 and a part of the year 1907. The appellant claims that he is entitled to a salary of $1,400 during these years under said chapter 68, Laws of 1899, and, in addition thereto, a salary of $2,500 under said section 6615, Laws 1899. This last section was amended in 1903, but the amendment has no effect upon the question at issue here. The respondent contends that chapter 68, p. 81, Laws 1899, is to be construed independently of, and not in connection with, said section 6615. The appellant contends that each section must be given effect in determining what salary a county judge in counties having increased jurisdiction is entitled to. Which of these two opposite contentions is the correct one depends upon the meaning of the proviso in said chapter 68, p. 81, Laws 1899; the same being: "Provided that the salary of county judges in counties having increased jurisdiction shall not be affected by the provisions of this act."

We think that each law determines by itself what the maximum salary shall be. Under chapter 68, p. 81, Laws 1899, the salary of judges in counties not having increased jurisdiction is limited to $1,800 per annum. Under section 6615, Rev. Codes 1899, the salary in counties having increased jurisdiction is $2,500. The reasonable meaning to be given to the proviso in said chapter 68 is that the salary of county judges in counties having increased jurisdiction remains the same as fixed by other statutes, regardless of the salary as fixed by said chapter 68. In other words, the provisions of said chapter 68 do not apply in ascertaining what the salary of judges of county courts in counties with increased jurisdiction is. In counties having increased jurisdiction, the salary of county judges as fixed by other laws are not to be changed or affected by the provsions of said chapter 68. Chapter 68 is not operative and does not act upon the salary fixed by such other laws, that is, such

other salary is not enlarged or diminished by said chapter 68. After a comparison and consideration of all the laws fixing the salary of the county judges in this state since 1890, this construction we think gives effect to the intention of the Legislature in enacting said chapter 68. As to the meaning of the word "affected" as used in said chapter, see Words and Phrases, vol. 1, p. 238.

In the year 1905 said section 6615, Rev. Codes 1899, was again amended. It is contended by the appellant that this amendment should be construed as not limiting the salary of county judges in counties having increased jurisdiction to the sum of $2,500, but that the same should be construed as allowing to said judges the sum of $2,500 besides the salary provided by chapter 68, p. 81, Laws 1899. In other words, it is contended by the appellant that the Legislature recognized by this amendment that said chapter 68 is still effective as providing in part what the salary of county judges shall be in counties having increased jurisdiction. We cannot agree with this contention. The last-named amendment fixed the salaries of county judges as follows: "As compensation for their services under this act, there shall be allowed and paid to the judges of county courts having civil and criminal jurisdiction, in addition to the salary provided for such judges of county courts in counties not having increased jurisdiction, the sum of one hundred dollars for each one thousand inhabitants or fraction thereof; provided that in no case shall the compensation for services under the increased jurisdiction provided for in this act exceed the sum of two thousand five hundred dollars and said sum shall cover all services under the prohibition law." We think the language of this enactment too clear for doubt as to the correct construction. It clearly was the legislative intent, as shown by the language, that the salary of county judges in counties having increased jurisdiction should not exceed the sum of $2,500.

Great stress is laid by the appellant upon the words "in addition to the salary provided for such judges of county courts in counties not having increased jurisdiction." This amendment does not affect the maximum salary allowed county judges in counties having increased jurisdiction. The evident intention was to allow those county judges the salary allowed under this amendment, besides that fixed by chapter 68, p. 81, Laws 1899, subject to the proviso that the total salary should not exceed in any case the sum of $2,500.

The provisions of chapter 68, p. 81, Laws 1899, and the provisions of this amendment, are to apply in determining what the salary shall be up to the sum of $2,500, but not when the combined salaries under the two acts exceed $2,500.

It follows that the judgment of the district court should be affirmed, and it is so ordered. All concur.

(121 N. W. 65.)

MELVINA MASSEY v. H. C. RAE.

Opinion filed April 6, 1909.

Rehearing denied May 15, 1909.

Husband and Wife — Conveyance — Validity — Evidence.

1. There is no presumption that a deed from a wife to her husband is not valid, but upon a showing of mistake, fraud or undue influence through which the husband secures the wife's signature to a deed when she is sick and weak through continued sickness, the burden of showing an adequate consideration, or that no mistake, fraud, or imposition was exercised, is on the husband, and if he fails to show, in view of the relations of confidence existing on account of the marital relation, that no fraud was practiced, and that the deed was understandingly and voluntarily executed, and that the consideration was fair and adequate, the deed will be set aside.

Deeds — Conveyance by Wife to Husband.

2. Evidence considered, and *held* to show that a deed from the wife to the husband was executed under circumstances that required the husband to show that no imposition or undue influence was exercised, and that the consideration was adequate, and that the deed was executed understandingly.

New Trial — Determination and Disposition of Case.

3. A new trial may be granted in cases tried under section 7229, Rev. Codes 1905, in furtherance of justice, where the action was dismissed on motion at the close of plaintiff's case, and final disposition of the case cannot for that reason be made.

Husband and Wife — Confidential Relations — Deeds — Evidence.

4. Relations of confidence will be presumed to exist between husband and wife in the absence of a showing to the contrary. The evidence in this case does not show that no confidential relations existed between the parties.

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

Action by Melvina Massey against H. C. Rae. Judgment for defendant and plaintiff appeals.

Reversed and remanded.

Glassford & Lacy and *M. A. Hildreth*, for appellant.

A deed obtained by persons in such relations to the grantor as to give them a controlling or strong influence over his conduct, will be set aside upon slight evidence of improper exercise thereof. Casborne v. Barshan, 2 Beaver, 76; Hill on Trustees 156-157-158-159-162; Demp v. Bennett 7 Simons, 539; Story's Equity Jurisprudence, 308-324; Wood v. Downes, 18 Ves. 120; Kleeman v. Peltzer, 22 N. W. Rep. 793.

The burden of proof is upon him taking a gift from one in confidential relations to show the transaction fair and proper. Sear v. Shafter, 6 N. Y. 268; Houghton v. Houghton, 15 Beaver, 278; Ford v. Harrington, 16 N. Y. 285; Davies v. Davies, Second New Rep. 284; Coutts v. Acworth, Law Rep. 8 Eq., 558-567; Burnaby v. Griffin 3 Ves. 266.

Barnett & Richardson, for respondent.

In view of the statutes granting to married women power to convey, no greater burden in the absence of undue influence, rests upon the husband, as to conveyances from the wife than from others. Tillaux v. Tillaux, 47 Pac. 691; Sheehan v. Sullivan, 58 Pac. 543; Nedby v. Nedby 21, Law J. Ch. 446-5; De. Cox. & S. 377, followed—Barron v. Willis, 68 Law J. Ch. 104 (1899)—2 ch. 578, 81 Law T. (N. S.) 321—48 Wkly Rep. 26.

MORGAN, C. J. This is an action to set aside a deed to a part of lot 1, block 12, of Keeney & Devitt's addition to the city of Fargo. The complaint states as the basis on which such relief is asked the following facts: That defendant had been acting as the plaintiff's agent in attending to the removal through legal proceedings of a tenant of the plaintiff from a building situated on a lot adjoining the plaintiff's residence. That the defendant had as such agent served or caused to be served upon such tenant a notice to quit some time previous to May 14, 1906, and that it was necessary to serve another notice, and that defendant did on May 14, 1906, fraudulently procure the plaintiff to sign a deed of the said property and deliver

the same to him through false representations that the paper was a notice to quit to be served upon her tenant to vacate said building. That she signed said deed believing it was a notice to quit, and that she was at the time "in such a condition of illness of body and mind that she had no means and did not know that the instrument she was signing was the deed above set forth, and that she had no knowledge as to her making and delivering said deed until some two or three weeks thereafter, when she was informed that she had deeded the said property to the defendant herein. The complaint also states that no consideration was paid to her for said deed. The answer is a qualified denial, and further alleges affirmatively that the plaintiff is defendant's wife, and that the conveyance was executed and delivered for a valuable consideration, and that the defendant has ever since said conveyanve been in the actual and open possession of the same, and is now the absolute owner thereof. At the close of the plaintiff's case, the trial court granted defendant's motion to dismiss the action, and made findings of fact as follows: That plaintiff and defendant have been husband and wife during the 15 years last past, and have resided in the city of Fargo during that time. That on May 15, 1906, plaintiff, for a valuable consideration, executed and delivered to defendant a quitclaim deed of the premises described, and that said deed was executed freely and voluntarily with full knowledge of the execution and delivery of the same. Judgment was duly entered on these findings, and the action was dismissed. Plaintiff appeals from the judgment and demands a review of the entire evidence under section 7229, Rev. Codes 1905. The record presents a difficult question of fact for determination. The defendant was not a witness at the trial. Hence just what facts he would testify to to substantiate his answer we do not know. He relies solely upon the insufficiency of the plaintiff's evidence to substantiate the cause of action set forth in the complaint. This he had a right to do if the evidence is actually insufficient to show any cause of action in favor of the plaintiff against the defendant.

We will not review the evidence at any great length, but will state enough thereof to indicate the basis of our conclusion that a new trial must be had. In the first place, the evidence of the plaintiff shows to our satisfaction that the defendant paid no consideration for the deed, nor did the plaintiff receive any therefor. The

plaintiff was asked the following questions: "Q. I will ask you whether or not any money or any consideration ever passed to you from this defendant or anybody for the deed in question? A. No, sir; not a dime. Q. Did he ever give you any money at all? A. Never in his life." The defendant's counsel urge that plaintiff received the proceeds of a mortgage placed on the lot by the defendant about one month after the deed was delivered. The evidence fails to show this fact. An inference of such fact might possibly be drawn from the evidence. This evidence shows that the plaintiff was in need of $1,600, and that a mortgage of $800 was placed on the property in suit by the defendant, and a mortgage for $800 was placed on the balance of the lot by the plaintiff. But there is no positive showing that the plaintiff received all of this money, and we do not think that the fact of consideration in a case of this kind should be allowed to rest in inference. The lot in suit is valued at from $3,000 to $4,000, and, if the plaintiff received $800 from the defendant a month after the deed in suit was given, it is far from showing that the $800 was a consideration for the deed. During the time that these mortgages were being negotiated the plaintiff was all the time endeavoring to procure a reconveyance to her of the property.

So far as the fraudulent representations alleged in the complaint as a basis for setting aside the deed are concerned, it is conceded that no such representations are expressly shown by the evidence. On the trial the plaintiff asked leave to amend the complaint by striking out all allegations therein as to fraudulent representations, and inserting in lieu thereof allegations to the effect that the deed was signed through mistake caused by sickness, and through what had theretofore transpired as to giving notice to quit to her tenant, and that, on account of such facts, she believed she was signing a notice to quit. The motion to amend the complaint was objected to by the defendant on the ground that the issues would be thereby entirely changed. The court refused to allow the amendment, and granted the motion to dismiss the action which had been theretofore made. In view of this record, it is apparent that the question of actual fraudulent representations inducing the execution of the deed must be eliminated in considering the evidence. The deed was signed in the presence of three persons besides the defendant. The plaintiff makes no attempt to show any actual fraudulent representations, but relies upon a claim of mistake as to what she thought she was signing, which was, as she alleges, brought about by what had transpired

before in regard to serving notices to quit and by her sickness. All the witnesses fully corroborated her testimony to the effect that she was very sick. They all testify that she had to be propped up or held up in bed to sign the deed and the notice. The deputy sheriff who was present to receive the notice to quit for service stated to the notary public who took the acknowledgment as they were leaving the room "that she was pretty sick, and I don't believe she will live long, and I don't think she was understanding what she was doing." A nurse who had attended the plaintiff two or three weeks testified that: "On May 15th she was very ill—she was what I considered in a dying condition, just between life and death." The notary public testified that he realized that she was sick, although he did not know how sick she was, and that he asked her, "Do you know what you are signing?" and that he would not have taken her acknowledgment unless he had asked her that question inasmuch as she had been sick, and that he asked her that question because she was quite sick. This testimony, taken in connection with plaintiff's positive testimony that she has no recollection at all of signing a deed is very convincing that she was in such a condition that she did not as a matter of fact understand what she was signing, and her condition was such that her signature and acknowledgment of the deed are of no weight whatever, and the deed should not be upheld, unless other circumstances show that she was acting with full understanding of the transaction. The plaintiff is a colored woman and the keeper of a house of prostitution, and this fact might lessen the weight of her testimony, or impair it entirely. But the other witnesses corroborate plaintiff's testimony on this question so fully that we think it established that she did not understand what she was signing when she signed the deed. The defendant's attorney endeavored to sustain the deed by showing that the notary asked her if "she knew what she was signing," and that she answered that she did, and said "that it was all right." The plaintiff did not state to the notary that she knew that she was signing a deed, and it seems to be a fact that she was not then and there told what property was included in the deed, and the notary simply testifies that from the best of his recollection he told her that it was a deed, but he does not claim that he told her what it was a deed of. Even if the testimony does show that the notary stated to her that it was a deed this fact would not necessarily mean that she knew or understood, in view of her condition, that it was a deed. The fact that she stated it

was all right, and that she knew what she was signing, has no significance in view of the fact that she thought she was signing a notice only.

Defendant also attempts to sustain the deed on the ground that the plaintiff told the notary that it was all right, and that she was satisfied, about two weeks after the signing and delivery of the deed. From the notary's evidence, however, it is clear that he himself does not know whether she meant to express satisfaction with the notary's services in looking up the records to ascertain what property she had conveyed, or whether she meant to say that she was satisfied with having given the deed to the defendant. It is a significant fact in this case as tending to show that the plaintiff did not know what she was signing that immediately upon ascertaining that the deed conveyed, not all her property, but only a part of the lot on which she resided, she continued to demand that he reconvey to her, and she has ever since insisted upon a reconveyance to her. She ascertained what the deed conveyed in about a week after the conveyance. and from that time until the present time has sought to compel him to reconvey to her. If she knew that she was signing a deed on the 15th of May, and signed it voluntarily in a legal sense, why did she change her mind and demand a reconveyance immediately on being informed that she had given a deed. The only person who can explain this fact, if any one can, is the defendant.

The complaint does not allege that these parties are husband and wife. The answer alleges this as a fact, and the record shows the fact by evidence unobjected to. It is strenuously urged by the defendant's counsel that the confidential relations usually existing between husband and wife did not exist as a matter of fact in this case, and, as a basis for this contention, it is urged that she endeavored to get rid of him. The fact remains, however, that the record shows that they were husband and wife, and lived together in the same house as such. We do not think that there is anything in this record that warrants us in considering the evidence, except according to the general rules applicable to transactions between husband and wife, or other parties between whom exist confidential relations. The fact that married women may convey their separate property without consent from their husbands in this state under section 4079, Rev. Codes 1905, does not abrogate the rule that deeds from wife to husband will be cautiously scrutinized, and, when circumstances

such as appear in this case are shown, a full explanation as to the consideration and circumstances under which the deed was given will be required, and the usual presumptions will not be indulged in thereafter. The case cited (Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691) is not in point, as that was a conveyance from husband to wife, and the conveyance was upheld on the ground that it was given in consideration of love and affection. We do not hold in this case that a deed from wife to husband is presumed to be fraudulent, but the husband must show absence of undue influence and the presence of an adequate consideration upon a showing prima facie of undue influence or fraud, or want of adequate consideration, or that the execution of the deed was made while the grantor was not in such a mental or physical state as to understand the nature of the transaction fully. If, for any reason, her deed is shown not to be understandingly given, or the giving of it was induced through imposition or undue influence, it devolves upon the husband to show fully what the circumstances were, and what the consideration was, and that it was fair and just. If the property conveyed by the deed is a gift, it must be shown to have been understandingly and voluntarily given as such. In other words, if there is ground to believe that undue influence was exerted by reason of the marital relations, or that the wife was in such condition that she did not understand what she was doing, the husband must affirmatively show the fairness and adequacy of the consideration, and that no imposition or undue influence was resorted to. In this case the deed recites the consideration as "one dollar and other good and valuable considerations." What these other considerations are is not shown. There is no testimony whatever outside of the deed showing why the deed was given, or what it was given for. The plaintiff expressly repudiates the transaction as one never intended, and the defendant remains silent. Under such circumstances, the defendant should have been called upon to explain the transaction. He prepared the deed the day before, or, at any rate, it was prepared by some one on the day before, and the defendant handed it to the notary just before it and the notice to quit were signed. No word of explanation then or now as to the consideration. As stated by Judge Cooley in Stiles v. Stiles, 14 Mich, 72: "There is no pretense that the conveyance was a gift. The defense rests upon the basis of contract, and a husband who thus abtains his wife's property under

the form of a purchase, and for a consideration merely nominal, would be bound to make clear and satisfactory proof of good faith, or the courts must presume that he has made improper use of his influence as husband to extort the conveyance. On his own showing, the bargain was an unconscionable one; and the ordinary presumptions in favor of the validity of a deed are rebutted by the circumstances." In 21 Cyc. p. 1293, par. 7, this rule is stated: "Equity will scrutinize more closely a conveyance from the wife to the husband than an ordinary conveyance. On account of the confidential relations and supposedly greater influence of the husband, the wife's conveyance may be attended with a presumption against its validity. Upon satisfactory evidence, however, that an adequate consideration was given, and that no coercion or undue influence was used, any presumption of fraud will be removed." Whereas there is no proof of any specific fraudulent representations, there is enough in the record to show that the defendant arranged to have the deed signed while he knew that the plaintiff was very sick and so weak from continued sickness that renders it doubtful at least if she fully understood the transaction. The record does not show who requested the deputy sheriff to be present to receive the notice to quit for service. It appears that plaintiff did not ask him to come to her home that day for that purpose. As the defendant was plaintiff's agent to attend to the removal of her tenant, it is fair to presume that he arranged to have the notary and the deputy sheriff come to the house at the same time. All these facts show that the defendant arranged for the signature of this deed at a time when he must have known that she was not in a condition to fully scrutinize papers or to understand their contents. If it was a mistake, it was caused by the plaintiff's condition, coupled with defendant's conduct. The defendant must have known that the plaintiff was acting under a mistake as to what she was signing. Under such circumstances, fraud may be inferred until the evidence overcomes such inference. If the plaintiff's evidence does not overcome such inference, the burden is on the defendant to show what the consideration is, and that there was no fraud, undue influence, mistake, or imposition. There is no hardship upon the defendant if he is required to tell all the circumstances in connection with this transaction if the same was honest and fair. In this state of the record, we cannot direct a judgment for the plaintiff, and the case cannot be finally disposed of without granting a new trial. The dismissal of the

action at the close of the plaintiff's case was error under the circumstances. Under section 7229, Rev. Codes 1905, this court may grant a new trial in furtherance of justice.

The judgment is therefore reversed, a new trial granted, and the case remanded for further proceeding, according to law. All concur.

(121 N. W. 75.)

INGA TRONSRUD v. FARM LAND AND FINANCE COMPANY.

Opinion filed April 19, 1909.

Rehearing denied May 14, 1909.

Appeal and Error — Dismissal — Grounds.

A notice of appeal reciting that appeal is taken from a part of the decree rendered by a district court in an action tried to the court without a jury under the provisions of section 7229, Rev. Codes 1905, formerly section 5630, Rev. Codes 1899, will not authorize this court to review or retry any question of fact specified on said appeal, or to affirm, modify or reverse the judgment of the district court or to direct the entry of a new judgment, or to order a new trial of the action or in any manner to finally dispose of the case on appeal, and an appeal so taken must be dismissed without further action.

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

Action by Inga Tronsrud against the Farm Land & Finance Company. Judgment for plaintiff and defendant appeals, and plaintiff moves to dismiss the appeal.

Appeal dismissed.

Purcell & Divet, for appellant. *O. S. Sem,* for respondent.

ELLSWORTH, J. This action was brought in statutory form to determine adverse claims to a tract of real property situated in Sargent county. Appellant, being served as a defendant, answered, claiming an estate and interest in the real property involved, based upon a purchase by one E. E. Hughson of the land at a tax sale for the taxes of the year 1899 on the 4th day of December, 1900, a certificate of tax sale issued to Hughson, who afterward assigned the same to one D. F. Vail, and a tax deed containing the usual recitals issued to said Vail on the 28th day of September, 1903. Vail afterward conveyed his title to the land in question to appellant, the

Farm Land & Finance Company, who it is alleged has been at all times since and now is the owner of the same. A trial was had in district court, at which both parties appeared and offered testimony. The district court made findings of fact and conclusions of law, and on the 16th day of February, 1907, entered its decree in the cause. By the terms of this decree Inga Tronsrud, the plaintiff and respondent, is declared to be the owner in fee of the land in question, title to the premises is quieted in her and confirmed against the defendant and appellant, Farm Land & Finance Company, and said defendant is enjoined and restrained from ever asserting any estate or interest in said land adverse to said plaintiff. The decree contains in addition to these provisions this clause: "It is further ordered, adjudged, and decreed that the defendant, Farm Land & Finance Company, has a valid and subsisting lien upon said premises under and by virtue of a tax sale thereof for delinquent taxes of the year 1899, made on the 4th day of December, 1900, to one E. E. Hughson, and a certificate of sale thereof issued on said date to said Hughson by the auditor of Sargent county, N. D., which lien in the amount of $96 is hereby established and confirmed." The defendant, Farm Land & Finance Company, thereupon prepared and settled a statement of the case preparatory to appeal, and on October 28, 1907, served on attorney for plaintiff and respondent a notice of appeal, which in its material parts is as follows: "You will please take notice that the above-named Farm Land & Finance Company hereby appeals to the Supreme Court of the state of North Dakota from that part of that certain judgment of the district court in and for the county of Sargent, state of North Dakota, in Fourth judicial district, entered in the above-entitled action on the 16th day of February, A. D. 1907, by which it was ordered, adjudged, and decreed that the plaintiff and respondent, Inga Tronsrud, is the owner in fee simple of the east half of the southwest quarter and lots three and four of section thirty-one, township one hundred thirty-two, range fifty-six, situate in Sargent county, N. D., and whereby the title to said land was quieted in Inga Tronsrud, and by which judgment it was further ordered, adjudged, and decreed that the defendant and appellant, the Farm Land & Finance Company, had no estate or interest in said property except a lien therein set forth, and whereby said defendant and appellant was enjoined and restrained from ever asserting any estate or interest in said land adverse to said plaintiff and respondent." A cost bond

in the sum of $250 was also served and filed with the clerk of the district court of Sargent county for the purpose of perfecting the appeal specified in said notice.

This case was tried to the district court without a jury, and belongs to the class of actions not properly triable to a jury mentioned in section 7229, Rev. Codes 1905. The appeal is taken under the regulations prescribed by said section 7229, and appellant in its statement of the case and abstract on appeal specifies 10 questions of fact, of which it desires a review by this court. Therefore, if the appeal of this action is properly taken, it is now before this court for trial anew of the questions of fact specified in the statement of the case; and this court is required to finally dispose of the same, whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court, or, if it deems such course necessary to the accomplishment of justice, order a new trial of the action. From the manner in which the appeal is taken, however, it is apparent that an insuperable objection is opposed to any final disposition by this court of the case in accordance with the provisions of the statute above cited. The notice of appeal in express terms recites that appeal is taken from only a part of the judgment rendered by the district court; and it has long been a settled rule of practice in this court that it is without power to review or retry in any part an action tried and appealed under the provisions of section 5630, Rev. Codes 1899, now section 7229, Rev. Codes 1905, unless the entire judgment appealed from is before it for final disposition.

The reasons for such ruling as originally announced in the case of Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129, are directly applicable to this appeal: "We are directed to affirm, modify, or reverse the judgment of the district court, or direct the entry of a new judgment; and, when such a course is necessary to the accomplishment of justice, we may order a new trial in the action. Are the provisions just referred to reconcilable with an appeal from a part of a judgment and the review of a part of the case in this court? We think not. It goes without saying that this court could not affirm, modify, or reverse a judgment over which it had no control. Neither could it grant a new trial in an action where a portion of the judgment remains intact in the trial court. The statute under consideration plainly requires a final disposition of the

entire case and an independent judgment thereon at the hands of this court. This command cannot be obeyed while a portion of the case remains in the trial court. * * * An appeal to authorize a retrial under said section must be from the entire judgment; in other words, such an appeal as will effect a transfer of jurisdiction over the entire case to this court. It is true that, under the present statute, we are not compelled in every case to review all of the evidence as under former statutes. Whether all or only a part of the evidence shall be reviewed by this court in this class of appeals rests with the appellant. He may choose to have all of the evidence reviewed, or he may elect, in preparing his appeal, to abide by the determination of the trial court as to a portion of the facts, and merely ask for a review of the evidence as to certain specified facts. But whichever course is pursued, the case is presented here for final determination and upon its merits. In one case it would be determined upon all the evidence and in the other upon a portion of the evidence, and those facts found by the trial court which are not challenged." Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129; Tyler v. Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660; Crane v. Odegard, 11 N. D. 343, 91 N. W. 962. As above stated, appellant only specifies for review in this court certain questions of fact arising upon the evidence offered at the trial which it claims were erroneously decided by the trial court. No mention is made of a correction of errors appearing in the decree or upon the statutory judgment roll. The entire purpose of the appeal is to secure a retrial of specified questions of fact. As, upon the appeal taken by appellant, this court is without jurisdiction to retry or review any questions arising out of the evidence or to reverse or modify the judgment or even to grant a new trial of the action, it follows that we can only dismiss the appeal from further consideration.

It is therefore ordered that the appeal be dismissed, such dismissal, however, to be without prejudice to a second appeal of said action, provided the time for such appeal has not expired. All concur.

MORGAN, C. J., not participating.

(121 N. W. 68.)

JACOB SCHERER, AS ADMINISTRATOR OF THE ESTATE OF FRANCES SCHERER, DECEASED v. FRANK SCHLABERG AND FRANK L. GRIFFIN, CO-PARTNERS AS SCHLABERG & GRIFFIN.

Opinion filed September 30, 1909.

Death by Wrongful Act — Death of Child — Measure of Damages.

1. In an action by a father for the death of a minor child by wrongful act of defendant, the measure of damages recoverable by the father is the probable value of the services of the child during minority to the father, considering the cost of support and maintenance during the early and helpless part of its life.

Same — Conjectural Damages — Nominal Damages.

2. In an action by a father for damages for the wrongful death of a daughter three months old, who is dangerously ill with uremia when the wrongful act complained of was committed, the question of the pecuniary injury of the father by the death of such child, if caused by the wrongful act of defendants, is purely a matter of speculation, conjecture and guesswork, and any verdict for more than nominal damages in favor of the father would necessarily be based upon conjecture or speculation.

Same — Cause of Death — Sufficiency of Evidence.

3. The child, damages for whose death by wrongful act of defendants are sought in this action by the father, was a girl three months old, dangerously ill with uremia. A physician was called, and left with the parents a prescription on defendant's drug store for medicine. By mistake of the defendant druggists medicine was given plaintiff containing one-eighth of a grain of morphine in each dose directed to be given. The infant afterward died. *Held,* under the evidence, that the jury, had the case been submitted to it for a verdict, could only have found a verdict for plaintiff based upon pure speculation and surmise as to the cause of the child's death.

Trial — Directed Verdict.

4. When the nature of the evidence, in an action for damages, is such that no verdict for the plaintiff can be returned except based upon mere conjecture, surmise or speculation, it is proper for the trial court to direct a verdict for the defendant.

Death by Wrongful Act — Contributory Negligence of Plaintiff Beneficiary.

5. In an action under the statute providing for the recovery of damages for death by wrongful act of defendant, the contributory negligence of the plaintiff beneficiary is a defense.

Same.

6. The prescription of an attending physician called for medicine in the form of a powder, to be given, one every three hours, to an infant three months old. The prescription was left with the mother of the child, and she was informed by the physician that it would be in powder form, and to give a dose once in three hours. By mistake of the defendant druggist, medicine, put up for another customer, in liquid form, the label on the bottle being marked with the name of the party for whom it was prescribed, and containing directions to give one teaspoonful every two hours until relieved, was delivered. The plaintiff father was not present when the information and the directions were given the mother by the doctor, but before any of the medicine was given was informed by the mother what the directions were. He also read the directions on the bottle, and knew that the prescription given had been for a powder. He was present when the liquid was administered to the child, and permitted it to be done. After the first dose was given, and when nearly time for the second dose to be administered, he suspected something wrong in the medicine, and telephoned the doctor from the residence of a neighbor. He left his home to telephone without imparting his suspicions to his wife, or directing her to delay the second dose until he had heard from the doctor, and the second dose was given before his return. *Held,* that under these facts, and others disclosed by the record, the plaintiff was guilty of contributory negligence in law.

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

Action by Jacob Scherer, as administrator of the estate of Frances Scherer, against Frank Schlaberg and Frank L. Griffin. Judgment for defendants and plaintiff appeals.

Affirmed.

Skulason & Burtness, for appellant.

Contributory negligence of a parent, although a beneficiary, not a defense. Norfolk Railroad Co. v. Groseclose, 88 Va. 267, 29 Am. St. Rep. 718; Wymore v. Mahaska County, 43 N. W. 264.

Negligence of one member of a family not attributable to another.

Cleveland, Columbus and Cincinnati Ry. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Wolf Admr. v. Lake Erie & W. R. Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812; Donk Coal Co. v. Leavitt, 109 Ill. App 385; Atlanta & Charlotte Air Line Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553; Louis-

ville N. A. & C. Ry. Co. v. Creek, 29 N. E. 481; Town of Knightstown v. Musgrove, 18 N. E. 452.

If from the facts different conclusions may be drawn by fair and impartial men, the case is one for the jury. Mares v. N. P. R. Co., 3 Dak. 336, 21 N. W. 5; Id., 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Cameron v. Ry. Co., 8 N. D. 124, 77 N. W. 1016; Owen v. Cook et al., 9 N. D. 134, 81 N. W. 285, 47 L. R. A. 646; McKeever v. Homestake Mining Co., 10 S. D. 599, 74 N. W. 1053; Bohl v. City of Dell Rapids, 15 S. D. 619. 91 N. W. 315; Pyke v. City of Jamestown (N. D.) 107 N. W. 359; Sarja v. G. N. Ry. Co., 109 N. W. 600; McTavish v. G. N. Ry. Co., 8 N. D. 333; Herbert v. N. P. Ry. Co., 3 Dak. 38; Williams v. N. P. Ry. Co., 3 Dak. 168.

Bangs, Cooley & Hamilton, for respondent.

Contributory negligence of the beneficiary is a complete defense. Vinette v. Nor. Pac. Ry. Co. 91 Pac. 975; Westbrook v. Mobile & Ohio R. Co. 66 Miss. 560; 14 Am. St. 587; Lindsay v. Railway Co. 35 Atl. 513; Ploof v. Burlington Traction Co. 41 Atl. 1017; Wolf v. Lake Erie & W. R. R. Co. 36 L. R. A. 812; Woodward v. Chicago & N. W. R. Co. 23 Wis. 400; Chicago City Ry. Co. v. Wilcox, 27 N. E. 899. Ill. Cent. Ry. Co. v. Warriner, 82 N E. 246; City of Pekin v. McMahon, 154 Ill. 141; 45 Am. St. 114; Apsey v. Detroit, L. & N. R. Co. 47 N. W. 319. Indianapolis St. Ry. Co. v. Antrobus, 71 N. E. 971; Spokane & Pacific Ry. Co. v. Holt, 40 Pac. 56; Tucker v. Draper, 86 N. W. 917; Mills' Adm'r v. Cavanaugh, 94 S. W. 651.

Where the evidence connecting the infant's death with the negligence of defendant is purely speculative, there is no question for the jury. Koslowski v. Thayer et al, 68 N. W. 973; Moore v. Gt. Nor. Ry. Co. 69 N. W. 1103; Peterson v. C. M. & St. P. Ry. Co. 102 N. W. 595; Traux v. M. St. P. & S. M. Ry. Co., 94 N. W. 440; Wadsworth v. Boston El. Ry. Co., 66 N. E. 421; Baltimore & O. R. Co. v. State, 61 Atl. 189. 192. Standard Oil Co. v. Murray, 116 Fed. 572, 576; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305; Meehan v. Gt. Nor. R. Co., 13 N. D. 432, 101 N. W. 183; Atchison T. & S. F. R. Co. v. Aderhold, 49 Pac. 83; Sherman v. Lumber Co., 45 N. W. 1079, Searles v. Manhattan Ry. Co. 5 N. E. 66; Laidlaw v. Sage, 52 N. E. 679. 689; Bond v. Smith et al., 21 N. E. 128; Cole v. German S. & L. Soc. 124 Fed. 113; Stratton

v. Nichols L. Co. 81 Pac. 831. Wheelon v. C. M. & St. P. R. Co., 52 N. W. 119.

There being no proof of father's age or other condition; nor of the three months child's mental or physical condition or characteristics, there was nothing for the jury to use as a measure of its aid to the father had it lived Regan v. C. M. & St. P. Ry. Co., 8 N. W. 522; Cooper v. Railway Co., 33 N. W. 306; Atrops v. Costello 35 Pac. 620; Houghkirk v. President et. 92 N. Y. 223; Gunderson v. N. W. El. Co., 49 N. W. 694; Atchison T. & S. F. Ry Co. v. Fajardo, 86 Pac. 300; Walker v. L. S. & M. S. Ry. Co., 62 N. W. 1032; Potter Adm'r v. C. & N. W. Ry. Co., 21 Wis. 377.

SPALDING, J. The plaintiff, Jacob Scherer, and his wife, Anna Scherer, were on March 20, 1906, the parents of a female child named Frances one day less than three months old. As far as shown by the evidence the child was healthful up to the time of the illness hereinafter described. On Sunday, March 18, 1906, this daughter became unwell. Tuesday morning, the 20th, Dr. Taylor was called and gave directions for the treatment of the child. He called again in the afternoon, and gave Mrs. Scherer a prescription on the drug store of the defendants. The doctor told the mother to send the prescription to the drug store, and that the medicine it called for would be in the form of powders, and to give one powder to the child every three hours. The husband was not present when these directions were given. The prescription was sent to the drug store about 5 o'clock by Stella Brady, who gave it to one of the druggists in the store, and received in return a claim check. She left the drug store, and on her return in a short time the same person to whom she gave the prescription delivered to her the medicine. She carried it to the plaintiff's residence, and was directed by the mother to place it on a writing desk, which she did. It was allowed to remain there until the return of the father about 6:30 p. m., when he and the mother examined it, and commented on its being in a bottle and a liquid, instead of in powders, as the doctor had stated it would be. The mother told the plaintiff that the doctor said it would be in powders, and his directions. She could not read English. The plaintiff could. He read the label on the bottle and the directions. The name of some person was written on the label. He testifies that he could read the name "Rose," but that the other name was blurred and could not be read; that

he thought that was the name of the medicine. In fact the name "Rose Clark" was distinctly written on the label before the directions. The directions which he read were to give one teaspoonful every two hours until relieved. The liquid in the bottle contained two grains of morphine, or about one-eighth of a grain to a teaspoonful. After discussing the difference between the medicine received and the statement of the doctor, plaintiff and wife, notwithstanding the lack of opportunity for the doctor to change the prescription, concluded that the doctor had changed his mind and put up a liquid. The father did not administer the medicine, but was present when the mother, with the assistance of another lady, did administer it. On attempting to give it undiluted, the child appeared to dislike it and suffer from the contact of the medicine with her mouth; and, although the directions said nothing about diluting, the mother reduced it with water and administered about a teaspoonful. Fifteen or 20 minutes after it was given the child appeared to suffer, and without entering into details of the testimony of the different witnesses, it suffices to say that the child was evidently in distress. The father waited until a few minutes before time for the second dose, when, suspecting that the changed condition of the child for the worse was caused by a mistake in the medicine, he went to a neighbor's about two blocks away and telephoned the doctor. He left without indicating to the mother his suspicion regarding the medicine, or cautioning her about giving another dose before he had communicated with the doctor. The doctor informed him that it was the wrong medicine. He returned in haste to his home and found that the second dose had just been given. The doctor arrived shortly, examined the child, and found a slight dilation of the pupils of the eyes. He testifies to no other symptom of morphine poisoning. The testimony of the different physicians indicates that if the digestive organs were in normal condition, the morphine would have been absorbed into the system in a few minutes, but that when the digestive system is out of order morphine may remain a considerable time in the stomach. The doctor washed out the stomach with permanganate of potash, for the purpose of relieving it from any morphine which it retained. He testifies that the effect of a solution of permanganate of potash used in this manner is to decompose and render morphine inert and absolutely harmless. He also gave the child a hypodermic of atropine to counteract the effect of any morphine which might have been

absorbed. This was done about 9 o'clock in the evening. He remained with the child until about 1 o'clock in the morning, and testifies that he made use of tests to determine whether there were any remaining effects of the morphine present, and that it is his positive judgment that when he left the child was free from any ill effect which she might have had from the morphine. She was lying perfectly still when he left, but the parents testified that she subsequently had several convulsions. The doctor called again the next forenoon, and found it still a very sick child, and it died about noon Wednesday. This action was brought under the provisions of the statute giving the father the right to maintain an action for death of his child by wrongful act, and it is for his benefit, he being the sole heir at law.

At the close of the case the defendants moved for the direction of a verdict in their favor on the following grounds: (1) That the evidence fails to show that the infant Frances Scherer died from the effects of administering the liquid called for by the prescription Exhibit C; (2) that the evidence fails to show that the defendants, or their agents, were guilty of any act which, or the result of which, was the proximate cause of the death of the infant, Frances Scherer; (3) that there is no evidence in the case upon which the jury can base a deliberate judgment that the death of the infant, Frances Scherer, was caused by the administering of the liquid called for by Exhibit C; that such verdict, if rendered, would be necessarily based on mere surmise, conjecture, and speculation; (4) that the evidence fails to show any facts from which, or upon which, the jury can base any damages; (5) that there is no evidence in this case which can be used by the jury as a measure of pecuniary aid which the father might reasonably expect from the infant Frances Scherer, had she lived; that damages, if awarded, could not be the result of judicial determination upon the evidence, but would be the result of the uncontrolled discretion of the jury; (6) that the evidence discloses that Anna Scherer, the mother of the infant, Frances Scherer, was, in exercising the care and custody of said Frances Scherer, acting as the authorized agent of said father, Jacob Scherer; that the negligence of either the father, Jacob Scherer, or the mother, Anna Scherer, in exercising such care and custody contributing to the death of such infant, would bar a recovery, and that the evidence discloses affirmatively such negligence on the part of both Jacob

Scherer and Anna Scherer contributing to the death of said infant, if such death was caused by the administering of the liquid claimed, as in law constitutes contributory negligence and bars a recovery; (7) that the evidence fails to show facts sufficient to constitute a cause of action against the defendants. The motion was granted, and the plaintiff duly excepted. From the judgment entered dismissing the action, and for costs against the plaintiff, this appeal is prosecuted. We have not stated the substance of all the evidence, and we cannot do so and confine this opinion within proper limits. It will simplify the intelligent consideration of the case to consider some of the reasons given by the respondent for sustaining the judgment, rather than to pursue the usual course of discussing the errors assigned by appellant, as appellant's assignments of error are in general terms.

1. It is contended that there is no evidence which could have been considered by the jury to furnish a measure of pecuniary injury which the father suffered from the death of the child. The rule regarding the measure of damages recoverable by the father for the death by wrongful act of a minor child seems to be the probable value of the services of the child during minority, considering the cost of support and maintenance during the early and helpless part of its life. Haug v. Railway Company, 8 N. D. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. Rep. 727; Morgan v. S. P. Company, 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143; Little R. & F. S. Ry. Co. v. Barker, 33 Ark. 350, 34 Am. Rep. 44; Smith v. C. M. & St. P. Ry. Co., 6 S. D. 583, 62 N. W. 967, 28 L. R. A. 573; Sutherland on Damages, § 1273. No evidence is presented in the record showing the age of the father or the expectancy of his life. This has been held to be fatal to recovery by the plaintiff; but, as we view the law, it is an immaterial omission in this instance. It was a female child only three months old. Dr. Taylor testified that it was dangerously ill when he called to see it, suffering from uremic poisoning. It is obvious that, with a female child three months old, dangerously ill, the pecuniary value of its life during its minority is wholly problematical and speculative. It is conceded that in actions of this nature juries are not confined to the consideration of the evidence alone, as they are in many other kinds of actions, but they may exercise a much wider latitude in applying their own knowledge and experience than would be proper in most other cases, but it is

apparent that no evidence, no knowledge, or experience of the jurors could justify them in saying that this child would have lived had no mistake been made in the prescription, or that in case of its continued life its earning capacity would have exceeded the expenditures necessary in its maintenance and education. On the contrary, the experience of mankind in civilized communities warrants the conclusion that its net earning capacity would most likely be a negative quantity. When it is impossible to arrive at a verdict except by speculation or surmise, guesswork, or conjecture, the case should be taken from the jury. Koslowski v. Thayer, 66 Minn. 150, 68 N. W. 973; Moore v. Gt. N. Ry. Co., 67 Minn. 394, 69 N. W. 1103; Peterson v. C., M. & St. P. Ry. Co., 19 S. D. 122, 102 N. W. 595; Truax v. M., St. P. & S. M. Ry. Co., 89 Minn. 143, 94 N. W. 440; Harrison v. C., M. & St. P. Ry. Co., 6 S. D. 100, 60 N. W. 405; Sherman v. Lumber Co., 77 Wis. 22, 45 N. W. 1079; Wheelan v. C., M. & St. P Ry. Co., 85 Iowa, 167, 52 N. W. 119; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305; Meehan v. G. N. Ry. Co., 13 N. D. 432, 101 N. W. 183; Wadsworth v. Boston El. Ry. Co., 182 Mass. 572, 66 N. E. 421; Baltimore & O. R. Co. v. State, 101 Md. 359, 61 Atl. 189, 192; Standard Oil Co. v. Murray, 119 Fed. 572, 576, 57 C. C. A. 1; Atchison, T. & S. F. R. Co. v. Aderhold, 58 Kan 293, 49 Pac. 83; Ruppert v. Brooklyn Heights R. Co., 154 N. Y. 90, 47 N. E. 971; Laidlaw v. Sage, 158 N. Y. 73, 52 N. E. 679, 689, 44 L. R. A. 216; Byrd v. So. Ex. Co., 139 N. C. 273, 51 S. E. 851; Stumpf v. Delaware, L. &. W. R. Co. (N. J. Sup.) 69 Atl. 207. Most of the American courts sustain the doctrine of nominal damages, although this doctrine is denied by the English authorities. We shall not determine which line of authorities is applicable in this state nor whether nominal damages would be proper in a case of this character, or similar cases.

2. It is next contended that the judgment should be sustained because any verdict rendered for plaintiff on the evidence as to the cause of the death of the child must have been purely speculative and conjectural. Dr. Taylor testifies that the child was dangerously ill with uremic poisoning. It is shown that it passed no urine for 24 hours, that its bowels did not act, and, without detailing the symptoms testified to both by the parents and others, as well as the doctor, that, with the exception of the slight contraction of the pupil, they indicated uremic poisoning, and not poison from morphine. The testimony of the physicians is in the main uniform on

this question, and as to the cause of the death, although Dr. Engstad, a witness for the plaintiff, testified when first on the stand that he did not think the child would die from one dose of the morphine solution; that it would depend upon the measures taken to counteract the poison, and it would be very hard to say whether it would die from the administration of two doses, and that it was a question very difficult to answer; that he could not give a direct answer. And in answer to a hypothetical question, which did not state all the material facts and circumstances as testified to by Dr. Taylor showing the condition of the child, he stated that the giving of morphine to the child, "had at least a predisposing cause, if not a direct cause." He explained what he meant by "predisposing cause" by an illustration that, when a person accustomed to partake heavily of whiskey contracted pneumonia, he would, in all probability, die; that the direct cause of his death would be pneumonia, but that the predisposing cause would be whiskey. He also testified that there were cases where he knew morphine had been retained in the stomach for two or three hours, or more, without being absorbed to any great extent, and that he had had cases, when morphine used to be given by the mouth, in which he did not get action from the morphine for an hour or two. Drs. Grassick, Healy, and Wheeler corroborated Dr. Taylor in his statement that the child died of uremic poisoning. We are of the opinion, after considering all the evidence submitted, that the trial court was justified in taking the case from the jury. The answer of Dr. Engstad, based upon the hypothetical question which failed to state the most marked symptoms of the child as testified to by Dr. Taylor, at most constituted but a scintilla of evidence in conflict with that given by the other physicians, and any verdict rendered for the plaintiff would have been based upon pure conjecture and guesswork. No jury could say what caused the child's death. As to this the authorities previously cited are applicable.

3. It is urged in support of the judgment of the trial court that the father was guilty of contributory negligence, and that for this reason he was not entitled to recover. It is perfectly clear that, notwithstanding the inexcusable mistake or negligence of the defendant, no injury would have resulted except for the carelessness, or lack of care, of the parents in administering medicine which they knew differed in character, in dose, and in the frequency of the dose from that prescribed by the physician in attendance. The doctor

plainly told the mother that the prescription would be in the form of a powder, to be given once in three hours. The child was dangerously sick. She did not send to the drug store for some time after the doctor left. A liquid was returned, the bottle inscribed with the name of the party for whom it was put up. The directions materially differed from those given by Dr. Taylor. All this was known by the father who, while not assisting in administering it, was present when the first dose was given, and did nothing to prevent its administration. After the change in the condition of the child, he suspected something wrong with the medicine, and, within a few minutes of the time for the second dose, left his home without suggesting that another dose should not be given until he consulted with the doctor. He was absent a considerable length of time, and on return found that the second dose had been given. It is argued, however, that they discussed the change in the medicine, and concluded that the doctor had changed his mind and put up a different remedy. It is apparent that this conclusion is a mere afterthought, and could have had no foundation, because the doctor was not seen in the meantime. The prescription was left with the mother. The preson who took it to the drug store delivered it to the druggist, not to the doctor. How it was possible for the doctor to have made the change is not suggested. A telephone was within such distance that they could have informed themselves as to the cause of the change of medicine without delay or difficulty. They neglected to do so. The fact that it was an infant three months old, very sick, and, as they must have known, by reason of its age and other conditions, susceptible to very small quantities of any medicine, charged them with a high degree of care. Had it been a grown person who was ill, their duties would have been different. A dose for one grown person would ordinarily approximate a dose for another grown person, but not so as to a grown person and an infant three months old, as they must have known. Whatever the results may have been from the administration of the morphine solution, it is clear to us that, notwithstanding the gross negligence of the defendants, no ill results could have occurred except for the negligence of the father in permitting the administration, not only of the first, but also of the second dose, and that his negligence was the proximate cause of any injury to the child resulting from the action of the defendants, if any injury did result, and that therefore he cannot recover.

4. It is urged by appellant in this connection that negligence of the father or mother is imputed negligence, and that to sustain the judgment on the ground of contributory negligence this court must adopt the doctrine of imputed negligence; that is, that if the father was negligent, his negligence must be imputed to the child, on the theory that contributory negligence of the child must be shown to support the defense of contributory negligence against the father, and that if the contributory negligence of the father would be a defense, the contributory negligence in this case was that of the mother, and can be imputed neither to the father nor to the deceased. As we view the law and the facts, the question of imputed negligence is not in this case in any degree whatever. The father knew all the facts, and was present when the medicine was given, and acquiesced in its being administered, and the negligence was his. He is the beneficiary, and the contributory negligence of the beneficiary defeats the action. The remedy applicable in this case, and in cases of this nature, is not for the benefit of the estate of the deceased, nor is it sought in behalf of the deceased. It is a remedy given for the heir at law who suffers injury by the wrongful death, and is for the sole benefit of such heir at law. Proceeds of any recovery go to him, in this case the father, and not to the estate of the deceased. And to say that he shall be allowed to recover, when he himself is guilty of contributory negligence, is to permit him to reap the benefit of his own wrong doing. Atlantic Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145; Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Westerberg v. K. C., etc., Ry. Co., 142 Pa. 471, 21 Atl. 878, 24 Am. St. Rep. 510; Westbrook, Mobile & O. R. Co., 66 Miss. 560, 6 South. 321, 14 Am. St. Rep. 587; Ploof v. Burlington Traction Co., 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108; Bamberger v. Citizens' St. Ry. Co., 95 Tenn. 18, 31 S. W. 163, 28 L. R. A. 486, 49 Am. St. Rep. 909; Smith v. Hestonville, M. & T. Co., 92 Pa. 450, 37 Am. Rep. 707; Johnson v. Reading & C. Ry. Co., 160 Pa. 647, 28 Atl. 1001, 40 Am. St. Rep. 752; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; W. U. Tel. Co. v. Hoffman, 80 Tex. 420 15 S. W. 1048, 26 Am. St. Rep. 759. In the Gravitt and Ploof Cases, supra, will be found very full citations of authorities and discussions of the law applicable to the case at bar.

The circumstances surrounding this case at the same time excite the profound sympathy of the court for the father and mother, and

a feeling that such gross carelessness as that of defendants, though harmless in its results, ought to be followed by appropriate punishment, but the decision of courts would justly cease to deserve the respect which is accorded them if they permitted their sympathies or their indignation to serve as a guiding motive in the determination of questions of law.

As we find no error in the action of the trial court, its order is affirmed.

FISK, J., disqualified, and C. A. POLLOCK, Judge of the Third Judicial District sat in his stead. CARMODY J., and POLLOCK, District Judge, concurring. MORGAN, C. J. concurs in the result without considering the questions of damages.

ELLSWORTH, J. (dissenting). I am unable to concur in the result announced by my associates in this case, or in their reasoning upon any of the points passed upon by the majority opinion.

The principles accepted by this court as governing the disposal upon appeal of cases tried to a jury in which a verdict has been directed by the court are so strongly established and well recognized that they cannot now be the subject of dispute or difference of opinion. When a trial court, at the close of the entire testimony in an action tried before it, holds as a matter of law that one party or the other is entitled to a verdict, and directs the jury sitting in the case to find accordingly, and an appeal is taken from the judgment entered upon the directed verdict, observance of these principles requires this court to disregard all conflicts in the evidence, and in its consideration of the case to construe the evidence most strongly against the party moving for the directed verdict. If it appears from the evidence so considered that the facts shown are such that different impartial minds might fairly draw different conclusions therefrom, it follows that the issues of fact should have been submitted to the jury—the body of men provided by the Constitution and laws for the determination of disputed or doubtful questions of fact. "The rule is the same where the evidence is undisputed, if different inferences therefrom may be fairly deduced by intelligent minds." It is only when it can be said that all reasonable and fair-minded men must, with the same facts before them draw but one conclusion from the evidence, that a trial court is warranted in any manner, or to any extent whatever, in controlling or directing the verdict of the jury. If, therefore, in the consideration of an appeal from a judg-

ment entered on a directed verdict, it appears that "the evidence is such that intelligent men may fairly differ in their conclusions thereon upon any of the essential facts of the case, it is the duty of this court to reverse the judgment and order a new trial." Cameron v. Gt Nor. Ry. Co., 8 N. D. 124, 77 N. W. 1016; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; McRea v. Bank, 6 N. D. 353, 70 N. W. 813; Pirie v. Gillit, 2 N. D. 255, 50 N. W. 710; Zink v. Lahart, 16 N. D. 56, 110 N. W. 931; Hall v. N. P. Ry. Co., 16 N. D. 60, 111 N. W. 609; Carr v. Soo Ry. Co., 16 N. D. 217, 112 N W. 972.

The facts admitted by the defendants in this case disclose a gross and entirely inexcusable act of negligence on their part. They were druggists, engaged in the business of compounding the medicines prescribed by physicians, and furnishing the same to patients the safety of whose health and lives are dependent upon the skill and care of those who undertake the performance of this highly important, delicate, and often dangerous duty. While so acting, they received a physician's prescription which upon its face indicated that the medicine prescribed was to be compounded for the use of an infant or "baby," and, after taking time sufficient to enable them to prepare the same with the greatest deliberation and care, delivered to the person sent to receive the medicine an entirly different compound, containing strong and poisonous ingredients that might be safely used only by a grown person. So little attention seems to have been given to the prescription for the infant's use that it was not known by the defendants that a mistake had been made, and that a medicine so dangerous to the life of the infant had been sent to it until two or three hours afterward, when the medicine in considerable quantity had been administered to the child and the bottle containing it returned to them by its father. While it is true that a court, in the consideration of facts such as these, should not permit emotional sentiments such as the sympathy or indignation to disturb its judgment, or cause it to disregard well-established principles of procedure, it is nevertheless its duty to search the facts with the greatest care to determine whether the harmful effect that naturally proceeds from negligence so culpable as this has not in fact resulted, and, if the evidence shows such to be the case, to hold the negligent party to strict liability to the extent of the damage suffered.

The negligent act of the defendants is admitted, the death of the child following shortly thereafter is proved, and if there is evidence showing, or tending to show, that the death of the child resulted

as a proximate cause of the negligent act, a case is made out entitling the plaintiff and appellant in this case to damages under the statute providing for an action against the party responsible for death by wrongful act. As conceded and shown by the authorities cited in the majority opinion, the American courts, practically without exception, sustain the doctrine that upon proof of the negligent act of the defendant resulting in the death of a person, and of the existence of a party entitled to recover under the provisions of the statute, a presumption at once arises that the party entitled to recover has sustained at least nominal damage. The opinion further concedes that in actions of this character, in determining the amount of damage sustained, juries are not confined to a consideration of the evidence alone as in other classes of actions, but may exercise a much wider latitude in applying their own knowledge and experience to the facts of the case than would be proper in most other cases. These points admitted, it seems to me that it necessarily follows, unless it can be said that there is no competent evidence to show that the death of the child resulted from the act of the defendants, that the plaintiff in this action has sustained at least nominal damage. If the plaintiff was entitled to even nominal damage, the district court was clearly in error in directing a verdict for the defendants. I entirely fail to understand how such error is obviated by the consideration that "it is obvious that with a female child three months old, dangerously ill, the pecuniary value of its life during its minority is wholly problematical and speculative." It is doubtless true that, after death, the pecuniary value of the life of any person within his minority, or in fact during any period of vital expectancy, is problematical in the sense that it can be determined only upon considerations that may be, from the ordinary legal standpoint, regarded as conjectural and speculative. It is also true that to strictly apply a rule of evidence requiring such pecuniary value to be shown with the exactness of mathematical calculation will entirely frustrate the purpose of the statute providing for an action for death by wrongful act, and prevent a recovery in any case whatever.

The statute under which this action is brought provides for an action in favor of the proper parties whenever the death of a "person" shall be caused by the wrongful acts of another. Section 7686, Rev. Codes 1905. This statute was enacted with an apparent legislative intent to provide a new right of action for the redress of

wrongs that by common law were without remedy. Being thus remedial in character, the statute should be liberally construed by the courts in a spirit that will, so far as lies within its terms, effectuate the remedy designed by the Legislature. A construction that will bring the statute into practical operation for the purpose for which it was obviously designed should be preferred to one that will render it nugatory and inoperative in any important particular. Under such construction an infant or child of immature and tender years is as truly a "person" within the meaning of the statute as an adult. The pecuniary damage resulting from the death of such an infant may not be so large in amount as if it were a person of mature years, having complex family relations; yet, according to all human experience, such damage is substantial, and should be determined by the same rules applied in an action for the death of an older person. There is an evident legislative purpose apparent in every part of the statute that in every case of death by wrongful act, whatever the age or capacity of the decedent, a jury shall examine into the facts and circumstances, and award "damages proportionate to the injury" to the party entitled to recover. In the light of these principles, and of those conceded by the majority opinion, it is difficult to comprehend how the fact that the child was but three months old and dangerously ill rendered the pecuniary value of its life during its minority more problematical and speculative than that of the almost innumerable cases in which recoveries have been sustained, under similar statutes, in the American courts.

Conceding that the pecuniary value of the life of a child thee months old is at least nominal, and probably substantial, on what reasonable principle can it be held that the fact it was suffering from a dangerous disease renders a finding in support of plaintiff's contention as to the cause of death "pure conjecture and guesswork?" It is admitted by the physician attending the child that, after the administration of the medicine containing morphine, the child exhibited symptoms of poisoning so unmistakeable that he considered it necessary, as an important part of his professional duty in the treatment of the case, to at once take vigorous measures to counteract these poisonous effects, and that his attention for a period of about four hours was devoted exclusively to that purpose. This treatment required the introduction of a rubber tube into the child's stomach, through which was poured a solution of permanganate of potash, and the injection into its veins of atropine, both chemicals

sufficiently powerful to decompose morphine and render it inert, together with manipulation of the body and lungs for the purpose of strengthening respiration and heart action. He claims by this course of treatment to have been entirely successful in counteracting the effect of the poison; but it is freely admitted by the medical testimony that such a course of treatment, while perhaps effectual in producing an evacuation of poison from the system, would have been extremely exhausting and debilitating even to a mature person. One physician testified that he had known two cases in which an attempt to wash out the stomach of an adult by means of a tube had produced convulsions in the patient. And it is apparent at a glance that the combined effect of the poison and the treatment necessary to the antidote must have seriously depleted the small reserve of strength of this young child, and reduced to a low ebb its vitality. With these facts before it a jury, without conjecture, speculation, or guesswork, might readily find that the administration of the morphine, together with the treatment necessary to counteract its effects, was largely instrumental in producing the death of the child. I believe that few persons can follow the entire evidence of this case and not feel strongly impressed with such conclusion.

Whether the poison operated directly in producing the child's death, or acted as a predisposing cause by weakening its constitutional powers of resistence to disease, as testified by Dr. Engstad, the defendants are alike responsible. The fact that disease was also operating at the time of the administration of the poison, and that disease of itself might have been fatal, does not raise a presumption that it did in fact produce the child's death. Death may be the result of several concurring causes, any one of which, operating alone, might not have fatal result. If the poisoning contributed to produce the child's death by so impairing its strength and vital forces as to render the disease incurable, when without the poisoning it might have yielded to treatment, the defendants are liable to exactly the same extent as though it had been the only cause. A jury in an action of this character cannot apportion the damage allowed, according to the injury produced by each or two or more concurring causes. The point for the jury is, did the negligent act of defendants operate as one cause, and did its effects contribute to produce the death of the child? If it did, the defendants will not be relieved of responsibility by showing that other causes operated at the same time to the same result. Louisville & C. R. R. Co., v. Jones,

83 Ala. 376, 3 South. 902; Thompson v. Louisville & N. R. Co., 91 Ala. 496, 8 South 406, 11 L. R. A. 146; Jucker v. Chicago & Railway Co., 52 Wis. 150, 8 N. W. 862; People v. Cook, 39 Mich. 236, 33 Am. Rep. 380; Beauchamp v. Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; Louisville, etc., Railway Co. v. Snider, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60.

The majority opinion holds that from the evidence introduced, "no jury could say what caused the child's death." This being true, it necessarily follows that neither the jury by its verdict, nor the court as a matter of law, could say that the child's death was caused by uremia, "the dangerous disease" whose presence so complicated the situation. As death unquestionably resulted, it follows that the only conclusion possible from the evidence is that it was produced by a complexity of causes, prominent among which are the administration of the poisonous drug and the exhaustion attendant upon the treatment necessary to counteract its effect. How such conclusions could entitle the defendants to a directed verdict I am wholly at a loss to understand. If the child had been in health at the time the morphine was administered, there could be no reasonable question but that its subsequent death was caused by poisoning. The fact, however, that it was at this time suffering with a dangerous disease, according to the holding of the majority opinion, at once removes the question of the cause of death into a region of speculation, surmise, and conjecture, and renders it impossible for a jury to render any verdict other than one in favor of the defendants. If such holding is to be regarded as a settled practice of this court, it becomes a serious question whether there can be said to be any liability on the part of a druggist who negligently compounds and delivers a poison to one already suffering from a dangerous disease.

Such holding is, however, as I regard it, more reasonable and consistent with principle than that which declares that plaintiff's cause of action is defeated by contributory negligence on the part of the father. By the terms of the statute this action cannot be maintained by the father of the child in his own right, but only as personal representative of the child. The widow or children of a decedent may sue in their own names, respectively, but the father is without standing except as the personal representative. The cause of action falls within the jurisdiction of the county court as a portion of the

assets of the estate of a deceased person. The father brings this action as the agent or instrument of the county court, and any recovery had will reach his hands as administrator, and must be strictly accounted for to that court. The county court will then proceed with its administration of the child's estate, and determine to what person, or persons, the assets of the estate are to be distributed. It is true that the law of succession of this state provides that the father of an unmarried child who dies without issue is its heir, or, in case of his death, the mother. It is apparent that a very considerable interval of time must elapse, and many uncertain events transpire, between the time of any recovery in this action and the determination of the county court as to who are the child's heirs at law, and the distribution to them, subject to the expenses of administration of the assets of the estate, and it seems to me that it is only by an amount of speculation, surmise, conjecture, and guesswork, very much greater than that necessary to determine the cause of the child's death in this case, that a court can say that the father of the child will then be living, and that there will be remaining, of that particular asset of the child's estate realized from a recovery of this action, a portion so considerable as to confer any pecuniary benefit on him. Whatever recovery is had comes to the father in his representative capacity only, in the right of the child, on the theory that it is such a cause of action as the child might have maintained if living. And I can conceive of no reasonable theory, except the absolete and now generally discredited one of imputed negligence, under which contributory negligence of the father can be said to be a defense in an action of this character brought by him as personal representative of the child. This view is supported by very respectable authority. Wymore v. Mahaska County, 78 Iowa, 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449; Norfolk & W. R. R. Co. v. Groseclose's Adm'rs, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

But the acceptance by this court of the doctrine that contributory negligence of a father is a defense to an action brought by him as a personal representative, for the death by wrongful act of a child, is, in my opinion, very far from warranting the further holding of the majority opinion that the father, Jacob Scherer, was, as a matter of law, guilty of contributory negligence in this case. There are facts bearing upon this question, which might have been given controlling importance by a jury, which are entirely disregarded by

the majority opinion; and, among these facts, I will ask attention to the following: Both the plaintiff, Scherer, and his wife were uneducated and unfamiliar with the English language and especially with English writing. Mrs. Scherer could not read writing at all, and Scherer only imperfectly. An older child of theirs had been sick for a period of almost two months before this time. During its sickness Scherer had gone to defendants' drug store to procure medicines prescribed by the attending physician, and some of these he had received in bottles in liquid form. This older child had died on the morning of the day on which the morphine was administered to the infant. Its body was in the house at the time, and Scherer had been busy throughout the day with the funeral arrangements. Both he and his wife were in an excited and nervous condition. Scherer was not present at the time the prescription for the baby was received from Doctor Taylor and sent to the drug store. He came in after the bottle of medicine had been brought, and conversed with his wife somewhat regarding it. Mrs. Scherer told him that the doctor had said that the medicine would be a powder. Scherer examined the bottle, and was able to make out the name of Doctor Taylor on the label and the direction to give the medicine every two hours. The name "Rose Clark," also appearing on the label, he states, was a little blurred on the second word, and, owing to his inexperience with English writing, he could make out only the word "Rose," which he supposed was part of the name of the medicine. Before giving the medicine to the child, the fact that it was a liquid instead of a powder was discussed somewhat between him and his wife, and they came to the conclusion that the doctor had changed his mind with reference to the ingredients after leaving their home, and that the liquid had been sent as the result of a subsequent direction given by him at the drug store. The fact that Doctor Taylor's name appeared on the label was taken by them as a guaranty that it was the right medicine. After the first dose of medicine had been given, and the child showed no signs of improvement, but seemed to grow worse, Scherer went to the house of a neighbor for the purpose of calling Dr. Taylor by telephone.

In determining whether or not the negligence of Scherer contributed to the death of the child, not only should all testimony that conflicts with the evidence of Scherer and his witnesses be disregarded, and all inferences taken most strongly in his favor, but whatever

seems hasty or ill-considered in his acts should receive a certain mitigation from the influences of surrounding circumstances, such as the excited mental condition of Scherer over the death of his other child, the many other serious matters with which his mind was occupied at the same time, the anxiety to do without delay whatever would relieve the sickness of the baby, and the implicit faith that unlettered people place in the prescription and advice of a physician attending their children. Under the circumstances of this case to measure the conduct of Scherer by rules even more inflexible than would be applied to that of a well-educated man, in the full possession of all his faculties of mind, experienced in the reading of writings and in the treatment of sickness, is obviously unjust. There is nothing in his conduct that does not seem to have been prompted by regard for the welfare of the child, and, under the trying conditions, an error of judgment should not be treated as a culpable lack of care. To hold that his acts constitute contributory negligence as a matter of law is, in my opinion, to disregard or misapply every precept adopted by this court to govern its action in such cases.

In my view of this case there are disputed questions of fact, both upon the point of the cause of the death of the child and the contributory negligence of the father, which the trial court should have submitted to the jury for detemination. Even though the rule requiring that the evidence be given a construction most favorable to the party ruled against were reversed, I believe the evidence on these points still presents facts from which different impartial minds might fairly draw different conclusions. To hold that all reasonable and fair-minded men, with the facts of this case before them, can draw therefrom but one conclusion almost reaches absurdity, in view of the fact that the judges of this court, after a long and careful consideration of the evidence, are divided in their opinion.

(122 N. W. 1000.)

JAMES C. YOUNG v. METCALF LAND CO.

Opinion filed March 19, 1909.

Rehearing November 5, 1909.

Brokers — Employment of Broker — Construction of Contract.

1. A contract in writing was entered into between an owner of large tracts of land in this state and a real estate dealer, by the terms of which the real estate dealer should have the exclusive sale of said lands for a period of ten years at such prices as he may deem best, provided that no tract should be sold for less than the appraised value named in Schedule A attached to the contract. Out of the proceeds from sales made a stipulated amount was to be paid to the landowner and the balance equally divided between the parties to the contract. *Held*, that the dealer had the sole right to fix the selling price of lands, provided, however, that the prices were not less than the appraised value, and that the owner could not arbitrarily refuse to approve the sales for the reason that the prices were not satisfactory to the owner.

Contracts — Interpretation — To Give Effect to Intention of Parties.

2. A contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect.

Broker — Sale Prevented by Owner — Measure of Damages.

3. The dealer having been prevented by the landowner from making the sales is entitled to the profits he would have made had the offers been accepted, and sales approved by the landowner.

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

Action by James C. Young against the Metcalf Land Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Koon, Wehlan & Bennett and *Ball, Watson, Young & Lawrence*, for appellant.

Where no terms are fixed by contract, the broker is to submit offers for his employer's approval; the broker is not entitled to his commission until his employer accepts the offer. 23 Am. & Eng. Enc. of Law (2nd.) 921; Sawyer v. Bowman, 59 N. W. 27; Goin v. Hess, 71 N. W. 218; Berry v. Tweed, 61 N. W. 858; Kiam v. Turner, 21 Tex. Civ. App. 417.

A broker must submit a buyer who is ready, willing and able to purchase on terms proposed by, or acceptable to the vendor. Clark & Styles on Agency, p. 1658; Neeley v. Lewis, 38 Wash., 20; Mattingly v. Pennie, 39 Pac. 200. Such broker must not only produce such purchaser, but he must secure a binding contract from him, or bring such buyer and vendor together, so the latter can secure such contract if desired. Flynn v. Jordal, 100 N. W. 326; Johnson v. Wright, 99 N. W. 103; Mattingly v. Pennie, supra; Kalley v. Baker, 29 N. E. 1091; McDonald v. Smith, 108 N. W. 291; 19 Cyc., 255; Hayden v. Grillo, 35 Mo. App. 647; Gerding v. Haskin, 141 N. Y. 514; Simpson v. Smith, 36 Misc. (N. Y.) 815.

Where the broker does not disclose to his principal the purchaser's name, the owner may refuse to sell without being liable for commission. 23 Am. & Eng. Enc. of Law (2nd Ed), 921; 19 Cyc., 266, note 72; Hayden v. Grillo, 35 Mo., App. 647; Gerding v. Haskin, 141 N. Y., 514; Simpson v. Smith, 36 Misc., (N. Y.) 815.

Broker must allege and prove that the purchaser found was able, willing and ready to buy on the terms of his proposed contract. Tracy v. Fobes, 109 N. W. 772; McDermott v. Mahoney, 106 N. W. 925; Iselin et al. v. Griffith, 62 Ia. 668; 18 N. W. 302; Pratt v. Hotchkiss, 10 Ill., App. 603; Leahy v. Huin, 33 Ill. App. 461; Coleman v. Mead, 76 Ky. 358; Russell v. Hurd, 113 Ill. App 63; Alt v. Doscher 92 N. Y. Sup. 439; Colburn v. Seymour, 76 Pac. 1058; Clark and Styles on Agency, p. 1668 and cases cited; Snyder v. Fidler 101 N. W. 130.

L. W. Collins, Emerson H. Smith, and *Engerud, Holt & Fraine,* for respondent.

In construing contracts, regard must be had to surrounding circumstances and situation of parties; and their intent given effect if it can be done without violence to the language of the contract. Stewart v. Marvel, 101 N. Y. 357; Taylor v. E. M. S. Co. 124 N. Y. 184; Jacquin v. Bontard, 35 N. Y. Supp. 496. Rev. Codes 1905, Sec. 5340.

The measure of plaintiff's damages was the profits he would have earned had the sales been consummated. Taylor Mfg. Co. v. Hatcher, 39 Fed. 440; Jacquin v. Boutard, 35 N. Y. Supp. 496; Taylor v. E. M. S. Co., 124 N. Y. 184; Fairchild v. Rogers, 20 N. W. 191; Durkee et al. v. Gunn, 21 Pac. 637.

The value of a contract is the sum stated on its face. Sutherland on Damages, Vol. III. pp. 520, 521 (1884 Ed.); Hart v. Hoffman, 44 How. Pr. 168; Goss v. Brown, 31 Minn. 484; 18 N. W. 290.

CARMODY, J. This is an action by respondent, a real estate dealer of Minneapolis, Minn., to recover damages against appellant, a New Jersey corporation, that owned a large number of tracts of land in Barnes, Stutsman, and other counties, in this state. On January 20, 1897, they entered into the following contract:

"This agreement, made this 20th day of January, A. D. 1897, by and between the Metcalf Land Company, of New Jersey, party of the first part, and James C. Young, of Minneapolis, Minnesota, party of the second part.

"Witnesseth: Whereas said Metcalf Land Company is the owner in fee of the following described lands in the County of———State of North Dakota, as shown by Schedule 'A' hereunto annexed, and marked 'Exhibit A.'

"And whereas, the said Metcalf Land Company has this day given the exclusive sale and management of said lands to said James C. Young, now, therefore, the said parties hereto hereby agree with each other, as follows: That said James C. Young has caused to be made a careful examination of said lands and an appraisement thereof, which said appraisement is marked opposite each tract upon said Exhibit A and is hereby accepted by said Metcalf Land Company. That said James C. Young shall have the authority to sell said land, or any part thereof, at such a price as he may deem best, provided, however, that no tract shall be sold for less than the appraised value named in said schedule A and it is distinctly understood that before any sale shall be binding upon the said Metcalf Land Company, the contract shall be approved and terms of payment thereof accepted by the said Metcalf Land Company. That said James C. Young is further to give reasonable amount of time and attention to the management and sale of said lands, and agrees to give to the benefit of the said Metcalf Land Co., the highest price for the sale of such lands which he can obtain, and to faithfully account to said Metcalf Land Company for all the proceeds which may be derived from such sales and make quarterly return of such sales and payments of such funds as may then be in his possession. And said James C. Young further agrees that he will use all faithful and reasonable effort to have the land sold under this contract put under cultivation as rapidly as possible by the purchasers thereof,

and it is mutually agreed that in case of said James C. Young advancing money for the purchase of seed, grain or any other necessary improvements on premises sold under this contract, that he may take as security the seed lien on crops, or take any other sort of security which he deems expedient or desirable, and the money so advanced by the said James C. Young shall be first returned with interest from the purchaser before any application of payment is made under the contract of sale, any balance remaining, or paid in by the purchaser after the money so advanced has been returned shall be applied in the usual way under the contract of sale.

"It is further mutually agreed, that the proceeds derived from the sale of said lands shall be applied as follows:

"First: To the payment of said Metcalf Land Co. of the sum of two dollars ($2) per acre, together with interest thereon at six per cent. (6%) per annum, from the date of this contract, and also of all taxes accruing or becoming due upon said lands from and after the date of this contract. including the tax of 1896, paid by said Metcalf Land Co., together with interest at the rate of six per cent. (6%) per annum thereon, from date of payment thereof.

"Second: The remainder of said proceeds shall be divided equally and one-half part thereof shall be paid to the said Metcalf Land Co., its successors or assigns, and the remaining one-half part thereof shall be paid to James C. Young, his heirs, administrators or assigns.

"It is further mutually agreed, that said James C. Young shall retain no profit under this contract until the whole amount of two dollars ($2) per acre, with interest thereon, and taxes, with interest thereon as herein provided, has been returned to the said Metcalf Land Company.

'It is further mutually agreed, that this contract shall remain in force and be mutually binding upon the parties hereto for a period of ten years (10) from the date hereof, unless sooner dissolved by written mutual consent, or by the death of James C. Young.

"It is distinctly understood and agreed that this contract is personal to James C. Young, and that no interest of any kind whatsoever in said lands, or any part thereof, is hereby conveyed or intended so to be conveyed by the said Metcalf Land Company to said James C. Young, and same shall terminate upon the death of the said James C. Young, provided, however, that in the event of the death of said James C. Young be-

fore the expiration of this contract, his administrators or assigns are to be entitled to his interest in the proceeds of all lands which have been sold, either for cash or on credit, and shall receive therefor the same amount as he himself would have done had he continued to live. It is understood and agreed that said James C. Young shall have no right or claim against the said Metcalf Land Company, or on said lands, or any part thereof, for commissions, expenses, or otherwise, except only for his one-half share of the profits arising from said sales, to be ascertained and divided as hereinbefore mentioned, stipulated and agreed.

"In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written."

Afterwards, and on or about the 18th day of November, 1905, the parties entered into a supplementary contract for the purpose of settling some disputes between them; none of them, however, relating to the transactions mentioned in this action. The supplementary contract, so far as material here, is as follows: "As a part of this proposition it is understood that under the original contract Mr. Young has the right to sell the lands at reasonable figures, not less than the appraised values, and that it is the duty of the company to approve of such sales without delay. And Mr. Young concedes that as to all tracts of land which he has not contracted for sale or sold prior to the expiration of the ten-year period prescribed in the original contracts, he will make no further claim upon or assert any agency rights therein when said ten-year periods have expired, and contracts for sale have not been made."

The complaint contains 17 causes of action. Briefly stated the allegations are: That appellant is a corporation organized under the laws of New Jersey; the execution of the contract; that the respondent proceeded to carry out the terms thereof, and sold a large quantity of the lands at prices, and on terms mutually satisfactory to both of said parties, and in accordance with the contract; that appellant duly approved of said sales; that each of the parties to this action made a profit after paying to appellant its fixed charges; that respondent negotiated the sale of one tract covered by the contract on the usual terms at a fair price; that appellant refused to sell at the price named; and arbitrarily fixed a higher price on the land, and declined to permit respondent to sell land at a fair price fixed by him. In other words, respondent claims that appellant violated the terms of the contract by withdrawing from

respondent the right given by the contract to determine the selling price of the land. As a result, he was prevented from selling the land, and thus lost the profits which he would have earned on the sale. Each of the other causes of action is the same, but relates to different tracts of land. The contract and a list of the lands owned by appellant and their appraised value were attached to and made a part of the complaint. The appellant answered, admitting its incorporation under the laws of New Jersey, the execution of the contract, the ownership of the lands mentioned in the complaint, and their appraised value, that respondent sold a portion of said lands at prices and on terms mutually satisfactory, which sales were approved by the appellant, and denied each and every other allegation in said complaint.

This action was tried in the district court of Cass county before Judge Pollock and a jury. Respondent dismissed as to his sixth cause of action. After both parties rested, respondent asked leave to amend his complaint by adding thereto in each of the causes of action a paragraph to the following effect, viz: "That said purchaser so contracting or offering to purchase said land was one who was ready, willing, and able to purchase the said land on the terms stated." Appellant objected to the allowance of the amendment, and insisted that it came too late, having been made after all the evidence was in, which objection was overruled, and amendment allowed.

At the commencement of the trial appellant objected to the introduction of any evidence under the complaint, as follows: "The defendant objects to the introduction of any evidence in this case upon the ground that the complaint does not state a cause of action, or sufficient facts to constitute a cause of action, and specified as grounds for the objection that it appears from the complaint that the plaintiff is seeking to recover commissions as a real estate broker for the sale of real estate; that it appears that his action is based upon a written contract of agency, 'Exhibit 1' attached to the complaint, and that under such contract he is entitled to no commissions except upon sales actually made and approved, and it appears affirmatively from the complaint that no sales were made or consummated upon which he is claiming commissions; the sales were not approved; further, that if plaintiff's complaint be construed as an action to recover damages for the arbitrary refusal of the defendant to approve the sales that it does not constitute a cause of action, for the reason that the complaint, with the contract attached

thereto, shows affirmatively that there was no legal duty or obligation upon the defendant to approve these proposed sales upon which his cause of action is based, and this objection is made as to each and every one of the 17 causes of action embraced in the complaint." Which objection was overruled.

At the close of the respondent's case appellant moved for a directed verdict, as follows: "The plaintiff having rested its case, the defendant now moves the court for a directed verdict in its favor upon all the issues and as to each cause of action, upon the ground that the plaintiff has failed to make out a case, and without waiving, and intending to reserve all other grounds for this motion, the defendant specifies particularly the following reasons for the granting of its motions: (1) That the plaintiff has not alleged or proved the consummation of any sale of land under the contract attached to agency contract attached to the complaint, which would entitle him to a commission. (2) That the plaintiff does not allege, and the proof does not show, facts sufficient to entitle the plaintiff to recover commissions in the absence of the consummation of the proposed sales. (3) Upon the ground that the undisputed evidence shows that the authority of the plaintiff to sell at a price of his own making, or at a reasonable price, if any such authority he had was revoked, and terminated prior to the making of the sales which constitute his causes of action; and the only authority as shown by the undisputed evidence which the plaintiff had at the time of making the sales in question was to sell at the figures named by defendant. The foregoing motion is made applicable to each and every one of the 17 causes of action, and is not meant to be exclusive, but for the purpose of attracting the court's attention to the chief grounds upon which we rely in this motion. And this motion is made with the sole purpose of obtaining a ruling upon a question of law, and reserving its right to a submission of the issues of fact to the jury, notwithstanding the making of this motion. That there is no pleading or competent evidence upon which a recovery can be had for a wrongful revocation of plaintiff's agency as to the lands in question, if there was in fact a revocation, and it was in fact wrongful." This motion was denied. Appellant rested without introducing any evidence. The appellant renewed the motion for a directed verdict which was made at the close of the

respondent's case in the language and with the reservations therein stated. This motion was denied. The respondent then moved the court to instruct the jury to return a verdict in his favor for the sum of $7,592.26, which motion was granted. Judgment was entered on the verdict and appeal taken therefrom.

It was stipulated that respondent's share of the profits which he would have made had the sales been approved by the appellant were $7,592.26. The terms of the sale were not fixed in the contract, but the evidence shows that their course of dealing had established a form of sale contract, which both parties understood, consented to, and acted upon. No question had been raised as to respondent's right to fix the selling price of each tract until near the end of the contract period. On April 13, 1906, appellant wrote respondent complaining of the prices at which he was selling the land, and stating that it would not approve any more sales unless they showed an advance over previous ones. To this respondent replied that he did not recognize appellant's right to make any ruling that would prohibit him from making sales at reasonable prices. The first sales made by respondent which were disapproved by appellant (unless possibly one of which the evidence is not very clear) were made during the months of May and June, 1906, and were disapproved by appellant on June 13, 1906. From this time on appellant insisted on fixing the selling price of the lands, but did not furnish any new appraisement of the lands remaining unsold until September, October, and November, 1906. During the period from June, 1906, until the end of the contract period, January 20, 1907, respondent sold some lands at prices fixed by appellant but at the same time denied the right of appellant to fix arbitrary prices on the lands. Between May 18, 1906, and January 20, 1907, appellant refused to approve of 16 sales made by respondent on the ground that the prices were inadequate; these being the sales involved in this action. "In construing contracts, regard must be had to the surrounding circumstances and the situation of the parties; and the real intent of the parties must be given effect if that can be done without doing violence to the language of the contract." Stewart v. Marvel, 101 N. Y. 357, 4 N. E. 743; Taylor v. E. M. S. Co., 124 N. Y. 184, 26 N. E. 314; Jacquin v. Boutard, 89 Hun. 437, 35 N. Y. Supp. 496. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful." Rev.

Codes 1905, § 5340. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the the intention of the parties." Rev. Codes, 1905, § 5347. "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." Rev. Codes 1905, § 5351. "Stipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention." Rev. Codes 1905, § 5359. Applying these principles, it is clear to us that respondent had the right to fix the selling price of the land, provided, however, that no tract could be sold for less than the appraised value ot the time of the contract. The contracts of sale and the terms of payment thereof were subject to approval and acceptance by appellant. But appellant could not arbitrarily withhold its approval, and could not withhold its approval at all if the land sold at a fair price, and for not less than its appraised value as hereinbefore stated. The measure of respondent's damages was the profits he would have earned had the sales been consummated. The amount of these profits was fixed by stipulation. Appellant, having disapproved of the proposed sales on an untenable ground, prevented respondent from earning the profits which he would have earned had the sales been made. Taylor Mfg. Co. v. Hatcher (C. C.) 39 Fed. 440, 3 L. R. A. 587; Jacquin v. Boutard, 89 Hun. 437, 35 N. Y. Supp. 496; Taylor v. E. M. S. Co., 124 N. Y. 184, 26 N. E. 314; Fairchild v. Rogers, 32 Minn. 269, 20 N. W. 191; Durkee v. Gunn, 41 Kan. 496, 21 Pac. 637, 13 Am. St. Rep. 300; Hunter et al. v. Wenatchee Land Co., 50 Wash. 438, 97 Pac. 494. In Durkee et al. v. Gunn, supra, Durkee & Stout entered into a written contract with Gunn & Marr, of which plaintiff was a member, by the terms of which Gunn & Marr were given the exclusive sale of a tract of 40 acres of land belonging to defendants, which was platted by said Gunn & Marr as part of Ft. Scott, Kan. The land was appraised at $300 per acre, the profits above that amount to be divided equally between the contracting parties, except that the owners of the land might withdraw from the agreement that portion of the tract south of a certain road, but if they did so, Gunn & Marr had the right to retain it on the terms stated, except the net price to Durkee & Stout was to be $350 per acre. Gunn & Marr afterwards dissolved partnership, which was

known to defendants, and Gunn continued the business. The property advanced in value to $750 per acre. Gunn made some sales which defendants refused to approve. They conceded the contract, and prevented the plaintiff from making any more sales. He then brought an action for damages for breach of the contract. Held, that he was entitled to recover such compensation as damages as was equal in amount to his share of the profits which would have resulted had the land been sold by him.

In Hunter et. al. v. Wenatchee Land Company, supra, the Wenatchee Land Company, owning large tracts of land in the state of Washington, entered into a written contract with the plaintiffs by the terms of which they were to have the exclusive sale of the land at a fair value and not less than $2.52 per acre. Out of the proceeds derived from the sale of said land they were to pay to defendants the sum of $1.52 per acre, together with the interest thereon at the rate of 6 per cent. per annum from date of the contract. The remainder of the proceeds arising from such sales to be divided equally, one-half to each party. This land was chiefly valuable for timber. After making the contract, and before any sales had been made, the defendant sold the timber on said lands. The plaintiffs then brought an action for breach of contract. The jury found that plaintiff would have sold the land for $146,000, which was $2.52 per acre, had not the contract been broken by the defendant. Held, that the plaintiffs were entitled to recover the profits they would have made, had they sold the land at the price hereinbefore mentioned.

It is urged that the court erred in overruling appellant's objection to the introduction of any testimony in behalf of respondent under his complaint, in allowing respondent to amend his complaint at the close of the testimony, in denying appellant's motion for a directed verdict, and in its ruling on the admission of evidence against the objections of appellant. Under our view of the case, as hereinbefore stated, these rulings were correct. Appellant makes a very elaborate argument on the theory that a broker is not entitled to his commissions unless he alleges and proves that he found a purchaser who was financially ready, able, and willing to purchase on the proposed terms, and cites a large number of authorities. We have examined the authorities thus cited. Most of them hold that a broker, to recover his commissions for producing a purchaser where the sale is not made, must show that the person presented by him was able

financially, as well as ready and willing to purchase. There are other cases, however, which hold that the burden of proof is on the principal to show that the person produced is not responsible on the ground that it is presumed, until the contrary appears, that the person procured as a purchaser is solvent and pecuniarily able to make the purchase. In our opinion neither of these two lines of authorities apply to the facts in this case. It is undisputed that the parties had by their course of dealing for several years established a form of contract and certain terms of sale deemed acceptable to both parties. The appellant found no fault with the terms of the sale, and expressed no desire to change, but refused to approve the sales on the sole ground that the prices were inadequate. This he could not do as hereinbefore stated. McFarland v. Lillard, 2 Ind. App. 160, 28 N. E. 229, 50 Am. St. Rep. 234, was an action brought by the plaintiff to recover commissions for finding a purchaser for some real estate belonging to the defendant. The court says: "It is doubtless true that, if the purchaser was not able to buy and pay for the land upon the terms of the contract, the agent could not claim to have procured a purchaser. But it is not always necessary that the agent, before he will be entitled to recover, must allege and prove the financial ability of the purchaser as the same will often be presumed." The court further says that this conclusively shows that the appellant repudiated the contract of sale not on account of the financial inability to comply with the contract, but because the purchaser's wife was dissatisfied, and further says that the owner cannot after repudiating the sale on some other ground than the purchaser's financial inability to complete the purchase defeat an action for a broker's commission on the last-mentioned ground unless that ground is made an element of the contract between the broker and the owner. Colburn v. Seymour, 32 Colo. 430, 76 Pac. 1058, cited by appellant, was an action by a broker to recover commissions on proposed sales which the property owner refused to make. The following language is used: "Certainly he has not been prevented from earning his commissions by the mere fact that the defendant refused to sell the property unless he proves that, but for the conduct of the defendant, the sale would have been consummated." In the case at bar it was stipulated as follows: "That the plaintiff's one-half of the profits on each of the causes of action which he would have made had the offers been accepted by the defendant were the following amounts, respectively"—and then follows the amounts of the different causes of action which make a

total of $7,592.26, the amount of the verdict. We think the evidence shows that respondent would have made the sales as set forth in his complaint, and the profits asked for, if appellant had accepted the offers made.

Appellant urges that, under the terms of the contract, respondent was not entitled to any commissions until he secured an offer which was accepted by his employer. We do not think the contract bears this construction. It is true that it required all sales negotiated by respondent to be made, subject to the approval of appellant, but this did not mean that the company could arbitrarily withhold its approval. To so construe the contract would defeat its purpose. Taylor v. E. M. S. Co., 124 N. Y. 184, 26 N. E. 314. Appellant insists that respondent's agency not being coupled with an interest was revocable, and that, before any of the alleged sales upon which respondent relied were made, appellant revoked any authority that respondent had to sell at prices fixed by him if he ever had any such authority. However this may be, appellant would still be liable to respondent for all damages resulting from the breach of the contract. Hawley v. Smith, 45 Ind. 183; Durkee et al. v. Gunn, 41 Kan. 496, 21 Pac. 637, 13 Am. St. Rep. 300.

This is not an action to recover commissions for the sale of real estate, but an action to recover damages for breach of contract.

Finding no reversible error in the record, judgment affirmed.

MORGAN, C. J., and FISK and SPALDING, JJ., concur.

ELLSWORTH, J. (dissenting). I cannot agree with the construction placed by my Associates upon the contract involved in the case at bar to the effect that respondent had the sole right to fix the selling price of the lands subject only to the condition that the price should not be less than the value fixed by the first appraisement. The clause, "and it is distinctly understood that, before any sale shall be binding upon the said Metcalf Land Company, the contract shall be approved and terms of payment thereof accepted by the said Metcalf Land Company," is obviously intended as a limitation of the power granted to Young to sell at such a price as he may deem best; and there is great force in the suggestion that it was the original intent of the parties that appellant should approve the contracts of sale with reference to the price at which the land was sold as well as in other particulars. The parties themselves, however, seem to have agreed upon a certain construction of this clause of

the contract, and whether or not their construction is correct, it was acted upon to such degree that neither party should now be heard to urge a different meaning. This construction is embodied in a writing subscribed by both parties, a clause from which is quoted at length in the majority opinion, and is to the effect "that under the original contract Mr. Young has the right to sell the lands at reasonable figures, not less than the appraised values, and that it is the duty of the company to approve of such sales without delay." Respondent was therefore not permitted to arbitrarily fix a price of sale at any figure above the original appraisement, but must sell only at reasonable prices; otherwise appellant might refuse to approve the contract, and such action on its part would not be a breach of its contract with Young. It was only when the price at which he tendered a sale was "at a reasonable figure" that appellant might not arbitrarily refuse to approve the contract of sale on account of the price. The determination of what prices were reasonable and what unreasonable was not left to the judgment of either respondent or appellant, but was a question for the trial court under all the circumstances of the case. Whether or not the figure offered for a certain tract was reasonable depended on several considerations, important among which was the actual market value of the land at the time each sale was made. A price that was reasonable in 1897 and 1898 might in 1905 and 1906 be so far below the actual value of the land, at that time, as to be very unreasonable.

Respondent, therefore, could maintain his cause of action only upon the theory that he sold the lands at reasonable prices and a fair market value, which appellant arbitrarily refused to accept. He assumes that proof of such facts is a necessary element of his cause of action when he alleges in his complaint that the price offered "was the reasonable and fair market price, and was the fair market value per acre for said tract of land, and that it was the highest price that could be obtained for said land by plaintiff." There is no presumption of law, however, that the prices at which respondent claims he sold the lands were reasonable or a fair market value at the time of the sale. Appellant in each case claimed that the price offered was below the actual value of the lands, and for that reason refused to approve the contract or accept the price. The denials of the answer raised a direct issue upon the allegations last quoted, and

put respondent to his proofs. Unless, therefore, respondent produced evidence sufficient to satisfy a jury that the price offered was reasonable and a fair market value, appellant cannot be held for breach of contract. Respondent had no more right to fix an arbitrary valuation on the land than appellant had to arbitrarily refuse to approve a contract of sale made at a reasonable price. There is absolutely no proof that the prices for which respondent claims to have sold the lands were reasonable unless his assertion that in certain cases the prices offered were "reasonable and acceptable" can be regarded as such proof. On the other hand, appellant claimed to have had an appraisement made of the lands by disinterested parties shortly before the time the alleged sales were made, and that the price sold for was in each case below the appraisement. Such appraisement would seem to be entitled to much greater weight as evidence of the actual value of the lands than the bald conclusion of respondent that the prices offered were "reasonable and acceptable." In any event the question of reasonable price was clearly one for the jury, and should have been submitted to it as demanded by appellant at the close of the trial.

The question whether the action is one to recover a broker's commission or for damage for breach of contract has received a great deal of attention in the briefs of counsel; but whatever distinctions may be made in the character of these actions, respectively, there is little distinction in the proof required to establish a measure of damage. In the first case, in order to recover, respondent must show that he had produced a purchaser ready, willing, and able to carry out a contract of sale at a reasonable price, and that appellant then refused to convey. In the second case he must show a breach of contract by appellant, and prove "detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Section 6563, Rev. Codes 1905. Such damages must be clearly ascertainable in both their nature and origin. They must be actual, not speculative; founded on fact, not conjecture. Hudson v. Archer, 9 S. D. 240, 68 N. W. 541. In order that he might recover such damages, respondent must satisfy the jury that he could and would have made bona fide sales of the lands to responsible purchasers for their reasonable market value within the time fixed by his contract if he had not been prevented from so doing by the unauthorized acts of appellant.

Respondent seems, upon the trial, to have recognized that it was incumbent on him to make proof of the fact that in each case of an alleged sale "said purchaser so contracting or offering to purchase said land was one who was ready, willing, and able to purchase the said land on the terms stated," as he asked leave to amend his complaint by inserting such allegation; and it would seem that where he was relying for proof of his damage upon sales actually made that he correctly assumed to show by this means that his sales were bona fide and made to responsible parties. The allegation inserted by amendment was covered by the denials of appellant's answer, and respondent was thus put to his proof. He offered no evidence, however, from which a jury might reasonably infer either that he had purchasers who were ready, willing, and able to purchase the land on the terms stated, or that the lands were sold in good faith to responsible purchasers for their reasonable market value at the time of sale; and at the close of the trial, although appellant insisted that these questions together with the other questions of fact arising in the case be submitted to the jury, the trial court directed a general verdict in favor of respondent.

In the status of the case at the close of the testimony, in my opinion, respondent's evidence under the most favorable construction falls short of proof of a cause of action either for the recovery of a broker's commission or for damages for breach of contract. The entire failure of any competent evidence upon several essential points might have justified the trial court in directing a verdict for defendant. Certainly, in view of the vague, doubtful and conflicting character of the evidence offered on these points, the trial court was not warranted in holding that intelligent minds might not fairly differ in the conclusions necessary to sustain respondent's cause of action and in directing a verdict for the plaintiff.

ON REHEARING.

CARMODY, J. A rehearing was granted in this case, and elaborate and exhaustive oral and written arguments were made on both sides. After carefully reconsidering the case, we are convinced that the result reached in the former opinion is right. On the trial of this action in the district court defendant contended that the evidence did not show facts sufficient to entitle the plaintiff to recover commissions in the absence of the consummation of the proposed sales;

that the undisputed evidence showed that the authority of the plaintiff to sell at a price of his own making, or at a reasonable price, if any such authority he had, was revoked and terminated prior to the making of the sales which constituted his causes of action, and the only authority, as shown by the undisputed evidence that the plaintiff had at the time of making the sales in question, was to sell at figures named by the defendant. In other words, that defendant had the right to fix the selling prices of the land. We do not so construe the contract or the evidence. Plaintiff had the right to sell the lands at reasonable figures, not less than the appraised value. The evidence shows that the price offered and submitted to the defendant by plaintiff for each tract of land in controversy was a reasonable and fair price for said tract. The evidence abundantly discloses plaintiff's qualifications, as an expert, to testify upon the question of the reasonable values of the lands in controversy. Paragraph 2 of the contract shows that before it was entered into plaintiff had caused to be made a careful examination of the lands and an appraisement thereof, which appraisement was marked opposite each tract, and was accepted by the defendant and attached to the contract. Paragraph 3 of the contract shows that plaintiff had authority to sell the land, or any part thereof, at such a price as he might deem best, not less than the appraised value named in the schedule. After the contract had been in force more than eight years, a supplemental contract was entered into which shows that plaintiff had the right to sell the lands at reasonable figures, not less than the appraised values, and that it is the duty of the company to approve of such sales without delay. The defendant had accepted plaintiff's appraisement of the land. Plaintiff testified that the price offered for each tract of land in controversy by each proposed purchaser was deemed by him reasonable and advisable to accept.

Appellant strenuously contends, as it did on the first argument, that plaintiff had to show by competent evidence that each proposed purchaser was able, ready and willing to make the purchase. This question, as far as the record shows, was not raised in the court below, but, assuming its contention in this respect to be correct, we think the evidence sufficiently shows that each purchaser was able, ready, and willing to complete his purchase, and that each sale would have been made if the defendant had approved of it. The proposed purchaser for each tract of land made a binding written offer which defendant could enforce as soon as it accepted the said offer. We

think the evidence shows that defendant, by its conduct, prevented the plaintiff from earning his one-half of the profits on each of the causes of action, the amount of which profits was agreed upon.

MORGAN, C. J., and FISK and SPALDING, JJ., concur.

ELLSWORTH, J. (dissenting.) I deem that a better understanding of all matters passed upon by the court in this case can be secured by making the points considered on rehearing the subject of a separate dissent as suggested by the arrangement adopted in the majority opinion. The remarkable shift in position of the parties which took place upon the rehearing of this appeal renders such division into parts almost necessary. Further than this, it better serves to illustrate the changes in view of the parties and of a majority of the court between the first hearing and rehearing and to bring out perhaps somewhat more clearly the reasons for my dissent.

As shown by an examination of the opinion upon the first hearing, the basis and groundwork of the decision was a construction of the contract involved by a majority of the court, to the effect "that the dealer [that is, the respondent] had the sole right to fix the selling price of the lands." It was also contended by respondent, and held in that opinion, that the respondent, having been prevented by act of appellant from making sales under the contract, was entitled to recover the profits he would have made had the offers received by him been accepted without reference to the usual test of whether or not the purchaser presented by him was ready, willing, and able to make the purchase. My dissent to that opinion was based upon the considerations: (1) That a proper construction of the contract did not give respondent the absolute right to fix the selling price of the lands, but required him to make sales at reasonable figures not less than the appraised values; and (2) that the sales not having been consummated, in order to prove a cause of action against appellant, respondent must, among other things, produce satisfactory and competent evidence that the purchasers whose offers he claimed to hold were ready, willing, and able to make the purchase. Both of these propositions were combatted by respondent in his original brief and on his first argument of the case. On the rehearing, in strong contrast to his first contention, respondent conceded that the correct construction of that clause of the contract providing for fixing a selling price is that "Young had no right to arbitrarily fix the selling price; on the contrary, he was bound

to act with diligence in good faith and reasonably and to put forth his efforts to get a reasonable price for the land and as much as he could. And, if he failed to observe any or either of the three implied obligations under which the contract placed him, it would be a breach of duty, and his act would impose no obligation on the other party." This plainly is a concession that, in order to maintain this action, Young must prove that the offers of purchase which he claimed to hold were made at reasonable prices. Such is admitted by the modified view of the majority of the court on rehearing in the words: "Plaintiff had the right to sell the land at reasonable figures not less than appraised value." This sweeping reversal of a fundamental principle of the first decision of the majority of the court led naturally to the expectation of a reversal of the decision itself; and the fact that the conclusion arrived at is the same emphasizes the fact that it is the result only and not the reasoning of the former opinion that is held to be right. All changes of attitude either upon the part of respondent or of the majority of the court are not, however, so remarkable in my opinion as the holding that notwithstanding this complete reversal of the basic principle of the former decision "the evidence shows that the price offered and submitted to the defendant by plaintiff for each tract of land in controversy was a reasonable and fair price for said tract." The only evidence in the record that can be said to touch even remotely upon the question of the reasonable value represented by the prices named in the offers to purchase is contained in respondent's own assertion that the price offered was one which he deemed "reasonable and acceptable." This statement is made without the slightest preliminary showing that the plaintiff had any acquaintance whatever with the tract of land concerning which he testified or with the value of the lands of that character in the community in which the land lay. More than this, he did not attempt to say what was the actual value of lands of that quality in the locality in which these were situated, but gave simply his opinion as to the value that to a dealer in lands under the circumstances of this sale was reasonable and acceptable.

The only support to such evidence suggested by the majority opinion is that "the evidence abundantly discloses plaintiff's qualifications as an expert witness to testify on the question of the reasonable values of the land in controversy." I do not think that it has ever been held in any court that the value of real estate is a proper subject for expert testimony, and know of no reason why

rules of evidence should be relaxed to permit the introduction of testimony of doubtful or inferior quality upon a question of this character, where, as in this case, the subject of valuation is spread out before the world. A statement of value, even when made in absolute terms by a witness acquainted with the land and with going prices in the community, has in it a large element of opinion or conclusion. To permit a witness whose qualification is simply that of an expert in the sale of lands to express an opinion that a certain sum is a reasonable value for lands with which he is wholly unacquainted means simply to build one conclusion on another and thus to produce a result doubly fallacious. The question of the value of these lands was one concerning which any person acquainted with the lands and with the values of real estate in the locality in which they lay was competent to testify. There is no question but that such witnesses could have been produced. Such being the case, why should the mere conclusion of a dealer who lived 300 miles or more distant from the lands, and who, so far as the evidence shows, had acquaintance neither with the quality nor the value of the lands, be received as competent evidence? The majority opinion states that "paragraph 2 of the contract shows that before it was entered into plaintiff had caused to be made a careful examination of the lands and an appraisement thereof, which appraisement was marked opposite each tract, and was accepted by the defendant and attached to the contract." It is true that the contract contains such clause; but it was executed on the 20th day of January, 1897, more than 10 years before the trial of this action; and it is difficult to understand how an appraisement made, not by respondent personally, but merely under his supervision, could qualify him to testify as a competent witness as to the reasonable value of the lands at the time of trial. Even though he had seen the lands at the time of the appraisement, the change in value that had taken place in the period of time that had elapsed would make it necessary for him to show that he was still familiar with the prices of land in that locality. The fact that appellant accepted the appraisement made under respondent's direction at this remote date it must in fairness be admitted does not in any manner bind it to estimates made by him 10 years later; and in the changed view of the majority of the court in reference to respondent's right to fix prices his statement that the price offered was "acceptable" or advisable to accept adds not the slightest weight

to his testimony. While counsel for respondent does not still concede that it was necessary for him to show upon the trial that the purchasers offered were ready, able, and willing to make the purchase, the majority of the court in its opinion on rehearing concedes that it was necessary; but holds as it did with respect to proof of reasonable value that this fact is sufficiently shown by the evidence. The evidence in the record accepted by the majority of the court as sufficient for the purpose is that "the proposed purchaser for each tract of land made a binding written offer which defendant could enforce as soon as it accepted the said offer." Such evidence is, in my opinion, more entirely inadequate for the purpose than that offered to prove reasonable value. There can be no question, I think, but that appellant might without breach of its contract have refused to approve of an offer of purchase, though made at a reasonable price, when it knew the party making it to be entirely irresponsible finacially, in no condition to comply with the terms of sale, and against whom a claim for damages could not be enforced in case he failed to carry out the contract. It would not be contended for a moment, I think, that, if respondent made sales to persons of this character and appellant refused to carry them out, respondent could be said to have suffered damage by its failure so to do.

As said in a well-considered opinion of the Supreme Court of Colorado: "Refusal of the defendant to consummate the sale has not damaged the plaintiff unless he can show that if the defendant had carried out his contract the sale would have been made. How can he show this except by proving that at the time the contract was repudiated, as claimed, he was in a position to have effected a sale in conformity with the conditions under which the property was placed in his hands? Certainly he has not been prevented from earning his commission by the mere fact that defendant refused to sell the property unless he proves that, but for the conduct of the defendant, the sale would have been consummated. The refusal of the owner to sell according to contract does not prove, neither does it raise a presumption, that the alleged purchaser was able to purchase, but renders the owner liable to the broker for commissions, the same as though the sale had actually been effected, provided the latter establishes that the proposed purchaser was ready, able, and willing to make the purchase upon the terms stipulated by the owner to the broker. The repudiation of the contract by the defendant did not change the rule of law that the plaintiff must make out a prima

facie case, and establish a state of facts from which it appears that he had earned his commissions. In order to do this, even though the defendant had refused to sell, it was incumbent upon the plaintiff to prove that at the time or times when according to his claim he had the right under his contract with the defendant to effect a sale that he had a purchaser ready, able, and willing to take the property upon the terms and conditions under which the defendant had agreed to sell. * * * While it is true that there seems to be some conflict of authority on the question of whether or not it was necessary for the broker to prove the financial ability of the purchaser, in those cases where the owner refuses to carry out the contract of sale, we are of opinion that the great weight of authority and the well considered cases on the subject require plaintiff to make such proof, because he must show, before he is entitled to recover his commissions, that he performed those actions which, according to the contract of his employment, it is necessary for him to perform in order to become entitled to the compensation agreed upon." Colburn v. Seymour, 32 Colo. 430, 76 Pac. 1058. If the effect of the decision in this case is to establish as a rule of practice in the courts of this state that a broker claiming commissions, in cases in which the owner refuses to convey, may prove that he has procured a purchaser ready, willing, and able to make a purchase in any amount by simply producing a written offer to purchase, made by some unknown, obscure, and, perhaps, wholly irresponsible person, I believe that the innovation will be both dangerous and demoralizing. The courts of last resort of but one state Minnesota, have approved such practice. It has been squarely repudiated by the Supreme Court of Iowa, which announces a safer rule in better accord, not only with the general principles of evidence, but with the current of authority on this point, in these words: "We think that, in order to entitle plaintiffs to recover, something more than a mere offer to purchase should be shown by them. Such an offer could be made by one without means, and who is in no condition to comply with the terms of the sale, and against whom a claim for damages, resulting from a failure to perform the contract of purchase, could not be enforced. An offer from such an one ought not to be considered as constituting the performance of plaintiffs' undertaking to negotiate the sale of the land. As the pecuniary responsibility of the purchasers was or ought to have been known to plaintiffs, and as upon it depended the performance of their contract with defendant,

the burden rested upon them to show it. These conclusions are supported by Coleman's Ex'rs v. Meade, 13 Bush (Ky.) 358, and McGavock v. Woodlief, 20 How. 221, 15 L. Ed. 884." Iselin et al. v. Griffith, 62 Iowa, 668, 18 N. W. 302. Additional support to this rule is to be found in Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326; Leahy v. Hair, 33 Ill. App. 461; Zeidler v. Walker, 41 Mo. App. 118; Kimberly v. Henderson, 29 Md. 512; Nolan v. East, 132 Ill. App. 634.

Of the decision of the majority of the court as it now stands as compared with the conclusions announced on the first hearing of the case it may truly be said that the last state is worse than the first, in that the rehearing seems to have resulted only in the adoption of what I believe to be an unsound rule of practice, which, if sustained, can scarcely fail to be productive of confusion, if nothing worse, in future cases.

(122 N. W. 1101.)

ANDREW ANDERSON v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Opinion filed September 30, 1909.

Rehearing denied November 17, 1909.

Railroads — Injuries to Animals — Circumstanial Evidence.

1. In an action to recover damages for injuries claimed to have been inflicted to plaintiff's horse by defendant's locomotive or cars, direct evidence is not the only class of evidence which may be used to prove the liability of defendant. The circumstances surrounding the location and finding of the horse, its tracks in the snow, the nature of its injuries, may as unmistakably point to and prove that the defendant's locomotive or cars inflicted the injury as the direct testimony of witnesses might, and, if in conflict with the evidence given by witnesses, may be sufficient to sustain a verdict for plaintiff.

Railroads — Injuries to Animals on Track — Sufficiency of Evidence.

2. Plaintiff's horse had been missing two days. On the evening of the second day it was found lying in the ditch near the ends of the ties of defendant's track under circumstances which the jury may have found were unexplainable on any theory except that one of defendant's trains inflicted the injuries, which necessitated killing it, and the verdict may be sustained on either of two theories: (a) That, if the jury considered the evidence given by the trainmen as

overcoming the statutory presumption of negligence on the part of defendant as to trains on the second day, no evidence was submitted to overcome such presumption relating to trains which may have passed over the defendant's road on the first day that the horse was missing. (b) That the jury may have found, from the circumstances, that the train passing on the evening of the second day, respecting which evidence was submitted, did inflict the injuries, notwithstanding the positive statements of the trainmen to the contrary, and that therefore their testimony that the horse was not seen in time to stop the train before reaching it should be disregarded, in which case the statutory presumption was not overcome. This court cannot determine which theory the jury adopted.

Appeal and Error — Harmless Error.

3. Certain rulings on the evidence and instructions to the jury examined, and *held* nonprejudicial to defendant.

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

Action by Andrew Anderson against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From an order overruling a motion for judgment notwithstanding the verdict and from a judgment for plaintiff, defendant appeals.

Affirmed.

J. T. McCulloch, Newton & Dullam, and *Alfred H. Bright,* for appellant.

If proof fails to show killing statutory presumption does not arise. Southern R. Co. v. Forsythe, 23 Ky. L. R. 942; 64 S. W. 506; Southern R. Co. v. McMillan, 101 Ga, 116; 28 S. E. 599.

Presumption must rest upon acknowledged or established facts. Richmond v. Aiken, 25 Vt. 324; Hammond v. Smith, 17 Vt. 231.

A dead animal near a railroad track raises no presumption that it was killed by a train. St. Louis I. M. & S. R. Co. v. Hogan, 42 Ark. 122; Ry. Co. v. Sagely, 56 Ark. 549, 20 S. W. 413; U. P. R. Co. v. Bullis, 6 Colo. App. 64, 39 Pac. 897.

M. C. Spicer and *T. R. Mockler,* for respondent.

Appelate court will not weigh conflicting evidence; it determines only if it is sufficient to support the verdict. Weiss v. Evans, 82 N. W. 388; Jeansch v. Lewis et al., 48 N. W. 128; Franz Falk Brewing Co. v. Meilenz, 37 N. W. 728, 5 Dak. 136; Muri v. White et al., 8 N. D. 58, 76 N. W. 503; Williams v. N. P. R. Co., 14 N. W. 97, quoting Thompson on Negligence, p. 1236.

Animals found injured on side of railroad track warrant a finding that they were injured by a passing train. Ill., etc., Ry. Co. v. Whalen, 42 Ill. 396; Blewhett v. Wyandott, etc., Ry. Co., 72 Mo. 583; Fraysher v. Miss., etc., Ry. Co., 66 Mo. App. 573; Johnson v. Ill. Cent. Ry. Co. 39 So. 780; Brockert v. Cent. Iowa Ry. Co. et al., 47 N. W. 1026.

SPALDING, J. Plaintiff recovered judgment in justice court, and, on appeal, in the district court for the value of a horse which he alleges in his complaint was negligently injured by the defendant on or about the 21st day of December, 1905, by being run against or over by one of defendant's locomotives and cars. The answer to the complaint is a general denial. The record shows that, at the point where the horse was found after the injury, three or four miles northwest of Washburn, defendant's railroad track runs northwest and southeast through a cut 10 or 15 feet deep and 600 or more feet long, and that there is a slight curve in this cut. Plaintiff turned three horses, including the one injured, out to graze and for exercise two days before the accident is alleged to have occurred. He found two of them, but was unable to find the third one. On the 21st day of December defendant ran a mixed train from Bismarck north to Garrison in the morning and back in the evening. Neither the plaintiff nor any of his witnesses saw the accident. It is shown that the two trains mentioned were the only ones which passed over the road on the 21st of December. The engineer and fireman testified that about the time they entered this cut going southeast on the evening of the 21st they saw an object ahead, but were unable to distinguish what it was; that it was not on the track, but at the side of the track. The engineer ran past it and then backed up to learn what it was. He and the conductor and brakeman found it to be a horse lying in the ditch on the side of the grade with one of its front feet cut off. The engineer and fireman testified that it was not on the track when they discovered it, and that they did not hit it either on the morning or evening trip. When they reached Washburn the engineer notified the station agent to send some one back to look after it. The trackman and another party were sent out and found it. It was clear of the track when they found it. Its left front and right hind feet were severed, and it had a large gash in one of its hips. It is clearly shown that the horse went upon the track at some point north of the cut, and the snow, of which there was from 6 to 10 inches, showed

that it had walked upon the east side of the grade near the ends of the ties for some distance, but when a short distance north of the place where found, had commenced to jump, and at about the point where found its tracks ceased, and it was found on the west side. Some of the trainmen testified that the snow was packed between the rails in such form as to indicate that the horse had lain there for some time. This is denied by other witnesses. Pieces of bone were found and frozen blood. The case was tried by the defendant largely upon the theory that it did not injure the horse, and in this court it strenuously argues that there is no evidence to warrant the jury in finding that the defendant inflicted the injury which resulted in the killing of the horse.

We are of the opinion that the evidence was ample to justify the jury in finding that some train of the defendant inflicted the injury. We are unable to say whether it found that train No. 92, namely, the train running south on December 21st, or some other train going in the same direction on the preceding day, did the damage. We may, however, assume that it found the train regarding which the evidence was submitted was the one which hit the horse, and then the question arises, in view of the testimony given by the trainmen, whether the verdict can be sustained. Direct evidence is not the only class of evidence which may be used to prove facts. Oftimes circumstances point more plainly and unmistakably to a fact than words by a witness can be made to do, and circumstances may be in such marked conflict with the testimony given by any witnesses as to conclusively rebut it. The circumstances surrounding the injury to this horse are such that the jury may have found that they clearly indicated the injury of the animal by a train, and, while not equally as clear, we think strongly point toward the train in question, notwithstanding the testimony of the trainmen. The jury may well have found that the condition of the animal could be explained in no other manner, and that the testimony given by the engineer and fireman was false. The verdict and judgment can be sustained on either of two theories. Under section 4297, Rev. Codes 1905, which makes the killing or damaging of any horses, cattle, or stock by cars or locomotives along the railway prima facie evidence of carelessness and negligence on the part of the corporation, when the jury found, as it must have found, that defendant's

locomotive injured the horse, this prima facie case had been established. It then fell upon the railway company to overcome the prima facie case of negligence so made. If it succeeded in doing so, as relates to the train in question, it was not overcome as to trains which passed on the preceeding day when the horse was also missing, as no evidence was offered regarding such trains. On the other hand, if the jury found that the circumstances impeached the testimony of the engineer and fireman, they may have disregarded all parts of their testimony and have reached the conclusion that the statements that the engine did not strike the horse were also untrue, in which case the prima facie case made by the plaintiff would remain intact and unrebutted. The appellant cites Wright v. Mpls., St. P. & Sault Ste. Marie R. R. Co., 12 N. D. 159, 96 N. W. 324, Hodgins v. Railroad Co., 3 N. D. 382, 56 N. W. 139, and Cumming v. Railroad Co., 15 N. D. 611, 108 N. W. 798, and relies especially upon the Hodgins Case; but the facts in that case and the present are so dissimilar that the principles there announced are not applicable. The circumstances did not materially conflict with the stories told by the trainmen, while in the case at bar there is a direct conflict. The other cases are not in point.

It is apparent that the court did not err in denying a new trial or in overruling the motion for judgment notwithstanding the verdict unless reversible error was committed in the reception or rejection of evidence or in the charge to the jury. Many errors are assigned on these grounds. Most of them, if errors, were cured by the subsequent admission of evidence covering the same points, and it is not necessary to consider those.

Exception No. 1 relates to the ruling admitting evidence that the right of way and track were not fenced. It is not necessary to determine whether this was error or not, because subsequently the same ground was covered without objection. Objection was made to the statement as to what occurred between the station agent at Washburn and the man he sent back to look for the horse; but their conversation was only preliminary and introductory to showing that he went back, and why, and contains nothing which we can say was prejudicial in any manner.

Exception No. 9 relates to the court's sustaining plaintiff's objection to the introduction of a rough diagram or draft of the cut offered by the appellant during the examination of the engineer. Aside from no foundation having been laid for its introduction

the court on sustaining the objection to its introduction as offered, suggested to the attorneys that they make a drawing that they could agree upon, whereupon counsel for appellant informed the court that they would try to do so at noon, and counsel for respondent replied that he was willing to do so. No such drawing was subsequently offered, and no showing made that they could not agree as to what was a correct diagram of the premises.

Exception No. 12 relates to the answer to a question asked the conductor of the train as to what he would say as to the conditions around where they found the horse as to the length of time the horse might have been in that condition. This question was objected to as leading and calling for a conclusion of the witness. We see no reversible error in striking out the answer given by the witness on the ground that it was a conclusion and not a fact.

The specific objections to portions of the instructions of the court to the jury rest upon the court's assumption that there was evidence from which the jury might find that train No. 92, of December 21st, injured the horse, and need no further comment.

Other assignments are without merit.

The order of the district court is affirmed. All concur, except MORGAN, C. J., and ELLSWORTH, J., not participating.

(123 N. W. 281.)

HANS MARTINSON v. MARY A. REGAN, ET AL.

Opinion filed November 4, 1909.

Vendor and Purchaser — Non-Performance by Purchaser — Excuses.

1. The mere fact of the commencement of an action against the vendor and vendee in an executory contract of sale of real estate, to determine adverse claims, the complaint being in the form prescribed by section 7522, Rev. Codes 1905, does not of itself furnish grounds or reasons excusing the vendee from performance, and this is especially so when the vendee, when negotiating for extensions of the time of payment, never gave as an excuse for failing to make payments the fact that such action had been commenced.

Same — Ability of Vendor to Perform.

2. Where a contract for the sale of real estate is entered into in good faith, is it not necessary that the vendor be actually in a situation to perform at the time it is entered into, provided he is able to do so at the proper time.

Same — Payment of Taxes by Vendee — Time of Performance — Waiver.

3. In a contract for the sale and purchase of real estate, under the terms of which payments were to be made yearly for a term of years and requiring the vendee to pay the taxes, without stating any date when they should be paid, time being made of the essence thereof, a notice requiring the vendee to perform served thirty-four days after the date taxes became delinquent is given in a reasonable time and without such delay as to be a waiver of performance, when the evidence shows that the vendee was not prejudiced by the lapse of the time mentioned.

Same — Right in Equity to Extension of Time.

4. When it clearly appears that the vendee cannot comply in any manner with the terms of a contract for purchase of real estate, and due service of notice to perform, followed by notice of cancellation, was made, a court of equity will not under most circumstances grant further time to the vendee for performance.

Contract Properly Cancelled.

5. *Held,* under the facts of this case, that no error was committed by the trial court in entering judgment canceling an executory contract for purchase and sale of real estate.

Appeal from District Court, Ramsey county; *Cowan,* J.

Action by Hans Martinson against Mary A. Regan and others. Judgment for plaintiff, and defendant Regan appeals.

Affirmed.

Anderson & Traynor for appellant.

Delay in cancelling contract waives right to terminate it. Fargusson v. Talcott 7 N. D. 183, 73 N. W. 207; Timmins v. Russell 99 N. W. 48; Boyum v. Johnson et al., 8 N. D. 306, 79 N. W. 149; Merriam v. Goodlett et al., 54 N. W. 686; Gaughen et al. v. Kerr et al., 68 N. W. 694; Pier v. Lee, 86 N. W. 642; 9 Cyc. 608; Eaton v. Schneider et al., 57 N. E. 421.

Notice of forfeiture given before vendor had acquired title was a nullity. Easton v. Lockhart, 10 N. D. 181, 86 N. W. 697; Townshend v. Goodfellow et al., 41 N. W. 1056; Rev. Codes 1905, Sec. 6617; 22 Am. & Eng. Enc. Law, 948, and Note 2; Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; Lyman v. Strondbeck 16 So. Rep. 662; Holmes v. Woods, 168 Pa. St. 530, 32 Atl. Rep. 54; Weaver v. Richards, 108 N. W. 382; Howe v. Coates et al, 107 N. W. 397; 2 Estee's Pleading, Sec. 2876.

Burke, Middaugh & Cuthbert, for respondent.

Vendor need not have title at time of contract, if he is able to convey at proper time. Clapp v. Tower et al., 11 N. D. 556; 93 N. W. 862; Townshend v. Goodfellow et al, 41 N. W. 1056; Brown v. Haff, 5 Paige Ch. 235; Jenkinson v. Fahey, 73 N. Y. 355; Pierce v. Nichols, 1 Paige 244; Brown v. Haff, 5 Id. 235; Dresel v. Jordan, 104 Mass. 407.

Appellant is estopped to question plaintiff's title. 2 Herman, Estoppel, p. 947; Cowdrey v. Greenlee, 8 L. R. A. (N. S.) 137; Schiffer v. Deitz, 83 N. Y. 300; Moore v. Smedburgh, 8 Paige's Ch. 600, 4 Law Ed. 558; Fargusson v. Talcott et al, 7 N. D. 183, 73 N. W. 207; Eaton v. Schneider et al, 57 N. E. 421; Monson v. Bragdon et al, 42 N. E. 383.

It is the duty of the vendee, after notice to comply with her terms of the contract, to perform; and upon failure is foreclosed of all rights under it. Harris v. Troup, 8 Paige, Ch. 423, 4 Law Ed. 488; Phillips v. Carver et ux. 75 N. W. 432; Ferris et al v. Jensen, 114 N. W. 372; Spolek et al v. Hatch, 113 N. W. 75.

Before vendee can claim a specific performance, he must show his readiness, willingness and ability to perform, and make a tender. Kreutzer v. Lynch et al., 100 N. W. 887; Cughan v. Larson et al., 100 N. W. 1088; Sec. 5254, Rev. Codes 1905; Arnett v. Smith, (N. D.) 88 N. W. 1037; Citing 11 Warvel on Vendors, p. 880, Sec. 32. 196; Cughan v. Larson, 100 N. W. 1088.

SPALDING, J. This action is here for trial de novo on appeal from a judgment in favor of plaintiff confirming title in him as against the defendants and awarding him possession of lots 1, 2, and 3, and the S. ½ of the N. E. ¼ and the S ½ of the N. W. ¼ of section 5, township 156 N. of range 63 W. in Ramsey county, and containing 319.93 acres. We shall not attempt to set out the pleadings, as they are sufficiently covered by the facts which we find. We find the facts as follows: That on the 20th of December, 1902, the plaintiff, herein the respondent, held a contract with one Brown for the purchase of the land described, and on that day entered into a contract in writing with appellant, whereby he agreed to sell, and she agreed to purchase, such premises and to pay therefor $5,120, $1,000 of which was paid on the execution and delivery of the contract, and notes given for the balance, payable $360 December 20,

1903, $940 December 20 1904, $940 December 20, 1905, $940 December 20, 1906, and $940 December 20 1907 all drawing interest at 7 per cent per annum payable annually from date, and she agreed to pay all taxes or assessments that might be levied or imposed on said land beginning with the year 1903, and to erect buildings thereon suitable for occupancy during the year 1903, and to break at least 80 acres in each of the years 1903 and 1904. It was agreed in the contract that time should be of the essence thereof, and that, on the failure of appellant to make either of the payments or to perform any of the covenants to be performed on her part, the contract at the option of the respondent should be forfeited and terminated and all payments made retained by respondent in full satisfaction and in liquidation of all damages by him sustained, and that he should have the right to re-enter and take possession in such contingency. The payments were to be made at the office of C. A. Dodge & Co. at Devil's Lake, N. D. The contract was not assignable without written consent of respondent, and (on the payments being made up to and including December 20, 1904, appellant should be entitled to a deed and to give a mortgage for the part remaining unpaid. Respondent delivered possession of the premises to appellant, who during the seasons of 1903 and 1904 caused to be broken about 100 acres thereon, but erected no buildings. She failed to make the payment due December, 1903, and, after some negotiations between the parties, respondent agreed to extend the time of the 1903 note to October 4, 1904, on receiving $50 which was later paid him. She failed to make any of the other payments on the contract, and paid no taxes on the premises for the years 1903 and 1904, and failed to plow back the land in the fall of 1904 and to seed it in the spring of 1905. In the meantime she had notified the plaintiff and his agents that she was unable to make further payments, and requested more time, and requested Dodge & Co., respondent's agents, to sell the land and get her back the money she had paid, or more. Respondent made no agreement with her to permit further delay in payment. She contends that he agreed to negotiate a loan on the property and give her the benefit of it by applying the amount obtained on her contract, but we do not find from the evidence anything more than a statement made to her that, if he could get enough to make it an object to do so, he would, and he states that he was unable to procure such a loan. Dodge & Co., on behalf of respondent wrote appellant March 7, 1905, that they were instruct-

ed to notify her that, if the contract was to run another season, he must have security on the crop by a bill of sale of one-half of the crop to be delivered at station, also that all taxes must be paid, and to have her sons call and see them regarding it. To this letter she replied, but it does not appear that she accepted the offer. In fact, the evidence shows that she had no seed to put in the land, and that it was unplowed, and that she had no horses or means of putting it in. March 8th respondent wrote her, informing her that the work must be done early that spring, and that she must look after the taxes. No payments being made, either of taxes or on the purchase price, and no work being done on the premises, respondent served written notice on her on the 4th day of April, 1905, to the effect that, by reason of her defaults in the payment of the principal, interest, and taxes, unless payment of the amounts then due were made within 30 days in accordance with the terms of the contract, it would be concelled. No payments being made, on the 5th day of May, 1905, notice of cancellation was served on her, and she was further notified that her notes were deposited in the First National Bank of Devil's Lake for delivery on her surrendering her copy of the contract and possession of the premises, and demand was made for possession. Appellant claims that respondent prevented her renting the land, and thereby complying with the terms of the contract as to cropping in 1905, by the acts and statements of Dodge & Co., his agents. It appears that, while the contract was in force, one Lambert brought an action against both appellant and respondent and others to quiet title in him to a portion of the premises, and served upon appellant a summons and complaint, the complaint being in the statutory form required in actions to quiet title; that one of the parties with whom she talked about renting the place was told by her of this action. He thereupon made inquiry of Dodge & Co. regarding it, and was by them told the facts in response to his inquiry. We do not find that they told him anything more nor less than the inquiry called for, or than the truth. The inquiry also covered the notice served by respondent. We do not find that this was the only cause for her failure to rent. Among other reasons the party did not take the land because he demanded a written lease and failed to receive it. This was not the fault of respondent. We, however, deem the subject of failure to lease to be immaterial in view of the other facts. It is contended that she was excused from performing by reason of the suit brought by

Lambert, but the evidence shows that such suit was dismissed with prejudice before the trial of the case at bar, and it furnishes no justification of a failure to make payments. Parties cannot be relieved from their obligations on every pretext of this nature. Respondent testifies that he was able at any time when she complied with the conditions to give her a warranty deed conveying good and valid title, and there is nothing in the record to conflict with this other than the mere fact of the commencement of an action, in statutory form, to quiet title. The commencement of such an action established no claim of title adverse to the respondent. The complaint did not state the grounds on which Lambert based his claims, and utterly failed to disclose any facts from which the merits of that action can be determined, and did not excuse appellant from meeting her obligations under the contract. She, in fact, never gave this as an excuse to respondent for failing to comply with the terms of the contract, and the evidence shows conclusively that it, in fact, did not influence her conduct. Where a contract is entered into in good faith, it is not necessary that the vendor be actually in a situation to perform at the time it is entered into, provided he is able at the proper time to place himself in that situation. Clapp v. Tower, 11 N. D. 556, 93 N. W. 862; Townshend v. Goodfellow, 40 Minn, 312, 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736.

The next contention is that respondent had waived his right to enforce cancellation by delay after the payments of 1903 and 1904 became due. This is in effect conceded by respondent, and it is not necessary to determine whether a waiver had occurred. Appellant cites several authorities holding that delay of three or four months waives strict compliance, but the facts were very different from these in this case. In all of such cases the vendee had done some act or acts in reliance on the waiver, had either made improvements on the property or expended money in making plans for future conduct in relation to it, or would have been prejudiced by some similar act showing a reliance upon the waiver. This appellant is in no such position. She did nothing whatever with the premises after the payment became due in October, 1904, as we have said, not even plowing back the land, and, even if the favor shown appellant in not more promptly insisting upon the cancellation by reason of her defaults in paying the notes does not constitute a waiver, respondent had not waived the payment of the

taxes due December 1, 1904, and delinquent March 1, 1905, and this default justifies the cancellation of the contract. It is contended that there was a delay of four months after such default before the notice to pay within 30 days was served. We do not so consider it. While taxes on real property become due December 1st, they are not delinquent, and no penalty or other imposition attaches until March 1st, and, while the contract did not specify when the taxes should be paid or when failure to pay them should work a forfeiture or default, we are satisfied that a reasonable construction of the contract and the law in such case fixes the date of delinquency as to the date of default. Appellant has no cause for complaint in fixing it at that date, as it gives her three months more favor than she would have had if construed to apply to the date when the taxes became due. The delay of a little more than a month after the date of delinquency cannot be considered as an unreasonable lapse of time before serving the notice. This is especially so in view of the letters of March 7th and March 8th, calling her attention to the necessity of paying taxes. Plaintiff was given by the notice 30 days in which to perform as to the items then due. The facts show that respondent had been extremely lenient to the appellant; that she had engaged in a venture in purchasing this land and was unable to carry out the terms of her contract, even approximately. The land had not increased materially in value at the time of the trial in the district court, and she was anxious to let go of it if she could and get her payments back, and was unable to carry it on if the contract was permitted to stand. Under some circumstances, she might be entitled to additional time or some allowance on account of the money paid, but on the trial she testified that she had no money to make payment and no means of procuring any, and it clearly appears that she cannot comply with the terms of the contract in the slightest degree as to further improvements and cropping, and it would only be a waste of time and a loss of interest to permit the contract to remain in force. In other words, it would be permitting appellant to speculate solely at the expense of respondent when she was not simply technically, but grossly, in default.

Appellant asks the court to decree that respondent be required to furnish a warranty deed to defendant, with good and marketable title, upon payment by the defendant of the amount due on the contract March 5, 1905. From the statements of appellant that she has

no means of carrying out the contract and making further payments, any such provision or requirement, if otherwise proper, would be entirely useless.

Damages are also asked by appellant. We are unable to comprehend any right, either in law or equity, to damages when she is the party in default. Under the circumstances of this case, she is not entitled to compensation for the breaking which she did, and it may be well questioned whether the evidence shows any increase in value of the premises by reason of such breaking at the time the notice was served.

The judgment of the district court is affirmed. All concur.

(123 N. W. 285.)

C. B. HUGHES, H. C. LANDER, WM. JONES AND F. C. ROWATT v. JOSEPH HORSKY, W. A. HAMILTON, ALBERT LOWE, ED. CHRISTENSON, AND J. A. MCDERMAID, AS BOARD OF COUNTY COMMISSIONERS OF PIERCE CO., NORTH DAK., AND THE COUNTY OF PIERCE, NORTH DAKOTA, A MUNICIPAL CORPORATION.

Opinion filed October 18, 1909.

Counties — Bond Issue — Sufficiency of Notice of Election.

1. Under a statute providing for an election on the question of issuing bonds for a courthouse or jail, or both, requiring the notice of such election to state its object, the amount of bonds to be issued, the denominations of such bonds, the length of time for which they shall run, and the rate of interest which they shall bear, an election held under a notice which failed to state the denomintaions of the bonds proposed to be issued, and the rate of interest which they were to bear, is invalid, and it is therefore illegal for the county officials to issue the bonds so voted.

Same — Separate Questions.

2. Under a statute providing for the issuance of bonds for county buildings providing for the submission of the question of the issuance of bonds for a courthouse, or jail, or both, *held,* that when the erection of a courthouse and jail in one building is contemplated, and the notice so indicates, the question of issuing bonds may be submitted and voted upon as one question; but that when two separate buildings are planned, two questions are presented, and although they may be submitted in the same notice, it must be so done that each voter may vote for or against each proposition independently of the other.

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

Action by C. B. Hughes and others against Joseph Horsky and others, as Commisisoners of Pierce county, and Pierce county. Judgment for defendants, and plaintiffs appeal.

Reversed.

L. N. Torson, for appellants. *A. M. Christianson* and *B. L. Shuman,* for respondents.

SPALDING, J. This is an appeal from a judgmnet against the plaintiffs and appellants, denying their demand that the county commissioners of Pierce county be restrained from issuing and negotiating certain bonds voted to be issued by said county at the November, 1908, general election, for the purpose of building a courthouse and jail in Pierce county. The first contention of appellants is that there was no sufficient notice given of the election held for the purpose of voting for or against the issuance of bonds for such purpose. Section 2565 of the Revised Codes of 1905, providing for elections on the issuance of bonds for county buildings requires: "Such election shall be held in the manner and upon the notice prescribed by law for other elections, but the published and posted notices of such election shall state its object, the amount of bonds to be issued, the denominations of such bonds and length of time for which they shall run and the rate of interest which they shall bear." In the case at bar the notice of election on bonds was included in the notice of general election held on the 3rd day of November, 1908, and so much of such notice of election as relates to the bond issue reads as follows: "Also to vote on the question of bonding the county of Pierce for $75,000 for a term of twenty years for the erection of a new courthouse and jail." No extended discussion regarding the adequacy of this notice is necessary. We have just held, in the case of Stern v. City of Fargo, that a notice which did not definitely state the amount of the bonds proposed for issuance was inadequate. The same reasons there suggested for so holding are equally applicable in the case at bar. This notice was faulty in not stating the denominations of the bonds or the rate of interest which they were to bear, and this defect rendered the election invalid. See Stern v. City of Fargo, 18 N. D. 289, 122 N. W. 403, and authorities there cited, all of which are applicable herein.

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C. B. HUGHES, H. C. LANDER, WM. JONES AND F. JOSEPH HORSKY, W. A. HAMILTON, ALBERT LOWI ENSON, AND J. A. MCDERMAID, AS BOARD OF MISSIONERS OF PIERCE CO., NORTH DAK., AND T PIERCE, NORTH DAKOTA, A MUNICIPAL CORPORAT

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1. Under a statute providing for an election issuing bonds for a courthouse or jail, or both, of such election to state its object, the amount of the denominations of such bonds, the length of t shall run, and the rate of interest which they sh held under a notice which failed to state the d bonds proposed to be issued, and the rate of inte to bear, is invalid, and it is therefore illegal fo to issue the bonds so voted.

Same — Separate Questions.

2. Under a statute providing for the issuanc buildings providing for the submission of the q of bonds for a courthouse, or jail, or both, *hc* tion of a courthouse and jail in one buildin the notice so indicates, the question of issuin mitted and voted upon as one question; but t buildings are planned, two questions are prese may be submitted in the same notice, it mu voter may vote for or against each propositi other.

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But for the fact that another election on the same subject may be held, it would be unnecessary to refer to the remaining contention of appellants, which is that the voters were, by the terms of the notice, compelled to vote either for issuing bonds for both a courthouse and jail, or against issuing bonds for either. In the Fargo case we held, under the facts and law applicable to that proceeding, that the submission of the question of issuing bonds for part of a waterworks system, and an electric light plant, were two purposes, not naturally or necessarily connected, and that therefore they could not be submitted in such manner that the voter must vote for or against both propositions. After careful consideration we are satisfied that the questions are not identical. The statute applicable to the issuance of bonds for county buildings is materially different, and we think contemplates the submission of the vote for or against bonds for a courthouse or jail together, provided the notice states that they are included in the same building. It reads:

"Sec. 2563. Whenever any county in this state, having three hundred voters or more, shall have been organized for four years or more, and the county seat of such county has been permanently located as provided by law and the buildings occupied by such county for courthouse, office or jail purposes are inadequate to the wants thereof, or unsafe by reason of extraordinary risk of fire or otherwise, such county may issue bonds for the purpose of purchasing a site for and erecting a courthouse or jail, or both, under the restrictions and according to the provisions of this subdivision of this article.

"Whenever in the judgment of a majority of the board of county commissioners in any county which comes under the provisions of this subdivision such county has insufficient or inadequate buildings for its use for courthouse or jail, or both, such board may order an election for the purpose of determining by a vote of the electors of such county the question of issuing its bonds for the purpose of erection of a courthouse or jail, or both, at such county seat, if none is provided. * * *"

Other portions of the statute relating to bonds for county buildings harmonize with our construction. The county of Pierce is destitute of both courthouse and jail. They are necessary means for the administration of justice and the enforcement of criminal laws of the state and in many ways serve a common purpose. It is the duty of the county to provide a suitable jail and a suitable place

for holding court and for offices for the county officials. A jail without a place for the trial of criminals would be of slight use, and vice versa. Furthermore the Legislature, in enacting the provisions of the Code quoted, must have been aware of and must have taken into consideration the custom which has long prevailed in this state, though less frequently followed now than in earlier times. We think that not less than one-half the counties in the state have provided a jail within the county courthouse. We are therefore of the opinion that the question of issuing bonds for the erection of a combined courthouse and jail may be properly submitted to be voted upon as one proposition. However, where the plan is to construct separate buildings for each purpose, although the statutory provisions might possibly bear the same construction, we think, for the reasons given in the Fargo case, that the questions of bonds for a courthouse and bonds for a jail should be separately submitted. They may be included in the same notice, but should be separately stated and so arranged on the ballot that each may be voted on independently of the other. This construction will protect each voter in all his rights, and harmonizes with the reasons applied in the best-considered cases, and will not be an attempted delegation of power by the voters to the county commissioners.

The judgment of the district court is reversed, and it is directed to enter a decree in accordance with the prayer of the complaint. All concur.

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

(122 N. W. 799.)

F. C. RISING AND EDWARD ISAACS v. GEORGE DICKINSON.

Opinion filed May 1, 1909.

Officers — Register of Deeds — Failure to Keep Numerical Index — Negligence.

1. Under section 2452, 2453, Rev. Codes 1905, it is made the duty of the register of deeds of each county to keep a numerical index in his office in which shall be noted, opposite the description of each tract, the volume and page of each mortgage or other instrument affecting the title thereto. *Held,* that defendant's failure for over two months after a mortgage was duly recorded to note the same in such numerical index is negligence per se, rendering him liable to one who, in reliance on such index, purchases the property and sustains damage as the necessary and proximate result of such official neglect.

Same — Contributory Negligence.

2. It is essential to a recovery for such negligence that plaintiff be free from contributory negligence, but it was not contributory negligence on plaintiff's part in failing to examine the grantor and grantee index wherein such mortgage was noted.

Ministerial Officers —Common Law Liability.

3. The register of deeds is a ministerial officer, and as such is liable at common law, in the absence of an express statute, to an action for damages caused by his failure or neglect to perform the duties of his office, or for their negligent or illegal performance.

Register of Deeds — Action — Sufficiency of Evidence.

4. The action was tried on the theory, and it is, in effect, conceded that it was essential to a recovery, however, that plaintiff should prove that one S., the mortgagor, and the person from whom he purchased the premises, and who gave him a warranty deed containing a covenant against incumbrances, was insolvent, and hence unable to pay the mortgage indebtedness or to respond in damages for the breach of her covenant. Evidence examined, and *held* insufficient, for reasons stated in the opinion, to establish such fact.

Appeal from District Court, Benson county; *Jno. F. Cowan,* J.

Action by F. C. Rising and another against George Dickinson. From a judgment for plaintiff Rising and an order denying a new trial, defendant appeals.

Reversed.

Lindstrom & Sinnes and *Burke & Middaugh,* for appellant.

McClory & Barnett, for respondent.

FISK, J. Plaintiff Rising recovered a judgment in the court below against defendant for damages for the alleged negligence of the latter, who was register of deeds of Benson county, in failing and neglecting to note in the numerical index a certain mortgage filed and recorded in his office on September 20, 1901.

The facts necessary to a correct understanding of the law points involved are as follows: On September 20, 1901, one Julia Solvey; who was the owner of the real property described in the complaint, gave a mortgage thereon on the Advance Thresher Company. Such mortgage, as above stated, was filed in defendant's office on September 20th, and recorded in Book 18 of Mortgages at page 445, and thereafter entered in the grantor and grantee's index of mortgages, but the same was not noted on the numerical index of mortgages until after December 5th following. On the latter date plaintiff Rising purchased the premises covered by such mortgage from Julia Solvey, taking from her a warranty deed of the premises with the usual covenant warranting the same to be free from all incumbrances, except a mortgage for $100 and one for $60 in favor of other parties. The proof shows that prior to such purchase the plaintiff Rising examined the reception book required to be kept by defendant as such register of deeds, covering entries for the period of about two months immediately prior thereto, and also the numerical index and failed to find the mortgage to the Advance Thresher Company in either of such records, and he claims to have made such purchase without any notice of any kind of the existence of such last-named mortgage. Subsequently, and prior to the commencement of this action, the holder of the Advance Thresher Co. mortgage foreclosed the same by action which resulted in a judgment decreeing that there was due thereon the sum of $492.30, and directing a sale of the premises to satisfy such sum. Plaintiff Rising appeared as an intervenor in such foreclosure proceedings, but, failing in his defense, he thereafter was required to and did pay to protect his title the sum aforesaid, which is one of the items of damage claimed to have been suffered by him by reason of defendant's said negligence. At the conclusion of the trial both parties moved for a directed verdict, whereupon the learned trial court excused the jury, and thereafter findings of fact and conclusions of law were made and judgment ordered in favor of the plaintiff F. C. Rising and against the defendant for $492.30, with interest, together with the costs and disbursements of the action.

A motion for a new trial was thereafter made and denied, and this appeal is both from the judgment and order aforesaid.

Among other things, appellant contends, in effect, that plaintiff was himself guilty of contributory negligence barring a recovery, because he neglected to make a proper and diligent search of the records, and that, if he had done so, he would have discovered the Advance Thresher Company mortgage. It is a conceded fact that this mortgage was duly noted both in the reception book and the grantor and grantee index, and that the same was recorded in mortgage book 18 on page 445, but was not noted in the numerical index, and that plaintiff Rising merely examined the reception book and the latter index. It is no doubt true that plaintiff by searching a little farther back in the reception book, or by examining the grantor and grantee index, would have discovered such mortgage, but we think he was not bound at his peril to do so.

The law required defendant to keep a numerical or tract index in which should be noted opposite the description of each tract the volume and page where each mortgage or other instrument affecting the same is recorded, and plaintiff had a right to assume that defendant had performed his duty in this regard. While it is true that such notation could not be made until after the instrument was recorded, or rather until its recordation is commenced, for the reason, as contended by appellant's counsel, that the officer until such time does not know the page upon which the record commences, still the undisputed evidence discloses that this mortgage was actually recorded over two months prior to the date plaintiff made the examination aforesaid, and we think it must be held as a matter of law that defendant was negligent in failing to note such instrument upon the numerical index within such time after the same was recorded. Wisconsin has a statute very similar to the statute of this state regarding the records including indexes to be kept by the register of deeds, and the case of Johnson v. Brice, 102 Wis. 575, 78 N. W. 1086, we think fully sustains us in these views. In that case the plaintiff relied solely upon the tract index, and it was there expressly held that plaintiff had a right to rely on such index, and his recovery was sustained upon the theory of defendant's negligence in failing to note a certain mortgage in such index. We think the statute requiring such numerical index to be kept clearly contemplates that immediately, or at least within a reasonable time after each instrument is recorded, it shall be noted on such index. The performance

of such duty requires but a brief period of time, and we are agreed that, under the facts in the case at bar, defendant was unquestionably guilty of actionable negligence per se in failing to note this mortgage upon said index prior to December 5, 1901.

Appellants's counsel call attention to the fact that in the Wisconsin case above cited the action was based upon an express statute fixing liability; but it is clear that, in the absence of such a statute, there is a common-law liability on defendant's part to respond in damages to any person who has been injured as the proximate result of his negligent performance of official duty. The register of deeds is a ministerial officer, and as such is answerable in damages for non-feasance, misfeasance, or malfeasance. As stated in 23 Am. & Eng. Enc. of Law (2d. Ed.) 377: "* * * He is liable in a civil action for the failure or refusal to perform the duties of his office, or for their negligent or illegal performance." See, also, the numerous cases cited therein. To the same effect, see Throop on Pub. Officers, § 743; also, State v. Ruth, 9 S. D. 84, 68 N. W. 189, wherein it was held that "an officer who, without legal excuse, fails to perform a ministerial duty, is liable for the proximate results of his failure to any person to whom he owes performance of such duty." That such is the law seems to us too plain for serious debate, and we pass this point without further comment.

This brings us to a consideration of appellant's exceptions to certain findings of the trial court. It is asserted that finding No. 8, in so far as it finds that plaintiff Rising relied upon the numerical index, has no support in the evidence, and that finding No. 14, to the effect that Julia Solvey, the mortgagor and plaintiff's grantor, was insolvent, is likewise without support in the evidence. The case was tried upon the theory, and it is, in effect, conceded, that if either of these contentions are correct, reversal must follow as both of such findings are essential to plaintiff's recovery. If plaintiff did not rely in purchasing said property upon the numerical index, or if he was not damaged in the eye of the law because of the fact that Julia Solvey was solvent and able to respond in damages for the breach of the covenant in her deed against incumbrances other than those mentioned, or financially able to pay the note secured by such mortgage, then plaintiff has no cause of action against defendant, at least for anything other than nominal damages. We have examined the record carefully, and failed to find any evidence to the effect that plaintiff in purchasing this land relied wholly upon the

numerical index with reference to existing incumbrances. It is true plaintiff testified that, before purchasing the land, he examined the numerical index, and also the reception book, and failed to find said mortgage noted upon either, and that he had no knowledge of the existence of such mortgage. For all that appears from the record plaintiff may have relied as much or more upon the covenant in his grantor's deed as upon the numerical index in question. Conceding, however, that the evidence upon this issue was sufficient to go to the jury, and hence the finding of the court will not be disturbed we are entirely clear that the evidence is wholly insufficient to sustain the finding that Julia Solvey was insolvent. The only testimony upon this point is that of the witness Stewart, who testified: "I am acquainted with Julia Solvey. I have known her ever since I have been in the county, till she left. She has gone to Canada. She is not a resident of this county or state at the present time, and has no property here. I have been acquainted for some time with her business affairs, and have had collections against her. I think I returned them to the M. M. Osborne Company. I was not able to collect anything on them. From my knowledge as to the state of her financial affairs and these collections I would state that Julia Solvey is at this time insolvent." The above testimony was given at the trial which commenced on November 22, 1906, whereas the transaction out of which plaintiff's cause of action arises took place in the early part of December, 1901, nearly five years prior thereto. How, then, can it be argued that the foregoing testimony in any manner tends to prove that Julia Solvey in December, 1901, and for a long time thereafter, was not perfectly solvent? But such testimony is wholly insufficient to prove her insolvency for another reason. It purports to give the mere opinion and conclusion of the witness without stating any facts as a basis therefor, and hence is entitled to no probative weight. The fact that the witness had collections against her and in favor of the M. M. Osborne Company which he was unable to collect tends to prove nothing. She may have declined payment of the same for perfectly valid reasons. He does not swear that these claims were reduced to judgment and execution was issued and returned unsatisfied, nor does he state what knowledge, if any, he had relative to the assets and liabilities of Julia Solvey. For all that his testimony discloses, she may not have owed a dollar to any one, and she may have owned property worth millions of dollars. Moreover, the testi-

mony of this witness fails to state when Julia Solvey went to Canada or when she ceased to own property in Benson county or in North Dakota. It may be from anything that appears in his testimony that she continued to reside and to own property here for several years after the plaintiff purchased said property, and after he acquired knowledge of the existence of such mortgage. As before stated, and for the reasons above stated, we are convinced that plaintiff signally failed to establish the fact of Julia Solvey's financial inability to respond in damages to plaintiff for the breach of her covenant aforesaid, and proof of such fact was essential to plaintiff's recovery. As to the proper method of proving insolvency, see Abb. Tr. Ev. (2d Ed.) 777-779.

Entertaining these views, it follows that the judgment and order appealed from must be reversed, and it is so ordered.

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

(121 N. W. 616.)

AULTMAN-TAYLOR MACHINERY CO. v. FRED CLAUSEN.

Opinion filed May 12, 1909.

Supreme Court — Statement of Case — Application to Extend Time.

An application to the Supreme Court for an order enlarging the time within which plaintiff may prepare and serve a proposed statement of the case, and for stay of proceedings until such statement is settled, will be denied; the Supreme Court having no jurisdiction to entertain such an application.

Action by the Aultman-Taylor Machinery Company against Fred Clausen. Application by plaintiff for an order enlarging the time in which to prepare and serve a statement of the case and for stay of proceedings.

Denied.

Weeks, Murphy & Moum, (*H. R. Turner* and *E. H. Wright,* of counsel), for plaintiff. *A. Woodward* and *Noble, Blood & Adamson,* for defendant.

PER CURIAM. Application to this court for an order enlarging the time within which plaintiff may prepare and serve a proposed statement of case, and for a stay of proceedings until such statement is settled.

The application is denied for the reason that the Supreme Court has no jurisdiction to entertain such an application. The trial court has the undoubted power for good cause shown and in furtherance of justice to grant the relief here prayed for, even though the statutory period for settling such statement or moving for a new trial has expired. Rev. Codes 1905, section 7068. The record discloses that a similar application was made to the presiding judge, and that he refused such application upon the sole ground that the court was without jurisdiction or authority to grant such extension. This was, in view of the express language of the foregoing section, clearly erroneous. This court, no doubt, has jurisdiction, in a proper proceeding, to review and correct any abuse of discretion on the part of the trial court, but we are aware of no authority justifying the practice adopted by plaintiff's counsel on this application.

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

(121 N. W. 64.)

THE STATE OF NORTH DAKOTA v. CHARLEY BEDNAR.

Opinion filed May 27, 1909.

Judges — De Facto — Right to Question Authority.

1. Following the rule announced in State v. Ely, 16 N. D. 569, 113, N. W. 711, 14 L. R. A. (N. S.) 638. *Held,* that Hon. A. G. Burr, who presided as judge at the trial of the issues in a criminal action against appellant, was at the date of such trial a de facto judge of the district court in and for Pierce county, and as such his acts are not subject to attack by a private suitor.

Indictment and Information — Prosecution in the Name and by the Authority of the State.

2. An information which is entitled in the name of the state of North Dakota, and in which the parties are designated as "State of North Dakota, Plaintiff, v. Charley Bednar, Defendant," sufficiently conforms to section 97, article 1, of the state constitution, which requires that "all prosecutions shall be carried on in the name and by the authority of the state of North Dakota," especially where, as in the case at bar, such information recites that the "state's attorney in and for Pierce county, in the state of North Dakota, as informant, here in open court, in the name and by the authority of the state, gives this court to understand and be informed." State v. Kerr, 3 N. D. 523, 58 N. W. 27, followed.

Indictment and Information — Assault With Intent to Kill — Inclusion of Lesser in Higher Offense.

3. Appellant was charged with the crime of shooting at another with a firearm with intent to kill, and the jury found him guilty of assault with a dangerous weapon by shooting at the complaining witness with a firearm with intent to injure him.

Held, that the crime of which he was charged is included within that charged in the information.

Appeal from District Court, Pierce county, BURR, J.

Charley Bednar was convicted of an assault with a dangerous weapon, and he appeals.

Affirmed.

A. M. Christianson and *L. N. Torson* (*L. J. Palda, Jr.,* of counsel), for appellant. *Andrew Miller* Atty. Gen., and *Alfred Zuger,* Asst. Atty. Gen., and *B. L. Shuman,* State's Atty., for the State.

FISK, J. Appellant was convicted of the crime of assault with a dangerous weapon. He assigns numerous errors but we will notice those only which are discussed in the brief.

The first assignment challenges the rulings of the trial court in overruling his objections to the jurisdiction of that court; the point of such objections being that the Honorable A. G. Burr, who presided at such trial, was not even a de facto judge of such court, and hence all his acts are nullities. Appellant's brief is almost entirely devoted to this assignment in an attempt to convince us that the decision of this court in State v. Ely, 16 N. D. 569, 113 N. W. 711, 14 L. R. A. (N. S.) 638, involving the same questions was erroneous. Such contention deserves but brief notice, as the same is wholly devoid of merit. We entertain no doubt as to the correctness of the decision in State v. Ely, notwithstanding the decisions of some courts to the contrary. But, aside from this, a conclusive answer to appellant's contention is the fact that he cannot raise such question in the manner attempted. Counsel are evidently laboring under an erroneous view of the law. By the objections they sought to raise the question of Judge Burr's authority to preside. They sought to question his official character as judge. This they could not do for the obvious reason, among others, that Judge Burr had no jurisdiction to pass on his own qualifications. Whether in fact or in law he was judge of the district court he could not determine. Moreover, it would, indeed, be a strange rule of law that would permit every

party to a lawsuit to volunteer to become a champion of the public rights by challenging the official right of the judge to act. Such is not the law. The judge of the Second judicial district, which embraced Pierce county, having ceased to act in such county, and the Honorable A. G. Burr in good faith, under color and claim of right, having assumed to act, he became and was a de facto judge, as was held in the Ely case, and, being such de facto officer he was as to all persons, except the public, a de jure judge. Coyle v. The Commonwealth 104 Pa. St. 117. In that case the defendant was convicted of murder in the oyer and terminer court of Adams county. A special plea was attempted to be interposed to the jurisdiction of the the court upon the ground that a certain act of the legislature approved April 9, 1874 (P. L. 54), attempting to create Adams county a separate judicial district, and providing for the election of a judge therein, was unconstitutional and void for the reason that such county did not contain the required population under the Constitution of said commonwealth. A demurrer to such special plea was sustained, and in disposing of the question the court, among other things, said: "The question sought to be raised by the prisoner's special plea to the jurisdiction is not properly before us. The rightful authority of a judge in the full exercise of his public judicial functions cannot be questioned by any merely private suitor, nor by any other, excepting in the form especially provided by law. A judge de facto assumes the exercise of a part of the prerogative of sovereignty, and the legality of that assumption is open to the attack by the sovereign power alone. If the question may be raised by one private suitor, it may be raised by all, and the administration of justice would, under such circumstances, prove a failure. It is not denied that Judge McLean was a judge de facto and, if so, he is a judge de jure as to all parties except the commonwealth. The attorney general representing the sovereignty of the state by a writ of quo warranto might properly present this constitutional question for our consideration, but it cannot come before us from any other source, or in any other form." The court held that such special plea to the jurisdiction could not in any event have availed the prisoner, even to raise the question intended thereby to be raised. See, also, 23 Cyc. 621, and numerous cases cited, among which are the following: State v. Williams, 61 Kan. 739, 60 Pac. 1050; People v. Gobles, 67 Mich. 475, 35 N. W. 91; Coyle v. Sherwood, 1 Hun. (N. Y.) 272; In re Burke, 76 Wis. 357, 45 N. W. 24; Manning v. Weeks, 139

U. S. 504, 11 Sup. Ct. 624, 35 L. Ed. 264; Commonwealth v. Taber, 123 Mass. 253; Hamilton v. State, 40 Tex. Cr. R. 464, 51 S. W. 217; State v. Brown, 12 Minn. 538 (Gil 448); People v. Dillon (Sess.) 26 N. Y. Supp. 778. We quote from the opinion in the last case as follows: "We are at a loss to understand how upon a trial before a court * * * the defendant can raise the question as to the regularity of the official bond of the presiding magistrate here suggested. It would be somewhat extraordinary for a judicial officer gravely to take evidence regarding the validity of his own title to the office which he fills, and to then determine * * * whether or not he was qualified to act. The embarrassment which would result from such a procedure is so apparent as to make comment or citation of authority unnecessary. If, in fact, the justice is not legally qualified, the law affords an adequate and speedy method of ousting him from the office which he usurps; but our system of jurisprudence hardly goes to the extent of authorizing a proceeding so abounding with possibilities for making the administration of justice ridiculous as to permit him to act as a judge in determining whether or not he is one." That such rule has for its foundation a wise and sound public policy must be apparent to all, for in its absence intolerable confusion would inevitably result.

The next assignment challenges the sufficiency of the information on the ground that it was presented in the name and by the authority of the "state," instead of in the name and by the authority of the "State of North Dakota," as required by section 97, art. 1, of the state constitution. This objection is hypercritical. It clearly and unmistakably appears from the information that the prosecution was carried on in the name and by the authority of the state of North Dakota. The title, as well as other parts of the information, discloses such to be true. State v. Kerr, 3 N. D. 523, 58 N. W. 27, directly sustains such an information as against the same kind of an attack.

It is next contended that the crime of which appellant was convicted is not embraced within the crime charged in the information. State v. Mattison, 13 N. D. 391, 100 N. W. 1091, and State v. Cruikshank, 13 N. D. 337, 100 N. W. 697, are relied on in support of such contention. If the verdict was as the printed abstract gives it, we would be required to sustain this contention under the prior decisions of this court above mentioned. But an examination of the original record on file discloses that a very material portion of the

verdict was in some manner omitted in abstracting the record. The verdict is in strict accord with the rule announced in such prior decisions, and hence was such a verdict as the jury had a right to return. It is as follows, omitting the title: "We, the jury in the above-entitled action, find the defendant, Charley Bednar, guilty of the crime of assault, with a dangerous weapon, by shooting at Frank Horack with a firearm with intent to injure him, although without intent to kill or to commit a felony, and without justifiable or excusable cause, as charged in the information. Theodore Dokken, foreman." We have examined the instructions complained of, and find no error therein. The record discloses that appellant was accorded a fair trial, and, finding no error in the record, the judgment is affirmed.

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

(121 N. W. 614.)

GRACE D. HEDDERICH v. GUS M. HEDDERICH, JR.

Opinion filed September 23, 1909.

On petition for Rehearing November 12, 1909.

Appeal and Error — Notice of Appeal — Appeal Bond — Appeal From Judgment.

1. A notice of appeal from a final judgment is ineffectual to bring up for review an order made after judgment denying a motion for a new trial, where such notice merely recites that defendant appeals from the judgment, and asks for a review of such order on said appeal. Furthermore, the undertaking on appeal makes no reference to such order, and, following the rule recently announced by this court in Sucker State Drill Co. v. Brock, 120 N. W. 757, such attempted appeal, conceding that defendant attempted to take an appeal from the order, was wholly abortive.

2. Where a motion for a new trial is made and denied after judgment and the appeal is from the judgment alone, the order denying the motion is conclusive as to all matters passed upon by the trial court on such motion, except errors properly appearing upon the judgment roll, which errors may always be reviewed on the appeal from the judgment.

Appeal and Error — Assignments of Error.

3. Assignments of error, in order to be available to appellant, must be based upon rulings which are reviewable in this court. It is accordingly held that the assignments relating to alleged insufficiency of the evidence and challenging the correctness of the order denying the motion for a new trial cannot be considered on this appeal.

Appeal and Error — Instructions — Assignment of Errors — Exception — Admission of Evidence.

4. Assignments based on alleged erroneous instructions to the jury where no exceptions were saved to such instructions, and assignments predicated on alleged erroneous rulings on the admission or rejection of testimony, where such testimony is not material in view of the other facts found by the jury, will not be considered.

Appeal and Error — Verdict of Jury — Immaterial Issues — Harmless Errors.

5. In a proceeding to determine the validity of the last will and testament of one H., the jury, by their special verdict, among other things, found that the execution of such will was the free act and deed of the testator; that the same was not executed under or in consequence of any undue influence exerted upon testator's mind by any other person; that the interpleader, who claimed to be the lawful issue of the deceased and an Indian woman known as "Medicine," and the sole heir of such deceased, was intentionally omitted by the testator as a devisee or legatee under the will; and that at the date of the execution of such will the testator was of sound mind. Such findings had the effect of eliminating as immaterial all other contested issues; hence alleged errors predicated upon the court's action with reference thereto need not be considered.

Trial — Jury — Direction of Answer to Interrogatory.

6. The question as to whether the testator was of sound mind at the time of executing such will was submitted to the jury, and they reported their inability to agree as to the answer to be made, whereupon the court, on motion of respondent's counsel, directed an affirmative answer thereto. *Held* not error, as there is no evidence upon which the jury could properly have made a negative answer to such question.

Appeal and Error — Admission of Evidence — Harmless Error.

7. Certain assignments based upon alleged erroneous rulings on the admission of non-expert testimony as to the mental condition of the testator at the time of making the will are overruled, as such rulings, if erroneous, were not prejudicial for reasons stated in the opinion.

Appeal from District Court, Williams county, *Goss*, J.

Petition by Grace D. Hedderich to the county court for the probate of the will of August M. Hedderich, deceased. The petition was opposed by Gus. M. Hedderich, Jr., and, from a judgment in proponent's favor, he appealed to the district court, where judgment was also rendered for proponent, and he appeals. Affirmed.

Palda & Burke (*John E. Greene*, of counsel), for appellant.

Jury must pass upon all the facts necessary to support a judgment. Moore v. Moore, 67 Tex. 293; Jenewein v. Town of Irving, 99 N. W. 346-348; Hardin v. Foster, 102 Ga. 180, (29 S. E. 174).

Failure to agree upon a material question is a mistrial, and case should be submitted to a new jury. Hardin v. Branner, 25 Ia. 364; Ry. Co. v. Reynolds, 8 Kans. 623; Clark et al, v. Weir, 14 Pac. 533; Redford v. Spokane St. Co., 36 Pac. 1085; Elliott v. Village of Graceville, 76 Minn., 430, 79 N. W. 503; Taylor v. Vandenberg, et al., 90 N. W. 142; Barstow v. Northern Assur. Co. of London, England, 72 N. W. 86; Clementson on Special Verdicts, 109.

A. L. Knauf and Ball, Watson, Young & Lawrence for respondent.

Failure to find on a fact in issue is harmless error when a finding in appellant's favor would not affect the judgment. Morrison v. Stone, et al., 37 Pac. 142; Blochman v. Spreckels, 67 Pac. 1061; Diefendorff v. Hopkins, 28 Pac. 265; Bush v. Maxwell, 48 N. W. 250; Ault v. Wheeler & Wilson Manuf'g Co., 11 N. W. 545; Schrubbe v. Connell, et al., 34 N. W. 503; Cooper v. Forgey et al., 42 N. E. 651.

Questions that can be answered but one way need not be submitted. Stringham v. Cook, et al., 44 N. W. 777; Weisel et al v. Spence, 18 N. W. 165; White v. Bailey, 14 Conn. 272; Johnson v. Ins. Co., 39 Mich. 33; Parmater v. State, 3 N. E. 382; Johnson v. Putnam, 95 Ind. 57; Glantz v. South Bend, 106 Ind. 305; 3 West Rep. 646; Spraker v. Armstrong, 79 Ind. 577; Indiana, B. & W. R. Co. v. Barnhart, 115 Ind. 399; 13 West. Rep. 425; Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566; Louisville, New Albany & Chicago R. Co. v. Martha R. Hart et al., 4 L. R. A. 553.

Whatever is not found in a special verdict is considered as not existing. Thayer v. Society of United Brethren, 20 Pa. 60; Berks

County v. Jones, 21 Pa. 413; Pittsburg, Ft. W. & C. R. Co. v. Evans, 53 Pa. 250; Loew v. Stocker, 61 Pa. 347; Vansyckel v. Stewart, 77 Pa. 124; Lawrence v. Beaubien, 2 Bailey, 623, 23 Am. Dec. 155; 46 Cent. Dig., 2087; Jones v. Baird, 76 Ind. 164, and cases cited, 46 Cent Dig., 2088; Glantz v. City of South Bend 106 Ind. 305, 6 N. E. 632, 46 Cent. Dig., c., 2088; Cooper v. Forgey et al., 14 Ind. App. 151, 42 N. E. 651, 46 Cent. Dig., c. 2088.

FISK, J. This litigation arose in the county court of Williams county, and involves the validity of the last will of one August M. Hedderich, deceased. Plaintiff and respondent, the widow of the deceased, and who claims to be his sole heir and legatee, filed in such county court a petition praying for the probate of such will. The appellant, who claims to be the lawful issue of an alleged marriage between the deceased and one Pazutah, an Indian woman, known as "Medicine," was permitted to intervene in such probate proceedings. By his petition in intervention appellant alleged the fact of such marriage on July 1, 1879, and that he is the lawful and sole issue thereof, having been born on March 25, 1880. He also alleged, in substance, that deceased was induced to make such will through the undue influence of others, by the terms of which will he was wholly omitted and his name was not mentioned as a legatee, although, as alleged by him, he was the sole surviving heir at law of such testator; also, that at the time of making such will the said testator was of unsound mind, and not mentally capable of making a will or of transacting ordinary business, and praying, among other things, that such will be refused probate, and that he be decreed to be the sole heir of the decedent. The respondent answered, putting in issue all of the allegations of the petition, except the fact of the execution of the will by the deceased and the date of defendant's birth. The issues thus framed were duly adjudicated in the county court, resulting in a judgment in plaintiff's favor upon each of such issues. Upon appeal to the district court, a jury trial was demanded and had, which also resulted in a judgment in plaintiff's favor from which judgment this appeal is prosecuted.

Certain questions of practice are presented which require brief notice. After the entry of judgment, a motion for new trial was made embracing all the grounds urged on the appeal from the judgment. Such motion was denied, and it was the evident intent of appellant's counsel to appeal both from the judgment and from the order denying such motion. It is very apparent, however, that the

attempted appeal from the order was ineffectual. The notice of appeal recites that defendant "appeals * * * from the judgment, * * * and that upon such appeal * * * defendant will ask for a review* * * of the order * * * overruling the motion * * * to set aside the verdict * * * and do grant a new trial thereof." The undertaking on appeal in no way refers to or mentions the order denying such new trial, but is merely an undertaking for the payment of the costs on the appeal from the judgment. Following the rule recently announced by this court in Sucker State Drill Co. v. Brock, 120 N. W. 757, the attempted appeal from the order must be held to be ineffectual. It is respondent's contention that in view of the fact that appellant urged on his motion for a new trial all the questions now urged on the appeal from the judgment, that the order denying such motion is, in effect, res judicata, and can be reviewed by this court only on an appeal from the order. Numerous cases are cited and relied upon in support of such contention, but we find none directly in point, and we have been unable, through an extended research, to find any authority for such a rule. The principal cases relied on are from Indiana, where they have a statute providing for a review by action in the trial court of judgments therein rendered. Such statutory review is not, as counsel contend, strictly analogous to our statutory motion for a new trial. See the article on Review in 18 Encyc. Pl. & Pr. 989-1052, for a full treatment of the subject. Even in the few states where such remedy exists a concurrent remedy by appeal is provided for by statute. While the writer's attention has not been directed to any authority expressly holding that an order denying a new trial is not conclusive as to errors apparent on the judgment roll, there are many authorities which inferentially so hold, and no doubt such is the correct rule. In Satterlee v. M. B. A, 15 N. D. 92, 106 N. W. 561, a motion for a new trial was made and denied after the entry of judgment. Such motion was made on the ground that the evidence was insufficient to justify the verdict, and also for errors of law occurring at the trial. An appeal was taken from the judgment alone, and the court assumed the right to pass upon the alleged errors of law. It is true that the question here raised was not suggested nor passed upon in that case. In Gade v. Collins et al., 8 S. D. 322, 66 N. W. 466, it was said: "unless the order denying or granting a new trial made after judgment is appealed from, either in connection with the appeal from the judgment or independently, the decision of the court below upon

the question of the sufficiency of the evidence to justify the findings or verdict will be res adjudicata." The court there at least inferentially held that as to other questions the decision of the court below on the motion for a new trial was not res judicata. To the same effect is the holding in Rogers v. King, 66 Barb. (N. Y.) 495, and many other authorities too numerous to mention. A proceeding for a new trial is held to be an independent proceeding not in the direct line of the judgment. As said by Chief Justice Sawyer in Spanagel v. Dellinger, 38 Cal. 284: "Under our system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or in a certain sense a collateral proceeding—a proceeding not in the direct line of the judgment, for the judgment may be at once entered and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal. The motion may be heard and decided, and an appeal taken on its own independent record, while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line." As stated in 1 Spelling New Trial & Appellate Practice, section 14: "The foregoing is only true in those states where the order on motion for new trial is an appealable order." Our conclusion, therefore, is that the appeal from the judgment presents to this court the alleged errors of law occurring at the trial as preserved in the judgment roll, although such alleged errors were also urged as grounds for a new trial in the court below, and the order denying such new trial is unappealed from.

This brings us to a consideration of the questions presented on the appeal. Ninety-four alleged errors are assigned in appellant's brief, but, for reasons herein stated, it is necessary to notice only a few of them. Those relating to alleged insufficiency of the evidence and to the order denying appellant's motion for a new trial are, in view of our conclusion that no appeal was taken from such order, concededly unavailing to appellant. Assignments 1 to 10, inclusive, and the last assignment being numbered 94, are thus disposed of.

Assignments numbered 11 and 12 are deemed abandoned, as they are not discussed in the brief.

Assignments numbered 26 to 31, inclusive, 34, 35, 37 to 52, inclusive, 54, 58, 61, 62, 64, 65 and 66 relate to rulings on the admission of testimony relative to the alleged marriage of deceased to the Indian woman Medicine and the paternity of appellant. Such

rulings need not be noticed as, even if erroneous, they are not prejudicial in view of the findings of the jury upon the other issues which will be hereafter referred to.

Assignments numbered 67, 68 and 85 are concededly unavailing, as they are predicated upon alleged erroneous instructions to the jury, and no exceptions were taken to such instructions.

Assignments numbered 69 to 84, inclusive, relate to the action of the trial court in directing the jury to answer certain questions in the special verdict, but these assignments are expressly waived by appellant's counsel, and need not be considered.

Assignments numbered 87 to 93, inclusive, are based upon the action of the trial court in making certain findings of fact and order for judgment; such findings covering questions submitted to the jury by the special verdict and unanswered by such jury. In view of the facts which were found by the special verdict, the facts thus found by the trial court were wholly immaterial; hence their finding was nonprejudicial to appellant. Every fact material to the controversy was embraced in the special verdict as returned by the jury. In addition to the facts relating to the execution of the will, over which there was no dispute, the jury by the special verdict found that the execution of such will was the free act and deed of the testator; that such will was not executed under or in consequence of any undue influence exerted upon the mind of the testator by Grace D. Hedderich or any other person; that the omission to provide for the interpleader in such will was intentional upon the part of the testator; and that the testator, at the time he executed the will, was of sound mind. If the special verdict as thus returned is regular, and was properly returned, it effectually eliminates all other questions submitted to the jury in such special verdict as immaterial. Had the jury answered all the other questions in appellant's favor, such answers would not have changed the result in the least particular. In the light of the facts found, it was manifestly immaterial whether the deceased married the Indian woman Medicine or not, and it was likewise immaterial whether appellant was the lawful issue of such marriage. Appellant's counsel contend, among other things, that the special verdict was incomplete because question 10 was not answered by the jury. By the answer to this question the jury was asked to say whether the omission of the testator to provide for the interpleader in his will was caused by or in consequence of any undue influence exerted upon his mind by any person, but we

think such question was sufficiently answered by the answer to the preceding question wherein the jury found that such will was not executed under or in consequence of any undue influence exerted upon the mind of the deceased by Grace D. Hedderich or any other person.

Appellant's contention that a failure of the jury to agree upon a material question amounted to a mistrial is no doubt sound, but it has no application in view of our conclusion, as above stated, that the jury made answers to all the material and essential facts embraced in such special verdict.

The only assignments, therefore, which we are required to consider, are those relating to the rulings of the trial court in the admission of certain evidence of nonexperts as to the mental condition of the testator, being assignments numbered 13 to 17, inclusive, and 21 and 22, and assignment numbered 86, which relates to the lower court's action in directing the answer to the twelfth question in the special verdict. The latter assignment presents the most vital question in the case, and will be considered first.

Question 12 is as follows: "Was the deceased, August M. Hedderich, of sound mind when he executed the said will?" After the jury had deliberated for some time, they were returned into court, and announced that they were unable to agree as to the answer to question 12, as well as numerous other questions. Thereupon respondent's counsel moved the court to direct the jury to answer question 12 in the affirmative, which motion was granted over defendant's objection and exception. Appellant's counsel strenuously urge that such ruling was prejudicial error, as it deprived defendant of his right to a jury trial of such issue, and that the inability of the jury to answer such question from the evidence of necessity resulted in a mistrial. Counsel are no doubt correct in their contention, provided the record discloses a substantial conflict in the evidence upon the question of the testator's mental capacity at the time of the execution of the will. The fact, however, that the jury was unable to agree upon the answer to be made to such interrogatory, or that the attitude of the trial court in submitting such question disclosed that he at first considered it a question properly for the jury, is in no manner conclusive of the fact that there was such a conflict in the testimony as to require a submission of such issue to the jury. If, as a fact, the record is destitute of evidence from which the jury might rightfully find that the testator at the time

of the execution of the will was mentally incapable of disposing of his property understandingly, then it became the duty of the court to direct an affirmative answer to such question. The law presumes that the testator was of sound mind, and the burden rested on appellant to rebut such presumption. How stands the proof as disclosed by this record? Appellant's counsel assert, with apparent confidence, that there is a serious conflict in the testimony as to the testamentary capacity of the testator at the date of the execution of the will, but they fail to specifically point to the place or places in this record where such conflict appears. They merely refer in a general way to the testimony of certain witnesses and to certain documentary evidence in the form of letters written by the testator. The interpleader, for the purpose of proving such issue, introduced the testimony of four witnesses in addition to the letters aforesaid. These were Lydia and Bell Leonhardy, Miss Bell and Dr. Ringo.

The first three testified as to their employment in the hotel at Williston where the testator and his wife boarded for several years, and that Mrs. Hedderich was in the habit of assisting her husband at the table in cutting his meat, etc., but on cross-examination they each testified, in effect, that the testator's mind was perfectly normal so far as they observed. Dr. Ringo was introduced as a medical expert, and upon hypothetical questions he gave it as his opinion that the testator was suffering from general paresis. This witness graduated at a medical college in Chicago six years prior to giving his testimony, and he stated that he would not set himself up as a specialist on brain diseases. He had no acquaintance with the testator, and never met him. Among other things he testified: "From all the evidence here before me, in September and the fall of 1903 I think Mr. Hedderich was able to understand a business transaction. All I know is the evidence. I never saw Mr. Hedderich." We have examined the documentary evidence relied on, and find nothing therein from which the jury could rightfully say that the testator was not on September 14, 1903, fully in possession of his mental faculties. As we view the evidence relied on by the interpleader, it is entirely insufficient to require a submission of such issue to the jury, even when considered apart from the other evidence bearing on this question, which other evidence is well nigh conclusive as to the testamentary capacity of the testator at the date of the execution of the will. Every witness acquainted with the testator in his lifetime, and who testified upon the subject of his mental capacity, gave

it as their unqualified opinion that he was perfectly sane, and the record evidence, including letters written by the testator and book entries made by him, very strongly corroborate the oral testimony upon this feature of the case, and to our minds completely refute the contention of the interpleader. Appellant's counsel lay stress upon the fact that on the very day that the will was executed the testator and his wife left Williston and went to Chicago. Counsel state that they evidently went "for the express purpose of consulting a specialist in that city in regard to the physical as well as the mental condition of Mr. Hedderich;" but we are unable to discover anything in the evidence to warrant the belief that they went in search of medical advice as to any mental ailment. The evidence discloses that testator returned to Williston in the spring of 1901, where he remained until the middle of August; that he was at Williston for about five weeks in the summer of 1905, and, with the exception of a brief illness in August, he was quite well, and was not taken sick again until the last week of his life in April, 1906. From a consideration of the evidence we are forced to the conclusion that it was not error to direct an affirmative answer to question 12 of the special verdict, as no other answer could properly have been made thereto under the evidence.

Upon the question of the weight to be given the documentary evidence in cases such as this see Moore on Facts, section 14; Wilcoxon v. Wilcoxon, 165 Ill. 454, 46 N. E. 369. Even conceding the truth of all that is claimed by the interpleader with reference to his heirship, it would not follow that testator's action in omitting him from the will was under the peculiar facts at all unnatural or unreasonable, and, even if unnatural or unreasonable, such fact or facts, standing alone, would be insufficient to establish testator's lack of testamentary capacity. The rule is well established that it is only where there is other evidence of mental incapacity that an unnatural and unjust disposition is a circumstance which, taken in connection with such other evidence, may tend to show testamentary incapacity. See numerous cases cited in the note to Morgan v. Morgan, 13 Am. & Eng. Ann. Cas. 1044-1046.

The assignments relating to the rulings on the admission of the nonexpert testimony as to the mental condition of the testator require but brief notice. Such rulings were not prejudicial, even if erroneous, as, if such testimony should be entirely eliminated, the result must be the same—a total failure on appellant's part to establish affirmatively the issue of mental incompetency of the testator.

For the foregoing reasons, the judgment is affirmed. All concur, except ELLSWORTH, J., who took no part in the decision.

ON PETITION FOR REHEARING.

FISK, J. A petition for a rehearing has been filed, in which it is strenuously contended that the issue as to the paternity of appellant is inseparably connected with that of whether the testator intentionally omitted to provide for him in the will, and that a finding against him as to the latter issue can be given no effect without also a finding in his favor as to the former. A very plausible and ingenious argument is presented in support of such contention, but, after mature deliberation, we are unable to concur in the views of counsel. It is no doubt true, as contended, that the omission referred to in Rev. Codes 1905, section 5119, relates to the omission to provide for any children or for the issue of any deceased child of the testator, but does it necessarily follow on this account that an intentional omission of the petitioner cannot be shown as a fact without first showing that he is a child of the testator? How is the latter fact at all material if, in the light of the facts, it appears that the testator, regardless of whether or not petitioner was his son, entertained no purpose or intent of recognizing him in his will? We think it must be said from the evidence that, whether interpleader was or was not the son of the deceased, it was the testator's intention to exclude him from any participation in the proceeds of his estate. In answering question 11 of the special verdict, the jury must have had in mind the contention of petitioner that he was a son of the testator as well as the denial of such fact by the testator. The primary question involved in the case was: Who was entitled under the will to receive the estate of deceased? The relationship of the petitioner to the testator was but a minor or incidental question.

The most that can be claimed by appellant is that, if the jury had found in his favor upon the question of paternity, such finding, together with the fact of his omission from the will, would have raised a mere prima facie presumption, contrary to the intent which the language of the will expresses, that the omission was not intentional. We are unable to see how appellant's rights are prejudicially affected by the fact that such prima facie presumption was not established by reason of the jury's failure to answer question 28 of the special verdict, when, from the testimony it clearly appears that

such presumption, if established, would have been fully and completely overcome.

The contenton of counsel in their petition for rehearing, in effect, that the evidence which would operate to overthrow the presumption, if established, can be given no weight until such presumption is first established, as a fact, does not appeal to us as sound. The foregoing opinion of the court in effect assumes, for the purposes of the point under consideration, that petitioner had established the requisite facts to create in his favor such prima facie presumption, to wit, that he is the lawful issue of deceased, and was omitted from the will. That such facts merely raise a prima facie presumption that he was not intentionally omitted, and that such presumption is rebuttable by evidence, extrinsic the will, is well established. In re Atwood's Estate, 14 Utah, 1, 45 Pac. 1036, 60 Am. St. Rep. 878; Coulam v. Doull, 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596, and cases cited. These authorities deal with a statute identically the same as our own.

Appellant's counsel urge that, in any event, the judgment in this case should be modified and the record so amended as to eliminate the findings of the trial court covering the omissions of the jury to answer the twenty-first, twenty-third, twenty-eighth and twenty-ninth questions in the special verdict; their contention being that there was a substantial conflict in the testimony as to the matters embraced in such questions, and hence the trial court clearly invaded the province of the jury in making such findings. In this counsel are clearly correct, and the judgment of the trial court will be modified accordingly.

Rehearing denied.

(123 N. W. 276.)

THE STATE BANK OF LISBON vs. D. C. CULLEN, DEFENDANT AND APPELLANT, AND LEWIS ELIJAH AND THOMAS A. CURTIS, DEFENDANTS AND RESPONDENTS.

Opinion filed April 17, 1909.

Vendor and Purchaser — Brokers — Lien — Negotiable Instruments.

1. The respondent C. negotiated a sale of a section of land from appellant to defendant E. on the crop payment plan; nothing being paid down. A contract was executed by the parties, but not recorded, wherein the appellant agreed that if certain acts were done, among others being the payment of the purchase price by the defendant E, he would deed the land described to said defendant. Payment was to be made by delivering one-half of the crop raised each year free from expense to appellant, and the application of the proceeds on the agreed price. The contract neither mentioned nor described any notes, but three notes were given, one being for an amount equaling $27 per acre for the land and due in 10 years. The other two amounted to $3 per acre, and were due the 1st of the next November after the contract was entered into. The two latter represented C.'s compensation for negotiating the purchase and sale. At his suggestion they were indorsed by appellant without recourse before delivery to him. On their receipt he transferred them to plaintiff and respondent as collateral security to indebtedness, most of which was pre-existing. Such notes in no way refer to the contract. We find from the evidence that it was agreed between appellant and C. at the time such notes were so endorsed that there should be no lien as security therefor upon the land or appellant's interest in the crop.

Held, that the plaintiff, even though an indorsee before maturity, for a valuable consideration and without notice, took such notes free from any lien upon appellant's interest in the crop and land.

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

Action by the State Bank of Lisbon against D. C. Cullen and others. Judgment for plaintiff, and defendant Cullen appeals.

Reversed and action dismissed.

Glassford & Lacy, for apellant D. C. Cullen. *Rourke & Kvello,* for respondent State Bank. *Thomas A. Curtis,* in pro. per.

SPALDING, J. This action was brought by the State Bank of Lisbon, and in its complaint personal judgment is demanded against the defendants for the sum of $1,920 and interest from the 1st day of November, 1906, and decreeing a specific lien upon all the crops of every name, nature and description sown, grown and harvested during the year 1906, upon section 11, in township 134

north, of range 54, in Ransom county, and upon said land as security for the payment of the judgment and interest, and for a sale of said premises to satisfy such judgment. The court found the plaintiff entitled to a personal judgment against the defendants Elijah and Curtis for the sum prayed for, with interest, and that against the defendant Cullen plaintiff was entitled to the relief demanded in its complaint, and to a specific lien upon the land described therein, and upon one-half of the crops of every name, nature and description grown thereon during the season of 1906 as security for the payment of said sum of money and costs, and that the same be sold to satisfy such lien. Personal judgment was entered against the defendants Elijah and Curtis as demanded, and it was decreed that the plaintiff have a specific lien upon the land described and upon the wheat and oats and the defendant Cullen's share of the crops grown on said land in the season of 1906 as security for the payment of such judgment. The decree directed the sale of the defendant Cullen's share of the crop mentioned and of the real estate named. The decree relative to such sale being in the usual form and providing for a sale in the manner customary in actions to foreclose mortgages upon real estate. It is not necessary to recite at greater length its terms. The record in this case comprises something over 400 printed pages. Under the practice in such cases all the evidence offered was received. The judgment and decree was appealed from by the defendant Cullen and a trial de novo requested. It is therefore required of this court that the facts be found as though it were an original trial in this court. If we were compelled to find upon the whole record, many intricate and difficult questions would have to be considered, but, as we view the case, the determination of one or two questions of fact will enable us to ascertain the rights of the parties. Neither Elijah nor Curtis appeals.

So far as is necessary to recite the facts, they are as follows: Defendant Cullen was the owner of the land. He did business in Anselm, Ransom county, but his residence was in Fargo. Defendant Curtis was a real estate agent at Lisbon, and he negotiated a sale of the land described on the crop-payment plan to the defendant Elijah. Nothing whatever was paid down on the contract. By its terms Cullen agreed that if Elijah should first do and perform everything specified in the contract, or reasonably to be implied, to be done and performed within the time specified, and

surrender the contract, he would then sell and convey to Elijah by deed of warranty the land described. In consideration of such agreement Eljiah was to purchase said premises and to pay therefor the sum of $19,200, with interest at six per cent upon all deferred payments after the first day of November, 1906, and to pay taxes and assessments, and during each season to seed to wheat or other crops mentioned all the cultivated land upon such premises, furnishing the seed himself, and to haul and market each year, without expense to Cullen, the crop grown. The usual provisions for plowing were contained in the contract, and one-half of all the grain raised upon the premises during the year 1906 and each year thereafter was to be sold before the first day of November in the year grown, and the proceeds applied towards the payment of the principal and interest until the full purchase price and interest should be paid. The contract reserved the title to all of the crops raised during the life of the contract in the defendant Cullen, but each year after the plowing had been done and the crop divided the other half was to be released and set apart and surrendered to the defendant Elijah. It was also provided that in case he failed to make the payments required, or made default in any of the other provisions of the contract, he was to surrender possession of the premises to Cullen, and the payments theretofore made were to be retained as rental for the premises, and as liquidated damages due by reason of his failure to carry out the terms of the contract. The contract was not assignable by Elijah without the written consent indorsed thereon of Cullen. The contract also contained other provisions in detail, such as are usually inserted in similar contracts, which need not be set out more fully. The contract nowhere describes or mentions any notes. It bears date of the 26th day of February, 1906, but undoubtedly was not executed until the 9th day of March, 1906, at which time there were executed by defendant Elijah and delivered to the appellant Cullen three negotiable promissory notes, one for the sum of $1,280, another for the sum of $640, each bearing interest at 6 per cent per annum after the 1st day of November, 1906, and both due November 1, 1906, and one promissory note for the sum of $17,280 payable in 10 years.

We need not determine whose agent Curtis was in this transaction. Neither is it necessary to determine whether he made any misrepresentations as claimed by defendants Cullen and Elijah to either of them to induce the execution of the contract. At the time the con-

tract was executed and delivered, with the notes, to Cullen the two smaller notes were, pursuant to agreement, indorsed by Cullen without recourse to Curtis. They represented the commission which the latter was to get for negotiating the transaction. At or about the time Curtis received them, which was about the 10th of March, 1906, he indorsed them to the plaintiff as collateral security for an indebtedness of about, $2,700. April 9, 1906, Cullen and Elijah met at Anslem, and by mutual agreement canceled the contract. It was surrendered, marked "Canceled," and Cullen delivered the large note to Elijah, and told him that Curtis held the other two notes. Elijah's reason for the cancellation of the contract is claimed to be that the quality of the land was not as represented to him by Curtis, and that a considerable portion of it could not be put in crop. Curtis claims that Elijah inspected the land for himself. Cullen cancelled the contract because he claimed Curtis had misrepresented to him Elijah's ability to carry on and pay for the land; that, instead of being able to furnish the teams, machinery, seed, provisions and other necessaries, he was practically unable to do any part of it. The issues on these points need not be decided by us. Neither shall we determine what the effect of the indorsement without recourse and delivery of negotiable notes before maturity to an innocent party may be upon the security. The appellant argues strenuously that such indorsement by the holder of the security who still holds title to the property involved is to release the security as to such notes. We find some very well-considered authorities holding this to be the law, and distinguishing between instances where the title is retained by the vendor and indorser and those in which the title is in the maker of the note, as in the case of a mortgage. The notes in question, as well as the contract, were executed by Elijah and delivered to Curtis, who transmitted them to the appellant Cullen from Lisbon to Fargo, after a verbal personal agreement that this should be done, whereupon Cullen endorsed the two notes as stated, and returned them with Elijah's copy of the contract to Curtis. Plaintiff claims, and relies largely upon such claim, that there was a verbal agreement between him and Cullen that the contract held by the latter should remain as security for the payment of the notes given Curtis; that Curtis should have a lien upon everything which was covered by the contract. The trial court so found. With this finding of fact we cannot agree. Our reasons for not doing so may be stated as

follows: The testimony on the subject is in direct conflict. On the side of the plaintiff it tends to show that the notes evidenced the interest of Curtis in the contract, that he and Cullen talked over how he was going to get his commission, and that he suggested to Cullen that the notes be made to evidence his interest in the contract, and to come due the 1st of November, 1906, and to be paid out of the first crops raised on the land, and that the lien should stand as security, and that Cullen assented to this. This testimony is wholly uncorroborated. On the other hand, Cullen testifies to all the particulars of the transaction; that in an interview with Curtis, when the latter submitted the offer to buy from Elijah, he told Curtis that he was not to be holden for the commission in any shape or manner, and that he must look to Elijah for his commission, and have no lien therefor, and that Curtis said he would prepare a contract and notes and send to him, and directed him to indorse his notes without recourse, and that he (Cullen) would not be held liable in any way; that he did not expect any lien to secure his commission; that Curtis prepared a contract which described two notes, one for $17,200, the other for $1,920, and sent the contract and notes to him at Fargo; that he examined the contract and construed it as giving a lien to secure the $1,920 note to Curtis; that he took it to Pierce & Tenneson, attorneys in Fargo, who placed the same construction upon it; that he thereupon employed Pierce & Tenneson to draft a new contract which should not give Curtis a lien, and the contract which was subsequently executed was the one so prepared, and for this reason: That about March 2d or 3d he went to Lisbon and saw Curtis, and told him that he could not sign the first contract because it would give him a lien, which was not agreed upon, and told him that he would not do anything of that kind, but that he had another contract in his pocket which, if Elijah would sign, the deal would be all right but, if not, the deal would be off; that Curtis examined the contract, and said it would be all right. He testifies that he then told Curtis that the understanding was that he was not to be liable on the commission notes in any way; that Curtis was to look to Elijah for his pay and he could not stand having that put in the contract, and Curtis step in and take his share of the crop, and have a lien upon the land as he understood it; that Curtis replied that he would not do anything of that kind; that it was not according to the agreement, and that Cullen was not liable for his commission in any way; that he was to look to Elijah for it,

and that Cullen should sign without recourse and would not be liable in any way, shape, or manner; that Curtis told him that he was going to sell Elijah cows and horses on which he would have a mortgage; that Elijah had three or four boys who were going to work out; and that he would pay, and that he was not afraid of his commission as Elijah was all right financially.

It is conceded that two contracts were prepared. Both are in evidence. It is also conceded that Cullen refused to sign the first contract. No explanation is made by Curtis. New notes were drawn when the second contract was prepared placing the commission in two notes, instead of one, as had originally been done. This change in the notes was made for the convenience of Curtis. The contracts are not alike in form; and, while they differ in some matters of substance, yet not so materially as to afford self-evident reasons for Cullen's refusal to execute the first when he executed the second, except that the second and executed contract does not describe any notes whatever. We find from these facts very strong corroboration of Cullen's version of the agreement. His explanations of his reasons for executing the second and refusing to execute the first contract are the only explanations given and are reasonable, particularly in view of the fact that Curtis' notes were due immediately after the first crop would be harvested, and that he was not taking his commission on the percentage basis, but was adding it to the selling price of the land. This conduct of Cullen is not denied, except as to the reasons given. The instructions by Curtis to indorse without recourse are in writing. The notes contained no reference to the contract, and in no manner disclosed that they carried security. We find that it was expressly agreed by Cullen and Curtis that Curtis took his commission notes without any recourse whatsoever, either under the notes or the contract, on Cullen or his property. What legal principles may have been applicable to the notes indorsed without recourse and delivered to respondent as collateral security, in the absence of any agreement, we do not determine, as it is perfectly clear that Curtis took such notes without security. If the bank parted with any value on receiving these notes from Curtis which from all the evidence is doubtful, it did not exceed $50. The president of the bank was the officer who transacted the business of taking the notes from Curtis, and his testimony on the subject is very vague and unsatisfactory. The evidence tends to show that at the time the notes were transferred to the respondent bank a contract was

shown the president, and that he was informed by Curtis that the notes were secured by such contract. It is clear to us that, if any contract was shown him, it was a copy of the first contract which was never executed by Cullen, and not the contract on which this suit is brought. Under these facts, it is plain that Curtis had no lien or security, and that he could therefore transfer none to the respondent without the knowledge or consent of either Cullen or Elijah, or both, and that respondent cannot maintain an action to enforce a lien upon either Cullen's share of the crops or the land. Many other interesting questions arose in the case, but, having arrived at the conclusion which we have stated, there would be no propriety in our passing upon them.

It may be added that the bank brought and tried this case on the theory that the contract was a mortgage, and that the rights of the parties were precisely the same as though Cullen had deeded the land to Elijah, and taken a mortgage back to secure the purchase price, including the notes held by it. Had this been done, while the rights of the parties in some respects would have been the same as now, yet the legal effect in many ways might have been different. Instead of a deed and a mortgage being given, this was an executory contract partaking more of the nature of a conditional sale contract than a mortgage. The title stood in Cullen at all times and the contract was never recorded or filed.

The judgment of the district court is reversed, and the action dismissed. All concur.

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

(121 N. W. 85.)

AARON J. BESSIE v. NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed May 1, 1909.

Appeal and Error — Proceedings After Remand — Dismissal Upon Failure to Prosecute.

1. Under section 7228 of the Revised Codes of 1905, providing in every case on appeal, in which the Supreme Court shall order a new trial or further proceedings in the court below, the record shall be transmitted to such court and proceedings had therein within one year from the date of such order, etc., no sufficient excuse for plaintiff's delay was shown, and the trial court should have dismissed the action.

Same.

2. The admission of service of the notice of trial by defendant's attorneys after the expiration of one year from the date of filing the remittitur in the office of the clerk of the district court, and the letters introduced by the plaintiff in evidence on a motion of defendant to dismiss, did not constitute a waiver on the part of the defendant of its right to insist upon a dismissal of the action.

Same — Waiver.

3. The fact that the defendant's attorneys appeared at the preliminary call of the calendar and asked that the case be set for a day certain did not constitute a waiver.

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

Action by Aaron J. Bessie against the Northern Pacific Railway Company.

Judgment for plaintiff.

Defendant appeals.

Reversed and remanded.

Ball, Watson, Young & Hardy, for appellant. *Chas. E. Wolfe*, for respondent.

CARMODY, J. This action was commenced in January, 1904, in the district court of Richland county. Under a stipulation the case was tried before Judge Lauder without a jury. The court made findings in favor of plaintiff and against the defendant. On appeal from the judgment entered therein, this court reversed the judgment of the district court, granted a new trial, and remanded the cause for further proceedings. The nature of the action is fully disclosed in Bessie v. N. P. Ry. Co., 14 N. D. 614, 105 N. W. 936. The remittitur was filed in the court below on January 9, 1906. No

further steps of any kind were taken in said cause until January 18, 1907, upon which last-mentioned date plaintiff served upon defendant's attorney a notice of trial for the term regularly fixed by law to be held on the first Tuesday in June, 1907. On January 14, 1907, Charles E. Wolfe, plaintiff's attorney, wrote a letter to Ball, Watson & Young, defendant's attorneys at Fargo, asking them if they would stipulate the case on the calendar for trial at the term of court then pending. On the 15 the day of January, 1907, defendant's attorneys replied, stating in substance that under ordinary circumstances they would be only too glad to accommodate plaintiff's attorney by stipulating the case for trial; but so many terms were then running, or just about to start, in which they had cases for trial, they would not feel at liberty to stipulate the case upon the calendar. As they remembered it, a jury trial had been waived, and the case would have to be tried by the court. At the opening of court, and upon call of the calendar on the first Tuesday in June, 1907, plaintiff's counsel announced that the cause was for trial by jury. Mr. Joseph G. Forbes announced that he represented the attorneys for the defendant in the case, said the defendant claimed that this was a court case, and asked that it be tried by the court, and inquired if there was not a "stipulation to try this case by the court." Mr. Wolfe said that was for the former trial, and was made because they wanted to try it at the term, and could not get it tried as a jury case. The court asked what the case was about, and, on being told, put it down as a jury case. An exception was taken by the defendant. Mr. Forbes then asked to have the case set for a day certain. After preliminary call of the calendar it was set for trial June 8, 1907.

No objection was made to the trial of the case until on the day when the trial was to be commenced, at which time defendant's counsel filed and served the following motion: "Comes now the defendant and moves the court to dismiss this action for the following reasons, namely: The judgment rendered herein was, on appeal, reversed by the Supreme Court, upon December 13, 1905, a new trial was granted, and the case remanded for further proceedings; that no proceedings whatever were had in said action within one year from the date of such order of the Supreme Court." Thereupon plaintiff submitted the following evidence in opposition to said motion: Mr. Wolfe testified in part as follows: "I am one of the attorneys of record for the plaintiff, and I think I am the sole

attorney; but I am not sure. After the reversal of the former judgment in this case, and after the remittitur came down, I did not do anything with regard to putting the case on the calendar of the succeeding term of court, for the reason that I forgot all about it. * * * The necessity for giving notice of trial to bring it on was not called to my attention until the December term of court, 1906, when Mr. Bessie came back from Williston. He removed from Wahpeton in the early part of June, 1906; went to Williston. And, as a matter of fact, prior to that time he had personal charge of the details of the conduct of this case. I simply did what I could to help him when I had time and opportunity. When called to my attention last fall, we were having a term of court here then, and it was too late to get the matter noticed for trial at that term. The term was adjourned until Janury, 1907—January 22d; and on the 14th day of January I wrote to the attorneys for the defendant in this case a letter, marked "Exhibit A 1" (which is the letter hereinbefore mentioned), and received the answer thereto. On receipt of the answer, I prepared and sent to counsel for defendant a notice of trial, which is on file in this case, and they admitted service on the notice either on the 17th or 18th of January, 1907. * * * So far as I know there has never been any intention, on my part at least, to abandon the prosecution of this case; and the reason why it was not brought on before was simply, as I have stated, that I forgot all about it at the June term, and I didn't think at the December term of the fact that it was necessary to renotice it for trial, and that fact was called to my attention at that term and then I took it up with counsel for the defendant, trying to arrange to have it put on amicably without notice. Failing to succeed in that, I served the notice." The letter and answer hereinbefore mentioned, were against the objection of the defendant, admitted in evidence. Motion to dismiss was denied, to which ruling defendant duly excepted.

The first assignment of error, which is the only one we have occasion to notice, is: "The court erred in overruling defendant's motion to dismiss for failure to prosecute within one year from date of the reversal by the Supreme Court." It is conceded that nothing was done in the district court, after the filing of the remittitur, until the notice of trial was served on January 18, 1907, except the letter from plaintiff's attorney to defendant's attorneys and the answer thereto. Section 7228 of the Revised Codes of 1905 reads

as follows: "In every case on appeal in which the Supreme Court shall order a new trial or further proceedings in the court below, the record shall be transmitted to such court and proceedings had therein within one year from the date of such order in the Supreme Court, or in default thereof the action shall be dismissed, unless upon good cause shown the court shall otherwise order." The respondent attempts to sustain the ruling of the trial court in its refusal to dismiss this action on the following grounds: "That sufficient cause was shown for the failure to prosecute within one year; and, whether the cause shown was sufficient or not, the appellant waived the objection by its conduct. The motion to dismiss was addressed to the sound discretion of the trial court and there has been no abuse of discretion."

It was the duty of the plaintiff to proceed in said case within one year unless prevented by some cause for which he was not responsible. Has any such cause been shown? We think not. The plaintiff is an attorney, and had charge of his own case. Mr. Wolfe merely did what he could to help him when he had time and opportunity. The plaintiff resided at Wahpeton, in Richland county, from the time the remittitur was filed in the district court on January 9, 1906, until June of the same year, after which he removed to Williston, in this state, and has resided there ever since. He was in Wahpeton during the December, 1906, term of the district court, and spoke to Mr. Wolfe about this action—whether before or after the year had expired the evidence does not show. Nothing whatever was done in the case within the year. Further proceedings having been ordered, and none had within the year, the action should have been dismissed, unless good cause was shown for ordering otherwise. Root v. Sweeney, 17 S. D. 179, 95 N. W. 916. In that case the court used the following language: "This litigation was initiated by the plaintiffs for the purpose of obtaining a personal judgment. Defendant was not interested in having it properly prosecuted. The plaintiffs alone were injured by the dismissal. They were bound to proceed within the year, unless prevented by some cause for which they were not responsible." The only cause for delay shown in the case at bar is that Mr. Wolfe, plaintiff's attorney, forgot about it. The evidence shows that the plaintiff had charge of his own case, and did not forget about it, but simply neglected to take any steps therein. There is nothing in the letters introduced in evidence by the plaintiff to show any waiver on the

part of the defendant. The letters were not written until after the year had expired. The admission of service of the notice of trial, after the year had expired, merely saved plaintiff the trouble of making proof of such service, and is a courtesy usually shown by one attorney to another. The defendant might have made the motion to dismiss on the first day of the term, but had the right to make it at any time before trial. We think, under the showing, the trial court had no discretion in the matter, and it was its duty to order a dismissal of the action.

The judgment of the district court of Richland county is reversed, and the cause remanded, with directions to enter judgment dismissing the action. All concur.

MORGAN, C. J., not participating.

(121 N. W. 618.)

WILLIAM C. LEISTIKOW v. FRANK C. ZUELSDORF.

Opinion filed June 29, 1909.

Sales — Evidence — Question for Jury.

1. Evidence examined, and *held* that the issue whether defendant became primarily liable to plaintiff for the payment of certain merchandise by reason of his having purchased the same from plaintiff, or whether such sale was made to one R., and the payment of the purchase price merely guaranteed by defendant, was properly submitted to the jury.

Witness — Cross Examination — Pleadings as Evidence.

2. The original complaint, which was verified by plaintiff's attorney, contained allegations inconsistent with the amended complaint upon which the case was tried, and also inconsistent with plaintiff's version of the transaction as testified to by him. Upon cross-examination of plaintiff, defendant's counsel offered in evidence such original complaint as a part of such cross-examination, which offer was objected to, and the objection sustained. *Held*, not error, as the offered proof, if admissible, was not proper cross-examination, but was a part of defendant's case, and its reception at such time was discretionary with the trial court.

Appeal and Error —. Evidence.

3. Certain other assignments, based upon rulings in the admission and rejection of testimony, examined, and such rulings *held* not prejudicial to appellant.

Appeal from District Court, Walsh county; A. G. BURR, Special Judge.

Action by William C. Leistikow against Frank C. Zuelsdorf.

Judgment for plaintiff and defendant appeals.

Affirmed.

Skulason and *Burtness,* for appellant.

If the whole credit is not given to the one who comes in to answer for another, his undertaking is collateral and must be in writing. Swift v. Pierce, 13 Allen, 136; Cahill v. Bigelow, 18 Pick. 369; Larson v. Wyman, 14 Wend. 246; Hardman v. Bradley, 85 Ill. 162; Reitzloff v. Glover, 64 N. W. 298; Williams v. Auten, 87 N. W. 1061; Butters Salt & Lumber Co. v. Vogel, 89 N. W. 560; Studley et al., v Barth, 19 N. W. 568.

Myers & Myers and *E. R. Sinkler,* for respondent.

Entry of charges to a person may be explained. Harris et al. v. Frank, 22 Pac. 856; Walker v. Richards, 41 N. H. 388; Lumber Co., v. Cong. Church, 59 Atl., 180.

FISK, J. Action to recover a balance of $930.47 and interest, claimed to be due plaintiff from defendant, on account of flour, feed and other mill stuffs sold and delivered to defendant at his special instance and request. The amended complaint upon which the action was tried alleges that such merchandise was, at defendant's special request, delivered to one Rolcyzinski, and charged to the latter upon plaintiff's books, but that the same was thus sold and delivered upon defendant's sole credit. The defense, briefly stated, is that such goods were sold to Rolcyzinski, and not to defendant, and that defendant never agreed to become primarily liable for the payment of the purchase price; that any promise on defendant's part to pay for the same was merely collateral and conditional; that it constituted merely an oral guaranty for the payment of Rolcyzinski's indebtedness, without consideration, and hence is void under the statute of frauds. The issues thus framed were submitted to a jury, and a verdict returned in plaintiff's favor, pursuant to which a judgment was duly rendered, from which the appeal is prosecuted.

The first two assignments of error are predicated upon the rulings of the trial court in denying appellant's motions for a peremptory instruction, made at the close of plaintiff's case, and also at the close of the entire testimony. These are the only assignments argued at any length by appellant's counsel. It is of course obvious that the correctness of such rulings depends wholly upon the state of the proof. If there was any evidence reasonably tending to support plaintiff's version of the transaction, then the rulings complained of were eminently proper. A careful examination of the record serves to convince us that the state of the proof was such as to necessitate a submission of the case to the jury. We are not concerned with the weight of the testimony, nor the credibility of the witnesses. These were questions for the jury. Without attempting a review of the testimony at length, we will briefly refer to it in support of our conclusion that a substantial conflict exists, and that there is sufficient testimony, if worthy of credence, to justify the verdict rendered.

Plaintiff's cause of action is based upon sales alleged to have been made to defendant between January 6, and March 20, 1905. It is uncontradicted that for some time prior thereto defendant had furnished to Rolcyzinski similar merchandise for sale on commission, that until about September, 1904, defendant was engaged himself in the milling business at Minto, and that after such date and up to January 6th thereafter he continued to supply Rolcyzinski with mill products for sale on commission, purchasing the same from plaintiff. It is plaintiff's contention, and such contention finds support in his testimony, that he continued to sell such mill stuffs to defendant under the identical arrangement and understanding theretofore existing, except that at defendant's request, and for certain reasons stated by defendant, such merchandise was charged on plaintiff's books to Rolcyzinski. Plaintiff is corroborated by the witnesses Dunn, who was formerly manager of plaintiff's mill, and Rolcyzinski. Among other things, plaintiff testified: "Mr. Zuelsdorf said, 'I will buy the flour and pay you for it, and let Mr. Rolcyzinski handle it.' He wanted him to continue in the flour business. * * * We delivered no flour to Rolcyzinski. We had nothing to do with him. * * * Zuelsdorf bought carload after carload that fall, and sent up payments until some time in January. He called me up by phone one evening, and he said Rolcyzinski would rather know what the flour cost, and on account of him having

the handling he would like to have me send the bills direct to Rolcyzinski, and open up an account with him, but he said, 'I will keep ordering the flour and I will pay for it,' and it was so done from that time on. I delivered no flour to Rolcyzinski until this arrangement was off. About the 1st of May Zuelsdorf called me up one evening by phone, and said that he had trouble with Rolcyzinski, and he says, 'I will buy no more flour for him, and whatever I have got for him now, that settles it. I will settle for that.' * * * He came up some little time after that. He came to the mill, and we figured up, and he says, 'Now, you can charge that to my account, and I will pay for it' * * * Zuelsdorf requested us to charge his personal account with it and credit Rolcyzinski. We did so at his request. * * * Zuelsdorf subsequently paid something on his account."

The witness Dunn, among other things, testified that he was present, and overheard the conversation between plaintiff and defendant referred to by the plaintiff in his testimony, and fully corroborates plaintiff's testimony. Among other things he testified: "It is pretty hard to remember the exact day back at that time. The only way I have of fixing it is the fact of the charge to the other man at Zuelsdorf's request. There is no question about that, and Mr. Zuelsdorf was to pay the account. The fact is more especially in my mind than dates. * * * I didn't understand Zuelsdorf to say that he wasn't going to handle any flour himself. He had been buying from Leistikow for some time, and there was to be some change. My understanding was that he wanted Leistikow to ship Rolcyzinski the flour instead of to him, so that he could keep a check of what this other man got in that way. We hadn't any dealings with Rolcyzinski at all. I didn't know him personally. I was not aware that he had been having business dealings with Zuelsdorf. It was no surprise to me when Zuelsdorf made this request. It was only a proper request to charge the flour to the other man, and Zuelsdorf would pay for it. There was nothing that I know of disclosed in that conversation giving any reason for this peculiar way of charging this flour to the stranger. As I understood it, Mr. Leistikow wouldn't charge this other man with flour. I didn't understand that. Zuelsdorf's first proposition was that he wouldn't buy any more flour himself, but that Leistikow might charge flour to Rolyczinski. It was something like this: Leistikow said he wouldn't charge flour to Rolcyzinski because he didn't know him."

Rolyczinski testified, in effect, that from 1900 until March, 1905, he was engaged in handling flour and feed for the defendant upon an agreed commission per sack, and that during this time there never was but the one arrangement between them. Under such arrangement he would turn over any money he collected on sales to Zuelsdorf. He never made any arrangement with Leistikow to handle his flour until some time in March, 1905. It is nowhere contended that Rolcyzinski, prior to March, 1905, ever had any direct dealings with the plaintiff, and he testified that Zuelsdorf never at any time was authorizied to make any arrangement with Leistikow by which flour was to be charged to him. This testimony, if true, completely refutes defendant's version of the transaction, and overcomes the somewhat strong presumption in defendant's favor arising from the fact that plaintiff charged such merchandise to Rolcyzinski's account. There is other evidence, both direct and circumstantial, tending to corroborate plaintiff's testimony, but the foregoing suffices to demonstrate that the court did not err in refusing to hold, as a matter of law, that no recovery could be had.

This brings us to a consideration of the appellant's assignments based upon alleged erroneous rulings in the admission and rejection of testimony. As a part of the cross-examination of plaintiff appellant's counsel offered in evidence the original complaint, the allegations of which are inconsistent with plaintiff's testimony; the same having evidently been drawn on the theory that the facts were as contended for by defendant. The same was objected to, and the objection sustained, upon the ground, among others, that it was not proper cross-examination. In this we think there was no error. The same was not, strictly speaking, proper cross-examination. It should have been offered as a part of defendant's case. Its introduction at that time was within the discretion of the trial court. Romertze v. Bank, 49 N. Y. 577; Gemmill v. State, 16 Ind. App. 154, 43 N. E. 909; 2 Wigmore on Ev. section 1261, and cases cited; Peyton v. Morgan Park, 172 Ill. 102, 49 N. E. 1003; Hennessy v. Insurance Co., 74 Conn. 699, 52 Atl. 490; Haines v. Fire Insur. Co., 52 N. H. 467. The original complaint ceased to be a pleading in the cause when the amended complaint was interposed. Hence any admissions contained therein are not conclusive against the plaintiff, and the allegations in such original complaint can be treated as admissions only by the introduction of such pleading in evidence. 1 Enc. of Ev. 437, and cases cited. It seems to be the

prevailing rule that such former pleading is competent evidence by way of admission when properly introduced in evidence, but it is competent, not as a pleading, but as any other written instrument containing an admission against interest, if the same is signed or acquiesced in by the party, or signed and filed by an attorney having authority to bind him by statements so made. Some courts have held such pleading not competent evidence as an admission, but the great weight of authority is to the contrary. See 1 Ency. of Evidence, 437-440, inclusive, and cases cited. For a valuable discussion of the question as to the admissibility of such original complaint, see the able opinion of Mitchell, J., in Vogel v. Osborne & Co., 32 Minn. 167, 20 N. W. 129, wherein the Minnesota court reached the conclusion that, where there is nothing to show that the admission in the original pleading was made with the knowledge or by the direction of the party, such original pleading was inadmissible in evidence. We shall assume, without deciding, that the original complaint was admissible, but we hold it not an abuse of discretion to refuse to receive the same as a part of the cross-examination of the plaintiff. Defendant did not offer the same as a part of his case. This he should have done. The order of proof is always largely within the discretion of the trial court.

Errors are assigned upon the rulings sustaining plaintiff's objections to certain questions put to plaintiff on cross-examination as to whether he informed his counsel, at the time he employed them, of certain facts thereto testified to by him. We think such rulings were correct as the questions called for the disclosure of confidential and privileged communications between attorney and client, and his privilege was properly claimed by the objections. See 10 Enc. of Ev. 205, 212, 328.

The next assignment challenges the ruling of the court below in sustaining plaintiff's objection to the following question, asked the witness Dunn on cross-examination: "Now did Mr. Leistikow pay Zuelsdorf anything for assuming the $1,143.16 on the Rolyczinski account?" The ground of the objection was that the question called for a conclusion of the witness, and also assumed facts not in evidence. We fail to discover any prejudicial error in such ruling. There was nothing in the prior testimony to justify the assumption that Zuelsdorf, at the time the account was transferred from Rolcyinski to his account, assumed any new liability. Plaintiff introduced the testimony of such transfer of account merely as evidence

tending to corroborate his version of the transaction, to the effect that Zuelsdorf purchased such merchandise on his own account, and was primarily liable for its payment at all times. Neither in the complaint, nor in plaintiff's proof, was any contention made that defendant assumed any new liability by the transfer of such account.

Immediately after the last-mentioned ruling defendant's counsel moved to strike paragraph 4 from the amended complaint a being redundant and irrelevant matter and a pleading of evidentiary facts. This motion was denied, but we fail to perceive how such ruling could have been prejudicial to defendant. If such motion had been made in time, it occurs to us that it should have been granted, as the facts pleaded were merely evidentiary in character. A complete answer, however, to such assignment is the fact that defendant preserved no exception to the ruling, and hence the same is not before us for review.

We deem it unnecessary to notice in detail the few remaining assignments, all of which relate to rulings as to the admission and exclusion of testimony. We have carefully examined the same, and find no prejudicial error in the rulings complained of.

The judgment appealed from is accordingly affirmed.

MORGAN, C. J., not participating.

(122 N. W. 340.)

ENDERLIN INVESTMENT COMPANY, A CORPORATION v. CARL NORDHAGEN, RANDE NORDHAGEN AND ELLEF NORDHAGEN.

Opinion filed November 4, 1909.

Justice of the Peace — Transcript — Execution.

1. Section 8452, Rev. Codes 1905, which reads as follows: "The judgment of a justice's court is enforced by process of execution. When the process is not stayed or suspended by any provision of this code, execution may issue at any time within five years after entry of judgment, but not afterwards, on application of the party in whose favor it was rendered, or his legal representative, to the justice who entered the same or his successor in office, or other justice who has custody of the docket"—does not prohibit the transcripting of a judgment entered in justice court after the expiration of five years, and within ten years from its entry, and the district court to which such judgment is transcripted may issue execution thereon at any time before the expiration of ten years from the entry of such judgment in the justice court.

Evidence — Lost Deed — Secondary Evidence — Foundation.

2. When the title to real estate is in issue, evidence of a lost unrecorded deed and its contents can only be given on laying a proper foundation by proving its execution, validity, tenor, delivery, loss and diligent search for it.

Recording of Transfers — Priority of Judgment Over Unrecorded Deed.

3. Under section 5038, Rev. Codes 1905, which makes every conveyance by deed void as against the lien of any judgment obtained against the person in whose name the title appears of record prior to the recording of such conveyance, an execution legally levied, and a sale thereon, and sheriff's deed issued at the expiration of the redemption period to the purchaser conveys good title, as against title derived from a prior unrecorded deed, of which the judgment creditor and purchaser had no notice.

Execution Purchaser — Possession of Land as Notice — Priorities.

4. The title to premises on which execution was levied stood in the name of Carl Nordhagen, the son of Ellef Nordhagen and Rande Nordhagen. All these parties, together with other brothers and sisters of Carl, all over 21 years of age, resided together upon the premises sold. The evidence fails to disclose any facts indicating that any one of the parties might not have claimed possession with as much reason as did the defendant Rande, the mother of Carl. *Held*, that the evidence is insufficient to constitute notice of the claim of Rande, the mother, to title in the land through an unrecorded deed, as against a title derived from such levy.

Adverse Possession — Elements of.

5. To render possession adverse, it must not only be actual, but also open, continuous, notorious, distinct and hostile, and of such a character as to unmistakably indicate an assertion of claim of ownership by the occupant.

Held, under the evidence of this case, that the defendant Rande Nordhagen is not shown to have been in such possession as to defeat a title under a judgment against her son Carl to the premises, resided upon by both.

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

Forcible entry and detainer by the Enderlin Investment Company against Carl Nordhagen and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Pierce, Tenneson & Cupler, for appellant.

A justice court judgment is enforceable by execution within ten years from its date. Vol. 8 Am. and Eng. Ency. Pl. and Pr. 363; Dakota Investment Co. v. Sullivan, 9 N. D. 303; Bailey v. Wagoner, 17 S. & R. 327; Catlin v. Merchants Bank, 36 Vt. 572.

Five years are the limit to the issue of an execution, not a transcript, upon a justice's judgment. Sec. 7093 Code 1905; Holton v. Schmarback 106 N. W. 36, 15 N. D. 38; Weishbecker v. Cahn, 104 N. W. 513, 14 N. D. 390; Williams v. Rice, 60 N. W. 153.

Recitals of a Sheriff's Deed are evidence. Section 7149 Code 1905; Everson v. State 92 N. W. 137; Sheids v. Miller, 9 Kan. 390; Baxter v. Leary, 72 N. W. 9.

To admit evidence of a lost deed, its execution, validity and delivery must be shown. Lewis v. Burns et al, 55 Pac. 132; Teller v. Brower et al., 14 Pac. 209; Dasher v. Ellis, 102 Ga. 830; Bigelow v. Young, 30 Ga. 121; Durham v. Holeman, 30 Ga. 619; Eaton v. Freeman, 63 Ga. 535.

And proof must be clear and satisfactory. Walmsley v. Child, 1 Ves. 341; Fisher v. Carroll, 6 Ired Eq. 485; Towle et al v. Sherer et al, 73 N. W. 180.

Unrecorded deed must give way to judgment. Rev. Codes 1905, Sec. 5038; Coles v. Berryhill, 33 N. W. 213; Berryhill v. Smith et al, 61 N. W. 144; Clark v. Butts et al., 76 N. W. 263; Freeman on Judgments, Section 366 and cases cited; Vol. 24 Am. and Eng. Enc. Law, p. 118; Vol. 24, Am. and Eng. Enc. Law, p. 128; Robertson v. Durden 89 Ala. 500; Gower v. Doheney 33 Ia. 36; Wells v. Baldwin et al., 10 N. W. 427; Wilcox v. Loominister Nat. Bank 45 N. W. 1136; Bank of Ada v. Gillikson et al., 66 N. W. 131; Dickenson v. Kinney, 5 Minn. 417; Glocher v. Brisbin, 20 Minn. 462; Coles v. Berryhill 33 N. W. 213; McFadden v. Blocker 2 Ind. Ter. 260; Oyler v. Renfro, 86 Mo. App. 321; Karst v. Gane et al., 32 N. E. 1073; Stephens v. Perrine et al., 39 N. E. 11; Field v. Ingraham 15 Misc. 529; Campbell v. Richardson, 6 Okla. 375; Price v. Wall, 97 Va. 334.

M. J. Barrett, for respondent.

Five years are the limit to a justice's judgment, as to the issue of an execution or transcript thereon. Farmers' State Bank v. Bales, 90 N. W. 945; Phillips v. Norton et al., 101 N. W. 727; Dieffenbach v. Roch, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829; Young v. Remer 4 Barb. 442.

No rights accrue upon an execution sale upon a justice judgment, issued after five years from its entry. Halsey v. Van Vliet, 27 Kan. 474; State v. McArthur, 5 Kan. 280; Rollin v. McIntyre, 87 Mo. 496; Ransom v. Williams, 2 Wall (U. S.) 313; White v. Clark, 8 Cal. 512; Coward v. Chastain, 99 N. C. 443; Lyon v. Rust, 84 N. C. 588; Lytle v. Lytle, 94 N. C. 683.

Possession under an unrecorded deed is notice. O'Toole et al v. Omlie et al., 8 N. D. 444, 79 N. W. 849; Lipp v. Southern Omaha L. S. Co., 40 N. W. 129; Daniel v. Hester, 7 S. E. 65; Phalen v. Brady, 1 N. Y. Sup. 626; Hottenstein v. Larch, 104 Pa. St. 454; Boyer v. Chandler, 32 L. R. A. 113; Brook v. Bordnew, 155 Pa. St. 407; Groff v. Ramsey, 19 Minn. 44; Palmer v. Bates, 22 Minn. 522; New v. Wheaton, 24 Minn. 406; Brinser v. Anderson, 6 L. R. A. 205; Gale v. Shillock, 4 Dak. 182; 29 N. W. 661; Peasley v. McFadden, et al., 10 Pac. 179; Lambert et al., v. Weber et al., 47 N. W. 251.

SPALDING, J. This is an action for unlawful entry and detainer. Plaintiff relies for title upon a sheriff's deed issued under the following circumstances: August 22, 1898, a judgment was rendered in justice court in Ransom county, N. D., in favor of one Goldberg against Ellef Nordhagen, Gilbert Nordhagen and Carl Nordhagen. A transcript of such judgment was filed and docketed in the office of the clerk of the district court of Ransom county March 18, 1905, and this was further transcripted and docketed in the office of the clerk of the district court of Ward county, May 15, 1905, at 9 o'clock a. m., and was assigned to the appellant July 26, 1905. District court execution was issued, levied on the land in question; a sale made to appellant; and, no redemption being made, sheriff's deed issued. A jury trial was waived, and, after the submission of the evidence, the district court made findings of fact and entered judgment in favor of the defendants and respondents. The respondent Rande Nordhagen is the mother of Carl Nordhagen and Gilbert E. Nordhagen and the wife of Ellef Nordhagen. The trial court held that by reason of the fact of the judgment of the justice court in Ransom county not having been transcripted to the district court until after the expiration of 5 years from its entry, the levy and sale under the execution referred to, and the sheriff's deed issued at the expiration of the redemption period, were invalid, and conveyed no title to appellant. It also found that Rande Nordhagen was the owner of the premises under a deed conveying the same to her

from Gilbert E. Nordhagen, made during the year 1903, and that such deed was lost and never recorded, that under the same she took possession of said premises, and has resided thereon at all times to date, and was at the time of the trial residing thereon with defendant Ellef Nordhagen, her husband, defendant Carl Nordhagen, and her other children, all over the age of 21 years. These are the material parts of the findings. It is contended by appellant that the evidence does not sustain these findings or the judgment.

The first question for consideration is the effect of a transcript of a justice court judgment to the district court after the expiration of 5 years from its rendition and entry. The respondent contends that the levy and sale of the premises under the pretended execution were void. If this is correct, the judgment must be affirmed, and all other questions are immaterial. If incorrect other questions must be decided. Section 7093, Rev. Codes 1905, provides that a justice of the peace must, on demand, give a certified abstract of his judgment, which may be filed in the office of the clerk of the district court of the county or subdivision in which judgment was rendered, and entered in the judgment book and the judgment docket thereof, and that from the time of the docketing thereof it becomes a judgment of such district court for the purposes of execution, and a lien upon real property owned by the debtor, and that a like certified transcript of the docket of such judgment may be filed, and the judgment docketed, in any other county or subdivision with like effect and in every respect as if the judgment had been rendered in the district court where such judgment was filed. Section 8446 prescribes the form for the abstract of such a judgment. No suggestion is offered in this case that the justice did not have jurisdiction to enter the judgment when entered, or that it was not transcripted in due form. Section 8452, Rev. Codes 1905, reads as follows: "The judgment of a justice's court is enforced by process of execution. When the process is not stayed or suspended by any provision of this Code, execution may issue at any time within five years after entry of judgment, but not afterwards, on application of the party in whose favor it was rendered, or his legal representative, to the justice who entered the same, or his successor in office, or other justice who has custody of the docket."

Respondent cites in support of its contention the case of Phillips v. Norton, 18 S. D. 530, 101 N. W. 727, which holds that the tran-

script of the justice court judgment must be made and filed with the clerk of the circuit court within 5 years after the entry of the judgment. With due respect for the Supreme Court of South Dakota, we must hold to the contrary. We think the question is settled by the reasoning of this court in the case of Holton v. Schmarback, 15 N. D. 38, 106 N. W. 36. We are of the opinion that the provisions of section 7093 simply limit the right to have execution within 5 years only to such right in the justice's court, and that it does not limit the life of the judgment, nor the right to transcript it to the district court. The provisions of the Code under consideration, and the subjects treated in connection with that section, are judgments and executions in justice courts, and it would be an unwarranted extension of the meaning of the section to hold that it applies to executions issued by a district court. The language of the section itself limits its meaning, and confines its operation to the justice court. This court, through Judge Young, in the Holton case, said in speaking of the above section: "It will be seen by reference to its language that it does not relate to the life of the judgment, but to the remedy for enforcement by justice court execution; and it prescribes the time in which a justice of the peace may issue execution. * * * It relates solely to the power of the justice court to enforce the judgment by execution, and limits the exercise of that power to 5 years; and it does not limit the life of the judgment. The power of the justice to issue execution is also terminated by the issuance of a transcript to the district court. But the life of the judgment continues 10 years from its rendition, and an action may be maintained upon it for that period." It is held in that case that the power of the district court to issue execution upon a justice court judgment which has been transferred to that court, and the limitation upon its power, are contained in sections 5498 and 5500, Rev. Codes 1899. Section 5498 is section 7093, Rev. Codes 1905, and section 5500, Rev. Codes 1899. Section 7099, Rev. Codes 1905, relates to the executions of judgments in the district court, and provides that the party in whose favor judgment has been given may, at any time within 10 years after the entry of the judgment, proceed to enforce it by execution, and it says the purpose and effect of filing a transcript is to enlarge the effect and means of enforcing the judgment of the justice court. The judgment becomes a lien upon the judgment debtor's property from the docketing of the transcript, and from that time forward it is like a judgment rendered in the

district court, and this includes the remedy for enforcement by district court execution. The time within which a district court judgment may be issued is governed by section 7099. It is limited to 10 years from the entry of the judgment. Later this court says: "The filing of the transcript gave to the justice court judgment a new effect. From the date of the filing it has, for the purposes of the lien and execution, the effect of a district court judgment." And in Weisbecker v. Cahn, 14 N. D. 390, 104 N. W. 513, it is held that the limitation upon the power to issue execution and the limitation upon the life of the judgment are different matters. Authorities are cited from other states by respondent, but are not in point when our statute is considered. No other objection is raised to the validity of the levy, sale, and sheriff's deed, and we are satisfied of their validity.

The next question is whether the evidence sustains the finding, and therefore the judgment, as to the title being in Rande Nordhagen under a deed from Gilbert executed and delivered in 1903. This requires brief mention only. No such deed was offered in evidence. Its absence was unaccounted for. It was not shown that diligent search had been made for it, or that it was lost. In fact no foundation was laid for proof of such a deed, and no direct proof was offered. It is an elementary principle of law that when the title of real estate is in issue, evidence of a lost deed and its contents can only be given on laying a proper foundation by proving its execution, validity, tenor, delivery, loss, and diligent search for it. In addition to this her title cannot be sustained, as against this execution sale, because no such deed was ever recorded, and it is nowhere contended that appellant had any notice or knowledge of such deed ever having been in existence. On the contrary, it is shown that when the agent of the plaintiff called at the residence of the Nordhagens, on the premises, before attempting to enforce collection of the judgment, and for the purpose of collecting it, he was informed by Carl Nordhagen, in whose name the legal title stood, and by Ellef Nordhagen, husband of Rande and father of Carl, that the land belonged to Carl. Carl had also executed two mortgages upon it and one chattel mortgage of crops, all of which were of record. Section 5038, Rev. Codes 1905, makes every conveyance of land by deed void, as against any attachment levy thereon, or any judgment lawfully obtained at the suit of any party against the person in whose name the title appears of record prior to the recording of such conveyance. The record title being in Carl Nordhagen, this section is applicable to

the case at bar. It is contended that defendant Rande Nordhagen was in possession of the premises, and that, therefore, appellant had notice of her claim to title. This contention is not supported by the evidence. We have shown that the whole family was residing upon the premises. The title of record was in Carl, and under the provisions of section 6777 of the statute, this carried a presumption of possession, and the evidence given on the subject is too meager and inadequate to support the possession of Rande, or to overcome the statutory presumption. It was simply to the effect that she resided on the premises. Had occasion arisen to do so, possession might have been shown just as adequately in Ellef, or any of the other children who resided on the premises.

Secret trusts and equities in relation to real property are expressly declared to be void by the provisions of the Code of this state, and any trust arrangement must be made a matter of record, or the title of the trustee will be deemed absolute in favor of his judgment creditors or purchasers from him. Sections 4821, 4823, 4835, Rev. Codes 1905. To render possession adverse it must not only be actual, but also visible, continuous, notorious, distinct, and hostile, and of such a character as to unmistakably indicate an assertion of claim of exclusive ownership by the occupant. Both Rande and Carl were occupants and the evidence comes very far from indicating, at the time the levy was made, a hostile assertion of title in Rande. See Evans v. Templeton, 69 Tex. 375, 6 S. W. 843, 5 Am. St. Rep. 71; Colvin v. Rep. Valley, etc., Co., 23 Neb. 75, 36 N. W. 361, 8 Am. St. Rep. 114; Cook v. Clinton, 64 Mich. 309, 31 N. W. 317, 8 Am. St. Rep. 816.

There is no merit in the claims of respondent, and the judgment of the district court is reversed. All concur.

(123 N. W. 390.)

STATE EX REL. CLAUSE HAGERT v. CHAS. F. TEMPLETON, JUDGE OF THE DISTRICT COURT OF THE STATE OF NORTH DAKOTA.

Opinion filed November 16, 1909.

Divorce — Right of Husband to Alimony.

1. Alimony, suit money, and counsel fees cannot be allowed to the husband in this state.

Same — Jurisdiction to Grant Alimony Statutory.

2. Jurisdiction in matters relating to divorce and alimony is conferred by statute, and the power of the courts to deal with such matters must find support in the statute, or it does not exist.

Same — Alimony — Right of Husband to.

3. Section 4071, Rev. Codes 1905, which provides that "the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action," was intended to be exclusive and to embrace the entire subject-matter of the allowance of alimony, etc., pendente lite.

Original application by the State, on relation of Clause Hagert, for a writ of mandamus to be directed to Charles F. Templeton, district judge.

Writ denied.

Geo. A. Bangs, for relator. *Skulason & Burtness,* for respondent.

FISK, J. Relator makes application to this court for a writ of mandamus directed to the Honorable Chas. F. Templeton, judge of the district court of the First judicial district, commanding him to assume and to exercise jurisdiction for the purpose of hearing and determining relator's application for an order requiring the wife, who is plaintiff in an action for divorce against her husband, the relator, to pay to relator certain sums of money for maintenance pendente lite and for suit money and attorney's fees to enable him to defend such action. The learned trial court refused to entertain such jurisdiction upon the sole ground of a lack of power or authority so to do.

By this application we are squarely confronted with the question whether, under the written or unwritten law in this jurisdiction, any power exists in the courts to entertain in a divorce action an application by the husband for an order requiring the wife to furnish

him temporary alimony, suit money, and counsel fees. We are entirely clear that no such power or authority exists, and will briefly give our reasons for thus holding: Concededly, alimony could not be granted to the husband at common law. Therefore the authority to grant such allowance, if any such authority exists, must be by virtue of the Constitution or statutes of this state. Turning to our statute (section 4071, Rev. Codes, 1905), we find that the Legislature has merely declared the rule of the common law. The section reads. "While an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." No similar provision is made for the husband. Such section clearly measures the court's power in the matter of the allowance of alimony and suit money pendente lite. Such is in effect the express holding of this court in Glynn v. Glynn, 8 N. D. 233, 77 N. W. 594, where the court, in denying the power to grant the wife alimony where a divorce is granted for her fault, said : "In the absence of statute, the rule is inexorable that no alimony can be allowed where a divorce is granted for the fault of the wife." In Groth v. Groth, 69 Ill. App. 68, one of the inferior courts of Illinois ordered the wife to pay the husband temporary alimony and solicitor's fees, and in reversing such order the appellate court said: "If alimony from a wife to a husband is a proper thing upon circumstances, legislation is necessary to authorize it. At common law a husband was required to provide his wife with necessaries; but there was no reciprocal duty. The statute gives her, not him, alimony. To give it to him is not to administer existing, but to make new, law"—citing Somers v. Somers, 39 Kan, 132, 17 Pac. 841, and Greene v. Greene, 49 Neb. 546, 68 N. W. 947, 34 L. R. A. 110. 59 Am. St. Rep. 560. In the recent case of Cizek v. Cizek, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 Am. & Eng. Ann. Cas. 464, it is said: "Are the provisions of chapter 25 exclusive in their grant of power to the district courts with reference both to the causes for which divorces may be granted, and to the allowance of alimony? Consideration of this question has led us to answer in the affirmative. Matters pertaining to divorce, separation, and alimony were originally of ecclesiastical cognizance; but in this country they have always been regulated by statute, and we think the courts have always looked to the statute as the source of their power." A very clear, concise, and accurate statement of the rule is made by the

Wisconsin court, as follows: "It is an undoubted general principle of the law of divorce in this country that the courts, either of law or equity, possess no powers except such as are conferred by statute; and that, to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings, or practice in it, or to the mode of enforcing the judgment or decree, authority therefor must be found in the statute, and cannot be looked for elsewhere, or otherwise asserted or exercised." Barker v. Dayton, 28 Wis. 367. That court in a later case has expressly reaffirmed such rule. Hopkins v. Hopkins, 39 Wis. 167. To the same effect, see Kenyon v. Kenyon, 3 Utah, 431, 24 Pac. 829.

The fundamental error running through relator's entire argument is that the jurisdiction to grant divorces and to allow alimony and suit money is included within the general equity powers conferred upon the district courts, and that, inasmuch as our Code enjoins reciprocal duties upon the husband and wife for support and maintenance, like remedies conferred upon the wife for alimony, suit money, and counsel fees should be granted the husband. Such argument, if addressed to the Legislature, would have much merit in its support. As said in Greene v. Greene, supra: "This condition of things is for the Legislatures, not the courts. * * * 'Alimony is allowed the wife in recognition of the husband's common-law liability to support her. Therefore, in the absence of legislation readjusting domestic relations and allowing it, there being no corresponding liability on the wife's part to support her husband, alimony cannot be granted him.'" 2 Am. & Eng. Ency. of Law (2d Ed.) 92. Counsel for relator construes such language as holding, in effect, that, where there is legislation readjusting domestic relations such as exists in this state, such fact empowers the courts, without statutory authority so to do, to grant alimony to the husband. This is erroneous. The Legislature, not the courts, have allowed the wife alimony in recognition of the husband's liability to support her, and no doubt it would be perfectly proper for the Legislature to allow the husband alimony in recognition of the wife's liability to support him; but the courts are without power to do so in the absence of legislative sanction.

If jurisdiction as to divorces and, as a consequence, as to the incidental questions of alimony, etc., was formerly included within the general equity powers of the courts, as is apparently assumed by

relator's counsel, his argument would be entitled to much more weight. Such, however, is not the fact. In addition to the foregoing authorities, see 1 Bish. on Marriage & Divorce, §§ 1400, 128, and cases cited.

Writ denied. All concur.

(123 N. W. 283.)

SCULLY STEEL & IRON COMPANY, A CORPORATION v. S. A. HANN.

Opinion filed October 21, 1909.

Pleading — Counterclaim — Sales — Damages.

1. A counterclaim for damages for refusal to deliver certain repairs for machinery ordered by defendant from plaintiff, which order plaintiff accepted and agreed to fill, considered, and *held* not to state facts sufficient to entitle defendant to substantial damages.

Same — Demurrer — Waiver.

2. Plaintiff demurred to the counterclaim as first pleaded, which demurrer was sustained. Afterwards an amendment was permitted, but which amendment did not cure the defect. To such amended counterclaim plaintiff replied, both denying the facts alleged and demurring to their sufficiency in the same pleading. *Held,* that plaintiff by thus replying did not waive his right to challenge the sufficiency of the facts therein alleged to constitute a cause of action, and the court did not err in thereafter sustaining the demurrer and giving plaintiff judgment upon the note as prayed for in the complaint.

Appeal from District Court, Ramsey county; *Cowan,* J.

Action by the Scully Steel & Iron Company against S. A. Hann. Judgment for plaintiff, and defendant appeals.

Affirmed.

Burke, Middaugh & Cuthbert, for appellant.

Filing an answer is a waiver of a demurrer previously interposed. De Boom v. Priestly et al., 1 Cal. 206; Pierce v. Minturn et al., Id., 470; Brooks v. Minturn, Id. 481; Bibend v. Kreutz, et al., 20 Id. 110, Hodgson v. Marine Ins. Co., 1 Cranch C. C., 569; Irwin v. Henderson 2 Id. 167; Brown v. Saratoga R. R. Co., 18 N. Y. 495; Barada v. Inhabitants of Carondelet, 8 Mo. 644; Hammersmith v. Avery, 1 West Coast Rep.

662; Anderson v. Northern Pac. Lumber Co., 21 Oregon 281; Madden v. Steamship Co. 86 Cal. 445; Barth v. Deuel, 11 Colorado 494; Young v. Martin 3 Utah 484; Lonkey v. Wells 16 Nevada 271.

The wrongful act of a party in refusing to fulfill a contract of sale is the proximate and natural cause of damages. Rev. Codes 1905, Sec. 6563; Vickery et al., v. McCormack, 20 N. E. 495; Culin v. Glass Wks, 108 Pa. St. 220; Field, Dam. 244; George Hammer v. A. A. Schoenfelder, 2 N. W. 1129; Cockburn et al., v. Ashland Lumber Co. 12 N. W. 49; Pacific Exp. Co. v. Darnell et al., 6 S. W. 765.

Anderson & Traynor, for respondent.

The objection, that the complaint does not state facts sufficient to constitute a cause of action may be taken any time. Caldwell v. Ruddy, 2 Idaho, 5; Burnham v. De Bevorse, 8 How. Pr. 159; Higgins v. Rockwell, 2 Duer 653; Montgomery County Bank v. Albany City Bank, 3 Seld. 404; Gould v. Glass, 19 Barb, 186.

FISK, J. Respondent sued appellant in justice court upon a promissory note. Defendant answered, merely alleging facts by way of counterclaim. Such answer was, in substance, as follows: That plaintiff is a foreign corporation engaged in the manufacture and sale of machinery and boiler fittings, plates, and supplies in the city of Chicago, and that defendant is engaged in the business of repairing machinery, including threshing rigs, boilers, etc., at Churchs Ferry, in this state. That on July 31, 1906 defendant placed with plaintiff an order, which was duly accepted by it, for a certain dome and extension and other machinery to be manufactured by plaintiff for defendant to be used in repairing a certain threshing engine and boiler then in defendant's custody for repairs, and which repairs were to be made in time for the threshing season of 1906. That on August 10th defendant notified plaintiff by telegram of the urgent demand for such dome and extension, and plaintiff replied, promising to ship same on the following Wednesday. On August 19th defendant wired plaintiff, asking if such dome and extension had been shipped, and subsequently received word from plaintiff refusing shipment thereof. The remainder of the answer, omitting the prayer for judgment, is as follows: "That the defendant was unable to procure a dome and extension and have the same manufactured at any place within the state of North Dakota, and by the time the defendant received notice from the plaintiff that it would not furnish the dome and extension the threshing season was well advanced. That, by reason of defendant's inability to complete the

threshing engine so in his hands, he has been subjected to severe criticism, and people who would have placed their work with defendant have refrained from doing so on account of defendant's delay in repairing the threshing engine, and the owner of said threshing engine is seeking to hold the defendant liable for damages largely in excess of $200, and defendant had to furnish the owner with an engine belonging to defendant, and solely by reason of the plaintiff's failure to manufacture and ship to the defendant said dome and extension, as it had agreed to do, the defendant was damaged in his reputation and business and has suffered injury in the sum of $200." To this answer plaintiff interposed a demurrer, which was sustained. Thereafter defendant was permitted to amend his answer, which he did by inserting after the words, "defendant had to furnish the owner with an engine belonging to defendant," the following: "for a period of over 20 days, the value of which engine was $10 per day." To this amended answer plaintiff filed a reply containing a general denial of the allegations thereof, and alleging that such counterclaim does not state a cause of action, and is not a proper matter for counterclaim. A jury trial was had which resulted in a disagreement. Thereafter the demurrer was argued by both parties and sustained by the court, whereupon judgment was rendered in plaintiff's favor, from which an appeal on questions of law alone was taken to the district court, where such judgment was affirmed. The case is here on appeal from the judgment of the district court. The rulings complained of are three in number, only two of which need be noticed, and those but briefly. They are stated in appellant's printed brief as follows:

"(1) The court erred in sustaining a demurrer, which had previously been overruled after the plaintiff had replied. Plaintiff's demurrer having been overruled, and he having replied to defendant's answer, plaintiff had waived any right under the demurrer.

"(2) The court erred in sustaining the demurrer to the defendant's answer on the ground that the facts set out did not constitute an answer and a counterclaim."

It seems to be appellant's contention that plaintiff by filing the reply to the alleged counterclaim waived its right thereafter to challenge the sufficiency of such counterclaim. There is no merit in such contention. The authorities cited by appellant are not applicable. The demurrer was not overruled as stated, but was sustained, and thereafter an amendment to the answer was permitted, to which

plaintiff in effect by its so-called reply both denied the truth of the allegations therein contained, and demurred to their sufficiency. As before stated, both parties thereafter participated in the argument of the demurrer. Whether they thought they were arguing the original demurrer or that included in the reply is not material. Nor is it material that plaintiff, contrary to the established practice, both replied and demurred in the same pleading, as no objection was made thereto. The fact remains that plaintiff at all stages of the case challenged the sufficiency of the counterclaim, and both parties argued the question of such sufficiency, and such question was submitted to and decided by the court. Even if the court had previously overruled the demurrer, he had the undoubted right to reverse his decision at a later time. Furthermore, the question as to the sufficiency of the facts alleged in the counterclaim to constitute a cause of action was not waived by the reply denying such facts. Rev. Codes 1905, § 6858.

Appellant's second contention is, in effect, that the facts alleged in the answer are sufficient in law to constitute a cause of action. In this we are also compelled to differ with counsel. If it should be conceded that such answer states facts sufficient to constitute a cause of action for mere nominal damages, still such concession would not affect the result in the least, and, furthermore, no such contention is made by appellant. That such counterclaim fails to allege facts entitling defendant to other than nominal damages is, we think, too plain for serious debate. The controlling rules governing this case are embraced in Rev. Codes 1905, §§ 6563, 6570, 6595. These sections provide:

"Sec. 6563. For the breach of an obligation arising from contract the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

"Sec. 6570. The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract, if it had been fulfilled."

"Sec. 6595. In estimating damages, except as provided by sections 6596 and 6597, the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence for him to make such a purchase."

The facts alleged in the counterclaim, when considered in the light of the statutory rules aforesaid, are clearly insufficient as a basis for the recovery of substantial damages. In this conclusion we find ample support in the authorities. Talbot v. Boyd, 11 N. D. 81, 88 N. W. 1026; Simpson Brick Co., v. Marshall, 5 S. D. 528, 59 N. W. 728.

To attempt a restatement of the reasons for such rules would be both unprofitable and useless. The authorities relied on by appellant's counsel are, we believe, each distinguishable from the case at bar as to the facts involved.

Judgment affirmed. All concur.

(123 N. W. 275.)

SUCKER STATE DRILL CO., A CORPORATION v. R. J. BROCK AND R. L. RICHARDSON, AS INDIVIDUALS AND AS A COPARTNERSHIP, DOING BUSINESS UNDER THE FIRM NAME OF BROCK & RICHARDSON.

Opinion filed November 24, 1909.

Appeal and Error — Failure to Assign Errors in Brief.

Appellant having failed to assign errors in its brief as provided by rule 14 of the rules of this court (91 N. W. viii), and the record showing no reason for relaxing the rule, the judgment appealed from is affirmed.

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

Action by the Sucker State Drill Company, against R. J. Brock and another, as individuals and as a partnership. Judgment for defendants, and plaintiff appeals.

Affirmed.

D. J. O'Connell and *C. W. Hookway,* for appellant. *W. C. Slavens* and *Christianson & Weber,* for respondents.

CARMODY, J. This is an action by plaintiff, a foreign corporation, against defendants on two promissory notes for the sums of $180 and $880, respectively, both dated October 27, 1902. Defendants set up in their answer, as a defense to the payment of said notes, a failure of consideration. On these issues the case was tried to a jury. At the close of defendants' case the plaintiff moved the court to direct a verdict in favor for the amount claimed in the complaint, which motion was denied, and plaintiff introduced evidence in rebuttal. After both parties rested, plaintiff again moved the court to direct a verdict in its favor, which motion was denied, to which ruling no exception was taken. Kephart v. Continental Casualty Co., 17 N. D. 380, 116 N. W. 349. The case was submitted to the jury, and a verdict returned in favor of the defendants, and judgment entered on said verdict. After the entry of said judgment, plaintiffs, on a statement of the case, made a motion for judgment notwithstanding the verdict or for a new trial, which motion was denied. Plaintiff appealed from the order of the court denying its motion for judgment notwithstanding the verdict or for a new trial, and from the judgment entered in favor of the defendants and respondents herein. Afterwards, on motion of the respondents, the attempted appeal from the order denying a new trial was dismissed.

As the case now stands, this is an appeal from the judgment only. We are met at the outset by a motion of respondents that the judgment appealed from be affirmed, for the reason that there are no errors assigned in appellant's brief, and that no exceptions were taken to any of the alleged rulings. This motion must be granted. Appellant has not complied with rule 14 of this court. There are no assignments of error in the brief. In a proper case we might relax the rule; but we cannot do so in this case, as it is apparent, by bare inspection of the abstract and amended abstract, that there are no prejudicial errors subject to review on this appeal, no proper exceptions having been saved. Globe Investment Co. v. Boyum, 3 N. D. 538, 58 N. W. 339; Hostetter v. Brooks Elev. Co., 4 N. D. 357, 61 N. W. 49; O'Brien v. Miller, 4 N. D. 308, 60 N. W. 841; Schmitz v. Heger, 5 N. D. 165, 64 N. W. 943; Henry v. Mayer, 6 N. D. 413, 71 N. W. 127; Brynjolfson v. Thingvalla Township, 8 N. D. 106, 77 N. W. 284; Wilson v. Kartes, 11 N. D. 92, 88 N. W. 1023; Marck v. R. R. Co., 15 N. D. 86, 105 N. W. 1106.

The judgment is affirmed.

FISK, J., concurs. MORGAN, C. J., not participating.

SPALDING, J. (concurring specially). The affirmance of the judgment in this case results in a gross miscarriage of justice; but, on a careful examination of authorities bearing on the question raised, I am unable to discover any method by which a reversal can be had on the record before us, without violating well-settled rules of practice in this jurisdiction. For this reason alone, I concur in the conclusion that it must be affirmed.

ELLSWORTH, J. (concurring specially). The principle that a ruling of a trial court denying a motion to direct a verdict, to which no exception is taken by the party making the motion, will not be reviewed on appeal to this court, even in a case where a motion for a new trial on the ground of the insufficiency of the evidence was made and considered by the court after that time, is announced in the case of De Lendrecie v. Peck, 1 N. D. 422, 48 N. W. 342. This holding has not been expressly overruled in any subsequent case, although a modification announcing a rule that I believe is on principle sounder and more closely within the evident intent of the law regulating appeals is found in Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353. The modification made does not, however, extend quite to, although it closely approximates, the facts of this case; and I place my concurrence in the above opinion solely upon the ground that a contrary view is not expressly sustained by previous holdings of this court.

(123 N. W. 667.)

THE STATE OF NORTH DAKOTA vs. W. H. WINCHESTER AND DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT AND HON. W. H. WINCHESTER, JUDGE THEREOF.

Opinion filed November 5, 1909.

Change of Venue — Discretion of Court — Application by Attorney General.

1. Construing section 9931 of the Revised Codes of 1905, which provides, in substance, that the state's attorney, on behalf of the state, may apply for a removal of a criminal action, and the court, being satisfied that it will promote the ends of justice, may order such removal, *held*, that the granting or denying of an application duly made by the Attorney General for a change of the place of trial of a criminal action on the ground that an impartial trial cannot be had in the county where the action is pending, is a matter within the sound discretion of the court to which the application is made, and its ruling will not be disturbed except for an abuse of discretion.

Jury — Challenge of Panel — Change of Venue.

2. The fact that the defendant as sheriff subpoenaed the jury might be sufficient cause for a challenge to the panel, but is not cause for a change of venue.

Criminal Law — Change of Venue — Abuse of Discretion.

3. Upon the showing in this case this court is not prepared to say that there was an abuse of discretion in denying the motion of the Attorney General for a change of venue.

Original application by the State of North Dakota for a writ of certiorari to the District Court of the Sixth Judicial District and the Hon. W. H. Winchester, Judge thereof.

Writ denied.

Andrew Miller, Attorney General, for the State. *Newton & Dullam,* for the Respondent.

CARMODY, J. This is an application for an original writ of certiorari on behalf of the state, the plaintiff, in State v. Duncan J. McGillis. On the return day both parties appeared by counsel, submitted their arguments, and stipulated that the case might be disposed of on its merits on the moving papers of the Attorney General and the return of the respondent.

On June 1, 1909, the Attorney General filed an information in the district court of Burleigh county charging Duncan J. McGillis with the crime of knowingly permitting a building owned by him to be used for the purpose of unlawful dealing in intoxicating liquors in violation of law. On the same day he pleaded not guilty to said information. On June 3d the state, by the Attorney General, filed in said district Court a motion for an order changing the place of trial of said action. The motion was based upon the affidavit of the Attorney General, which alleged, in substance that in his opinion the state could not have a fair and impartial trial in Burleigh county. That the people of said county were so prejudiced against the prosecution and conviction of offenders against the various statutes of this state prohibiting the illegal sale of intoxicating liquors and unlawful use of buildings for such purpose that said laws have ever since their enactment been openly and notoriously violated by numerous and divers persons in the City of Bismarck and various parts of the county with the knowledge and tacit approval of the people generally and of the peace officers,

and that attempts to punish offenders against such laws have generally been met with determined resistance and refusals to convict or indict without regard to the evidence furnished by the prosecution, and that at this term of court one Bartheau on his third trial for violation of the prohibition law was acquitted. That the defendant in this case is the duly elected, qualified, and acting sheriff of this county, and as such sheriff, by himself and his deputies, subpœnaed the present jury, and as such sheriff, through himself and his deputies, has charge of such jury. That, in addition to being sheriff, he is an active politician, and one James Myers, who is now under arrest for violation of the prohibition law, was at the time of his arrest a tenant of the defendant herein in the defendant's building described in the information. That another defendant, Joseph Higgins, who was arrested at the same time, charged with keeping a common nuisance, was a tenant of one E. G. Patterson. That said E. G. Patterson for many years has been a prominent politician in this county, and is now chairman of the board of county commissioners. That said E. G. Patterson and the defendant McGillis up to this date and for many years last past have been at all times directly or indirectly interested in places where intoxicating liquors have been sold in violation of law, or directly engaged in the sale of intoxicating liquors in violation of law, and for many years have been the leading influence in this county that has made possible the prevention of the enforcement of the prohibition law, as affiant is informed and verily believes, and that the prestige of said E. G. Patterson, and of the said Duncan J. McGillis, when combined, is so great that affiant believes that a jury cannot be had in the county that would give the state a fair trial in the case of the State of North Dakota against Duncan J. McGillis. That while said motion for a change of the place of trial was still pending and undetermined, and on June 4, 1909, the Attorney General made a motion and requested the respondent to call in a judge of another district court of this state to preside at the trial of said action. On June 10th the respondent denied the motion of the State for a change of the place of trial, and requested the Honorable W. C. Crawford, Judge of the Tenth Judicial District to preside at the trial of said action in Burleigh county. Thereafter, on June 11, the state, through the Attorney General, setting forth the facts and proceedings above stated, procured an order

from a judge of this court commanding the respondent to show cause before this court on June 15, 1909, why an appropriate writ should not issue requiring and commanding him to transmit to this court all pleadings, orders, affidavits and records herein and the records of the proceedings had in said criminal action entitled, "The State of North Dakota v. Duncan J. McGillis," to the end that this court may review the rulings thus made. On the return day a verified answer to the order to show cause was filed on behalf of the respondent, which states the reasons for his action, in substance, as follows: Admits the filing of the information against Duncan J. McGillis, his plea of not guilty, the motion for the change of the place of trial of the action of the State of North Dakota against said Duncan J. McGillis. That the Attorney General made the affidavit mentioned in his application for the order to show cause which was used in support of the motion for a change of the place of trial; the application of the state to have respondent call in another judge to preside at the trial of said action. That he called in the Honorable W. C. Crawford, Judge of the Tenth Judicial District. That Duncan J. McGillis, defendant in said criminal action, filed his own affidavit, the affidavits of E. G. Patterson, G. F. Dullam one of the attorneys for the defendant, and of some thirty or more persons resident within Burleigh county and the city of Bismarck. On behalf of said defendant the affidavits admitted that said Duncan J. McGillis, the defendant, is sheriff of Burleigh county, and that E. G. Patterson is chairman of the board of county commissioners. That defendant, by himself and his deputies, subpœnaed the present jury, and by himself and his deputies has charge of such jury, and denied, in substance, all the other allegations in the affidavit of the Attorney General, and stated that in the opinion of each the state could have a fair and impartial trial of the action of the state against Duncan J. McGillis in Burleigh county. That in view of all the affidavits mentioned, and in consideration thereof, the said respondent then and there became and was convinced that no cause existed sufficient to move the discretion of said court or to justify the removal of the action against said Duncan J. McGillis from said Burleigh county to some other county for trial, either within or without the Sixth Judicial District, and he therefore denied the motion of the Attorney General to change the place of trial in said action.

It is, and has been, the universal practice of this court on the return of an order to show cause to pass upon the merits on all applications for original writs where the parties stipulate that this may be done, and also stipulate that the facts are as set forth in the moving papers and the respondent's return. Such stipulations were made in this case.

There are two questions involved in this case: One, whether Sec. 9931 of the Revised Codes of 1905 is mandatory. Said section reads as follows: "The state's attorney, on behalf of the state, may also apply in a similar manner for a removal of the action, and the court, being satisfied that it will promote the ends of justice, may order such removal upon the same terms and to the same extent as are provided in this article, and the proceedings on such removal shall be in all respects as above provided." The other whether the facts presented show that the respondent abused his discretion in refusing to grant the motion for a change of the place of trial. We are convinced that Section 9931, supra, is not mandatory, and that the state is not as a matter of right entitled to a change of the place of trial in a criminal action. In State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686, this court, speaking through Judge Corliss, says: "The question whether a fair and impartial trial cannot be had in the county in which the action is triable must be settled by the judge. It must be made to appear to his satisfaction by affidavit that a fair and impartial trial cannot be had in that county. Having no interest in the question, the law very properly leaves it to him for a decision." In this case, as in any other case before an appellate court, we cannot go outside of the record and assume the possible existance of other facts than those disclosed by the record in order to sustain or reverse the decision under review. The granting or denying of an application duly made for a change of the place of trial of an action on the ground that an impartial trial cannot be had in the county where the action is pending is a matter within the sound discretion of the court to which the application is made, and its ruling will not be disturbed except for an abuse of discretion. Ross v. Hanchett, 52 Wis. 491, 9 N. W. 624; Giese v. Schultz, 60 Wis. 449, 19 N. W. 447; State v. Hall, 16 S. D. 6, 91 N. W. 325, 65 L. R. A. 151; Territory v. Egan, 3 Dak. 119, 13 N. W. 568; People v Webb, 1 Hill (N. Y.) 179; People v. Baker, 3 Abb. Prac. (N. Y.) 42; Commonwealth v. Balph, 111 Pa. 365, 3 Atl. 220; Com-

monwealth v. Delamater, 145 Pa. 210, 22 Atl. 1098; People v. Peterson, 93 Mich. 27, 52 N. W. 1039; People v. Fuhrmann, 103 Mich. 593, 61 N. W. 865; People v. Vermilyea, 7 Cow. (N. Y.) 137.

In People v. Baker, supra, the court says: "There are many palpable reasons why trials in criminal cases should ordinarily be had in the counties where the transactions which gave rise to them occurred, and a change should not be made except for forcible and clearly established causes." In People v. Peterson, supra, the court says: "It cannot be said but that the question rested within the sound discretion of the trial court to judge and determine the sufficiency of this showing for a change of venue." The Attorney General made a very strong showing in behalf of the state, yet we cannot say, after a careful review of his affidavit and the return of the respondent, that the district court abused its discretion in denying the motion of the state to change the place of trial.

The fact that the defendant, as sheriff, by himself and his deputies, subpœnaed the jury, might be sufficient cause for a challenge to the panel, but is not cause for a change of venue. It follows, therefore, that the application for the writ must be denied and the temporary restraining order dissolved, and it is so ordered.

MORGAN, C. J., and FISK, J., concur. SPALDING and ELLSWORTH, JJ., dissent.

SPALDING, J. (dissenting). On a somewhat superficial examination of the record and the questions involved in this application, I was disposed to concur in the majority opinion, but, after giving it more careful attention, I am unable to do so. The record before us contains in full the motion papers, including the affidavit supporting the application of the Attorney General for a change of the place of trial used in the district court, and it is conceded in the majority opinion that that official made a strong case. It is at least customary to include in or annex to the return a copy of the record made in the lower court. This was not done in this instance. It is unnecessary to consider whether the omission in itself is fatal to the respondent's case, because it was stipulated on the hearing in this court that we might consider and decide the application for the writ upon the papers before us. The original record, including the affidavits submitted to the district court by the respondent, cannot be considered, because, as indicated, they are not

contained in the record. The Attorney General having made out a case, we are limited in determining whether the judge of the district court legally exercised his discretion in denying the application to a consideration of the competent and material statements in the return. The Attorney General charged that he had good reason to believe, and did believe, that the state could not have a fair and impartial trial of said action in Burleigh county. Among the reasons given for the statement were that the people of the county were so prejudiced against the prosecution and conviction of persons for offenses against the various statutes prohibiting illegal traffic in and sale of intoxicating liquors, and the unlawful use of buildings for such purposes, and permitting buildings and premises to be used therefor, that it was common knowledge and the commonly expressed opinion of the people of the county that the state could not, in Burleigh county, obtain a fair trial for the crime charged, or in any case where the crime charged was the violation of the prohibition law; that the laws of the state on that subject and the maintenance of premises for such unlawful use and of knowingly permitting such use by owners of buildings had ever since the enactment of such laws been openly and notoriously violated by numerous persons in the city of Bismarck and other parts of the county with the knowledge and tacit approval of the people generally and of the peace officers, and that the attempt to punish offenders against such laws had generally met with determined resistance and refusal to convict or indict without regard to the evidence furnished by the prosecution; that at the term of court then in session, in the case of State v. Bartheau, the defendant was acquitted on his third trial for violation of the prohibition law, notwithstanding the fact that the Attorney General believed that the evidence introduced was more than sufficient to warrant a conviction, and that such acquittal could not have been by any reason of any reasonable doubt of the guilt of said defendant in the minds of the jurors, but was solely on account of the prejudice against the enforcement of the law, and reference was made in support of that contention to the reporter's record of the evidence introduced on such trial, and that at the first trial in said case at a former term of the district court for Burleigh county, Hon. W. J. Kneeshaw then presiding, repremanded the jury for its disagreement, and that in such case the evidence introduced was substantially the same as in the trial at which said defendant was acquitted; that

the defendant McGillis was the duly elected, qualified, and acting sheriff of said county, and that he himself, and through his deputies, subpœnaed the members of the jury, was in charge of the jury, the courthouse, jury rooms, jail, and courthouse premises, whereby he has easy and ready access to the jury and witnesses in attendance on such court; that said defendant, besides being sheriff, was an active politician of the county, and that at the time of his arrest one James Meyers was his tenant in the building described in the information and that Meyers was also under arrest; that in the case of State v. Higgins, charged with keeping and maintaining a common nuisance as defined by the prohibition law, the defendant Higgins was arrested at the same time that the herein named parties were arrested, and was a tenant of one Patterson in the building described in the information in the last mentioned case, and that Patterson had for many years been a prominent politician in the county, and was then chairman of the county commissioners thereof, and that the prestige of said Patterson and of the respondent, when combined, was so great that in his belief a jury could not be had in the county that would give the state a fair trial in the case of State v. McGillis; that both said Patterson and said McGillis up to that date had for many years last past been at all times directly or indirectly interested in places where intoxicating liquors had been sold in violation of law, or directly engaged in the sale of intoxicating liquors in violation of law, and were the leading influence in Burleigh county that had made possible the prevention of the enforcement of the prohibition law, and that in his belief the interest of said Patterson and the defendant McGillis in preventing conviction would be a common interest for the protection of their respective properties and interests, and that their united efforts would be exerted to prevent the state from obtaining a fair trial; that the prejudice existing in the county against the enforcement of the prohibition law was general, and that among other reasons for his belief was his knowledge of the sentiment of the public obtained through a residence of four years, part of such time having been spent as a prosecuting official whose duty it was to prosecute violators of such law and to inform himself as to general conditions and public sentiment. These allegations are met in return, as far as they are met, by quotations from the affidavits of the defendant McGillis, of Patterson, and of Dullam, one of the defendant's attorneys, and, as far as the recitations of the order of the trial

court denying the change of venue indicate the affidavits of the three persons named constitute the only evidence submitted by the defendant. It will be observed that, although there is no allegation that Patterson had been informed against for permitting his building to be used for illegal purposes under the prohibition law, yet it is positively stated that a tenant of his in such building had been arrested on the charge of violating that law. So it is apparent that patterson stands in nearly the same relation to the prosecution as does defendant McGillis. The return states that McGillis in his affidavit alleges that the charge that he at all times has been or is, directly or indirectly, interested in places where intoxicating liquors have been sold in violation of law, or directly engaged in the illegal sale of such liquors, and had for many years been the leading influence in the county that had made possible the prevention of the enforcement of the law, is false and without foundation, and denies that he has any particular prestige, political or otherwise, but alleges that he was defeated for public office two years ago in the city of Bismarck; that the prestige of said Patterson was not as stated in said affidavit of the Attorney General, but that the said Patterson had twice been defeated for office since the spring of 1907; and that statements that Patterson and the affiant were using, or would use their influence to prevent the enforcement of the prohibition law, are also untrue. This affidavit is largely denials that affiants have at all times been guilty of the acts alleged. The affidavit of Dullum is stated in the return of respondent to be to the effect that during the term of court then sitting four cases had been submitted to juries in which defendants were charged with unlawfully selling intoxicating liquors, in three of which verdicts of guilty were found, and only one defendant was acquitted; that other defendants have pleaded guilty to not registering their United States government licenses; that he had heard many jurors examined as to their qualifications who testified almost without exception that they were in favor of enforcing the provisions of the prohibition law; that he did not believe that Patterson had the prestige ascribed to him by the Attorney General; and that he believed that the state could and would have a fair and impartial trial. He fails to disclose how many of the three persons convicted were convicted in their absence. The remaining portion of his affidavit presents a quibble on the distinction as to public sentiment between the crime of selling intoxicants and

the crime of permitting a building to be used for such purpose illegally. The affidavit of Patterson is in all material respects a duplicate of that made by McGillis, and alleged that the charge that he at all times for many years has been directly or indirectly engaged in the sale of intoxicating liquors, etc., is untrue. The return also states that the affidavits of some thirty or more persons, residents of Burleigh county, were used on the application, but it makes no reference to their contents. The remainder of the return is devoted mostly to showing that the court exercised its legal discretion in denying the change, and in setting forth its construction of the law regarding a change of the place of trial in criminal actions. In my opinion these affidavits do not meet the allegations supporting the application fully, and that the statements contained in such affidavits coming as they do from the defendant and another in a similar position are entitled to very little weight. Many of the statements are mere evasions of the Attorney General's allegations. The fact that McGillis has been defeated for office in the city of Bismarck is immaterial when used to show that an impartial jury can be obtained. The city of Bismarck is but a small portion of the county of Burleigh, and, if such statement is entitled to any consideration, it can only apply to jurors drawn from the city of Bismarck. Patterson does not state what offices he had been defeated for, nor in what part of the county, but it does clearly appear that he was chairman of the board of county commissioners and McGillis sheriff of the county at the time they were claiming to be without political or other prestige. The statements of Dullam's affidavit are immaterial, and those of the thirty citizens cannot be considered because we do not know, and have no means of knowing what they contained.

The order denying the application of the Attorney General recites that it was entered upon the affidavits of Andrew Miller on behalf of the state, and those of McGillis, Patterson and Dullum, on behalf of the defendant, and makes no reference to the court having considered any other evidence or facts. The return is most carefully and ingeniously drawn, and is in the nature of a special plea. The quotations from the affidavits submitted by the defense in a very large degree evade the issue. As I have previously indicated, they are largely devoted to allegations that the parties named have not at all times for many years been engaged in violations of the law, or that their influence is not the leading influence in the

town, or county, or that it has been exagerated by the Attorney General. If the judge of the district court was at liberty to consider his own knowledge of conditions, the order does not state that he did so, or disclose what his knowledge was other than as derived from the affidavits mentioned. I am strongly impressed that, when the Attorney General in his application makes out a case for the change of the place of trial of a criminal action, it is mandatory upon the court to grant it. The English authorities cited in the case of Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662, are not accessible, but the opinion in that case was written after a most careful and searching examination of all authorities bearing on the subject, and, if I read it aright, the Court there found that by the common law of England on the application of the Crown or the Attorney General a change of the place of trial was granted as of course. It also found that the common law was in force in such proceedings in this state except in so far as the procedure was regulated by statute. The statute does provide for an application by the state's attorney, but it does not tend to regulate the procedure on the application of the Attorney General. Section 10320, Revised Codes 1905, reads: "The procedure, practice and pleadings in the district courts in this state, in criminal action or in matters of a criminal nature, not especially provided for in this code, shall be in accordance with the procedure, practice and pleadings under the common law." The omission of the Legislature to make provision regarding the change in place of trial on application of the Attorney General doubtless occurred for the same reason that so few authorities are found relating to a change on his application. It is stated in the Barry Case at page 146, where it is said: "It is true that most of the reported cases on this subject are where the application was by the defendant. The reason for this is found in the fact that the Crown's right was an admitted one, whereas that of the defendant rested upon an exercise of the court's discretion, and the latter was therefore most frequently the subject of judicial inquiry. The Crown's right was seldom, if ever, challenged, and no case has been cited or found by us where it was denied." In this country the statutes of many of the states fully regulate the procedure. Likewise many of the statutes limit the right to a change of the place of trial from the county where the offense is charged to have been committed to the defendant,

unless on the application of the state he waives his right to a trial in the county. For this reason a large proportion of the authorities cited in the majority opinion are not relevant. The Kent Case is an authority only when the defendant makes the application. There is a distinction where no specific regulation is imposed by the statute between applications on the part of the defendant and those made on behalf of the state. If the granting of the change on the application of the state rests solely within the discretion of the trial court, in many counties where criminal statutes are in disfavor and are ignored by the people and the officials the discretion of the trial judge in passing upon such applications is in practical effect nonreviewable, as follows from the majority opinion, and the state might as well abandon all attempts to protect the lives, the liberty or the property of its subjects in such counties and submit at once, and as gracefully as possible, to the domination of the criminal and lawless elements in some localities. I cannot agree that the rights of a single individual are any more sacred than are those of the people. The object of all statutes providing for a change of the place of trial is to secure justice and to guard against injustice, and it was never contemplated that the laws should be perverted to deny justice or protection to the sovereign people of the state by reason of local prejudice preventing the election of unbiased and fair officials whose duty it is to administer and execute the criminal laws. No court ought to place any such construction on our system of criminal procedure, unless the legislative branch of the government has made it clear by express language that it should do so, and even then its power might be questioned.

A statement in the paragraph of the return not heretofore referred to and not mentioned in the majority opinion requires notice. I quote: "That respondents are fully convinced and believe from their observation and knowledge of the situation existing in Burleigh county, N. D., wherein said action of the State of North Dakota v. Duncan McGillis is now pending, that both parties thereto may and will have a fair and impartial trial before the average jury that would be procured in such county." It is apparent that this statement is intended to bolster up and strengthen the conclusion of the district judge and the order denying the application for a change of the place of trial. It indicates that in reaching his

decision he did not confine himself to a consideration of the evidence submitted by the parties, but that he also proceeded upon the theory that he might legally consider his own knowledge of the situation existing in Burleigh county. I do not attempt to discuss the correctness of this position, because it is unnecessary to do so, but I am satisfied that if he has a legal right to take into consideration the results of his own observations and his own knowledge, and render a decision either wholly or in part based upon his observations and knowledge of conditions without disclosing, either in the order denying the application or in his return, the extent and character of such knowledge and observations, his order is as much nonreviewable as though the statute or Constitution had made it so in express language. This court can never in such case determine to what extent the decision of the trial court was predicated upon its undisclosed knowledge derived from sources independent of the evidence submitted by the parties. In most cases the trial court is bound to judge of the application as well as of the adequacy of the defense by a consideration of the evidence presented. See Ruff et al. v. Phillips et al., 50 Ga. 130; Scroggins v. State, 55 Ga. 380. And to admit that that court may take matters outside of the record, information obtained from whatsoever source, into consideration in arriving at its decision, or to hold in this case that there was not an abuse of discretion, when the fact that the court did take such matters into account, as disclosed by his return, is not to hold that a change of the place of trial rests upon the sound legal discretion of the lower court, but is, in effect, to hold that in every instance where that court says it took into consideration evidence outside of the record, and fails to disclose the substance thereof, its decision is final, and that this court in such instances ceases to be a court of last resort, but that the district court by its own act constitutes itself the final arbiter of the rights of the public. This court can in the presence of such a statement in a return never say that the trial court abused its discretion. Had the order denying the application or even the return included a statement of the facts claimed to be within the knowledge or observation of the trial court relevant to the matters at issue, a different question would be presented. It would then be possible for this court to pass upon the exercise of the discretion of the trial court, but if that court can, as in effect, follows from the majority opinion, determine such an application upon the knowledge

possessed by the judge, and not imparted to him officially or in the shape of evidence the nature of which is not disclosed in the record made, it may be seriously questioned whether in its supposed power to review the discretion of that court this court may not, and should not, call into exercise the result of its own observations, and take judicial notice of facts transpiring in Burleigh county relating to the trial of those charged with violating criminal laws, the rarity of convictions even on conclusive evidence, and of facts and matters occurring at and relating to such trials in that court which are, and have been for many years, notoriously public, and of the present and past attitude of the public toward the subject.

In conclusion I am satisfied that, if the writ carrying the change should only be granted on an abuse of discretion being shown, the return is inadequate and fails to meet the showing made by the Attorney General on behalf of the state, and that, in any event, on the application of the Attorney General and a case being made, the change should be granted as of course.

ELLSWORTH, J. (dissenting). The application presented by this case is that this court issue "a supervisory writ requiring the district court of Burleigh county and Honorable W. H. Winchester, as the judge thereof, to certify to this court the records, files, and proceedings in a certain criminal action entitled the State of North Dakota v. Duncan J. McGillis, to the end that said records, files, and proceedings may be reviewed by the Supreme Court, and justice may be done in the premises." In response to an order to show cause issued from this court the respondents filed a return in which, after a lengthy showing directed entirely to the end that the Attorney General is not entitled to the writ applied for, they "protest that they shall not be required to transmit to this court, or be commanded to do so, all the pleadings, orders, affidavits and records in said action of the State of North Dakota v. Duncan J. McGillis and all the records of proceedings had in the said criminal action, or any of them, and ask that said application therefor be disallowed and dismissed."

In my view the only point presented to this court for decision is that of whether or not upon the application and showing made by the Attorney General the writ of certiorari should issue. The Attorney General does not make specific application for this writ; but it is apparent from his moving papers that the writ of certiorari is the only supervisory writ under which he can receive any relief

whatever. This being the case I think the application should be read as though it were expressly made for a writ of certiorari from this court to the district court of the Sixth judicial district. I believe that jurisdiction of this court to determine any of the points passed upon in the majority opinion is dependent entirely upon the writ and cannot be acquired by any other means. The moving papers, both of the Attorney General and of the respondents, are directed entirely to the point of whether or not the writ shall issue. The Attorney General applies for the issuance of a supervisory writ and the respondents protest against it, and direct their entire showing to the point that they should not be required to do the things that will be required of them in case the writ issue.

The majority opinion seems to proceed on the theory that an oral stipulation of counsel made on the hearing to the effect that the proceeding may be disposed of on its merits on the showing made dispenses with the necessity for the writ. This stipulation can have the effect of waiving the writ provided only that it appears the full purpose of the writ is accomplished by the return. It is apparent at a glance that such is not the case. Fragmentary excerpts from the record that was before the district court, together with the conclusions of persons interested in the outcome of this proceeding as to what the record contains and the legal construction to be placed on the statutes involved, cannot be said to bring before this court the evidential facts on which the district court acted. Yet the return contains only this as appears from the opinion of Judge SPALDING.

I regard it as a matter of the highest importance that this court in deciding any of the very important questions presented upon this proceeding should have before it the entire record acted upon by the judge of the district court. Further than this, I believe that without such record this court is without jurisdiction to make any order in any manner affecting the ruling of the judge of the district court, whether he has regularly pursued the authority of such court or not. I can think of no reason deserving of the slightest weight why questions affecting the sovereignty of the state should be disposed of upon an incomplete, mutilated or imperfect record when this court has full power by the issuance of a prerogative writ to bring the entire record before it.

So far as the question may be properly considered, as to whether or not a judge of the district court is vested with a discretion authorizing him to deny a change of venue in a criminal case when application is made therefor by the Attorney General, as is shown to have been made in this case, I fully concur in the conclusions reached by Judge SPALDING. If such discretion is conceded to exist, however, upon the question of whether or not the district court abused its discretion in denying a change of the place of trial in the case of State v. McGillis, I am of the opinion that this court is precluded from taking any action whatever by reason of the fact that it has not before it the showing made to the district court. The application of the Attorney General upon its face discloses a state of facts which unquestionably authorizes this court to issue a writ that will enable it to fully review these interesting and important questions, and in my opinion the writ of certiorari should issue.

(122 N. W. 1111.)

NOTE.

Affidavit for change of venue must state facts not conclusions. Ter. v. Egan, 3 Dak. 119, 13 N. W. 568; State v. Chapman, 1 S. D. 418, 47 N. W. 411; see also State v. Palmer, 4 S. D. 546, 57 N. W. 490. A trial does not begin until a jury is impanneled; and a change of venue may be had at any time before then. State v. Kent, 5 N. D. 516, 67 N. W. 1052. Relying on verbal promise of attorney, and allowing time to answer to expire, precludes change of venue, 8 S. D. 11, 65 N. W. 34. Change of venue in civil action for convenience of witnesses, may be granted on application of one co-defendant the other not objecting. Fletcher v. Church, 11 S. D. 537, 78 N. W. 947. See also Small v. Gilruth, 8 S. D. 287, 66 N. W. 452. Need not send to adjoining county whose courthouse is nearest. Waldron v. Evans, 1 Dak. 11, 46 N. W. 607. Judge not limited to adjoining counties. Murphy v. District Court, 14 N. D. 542, 105 N. W. 738. Duty of selecting place of trial is with the judge in the exercise of a sound discretion. Murphy v. District Court, 14 N. D. 542, 105 N. W. 728; Zinn v. District Court, 17 N. D. 135, 114 N. W. 472. Where discretion is vested in the trial judge his act will be reviewed only for abuse, Murphy v. District Court 14 N. D. 542, 105 N. W. 728. Order for change of venue is appealable. Robertson Lumber Co.

v. Jones, 13 N. D. 112, 99 N. W. 1082. Facts sufficient to order change. Id. The "right to trial by jury" is subject to change of venue at the instance of the state. Barry v. Truax, 13 N. D. 131, 99 N. W. 769. Statute authorizing a change of venue at the instance of the state is constitutional. Barry v. Truax, 13 N. D. 131, 99 N. W. 769; Zinn vs. District Court, 17 N. D. 135. Change of venue in justice court cannot be had after overruling of demurrer. Walker v. Maronda, 15 N. D. 63. State may have change of venue under the same circumstances as defendant. Zinn v. District Court, 17 N. D. 135; 114 N. W. 472.

AMELIA HANSON, v. MARTIN SVARVERUD, HANS SVARVERUD, AND ANDREW SVARVERUD.

Opinion filed March 11, 1909.

Statute of Frauds — Pleading — Presumption of Writing.

1. Where a contract within the statute of frauds is declared on, the court will presume that it was in writing, unless the complaint shows that it was not.

Pleading — Allegation of Ownership — Possession.

2. An allegation in a complaint that a grantor in a deed was in possession of the land conveyed when the deed was executed and delivered, and thereafter, is sufficient as an allegation of the ownership of the land by the grantor when the deed was delivered.

Trusts — Constructive Trusts — Family Relation — Fraud.

3. A complaint alleging that a deed, absolute in form, from parents to their sons was executed solely in reliance on the confidence existing between them and their sons, and in reliance on their sons' promise to accept the deed in trust for the use of the grantors while they lived, and after their death to convey the land equally among all the children of the grantors, states a cause of action for declaring the deed to have been executed in trust for said purpose, and a court of equity will enforce the promise, as the refusal to carry it out is constructively fraudulent.

Constructive Fraud.

4. In such case the agreement is enforced as based on the confidence imposed, which makes the refusal to comply with the contract a constructive fraud.

Same.

5. Under such circumstances, an allegation of actual fraud is not essential, as the refusal to comply with the agreement is constructively fraudulent, in view of the alleged confidential relations.

Same.

6. Where the refusal of a grantee to carry out the terms of a trust agreement in reference to conveying real estate is actually or constructively fraudulent, a court of equity will enforce the agreement, although the same is not in writing.

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

Action by Amelia Hanson against Martin Svarverud and others. Judgment for defendants, and plaintiff appeals.

Reversed and remanded.

Rourke & Kvello, for appellant.

The question of the statute of frauds cannot be raised by demurrer. Broder v. Conklin, 19 Pac. 513; McDonald v. Association, 51 Cal. 210; Bigelow v. Sanford, 57 N. W. 1037; Brison v. Brison, 17 Pac. 689; Whiting v. Gould, 2 Wis. 552.

A breach of confidence is constructively fraudulent, and gives rise to a constructive trust. Sherman v. Sandell, 39 Pac. 797; Bartlett v. Bartlett, 19 N. W. 691; Brison v. Brison, supra; Bowler v. Curler, 37 A. S. R. 501; Athrens v. Jones, 62 N. E. 666; Larmon v. Knight, 29 N. E. 1116; Newis v. Topfer, 96 N. W. 905; Hayne v. Herman 32, Pac. 171; Alliniz v. Casenave, 27 Pac. 521.

T. A. Curtis, for respondent.

Deed from a parent to a child will always be presumed free from suspicion. Millican v. Millican, 24 Tex. 426; Olephant v. Liversidge, 30 N. E. 334; Burt v. Quisenberry, 24 N. E. 622; Brauland v. Bradley, 2 Smale & G. 339; Yeakel v. McAtee, 27 Atl. 277.

Breach of contract in the absence of fraud will not create a constructive trust. Lotta v. Kolbourn, 150 U. S. 524, 14 L. Ed. 201; Piedmont Land Impt. Co. v. Piedmont Foundry Co., 96 Ala. 389; Hammelton v. Downer, 152 Ill. 651, 38 N. E. 733; Minot v. Mitchell, 30 Ind. 228, 95 Am. Dec. 685; Acker v. Priest, 61 N. W. 235; Dunn v. Zwilling, 62 N. W. 746; McClain v. McLain, 10 N. W. 333; Blount v. Carroway, 67 N. Car. 396.

MORGAN, C. J. This is an action for an accounting by the defendants, and in addition to an accounting the plaintiff asks to have a certain deed adjudged to be a trust deed. The facts stated in the complaint are, in substance, as follows: That the plaintiff and the defendants are the children and sole heirs at law of Andrias P. Svarverud and Helene Svarverud who, on October 21, 1892, conveyed to Hans Svarverud and Andrew Svarverud, two of the above-named defendants, the lands which are involved in this action, by a deed absolute in form. That said conveyance, although absolute in form, was made in trust for the grantors. That the grantees were to pay to the grantors during their lifetime the net proceeds of the lands, and after the death of either of the grantors the proceeds were to be paid to the survivor, and after the death of both grantors the lands were to be equally divided and conveyed to the four children of the grantors. The allegations of the complaint as to the conveyance and the purposes thereof are set forth in the following language: "That the said Andrias P. Svarverud and Helene Svarverud were moved and induced to convey the above-described land solely and only by reason of the confidence they had in the defendants, Hans Svarverud and Andrew Svarverud, and because of the promise, then and there made by the said defendants Hans Svarverud and Andrew Svrverud that they would pay the said net proceeds derived from the operation of said lands to the said Andrias P. Svarverud and Helene Svarverud for their maintenance and support during their lifetime, and after their death to divide the said land equally among the four children of the said Andrias P. Svarverud and Helene Svarverud." The complaint further alleged that there was no consideration for the deed, and that the consideration of $2,000 expressed therein has never been paid, and was not intended to be paid. The complaint alleges, further, that Andrias P. Svarverud died on the 27th day of June, 1902, and that the said Helene Svarverud died on the 25th of October, 1906, and that from the time of the giving of the said deed, up to the 27th day of June, 1902 the said Andrias P. Svarverud remained in possession and control of the premises, and exercised supervision over the same, and received the rents and profits from said lands, pursuant to the agreement between the grantors and the grantees in said deed. The defendants Hans Svarverud and Andrew Svarverud have been in possession and occupation of said lands, and the whole thereof, from the death of the said Andrius P. Svarverud up to the commencement of this action. That the reasonable value

of the use of said premises from the 27th day of June, 1902, to the 25th day of October, 1906, is the sum of $500 per annum. The said defendants, it is alleged, have never fully accounted for the proceeds of said lands, and have refused to convey to the plaintiff an undivided one-fourth share of said lands in pursuance of said agreement. The relief demanded is that said deed be declared a trust deed, and an accounting be had between said defendants Hans Svarverud and Andrew Svarverud, and the plaintiff, Amelia Hanson, and Martin Svarverud. The defendants demurred to the complaint on the ground that the facts stated therein do not constitute a cause of action. The trial court sustained the demurrer, and the plaintiff has appealed from the order sustaining the same.

It is first claimed that the complaint fails to state that the grantors in the deed, being Andrias P, Svarverud and Helene Svarverud, were the owners of the land when they conveyed the same to the defendants, and entered into the agreement with reference to said lands. There is no direct allegation of ownership in the complaint, but facts are stated therein from which a presumption of ownership arises. The fact that the grantors were in possession of the land when the deed was executed and delivered, and remained in such possession until the death of Andrias P. Svarverud, is shown by the complaint. We deem these allegations of possession sufficient as allegations of ownership. See section 7317, subds. 11, 12, Rev. Codes 1905. It is also claimed that the demurrer was properly sustained, for the reason that the complaint contains no allegations of fraud. A trust relationship may be enforced, and the refusal to enforce it declared constructively fraudulent, although no fraudulent conduct or acts are shown as a fact. Implied or constructive fraud is sufficient to warrant a court of equity in declaring a deed absolute in form to be in trust for the grantee, or in trust for some other person at the grantor's request. A court of equity will enforce a trust agreement under such circumstances, although the requirements of the statute of frauds have not been complied with. The agreement is enforced because it would be inequitable and unjust to permit the grantee to profit by his wrongful conduct in refusing to execute and carry out the terms of his agreement.

In Beach on Trusts and Trustees, § 225, the rule is stated as follows: "Equity will make a person the constructive trustee for property which he has acquired by fraud, wherever it would be in conflict with justice to permit him to hold it in his own right. Where

a person obtains legal title to land by imposition and fraud, and under such circumstances that he ought not in equity to hold and enjoy the beneficial interest, a court of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances, and declare the offending party a trustee of the legal title, and order him to hold it, or execute it, in such manner as to protect the rights of the defrauded party. * * * Trusts in real property arising from fraud, actual or constructive, are not within that part of the statute of frauds which requires the trust to be declared by a written instrument; but such trusts arise by operation of law, and may be proved by parol evidence." In section 226 the same author says: "Where, as a part of the original contract through which he becomes the absolute grantee, but is in fact constituted merely a trustee, he agrees to execute his declaration of the trust, and preserve the same for the plaintiff's use, but fraudulently fails and refuses so to do, the terms of such trust may be proved by parol, notwithstanding the statute of frauds. If fraud, actual or constructive, tainted the original contract, parol evidence is admissible, notwithstanding the statute." In Cardiff v. Marquis, 114 N. W. 1088, a similar question was before this court. A deed absolute in terms was held to be in trust for the grantee's daughter, under a parol contract. In that case the trust agreement was upheld on account of the relations of confidence existing between the grantee and his daughter, and because it would be an injustice to the daughter not to enforce the contract, and would be a constructive fraud upon her which a court of equity would not sanction, although the agreement rested wholly in parol.

The respondent claims that no confidential relations are presumed to exist between parent and child to the extent that a deed from parent to child can be presumed fraudulent. Under what conditions and circumstances confidential relations will be presumed between parties we need not pass upon in this case. The confidential relation is alleged as a fact in the complaint, and, so far as the demurrer is concerned, is deemed to be a fact. Respondent claims that the complaint states only conclusions, and not facts, in alleging that relations of confidence existed between the parties in this case. The allegations are sufficient, although attacked by demurrer. They show that the conveyance was executed in reliance upon the fact of confidence. See Brison v. Brison, 90 Cal. 323, 27 Pac. 186. In that case the transaction was held constructively fraudulent.

The complaint alleged actual and constructive fraud. There was no finding upon the question of actual fraud, but the facts were nevertheless held to render the contract constructively fraudulent. In the case at bar, the complaint states facts showing that the grantors had confidence in their two sons, and, relying upon such confidence, conveyed their land to them in trust for the grantors as a matter of fact while they lived, and after their death the land was to be equally divided between all their children. It would be giving effect to a constructive fraud to permit the defendants to hold the land under such circumstances, although the contract would not be enforceable in a court of law. Section 4821, Rev. Codes 1905, provides that no trust in real property shall be valid unless created or declared by writing, or by operation of law. That section reads as follows: "No trust in relation to real property is valid unless created or declared: (1) By a written instrument, subscribed by the trustee or by his agent thereto authorized in writing; (2) by the instrument under which the trustee claims the estate affected; or (3) by operation of law." In giving effect to a similar statute the Supreme Court of California, in Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, said: "Under these provisions there can be no doubt but that the defendant's promise to convey was invalid, and could not be enforced. It is to be observed, however, that the statute excepts from its operation such trusts as arise 'by operation of law.' Substantially the same exception is in the English statute of frauds, and in the statutes of most of the United States. And the universal construction given to it is that it excepts from the operation of the statute, among other things, trusts which arise from fraud, actual or constructive, or, as they are termed, 'constructive trusts.' It is no longer worth while for any counsel to argue against this construction of the statute. The only point which is open to debate in cases of this character is whether the facts show such a case of fraud as falls within the exception. Such fraud may be either actual or constructive; and, in our opinion, both exist in the case before us." In addition to the cases cited in Cardiff v. Marquis, supra, the following are in point: Ahren v. Jones, 169 N. Y. 555, 62 N. E. 666, 88 Am. St. Rep. 620; Larmon v. Knight, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229; Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905; Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171. We think the allegations of the complaint in this case sufficient to allege a constructive trust.

The complaint is silent upon the question whether the trust agreement was in writing or oral. Under such circumstances the complaint is not subject to demurrer, and the agreement will be presumed to be in writing. The parties will be presumed, in the absence of a contrary allegation or showing, to have entered into a binding agreement. Conceding, for the purpose of this case only, that the complaint may be attacked by demurrer because it fails to show that the provisions of the statute of frauds were not complied with, the demurrer should have been overruled on this ground also. See 9 Enc. Pl. & Pr. p. 701.

The order sustaining the demurrer is reversed, and the cause remanded for further proceedings. All concur.

(120 N. W. 550.)

POIRIER MANUFACTURING COMPANY v. A. R. KITTS.

Opinion filed March 12, 1909.

Words and Phrases — Conditional Sale Defined.

1. A "conditional sale" is a sale in which the transfer of the title in the thing sold to the purchaser, or his retention of it, is made to depend upon the performance of some condition.

Sales — Conditional Sale — Distinguished From Agency Contract.

2. Contract examined and *held* to be a conditional sale contract, and not an agency contract.

Same — Conditional Sale — Breach — Election of Remedies.

3. The vendor, on breach of the terms of the conditional sale contract by the vendee, may elect to recover possession of the property, or waive his title, and sue for the value or selling price, but he cannot do both.

Appeal and Error — Points Not Raised Below.

4. The Supreme Court will not consider, as a ground for reversal of the judgment of the trial court and its order denying a new trial, a point not raised in the trial court.

Sales — Rescission — Unconditional Offer.

5. An offer to rescind a contract of sale on the ground of a breach of warranty, coupled with conditions as to payment of freight and storage, and to return only a portion of the property purchased, is not such an unconditional offer to rescind as can be sustained to defeat an action for the purchase price.

Sales — Affirmance by Buyer.

6. The facts disclosed in the record in this case show an affirmance of the contract by the appellant.

(Syllabus by the Court.)

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

Action by the Poirier Manufacturing Company against A. R. Kitts. Judgment for plaintiff, and defendant appeals.

Affirmed.

Townley & Frankberg and *Stambaugh & Fowler*, for appellant.

Turner & Wright, for respondent.

SPALDING, J. This is an appeal from an order denying a new trial, and from a judgment entered in favor of the plaintiff on motion for a directed verdict. The complaint alleges the sale and delivery by the plaintiff to the defendant of merchandise consisting of seeding and drilling machinery, for which it is alleged the defendant agreed to pay $997.50. The answer is very lengthy. It is unnecessary to quote it, and we shall only refer to it briefly. It denies the sale of the machinery and the indebtedness, and pleads a contract in writing relating to the goods in question, the terms of which are referred to below. It alleges that defendant received from plaintiff, accepted and paid the freight on, 10 drills, 8 of which he was unable to sell on account of defective construction, etc.; that he received and holds $225 for plaintiff on account of the sale of 2 of said drills. The defendant then attempts to plead a counterclaim growing out of an alleged breach of warranty by reason of which he was damaged, in his effort to make the drills work, $50, and he also attempts to plead a rescission of the contract. To this answer and counterclaim the plaintiff interposed a general denial. The case was called for trial, and the size and kind of 10 drills received by defendant from plaintiff were shown, and the contract between the parties was offered in evidence, and received over the objection of the defendant, whereupon the plaintiff rested. The plaintiff then objected to the introduction of any evidence on the part of the defendant, substantially upon the grounds that the answer did not state facts showing a rescission of the contract, inasmuch as it did not show that all the property had been returned, or offered to be returned, and that the defendant had sold and used a part of it,

that the allegations of damages from breach of warranty were insufficient and an improper rule for damages pleaded, and that the answer failed to state facts constituting damages by way of time and money expended. The court overruled the objection of the plaintiff as to the $50 item of damage, but sustained it as to the balance, whereupon the defendant proceeded to offer proof. The court asked his attorneys if they wished to amend their answer; and, on their replying in the negative, the plaintiff's counsel submitted a motion to direct a verdict for plaintiff in the sum of $1,071.21. This motion was granted, and a verdict returned accordingly.

Three questions are presented by the assignments of error, and the brief and argument of the plaintiff, for our consideration. The first relates to the construction of the contract in question. It is urged by the appellant that it is a contract of agency, and that therefore it was improperly received in evidence, and forms no basis for the judgment. This requires us to consider the terms of the contract, and what its legal effect is when taken as a whole. It may be an agency contract, although the word "agent," or "agency," was not employed in it anywhere. On the other hand, it may be employed, and still the contract not create an agency. The word "agent" appears in only one place, and the construction which appellant relies upon he attempts to gather from its use in that instance. The respondent agrees to do certain things named and "to fill orders promptly so long as it has machines on hand and transportation can be procured, and to appoint no other agent for said territory; provided the party of the second part fully performs the foregoing stipulations and agreements." The word "agent" is employed in more than one sense, and it is frequently used to indicate that a merchant or dealer has the exclusive right to sell a specified article in certain territory, when in fact no agency exists. The dealer in no sense represents the manufacturer, but simply buys from him in the regular course of trade, and sells the specified article to the public. The public in such case, and sometimes the dealer himself, frequently refers to this as an "agency" for the article. Almost anyone can call to mind instances of this nature in everyday experience, and in every village and city. We are of the opinion that this is all that is meant by this provision in the contract. The appellant was given the exclusive right, as long as he complied with the conditions, to handle machinery of respondent's manufacture within the territory named. The agreement to appoint no other

agent means this, and nothing more. This is made clear by reading the contract entire, and considering the other provisions which it contains, and which are inconsistent with the theory of appellant. The appellant is authorized to sell the grain-seeding machinery manufactured by respondent in certain designated territory. The appellant agrees to purchase of respondent machinery of its manufacture to supply his trade, at prices shown on the list. The terms of payment are set out in the contract, and it provides that if the terms of payment are not complied with, and appellant does not purchase machinery of respondent for his entire trade in the territory named, the whole list is to immediately fall due, meaning, we take it, that the term of credit for the articles purchased shall immediately expire. Respondent agrees to deliver the goods purchased of it in specified quantities f. o. b. cars at its place of business, and at other places on terms named, and fill all orders promptly, and warrants its goods to do as good work as any of the kind, but only against breakage caused by manifest defect in material in the year in which sold, and that credit for parts to replace defective parts will be allowed only upon certain conditions, and retains the right to cancel the contract whenever dissatisfied with the party of the second part. The appellant agrees to accept the goods ordered when shipped, or to pay liquidated damages for refusing to do so, and to look to carriers for loss for damage to goods, and to sell or handle no other make of such machinery, and to make settlement on the 1st of May by note. And it is agreed that on certain conditions the time of payment shall be extended, and that settlement of accounts shall be consummated, only by written approval of an officer of the respondent at Gladstone, Minn. The contract also contains this provision: "In all cases the title and ownership of goods covered by this contract shall remain and be vested in the party of the first part, until sold by the party of the second part in the regular course of business, or settled for as above."

We are unable to construe this contract as a whole, which is the only rule for construing it, except as a conditional sale contract. "A conditional sale is a sale in which the transfer of title in the thing sold to the purchaser, or his retention of it, is made to depend upon the performance of some condition." 6 Am. & Eng. Enc. of Law, 437; Morrison Mfg. Co. v. Fargo Storage Co., 16 N. D. 256, 113 N. W. 605, 12 L. R. A. (N. S.) 820; note, 94 Am. St. Rep. 209. The vendor under contract of conditional sale may elect

whether he will recover possession of the property sold in which he still retains title, or waive his title and sue for the value or selling price, but he cannot do both. The respondent elected to bring suit for the purchase price. Dowagiac Mfg. Co. v. Mahon & Robinson, 13 N. D. 516, 101 N. W. 903; 6 Am. & Eng. Ency. of Law, 480, and cases cited; Button v. Trader et al., 75 Mich. 295, 42 N. W. 834; Heller et al. v. Elliott, 44 N. J. Law, 467; Parke & Lacy Co. v. White Lbr. Co. et al., 101 Cal. 37, 35 Pac. 442; Truax v. Parvis, 7 Houst, (Del.) 330, 32 Atl. 227; Bailey v. Hervey, 135 Mass. 172; Morris v. Rexford, 18 N. Y. 552; Alpha Checkbrower Co. v. David Bradley & Co., 105 Iowa, 537, 75 N. W. 369; Turk v. Carnahan, 25 Ind. App. 125, 57 N. E. 729, 81 Am St. Rep. 85.

It is urged as a reason for reversing the judgment of the lower court that this action was brought prematurely; that nothing was due until a settlement under the terms of the contract. We are not at all certain that it was incumbent upon the respondent to secure a settlement or even attempt to do so, before bringing this action, but in any event the point does not appear from the record to have been raised in the trial court, and it cannot therefore be considered on this appeal. McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243; Van Gordon v. Goldamer, 16 N. D. 323, 113 N. W. 609.

The third question discussed relates to the rescission of the contract by the appellant. The trial court evidently held that the answer of the defendant did not show a valid rescission of the contract. In this it was right. Appellant discusses this question very briefly. The ground on which he claimed the right to rescind was that the machinery purchased did not fill the warranty. He attempted to plead a breach of such warranty, but the trial court struck out that part of the answer relating thereto. The rule in both Minnesota and this state is that a breach of warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended to operate as a condition. McCormick v. Fields, 90 Minn, 161, 95 N. W. 886; Lynch v. Curfman, 65 Minn. 170, 68 N. W. 5; Rev. Codes N. D. 1905, § 5378. The answer alleges that at certain times during the spring and selling season of 1905 defendant gave plaintiff due notice of the defective condition of the machinery purchased, and at that time, and soon thereafter, offered to deliver the same to plaintiff, and here and now offers said machinery to plaintiff, and to make full and complete and just settlement to plaintiff on account of said drills and seeding machinery

under and by virtue of the terms of said contract, and that he now holds said eight drills and seeding machinery for plaintiff at Fergus Falls, Minn, subject to freight and storage charges. These were not such offers as create a rescission of the contract. They were not unconditional. The acts of the defendant, whether the drills sold by him were sold prior or subsequent to the offers to rescind, which is not disclosed by the record, affirmed the contract. Owens Co. v. Dougherty, 16 N. D. 10, 110 N. W. 78.

The judgment and order of the district court is affirmed. All concur.

(120 N. W. 558.)

LUCY A. HOLCOMB, GUARDIAN OF EMRA J. HOLCOMB, MINOR, v. EDWARD J. HOLCOMB, ADELIA BUTTON, BESSIE HOLCOMB AND EMRA J. HOLCOMB, AND EDWARD J. HOLCOMB, ADMINISTRATOR OF THE ESTATE OF ALANSON L. HOLCOMB, DECEASED.

Opinion filed March 18, 1909.

Homestead — Who Entitled — Head of Family — Status of Divorced Husband.

1. By section 5049, Rev. Codes 1905, the homestead of every head of a family, not exceeding a certain value and a designated extent of territory, is made exempt from judgment lien and from execution or forced sale, except as otherwise specially provided, and by section 5070 the phrase "head of a family" is defined to mean: "(1) The husband or wife when the claimant is a married person. * * * (2) Every person who has residing on the premises with him or her and under his or her care and maintenance, either: (a) His or her child or the child of his or her deceased wife or husband, whether by birth or adoption. (b) A minor brother or sister or the minor child of a deceased brother or sister. (c) A father, mother, grandfather or grandmother. (d) The father or mother, grandfather or grandmother of a deceased husband or wife. (e) An unmarried sister or any other relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves."

Held, that a divorced husband who, by the decree of divorce, has been deprived of the custody of his minor children, and who, by such decree, is required to pay to the mother a stated sum for the support and education of such children, which allowance is, by the decree, made a lien upon the real property theretofore used as the homestead, is thereafter no longer the head of a family, and is not entitled to a homestead exemption when he does not have residing

on the premises with him and under his care and maintenance one or more of the persons mentioned in subdivision 2, section 5070, aforesaid.

Homestead — Death of Owner — Minor Child of Divorced Parent.

2. Section 5071, Rev. Codes 1905, provides that "upon the death of a person in whom the title to real property constituting a homestead as defined in this chapter is vested a homestead estate in such real property shall survive, descend, and be distributed to the persons and in the order following: (1) To the surviving husband or wife for life; or (2) there being no surviving husband or wife, to the decedent's minor child or children until the youngest attains majority; or (3) the surviving husband or wife dying before, then thereafter to the decedent's minor child or children until the youngest attains majority." *Held,* construing the above section, that when the decedent, at the time of his death, was not entitled to a homestead exemption, no homestead estate can survive, descend, or be distributed to any of the persons therein mentioned. Hence the district court under the facts properly reversed the order of the county court granting the petition of appellant to set aside certain real property therein mentioned as the homestead of decedent's minor child.

(Syllabus by the Court.)

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

Emra J. Holcomb, a minor, through his guardian, Lucy A. Holcomb, petitioned the county court to set apart to himself premises as the homestead of Alanson L. Holcomb, deceased. The petition was granted by the county court, and Edward J. Holcomb and others appeared to the district court, where such order was reversed, and Emra J. Holcomb appeals.

Page & Englert, for appellant.

Right of homestead survives a divorce and remains with the holder of the record title. Biffle v. Pullman, 21 S. W. 450; Blandy v. Asher, 72 Mo. 27. Redfern v. Redfern, 38 Ill. 509; Stahl v. Stahl, 2 N. E. 160; Roberts v. Moudy, 46 N. W. 1013, 27 Am. St. Rep. 426; Zapp v. Strohmeyer, 13 S. W. 9; Hall v. Fields, 17 S. W. 82; Byers v. Byers, 21 Ia. 268; Woods v. Davis, 34 Ia. 264; Doyle v. Coburn, 6 Allen, 71; 21 Cyc. 598; 9 Enc. Law (2d Ed.) 859; 15 Enc. Law (2d Ed.) 556.

Divorced wife has no interest in homestead of divorced husband. Rosholt v. Mehus, 3 N. D. 513; 57 N. W. 783, 23 L. R. A. 239; Brady v. Kreuger, 66 N. W. 1083; Heaton v. Sawyer, 60 Vt. 495, 15

Atl. 166; Wiggen v. Buzzell, 58 N. H. 329; Stahl v. Stahl, 2 N. E. 160.

Children of a divorced parent inherit. Walker v. Walker, 54 N. E. 956.

Granting of divorce and custody of children does not affect the status of head of family. Byers v. Byers, 21 Ia. 268; Woods v. Davis, 34 Ia. 264; Zappas v. Strohmeyer, 13 S. W. 9; Hall v. Fields 17 S. W. 82; Blandy v. Asher, 72 Mo. 27; Philbrick v. Andrews, 35 Pac. 358; Biffle v. Pullman, 21 S. W. 450; Roberts v. Moudy, 46 N. W. 1013, 27 Am. St. Rep. 426; Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

Homestead once acquired is not lost by death, absence or desertion, without husband's fault, of wife and children. Palmer v. Sawyer, 103 N. W. 1088; Silloway v. Bronen, 12 Allen 30; Stults v. Sale, 92 Ky. 5, 17 S. W. 148, 36 Am. St. Rep. 575, 13 L. R. A. 743.

Divorce does not affect child's rights of homestead. Woods v. Davis, 34 Ia. 264.

Herman Winterer and *D. S. Ritchie* for respondents.

Residence together as a family and occupancy of homestead are essential to vest a homestead right. Givens v. Hudson, 64 Tex. 471; Keyes v. Hill, 30 Vt. 759; Petty v. Barrett, 37 Tex. 84; Burns v. Jones, 37 Tex. 50; Roco v. Green, 50 Tex. 483; Hoffman v. Neuhaus, 98 Am. Dec. 492; Barbee v. Hayatt, 31 Pac. 694; Dayton v. Donart, 22 Kan. 184; Gatton v. Tolley, 22 Kan. 472; Stratton v. McCandliss, 4 Pac. 1018; Hafer v. Hafer, 6 Pac. 537; Hafer v. Hafer, 13 Pac. 821; Vining v. Willis, 20 Pac. 232; Vandiver v. Vandiver, 20 Kan. 501; Turner v. Turner, 54 Am. St. Rep. 110; Tillar v. Bass, 57 Ark. 179; Aucker v. McCoy, 56 Cal. 524; Pfister v. Dascet, 10 Pac. 117; Tromans v. Mahlman, 27 Pac. 1094; Oliver v. Snowden 43 Am. Rep. 338; Gwans v. Dewey, 47 Iowa, 414; First Nat. Bank v. Hollingsworth, 43 N. W. 536; Maguire v. Hanson, 74 N. W. 776; Lee v. Miller, 11 Allen 37; Tillotson v. Millard, 82 Am. Dec. 112; Kelley v. Dill, 23 Minn. 23; Finnegan v. Prindeville, 83 Mo. 517; Power v. Burd, 43 Pac. 1094; Currier v. Woodward, 62 N. H. 63; White v. Danforth, 98 N. W. 136; Kramer v. Lamb, 87 N. W. 1024.

It must be family occupancy, not of owner alone. Waples on Homesteads and Exemptions, 181; Hiatt v. Bullene, 20 Kan. 557;

Tarrant v. Swain, 15 Kan. 146; Farlan v. Sook, 26 Kan. 397; Ashton v. Ingle, 20 Kan. 670; Koons v. Rittenhouse, 28 Kan. 359; Goodloe v. Dean, 81 Ala. 479; Currier v. Sutherland, 54 N. H. 475.

Divorce determines homestead rights. Rosholt v. Mehus, 3 N. D. 513; Heaton v. Sawyer, 60 Vt. 495, 15 Atl. 166; Stahl v. Stahl, 2 N. E. 160; Wiggin v. Buzzell, 58 N. H. 329; Gilley v. Gilley, 79 Me. 292.

Homestead laws are to guarantee the home against necessity, improvidence and importunity of creditors. In re Fath's Estate, 64 Pac. 995; Keyes v. Cyrus, 34 Pac. 722; In re Ruckingham, 102 Fed. 972; Moran v. King, 49 C. C. A. 578; In re Stone, 116 Fed. 35; White v. Swann, 82 Am. St. Rep. 282; In re Adams' Estate, 57 Pac. 569; Zachman v. Zachman, 66 N. E. 256; Fullerton v. Sherrill, 87 N. W. 419; Koster v. Gellen, 82 N. W. 823; Brown v. Hughes, 94 N. W. 438; Blumer v. Albright, 89 N. W. 809; Loessin v. Washington, 23 Tex. Civ. App. 515.

FISK, J. This is an appeal from a judgment of the district court of Barnes county, and comes here for trial de novo under the provisions of section 7229, Rev. Codes 1905.

The facts are not in dispute, and are briefly as follows: Alanson L. Holcomb, deceased, and Lucy A. Holcomb, were husband and wife. Emra J. Holcomb is the lawful issue of such marriage. In the fall of 1898 the said Alanson L. Holcomb and his wife, Lucy, together with their minor son Emra, went to reside upon the N. W. ¼ of section 10, township 142 N. of range 57 W., in Barnes county, which real property was owned by the husband. Said real property was the only real property owned by Alanson L. Holcomb, and the same was the homestead of himself and said family. In the spring of 1905 the mother, with the consent of her husband, took her said child to Oklahoma, where she was advised to go for her health, and remained until January 1906. During their absence, the husband and father remained in possession of the homestead. Upon her return from Oklahoma, and for reasons which it is unnecessary to mention, Lucy A. Holcomb commenced divorce proceedings against her husband, which resulted on April 10, 1906, in a judgment in her favor divorcing her from her said husband and by such judgment she was awarded the custody of such minor child, and Alanson L. Holcomb, the defendant therein, was adjudged to pay the sum of $100 per annum for the support and education of said minor child, which allowance was made a lien upon said land. A few days after

the judgment aforesaid was entered, Alanson L. Holcomb died intestate. At the time of his death he was the fee owner and in possession of said premises. In the course of the administration of his estate, and on June 16, 1906, Emra J. Holcomb, through his legally appointed guardian Lucy A. Holcomb, petitioned the county court to set apart said premises as the homestead of the deceased to Emra J. Holcomb, such minor child. Such petition was by the county court granted, and an order made accordingly. From this order an appeal was prosecuted to the district court, where such order was reversed, and it is from the judgment reversing such order that this appeal was taken.

Claims aggregating a large amount were filed against said estate by creditors, and the sole question involved relates to the respective rights of such creditors and certain legal heirs other than Emra J. Holcomb and the homestead claim of such minor child. The latter's rights are wholly dependent for their validity upon the question whether Alanson L. Holcomb at the time of his death possessed a homestead right in said premises. It is a self-evident proposition that, if the father at the time of his death had no homestead right in the premises, the child can have none after his father's death. The son, in other words, could acquire no rights not vested in his father at the time of his death. The pertinent inquiry, therefore, is: Did Alanson L. Holcomb, after the entry of the judgment of divorce, continue to possess his homestead right in said premises? If not, the judgment appealed from was clearly correct. By section 208 of the Constitution the legislative assembly is commanded to recognize the right of the debtor to enjoy the comforts and necessaries of life by wholesome laws exempting from forced sale to all heads of families a homestead. Pursuant to this mandate, the Legislature, by the enactment of Section 5049, Rev. Codes 1905, has exempted the homestead of every head of a family not exceeding in value $5,000, and by section 5070, Rev. Codes 1905, the phrase "head of a family" is defined as including "(1) the husband or wife when the claimant is a married person; but in no case are both husband and wife entitled each to a homestead under the provisions of this chapter. (2) Every person who has residing on the premises with him or her and under his or her care and maintenance, either: (a) His or her child or a child of his or her deceased wife or husband whether by birth or adoption; (b) a minor brother or sister or the minor child of a deceased brother or sister; (c) a father,

mother, grandfather or grandmother. (d) the father or mother, grandfather or grandmother of a deceased husband or wife; (e) an unmarried sister of any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves."

It will thus be seen that, to be entitled to the homestead right or exemption, the person must be the "head of a family," and, where such person is unmarried, he or she must have residing on the premises with him or her and under his or her care and maintenance one or more of the persons enumerated in subdivision 2, § 5070, Rev. Codes 1905, supra. By section 5071 it is provided that, "upon the death of a person in whom the title to real property constituting a homestead as defined in this chapter is vested, a homestead estate in such real property shall survive, descend, and be distributed to the persons and in the order following: (1) To the surviving husband or wife for life; or (2) there being no surviving husband or wife to the decedent's minor child or children until the youngest attains majority; or (3) the surviving husband or wife dying before, then thereafter to the decedent's minor child or children until the youngest attains majority." It is plain from the very language of the last section that no homestead estate can survive, descend, or be distributed to the persons therein mentioned if the person having the title to such real property is not entitled to a homestead right therein at the time of his or her death. By the judgment in the divorce action the family ties were severed, and Alanson L. Holcomb became a single person, and it is not contended that he thereafter had residing with him upon such land any of the persons mentioned in section 5070, Rev. Codes 1905. The custody of the minor child, Emra, was by the judgment, awarded to his mother, and provision was therein made for the support and education of such child. No disposition was made of the homestead by the decree, and hence under the decision in Rosholt v. Mehus, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239, it remained the property of Alanson L. Holcomb discharged from all rights or claims of the other party. From the fact that it remained the property of Alanson it does not follow that it remained his homestead, and under section 5070, supra, it could not so remain, as he was not the head of a family as therein defined. Regardless of what the rule may be in other states, it is very clear that under the provision of our Code relating to the homestead Alanson L. Holcomb, after the entry of

the decree of divorce and at the time of his death, possessed no homestead right in the premises, and hence no such right descended to his minor son, whose custody was awarded to the mother, and whose support and education was expressly provided for in such decree. We do not construe the opinion in Rosholt v. Mehus, supra, as announcing a contrary rule. In fact, the opinion in that case expressly cites with approval the cases of Wiggin v. Buzzell, 58 N. H. 329, Heaton v. Sawyer, 60 Vt. 495, 15 Atl. 166, and Biffle v. Pullman, 114 Mo. 50, 21 S. W. 450 which cases lend support to the views above expressed. See, also, Cooper v. Cooper, 24 Ohio St. 488.

Most of the authorities relied upon by appellant's counsel will be found, upon examination, not in point. They were decided under statutes different from our Code or the facts were different.

The conclusion which we have reached upon the first point presented renders a consideration of the other propositions unnecessary.

The judgment appealed from is affirmed.

MORGAN, C. J., and CARMODY, J., concur. SPALDING, J., being disqualified, took no part in the decision.

ELLSWORTH, J., (dissenting). Statutes such as are found in chapter 41 of our Civil Codes, including sections 5070 and 5071, referred to in the majority opinion in this case, having for their purpose the conservation of homes and the protection from dependence and want of those members of a family who are helpless or otherwise unprovided for, proceed from a wise, humane, and benevolent purpose on the part of the legislator, and should be construed by the courts in the same liberal and generous spirit in which they are ordained. These statutes, especially in their exemption feature, are remedial in character, and should be interpreted in the spirit that will best carry into effect the remedy designed by the legislator. "The policy of the homestead law is the conservation of homes for the good of the state. The mischief to be prevented by those laws is the breaking up of families and homes to the general injury of society and of the state. The remedy provided is the exemption of occupied family homes from the hammer of the executioner. Whether the exemption be only for the period of occupancy by the head of a family, or be extended during the life of his wife and the minority of his children, it is a remedy to be liberally accorded whenever

the intent of the Legislature is doubtful and the necessity of favoring or disfavoring a remedial provision is thus thrust upon the court." Waples on Homestead and Exemption, p 29. The immunities provided for in the homestead laws are not intended for or extended to one member of a family more than another. The "head of a family" stands as its representative in law, but the benefits extended to him in such relation are provided, not for his personal advantage, but for that of the family, and are received and held by him in trust for the good of every member. This is clearly recognized by the provision of our statute (section 5071) providing that upon the death of the person in whom the title to real property constituting a homestead is vested the homestead estate shall survive and descend to the surviving husband or wife, or, if there be no such surviving member, to the decedent's minor child or children until the youngest attains majority.

It is conceded by the majority opinion that until four days before his death Alanson L. Holcomb was the head of a family within the meaning of section 5071, and as such entitled to a homestead exemption in the property in question. He was at that time a married man and the father of a minor child dependent upon him for maintenance, although his wife and child were not actually residing at his place of abode. Their residence, however, was constructively there, and, if during this period he had died, there is no question but that a homestead estate in his land might have been claimed by the wife for her own benefit and the benefit of the child. If plaintiff was the head of a family at the time the divorce was granted to the wife, he did not during the life of the child cease to be such by reason of the divorce. By the divorce the marriage relation was dissolved, and the wife ceased to be a member of the family of which her husband was the head; but the mutual relation of Holcomb and the child was entirely unaffected. The child was not a party to the quarrel of its parents or to the divorce action, and could not by reason thereof be deprived of the measure of protection vested in Holcomb for the benefit of the family, children as well as wife. Holcomb under the decree of divorce was still liable for the payment of a specific sum to be used for the support of the child. This sum was not, however, "awarded" to the child as found by the district court in the sense that the child's right to parental maintenance was limited thereby. The award was only to the wife, and simply limited the claim of the wife upon the

husband for that purpose. If the wife should become unable to furnish it, Holcomb was still liable for such additional sum as would supply a full maintenance for the child. The father, having a minor child under his maintenance, was therefore clearly the head of a family within the definition of section 5070 as well before as after the divorce, unless it can be said that the child was not "residing on the premises with him." "Every person has in law a residence;" and "the residence of the father during his life and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor children." Rev. Codes 1905, § 12. The residence of the child by the provision of this statute being with the father could not be lost until another elsewhere was gained; and neither the child itself by its own act or by that of its guardian could change its residence. If before the divorce, while absent from her husband's residence in Oklahoma, the wife had died, the husband might still have claimed his homestead exemption as the head of a family; for the child, though actually with its mother in Oklahoma, was still constructively residing with him, and for its benefit, if not his own, he might still have claimed the protection of the homestead laws. Doyle v. Coburn, 6 Allen (Mass.) 71. The reasons for protecting the homestead rights where the marriage relation has been terminated by a divorce are as strong as when it has been dissolved by death. Zapp v. Strohmeyer, 75 Tex. 638, 13 S. W. 9. The relation of Holcomb to the property and to the child continued absolutely unaltered by the divorce. It is true the family relation was disturbed and broken by the divorce to the extent that the wife ceased to be a member of it; but his right to a homestead exemption in the property for the benefit of himself and his minor child still remained, and was in no sense lost or destroyed by the divorce. Biffle v. Pullman, 114 Mo., 50, 21 S. W. 450. If the right still continued in him after the divorce by express terms of the statute, it descended to the child at his death, and the homestead should have been set apart to the child upon proper application such as was made to and granted by the county court of Barnes county. A liberal construction of the law of our state providing for homestead exemption, keeping in view the remedy obviously intended by the Legislature, cannot, in my opinion, lead to a different result.

There is abundant authority for this conclusion. Walker v. Walker, 181 Ill. 260, 54 N. E. 956; Hall v. Fields, 81 Tex. 553, 17

S. W. 82; Woods v. Davis, 34 Iowa, 264; Seaton v. Marshall, 6 Bush (Ky.) 429, 99 Am. Dec. 683; Byers v. Byers, 21 Iowa, 268. The Supreme Court of Nebraska under a statute substantially analogous to our own in all particulars has held that a party standing almost precisely in the relation of Holcomb prior to his death to this property was entitled to a homestead exemption. Roberts v. Moudy, 30 Neb. 683, 46 N. W. 1013, 27 Am. St. Rep. 426.

These considerations impel me to a conclusion the opposite of that reached by my associates. In my opinion the decree of the district court vacating the order of the county court of Barnes county setting apart the homestead for the benefit of the minor child during its minority should be reversed, and the order of the county court restored and affirmed.

(120 N. W. 547.)

ELIZABETH COMFORD v. GREAT NORTHERN RAILWAY COMPANY, ET AL.

Opinion filed March 12, 1909.

Public Lands — Railroad Right of Way — Definite Location.

1. The grant of right of way and station grounds upon public lands of the United States to railroad companies, under the provisions of Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), becomes operative only when a railroad company, specially indicated as a grantee by compliance with section 1 of the act, has definitely located its right of way and station grounds adjacent thereto. Such definite location may be made, either by acts of the railroad company which operate as unmistakable evidence of appropriation, such as the construction of its railroad, station buildings, and other appurtenances, or by filing with the register of the land office for the district where the land is located a profile of its line of route and station grounds, approved by the Secretary of the Interior, in compliance with section 4 of the act.

Same — Station Grounds.

2. Actual construction of a railroad definitely locates only a right of way extending to a distance of 100 feet on each side of the central line of track. Definite location of station grounds outside of, and adjacent to, such right of way must be made, if at all, by other and further acts of the railroad company which operate as unmistakable notice to an intending settler of an appropriation by the railroad company of certain grounds for such purposes.

Same — Homestead Entry — Priority of Rights.

3. The rights of an entryman under the homestead law, who settles upon the public lands prior to the time that a railroad company has filed with the register of the land office for the district where the land is located a profile on which is shown a selection of a part of this land outside of, and adjacent to, its right of way as station grounds, are superior to those of the railroad company, unless prior to his settlement the railroad company has done acts that operate as unmistakable evidence and notice of an intention, on the part of the railroad company, to appropriate a portion of said land to its uses for station grounds.

Same.

4. The placing of structures appurtenant to a station, within the limits of the right of way of a railroad, is not of itself evidence of appropriation of any land for station uses outside of the right of way.

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

Action by Elizabeth Comford against the Great Northern Railway Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Arthur Le Sueur and *Murphy & Duggan,* for appellants.

Building of road as definitely locates as the filing of a map. Jamestown & Northern Ry Co. v. Jones, 177 U. S. 126; St. Paul & Man. Ry. Co., v. Maloney, 24 L. D. 460; Montana Central Ry. Co., 25 L. D. 250; S. P. & M. R. Co., 26 L. D. 83.

Use of lands as station grounds is evidence of location. In re St. Paul, Minneapolis & Manitoba Ry. Co., 26 L. D. 83; In re Montana Central Ry. Co., 25 L. D. 250; St. Paul, Minneapolis & Man. Ry. Co. v. Maloney, 24 L. D. 460.

Settlement of an alien does not affect operation of a railroad grant. Central Pac. Ry. Co. v. Booth, 11 L. D. 89; Tittemore v. Southern Pac. 10 L. D. 463; Southern Pac. Ry. Co. v. Saunders, 6 L. D. 98; McCurdy v. Central Pac. Ry. Co., 8 O. C. L. 36 Kelly v. Quast, 2 L. D. 627.

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

Different considerations apply to grant of lands than to the right of way. Ry. Co. v. Jones, 177 U. S. 125.

Actual construction is definite location. Doughty v. Soo Ry. Co. 15 N. D. 290, 107 N. W. 971.

The grant takes effect only when the company does some act that establishes fixity of location. Van Wyck v. Knevals, 106 U. S. 360, 27 L. Ed. 201; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. Ed. 1122; Smith v. N. P. Ry Co., 58 Fed. 513; Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. Rep. 362.

ELLSWORTH, J. This is an action, in statutory form, to determine adverse claims to real property. The real property involved is a strip of land 100 feet wide and about three-quarters of a mile long, adjacent to the right of way of the appellant Great Northern Railway Company, and extending diagonally from the north line of a quarter section of land now owned by respondent, described as the S. ½ of N. W. ¼ and N. ½ of S. W. ¼ of section 36, township 157 N., range 94 W., in Ward county, N. D., to the White Earth river, which passes within a short distance from the east line of this land. Appellant claims title to this strip of land by virtue of compliance on the part of its lessor the St. Paul, Minneapolis & Manitoba Railway Company, with the provisions of an act of Congress, dated March 3, 1875 (18 Stat. 482, c. 152), granting right of way across the public lands to railway companies. The claim of respondent to the land rests upon the title conveyed by the United States to her grantor, one William McTavish, a settler upon the public lands under the provisions of the homestead act, and a patent issued to him upon final proof of settlement and residence.

The provisions of the act of March 3, 1875, so far as they are pertinent to the points presented by this appeal are as follows:

"Section 1. The right of way through the public lands of the United States is hereby granted to any railway company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of 100 feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks,

turnouts, and water stations not to exceed in amount 20 acres for each station to the extent of one station for each ten miles of its road. * * *

Sec. 4. Any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of 20 miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such a right of way shall pass shall be disposed of subject to such right of way: provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The facts, with reference to which there is little controversy, appear to be that the St. Paul, Minneapolis & Manitoba Railway Company, to whose interest appellant claims to succeed as lessee, on April 6, 1880, filed with the Secretary of the Interior of the United States copies of its articles of incorporation, and proofs of its organization under the same. In the year 1887 it constructed its railroad across the land in question, now owned by respondent, and placed certain buildings and other structures upon this land. These constructions consisted of a water tank, pumping plant, section house, a small depot building and stockyards. All of these, except the stockyards, were placed on the northerly side, and within 100 feet of the railway track. The stockyards were placed on the southerly side of the track. The evidence is conflicting as to the original size of this structure; but we think a decided weight of the testimony shows that, prior to the year 1895, it extended somewhat less than 100 feet from the central line of the track. In 1895 these stockyards were greatly increased in size, in that they were more than doubled in width, and extended in length to a point about 200 feet distant from the track, and have continued to occupy that space from that time to the present. On or shortly prior to April 18, 1887, appellant's lessor filed with the Secretary of the Interior of the United States a plat or profile of its line of route, designated as "Map of located line of the St. Paul, Minneapolis & Manitoba Railway from Minot, Dakota T., to the Great Falls, Montana T."

This plat was filed with the purpose, as declared by the president of the railroad company in his certificate thereto, "in order that said company may obtain the benefit of act of Congress approved February 15, 1887 (24 Stat. 402, c. 130), entitled 'An act granting to the St. Paul, Minneapolis & Manitoba Railway Company the right of way through Indian reservations in Northern Montana and North Western Dakota." As appears by a notation thereon this plat was, on July 2, 1887, "approved so far as the line of route passes over public lands." by the Secretary of the Interior. This map does not definitely locate appellant's land; but in the near vicinity of the White Earth river, as indicated on the plat, is a small circle marked "depot grounds." There is nothing to show that this plat was, at any time, filed with the register of the land office for the district where respondent's land is located. On January 13, 1900, appellant filed in the United States land office at Minot, N. D., a plat of its line or route across the land owned by respondent. This plat seems to have been withdrawn and afterward refiled in the United States land office at Minot on February 11, 1901. On this profile, in addition to the red line marking the course of the railroad track across respondent's land from the White Earth river to its northern boundary, there appears, on the north side of the track, a dark line at a distance, as indicated on the plat, of 100 feet, and on the south side of the track a dotted line at an indicated distance of 100 feet, and a continuous dark line at a further distance of 150 feet. There is no designation of the purpose of the dark lines, except the notation in their vicinity of "Sta. White Earth." This plat was, on June 10, 1901, "approved subject to all valid existing rights" by the Secretary of the Interior. A certificate appearing on this plat is to the effect that it "has been prepared to be filed in order to obtain the benefits of the act of Congress approved March 3, 1875, entitled 'An act granting to railroads the right of way through the public lands of the United States.'" and appears to be the only plat filed by appellant's lessor for that purpose.

Respondent's grantor, William McTavish, first settled upon the land in question in the spring of the year 1888. No survey of the land had then been made by the government. McTavish was not a citizen of the United States, and did not declare his intention to become such until October 31, 1894. He was, however, a resident of that part of Dakota Territory which, on November 4, 1889, became the state of North Dakota. In 1888 he was employed as a

pumpman at White Earth Station by the railroad company, and built a small house about 100 feet from the track on the south side. He lived in this house for about two years and then built another something over 200 feet from the south side of the track, between White Earth river and the railroad stockyards. In this house he lived continuously until July 28, 1900. On May 1, 1889, a government survey of the land was completed, and the plats of such survey filed in the district land office at Minot. McTavish at once made entry, under the homestead act, of the tract of land immediately surrounding his place of settlement, and on July 28, 1900, made final proof of his settlement and residence. This proof was accepted by the land department, and on November 28, 1900, a patent was issued, granting to McTavish the S. ½ of N. W. ¼ and N. ½ of S. W. ¼ of section 36, Township 157 N. range 94 W., fifth P. M., in North Dakota, without reservation of any claim or interest of any railway company for right of way or station grounds. On February 11, 1902, McTavish conveyed the land so granted to the respondent, Elizabeth Comford, by warranty deed, without reservation of any character.

The entire controversy presented by this appeal turns upon the construction to be given the act of March 3, 1875, granting right of way over the public lands to railroad companies. This act has heretofore been twice before this court for consideration. Jamestown & Northern Ry. Co. v. Jones, 7 N. D. 619, 76 N. W. 277; Doughty v. Minneapolis, St. Paul & Sault Sainte Marie Ry. Co., 15 N. D. 290, 107 N. W. 971. Appeals in both cases were taken from this court to the Supreme Court of the United States, and the Judgment in the first-mentioned case was reversed, the other affirmed. Jamestown & Northern Ry. Co., v. Jones, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698; Minneapolis, St. Paul & Sault Sainte Marie Ry. Co. v. Doughty, 208 U. S. 251, 28 Sup. Ct. 291, 52 L. Ed. 474. In both of these cases the question in controversy was what constitutes definite location of a right of way under the act of March 3, 1875. In the case of Railway Company v. Jones it was settled that a right of way be definitely located within the meaning of the act, and the grant became operative by actual construction of the railroad. In the case of Railway Company v. Doughty, it was decided that the doctrine of definite location by actual construction of the railroad would not be extended to a case where the only evidences of appropriation consisted of a survey of the line of route, and the adoption

of the survey by the board of directors of the railroad company; or, in other words, that no act short of actual construction will operate to fix location, except the filing of a map or profile of the road, in compliance with the terms of section 4 of the act. The reason given by the Supreme Court of the United States for its holding that the line of route of a railroad may be definitely located by actual construction is that "actual construction of the road is certainly unmistakable evidence and notice of appropriation." This ruling would indicate that the element of notice to an intending settler enters largely into the purposes of the act of March 3, 1875. As the provisions of the act definitely fix the limits of the right of way granted at 100 feet on each side of the central line of the road, it follows that, when this line is definitely located, either by construction of the road, or by the filing of a plat as provided by section 4, an intending settler is immediately apprised of the exact extent of the claim of the railroad company upon any tract of the public lands, and may govern his entry accordingly.

The same rule of definite location cannot, however, be applied to station grounds, for the obvious reason that the shape, distance from the line of route, and boundaries generally of the station grounds are not described by the terms of the act. The extent of appropriation for this purpose may not exceed 20 acres for each station, and it must be taken adjacent to the right of way. These conditions met, there is no further restriction, and whether the station grounds extend in a narrow strip along the right of way, or in a square, oblong, or triangular form to a considerable distance from the track, depends entirely upon the selection made by the railroad company. It follows, therefore, that, if station grounds may be definitely located within the meaning of the act of March 3, 1875, by actual appropriation for railroad purposes, the element of notice to an intending settler requires some act on the part of the railroad company giving unmistakable evidence of its intention to appropriate certain land for that purpose. Compliance with section 4 of the act by filing in the district land office an approved plat of the line of route upon which the form and extent of its station grounds are shown would unmistakably operate as such notice. Where such plat is not filed, however, the railroad company must establish the fact of definite location by acts of construction or appropriation to its uses, as definite and unmistakable in character as would be shown by compliance with section 4.

In the case at bar the filing by the railroad company of the map of its located line in April, 1887, will not operate as a definite location of station grounds under the terms of section 4 of the act of March 3, 1875. This map was prepared and filed for the purpose of securing certain rights under the grant of another act of Congress, was not filed with the register of the land office in the district where the land was located, and was not, and could not have been, brought to the attention of an intending settler. The plat filed in the district land office at Minot on January 13, 1900, even if it may be said to locate station grounds with sufficient certainty, was not approved or filed until long after the rights of respondent's grantor had attached. It is apparent from the terms of the act that rights acquired under the provisions of section 4 attach only from the date of filing an approved plat in the local land office.

It is conceded that the grant of McTavish under his patent relates back to October 31, 1894, the date at which he declared his intention to become a citizen of the United States. There is some contention that, being a resident of North Dakota at the time of its admission to statehood, his rights relate back to November 4, 1889. Between these conflicting dates it is unnecessary for us to decide, as the weight of testimony indicates that any notice of appropriation of station grounds given by the railroad company in 1889 was substantially unchanged in 1894. This notice consists only in the construction of stockyards, extending at both dates somewhat less than 100 feet from the center line of the track. We fail to see in such construction any clear and unmistakable notice of appropriation of any amount of ground for station uses beyond that actually covered by the structure itself; and, as this was wholly within the right of way, which it is conceded the railroad company had acquired by actual construction of its track, there is no intention manifest on its part to appropriate, at this point, any grounds whatever outside the limits of its right of way. Certainly there is no act of the railroad company shown in the evidence which can be held to operate as notice to an intending settler prior to 1895 that it intended to claim any part of a strip of land 100 feet wide entirely outside of, and adjacent to, the south side of its right of way, and extending along it for a distance of three-quarters of a mile.

The rulings of the land department are throughout consistent with the theory of Secretary Vilas in Dakota Central Ry. Co. v. Downey, 8 Land Dec. Dep. Int. 115, that while the title to station

grounds may be obtained by a railroad company by actual appropriation, without compliance with the terms of section 4 of the act of March 3, 1875, yet that such title extends only to such grounds as are indicated by unmistakable acts of appropriation. What those acts must be is not stated, but that they must be obvious and substantial is indicated in the cases in which hearings are ordered for the purpose of determining the extent of the railroad companies' appropriation. St. Paul, Minneapolis & Man. Ry. Co. v. Maloney, 24 Land Dec. Dep. Int. 460; In re Montana Central Ry. Co., 25 Land Dec. Dep. Int. 250; In re St. Paul, Minneapolis & Man. Ry. Co., 26 Land Dec. Dep. Int. 83.

Our conclusion is that appellant has failed to show any claim to station grounds upon the land in question, either by actual appropriation for that purpose, or by compliance with the terms of section 4 of the act of March 3, 1875, prior to the time that the title of respondent's grantor attached, and that respondent is entitled to a decree quieting her title to this land. As this was the judgment of the district court, its decree is affirmed. All concur.

(120 N. W. 875.)

JOHN U. HEMMI v. ALZINA R. GROVER.

Opinion filed March 18, 1909.

Attachment — Undertaking — Amount — Affidavits — Averments as to Property — Dissolution — Grounds — Sufficiency of Affidavits — Statement of Cause of Action — Service by Publication — Property in State.

On an appeal from an order dissolving an attachment defendant urges the following reasons in support of the correctness of such order:

(1) That the undertaking for attachment was insufficient because in a sum less than the amount of the claim specified in the warrant.

(2) That neither the complaint nor the affidavit for attachment show that defendant owned property in this state subject to attachment.

(3) That the statutory grounds for attachment are insufficiently stated both in the complaint and in the affidavit for attachment.

(4) That both the complaint and the affidavit for attachment are defective and fail to set forth a cause of action.

(5) That the affidavit for publication of the summons neither states, nor the complaint shows, that defendant has property within this state or debts owing to him from residents thereof, as required by

section 6840, Rev. Codes 1905, and that, therefore no jurisdiction was acquired, and the attachment must fall.

Held, for reasons stated in the opinion, that none of such grounds is tenable, and, *held,* further, that no valid ground is disclosed in the record warranting a dissolution of such attachment.

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

Action by John U. Hemmi against Alzina R. Grover, in which action plaintiff caused an attachment to issue. From an order dissolving the attachment, plaintiff appeals.

Reversed.

John U. Hemmi, for appellant.

Alfred Zuger, for respondent.

FISK, J. This is an appeal from an order dissolving an attachment. The grounds of the motion to dissolve such attachment are stated in the notice of motion as follows: "That no proper warrant of attachment was ever issued, served, levied, and returned in this cause in the manner required by law, and no sufficient affidavit and undertaking for attachment was ever issued, served, or filed in this case." It is stated in the notice that defendant appears specially by her attorney for the purpose, and makes no other appearance. The grounds upon which the attachment was dissolved are stated in the order dissolving the same as follows: "It appearing to the court from the records and files in said action that defendant is not a resident of this state, and that neither the complaint, the affidavits for publication and attachment, nor any of the papers served or filed, or proceedings had herein, show that defendant has property within this state or debts owing to her from residents thereof, and it further appearing that the undertaking for attachment is defective, in that neither the principal nor any surety ever acknowledged the execution of same, nor was the execution proved in any manner, and it being shown that the records and files failed to show the issuance of any warrant of attachment against the property of the defendant, and same failed to show that any valid warrant of attachment was ever levied upon any property of defendant in this state, and no return of the sheriff of Stutsman county was filed in the clerk's office showing the proceedings of the sheriff upon any warrant of attachment herein, therefore, on motion of Alfred Zuger, attorney for defendant, it is

ordered that the attachment herein be, and the same is hereby, dissolved for the reasons above set forth."

Counsel for respondent urges in support of the order appealed from: (1) That the undertaking for attachment was insufficient, in that it was in a sum less than is required by section 6944 of the Revised Codes of 1905. (2) That the order dissolving the attachment was properly granted on the complaint and affidavit for attachment alone. (3) That the statutory steps required to obtain constructive service of a summons on a non-resident and the statutory steps necessary to a valid attachment are interdependent, and that hence the attachment was properly dissolved because the statutory steps necessary to obtain a constructive service of the summons were defective. (4) That, even if the order dissolving the attachment was not strictly proper, still a reversal of such order would be unavailing for the reason, as stated, that no jurisdiction was acquired; the steps necessary to acquire constructive service of the summons being defective. If none of these contentions is sound, the order appealed from must be reversed, but, on the other hand, if any of them are correct, such order must be affirmed.

The sufficiency of the undertaking for attachment is challenged upon the ground that the liability thereunder is limited to the sum of $800, whereas the warrant of attachment specifies the amount of plaintiff's claim to be the sum of $800, with interest at the rate of 7 per cent. per annum from the 17th day of May, 1907, which is the date of the summons, complaint, and the attachment papers in the case. The amount of plaintiff's claim, as stated both in the complaint and affidavit for attachment, is the sum of $800, and no greater sum is prayed for in the complaint. The warrant of attachment refers to the complaint, with a recitation that plaintiff therein demands judgment against the defendant for the sum of $800, with interest at the rate of 7 per cent. per annum from the 17th day of May, 1907. This is clearly a mistake in so far as the interest is concerned, but this is clearly immaterial, as it nowhere appears in any of the papers in the case that plaintiff's claim at the date the attachment was sued out was in excess of $800. Interest to accrue in the future should not be considered in determining the amount of the undertaking, as the amount of such interest could not be definitely determined, but would depend wholly upon the date of entry of judgment. It follows that respondent's counsel is clearly in error upon his first proposition.

But it is next contended that the attachment was properly dissolved because the complaint and affidavit for attachment fail to show that defendant had property within this state subject to attachment. Such a statement or allegation in the complaint is not required, and we know of no law in this state requiring such fact to be shown in the attachment affidavit. Section 6942, Rev. Codes 1905, prescribes that the affidavit for attachment shall set forth in the language of the statute one or more of the grounds of attachment enumerated in section 6938, and no such ground is enumerated in the latter section.

It is also contended that the two grounds for attachment, to-wit, nonresidence of defendant and that she is about to sell and convey her property for the purpose of defrauding her creditors, are defectively stated in the complaint and affidavit for attachment, in that they are stated on information and belief. This is true so far as the statement in the complaint is concerned, but any statement of grounds for attachment in the complaint is improper and immaterial. If the statement contained in the affidavit is in the statutory language as required by section 6942, Rev. Codes 1905, it is sufficient. Turning to the affidavit, we find a positive statement that defendant is not a resident of this state. The argument of respondent's counsel that because the complaint and affidavit were sworn to on the same day that they must be considered together, and that, if there be any variance between the allegations of the complaint and the affidavit, the complaint must control, is wholly untenable. As before stated, such matters are wholly foreign to a complaint, and, if inserted therein, will be treated as surplusage and given no controlling effect over the positive statements in the affidavit. We fully agree with respondent's counsel that statements on information and belief in the affidavit for attachment are insufficient, and that hence the affidavit in the case at bar, in so far as the second ground for attachment is concerned, is void; but the affidavit is good as to the other ground, namely, nonresidence of defendant.

It is next asserted that both the complaint and affidavit for attachment are defective, as they fail to set forth a cause of action, and hence that the attachment was properly dissolved. This contention is based upon the following South Dakota decisions: Coats v. Arthur, 5 S. D. 274, 58 N. W. 673; Narregang v. Muscatine Mortgage & Trust Co., 7 S. D. 574, 64 N. W. 1129; Pearsons v. Peters, 19 S. D. 162, 102 N. W. 606. Such contention deserves but brief

notice. The South Dakota decisions are based upon a statute similar to section 4993 of the Compiled Laws of 1887 of the late territory of Dakota, which is materially different from section 6938 of the Revised Codes of 1905 of this state, as a comparison will disclose. Under the latter section it is expressly provided that an attachment may issue in an action for damages whether arising out of contract or otherwise. For these reasons the cases cited and relied upon by respondent are not in point. We are entirely clear that the complaint in the case at bar sufficiently states a cause of action, and section 6942, Rev. Codes 1905, does not require the affidavit to set forth anything except "one or more of the grounds of attachment enumerated in section 6938. * * *"

It is next contended that the steps taken to obtain constructive service of the summons were defective in certain particulars, and hence that the attachment must fall. We think such contention untenable. It is true, as contended by respondent's counsel, that by section 6840, Rev. Codes 1905, the affidavit required as a basis for obtaining constructive service of the summons must state, or the complaint show, "(1) that the defendant has property within this state or debts owing to him from residents thereof." Even if this were a proper ground for dissolving the attachment, we think the complaint fairly shows such fact. The complaint alleges, in substance, that on May 2, 1907, the defendant, through her duly authorized agent, entered into a contract to sell and transfer, by deed of conveyance certain real property therein described and located in Stutsman county, N. D. And we think it may fairly be presumed from such fact, when not denied, that defendant was the owner of such real property, not only on May 2d, but on May 17th, the date the action was begun and the attachment sued out.

In conclusion we are convinced that there is no merit in any of the contentions urged by respondent's counsel why the order appealed from should be sustained and the record fails to disclose any valid reason for sustaining the same.

The district court is accordingly directed to set aside its order, and reinstate the attachment proceedings. All concur.

(120 N. W. 561.)

STATE OF NORTH DAKOTA, AT THE RELATION OF STATE FARMERS MUTUAL HAIL INSURANCE COMPANY v. E. C. COOPER, AS COMMISSIONER OF INSURANCE OF THE STATE OF NORTH DAKOTA.

Opinion filed April 26, 1909.

Statutes — Repeal by Implication — Irreconcilable Acts.

1. Although repeals by implication are not favored, two irreconcilably repugnant acts passed at different times relative to the same subject cannot stand together, and the later operates to repeal the former.

Insurance — Mutual Hail Insurance Companies — Authority to do Business in State.

2. It is therefore held that section 4449 of the Revised Codes of 1905, as amended by chapter 153, page 245, Laws 1907, repealed section 4447 of said Revised Codes, and that mutual insurance companies organized under the laws of any other state or country are authorized to engage in the business of hail insurance in this state by complying with the provisions of said section 4449 so far as it applies to foreign mutual insurance companies.

Appeal from District Court, Burleigh County, *Winchester*, J.

Mandamus by State, on the relation of the State Farmers' Mutual Hail Insurance Company, against E. C. Cooper, as Commissioner of Insurance.

Judgment for respondent and relator appeals. Reversed and remanded.

Engerud, Holt & Frame and *Turner, Wright & Lewis*, for appellant.

Andrew Miller, Atty. Gen., and *Alfred Zuger*, Asst. Atty. Gen., for respondent.

CARMODY, J. This is an appeal from a judgment dismissing plaintiff's application for a writ of mandamus against the defendant, requiring him as insurance commissioner to receive and entertain plaintiff's application for leave to transact a hail insurance business in this state. The facts are agreed upon by the parties, and are as follows: That the relator is an insurance company organized under the laws of the state of Minnesota, on the Mutual plan, and that its business is the insurance of growing crops against hail. It has submitted to the defendant an application for leave to transact a hail insurance business in this state, together with a copy of its articles of incorporation and power of attorney making and

constituting the defendant its attorney in fact, upon whom service of legal process against it may be made, together with a statement of its assets and liabilities. The relator was at said time and now is, ready and willing to deposit with the treasurer of this state the sum of $25,000 in money for the purposes enumerated in section 4449 of the Revised Codes of 1905, being section 1, c. 114, p. 152, Laws 1903, as amended by Chapter 153, p. 245, Sess. Laws 1907. If he deemed he had authority so to do, defendant would admit the relator to transact a hail insurance business in this state. He has, however, refused to receive or entertain the application of the relator, and he places his refusal on the sole ground that in his judgment, under the provisions of Section 4447 of the Revised Codes of 1905, being sections 1, 2, c. 109, p. 145, Laws 1903, foreign mutual hail insurance companies are prohibited absolutely from transacting the business of hail insurance in this state, and that no discretion is vested in the insurance commissioner, but that he is wholly without authority to admit such companies to transact the business of hail insurance in the state. The trial court made its findings of fact, conclusions of law, and order for judgment in favor of the defendant and against the relator, dismissing the application on the sole ground that foreign mutual insurance companies are prohibited from taking any hail risk, and from transacting the business of hail insurance in this state, and that the commissioner of insurance is wholly without authority to admit such companies into this state for the purpose of transacting a hail insurance business. Judgment was entered accordingly, from which judgment this appeal was taken.

Prior to the enactment of chapter 109, Laws 1903, being sections 4447, 4448, Rev. Codes 1905, foreign mutual hail insurance companies transacted the business of hail insurance in this state. Chapter 109, being sections 4447, 4448, Rev. Codes 1905, so far as material here, reads as follows:

"Section 1. No foreign insurance company incorporated upon the mutual plan shall directly, or indirectly, take any hail risk, or transact the business of hail insurance in this state.

"Sec. 2. All contracts, notes, mortgages, and other evidence of indebtedness made or taken in violation of sec. 1 hereof are hereby declared void.

"Sec. 3. Any person who violates any of the provisions of this act or who procures or induces another to do so is guilty of a misdemanor.

"Sec. 4. All acts and parts of acts in conflict with the provisions of this act are hereby declared repealed."

This act was approved March 4, 1903. An emergency clause made it immediately affective. The same legislature passed chapter 114, Laws 1903, being sections 4449, 4454, Rev. Codes 1905. This act was approved March 10, 1903, and was accompanied by an emergency clause; and, as far as material to the decision of this case, reads as follows:

"No mutual insurance company hereafter organized under the laws of this state, or now or hereafter orrganized under the laws of any state or country, shall engage in the business of hail insurance in this state without first depositing and thereafter keeping on deposit with the treasurer of this state, the sum of twenty-five thousand dollars in money, or in lieu thereof, bonds of this state or of the United States, of the par value of twenty-five thousand dollars." This section was by the legislative assembly of 1907 re-enacted and amended to read as follows: "No mutual insurance company hereafter organized under the laws of this state or now or hereafter organized under the laws of any state or country shall engage in the business of hail insurance in this state without first depositing and thereafter keeping with the treasurer of this state the sum of twenty-five thousand dollars in money, or in lieu thereof bonds of this state or of the United States, of the par value of twenty-five thousand dollars; provided, that domestic mutual hail insurance companies in lieu of said deposit shall be required to file a bond in the office of the commissioner of insurance in the sum of twenty-five thousand dollars, conditional for the carrying out of its contracts and obligations incurred by its policies, said bond to be satisfactory as to form and surety to the insurance commissioner."

The decision of this case depends wholly on statutory construction. Is chapter 109 of the Laws of 1903 still in force, or has it been repealed by the enactment of chapter 114, Laws 1903, which was re-enacted and amended by chapter 153, Laws 1907? There is no express provision repealing said chapter 109; and, if repealed at all, it is by implication. A statute in derogation of an existing statute will be strictly construed in consequence of implied repeals being regarded with disfavor. 1 Lewis' Sutherland, Stat. Con. (2d Ed.) 472. It is our duty to make all acts stand if by any reasonable construction they can be reconciled. Repeals by implication

are, however, recognized as intended by the legislature, and its intention to repeal is ascertained as the legislative intent is ascertained in other respects, when not expressly declared, by construction. "An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act. In such case the later law prevails as a last expression of the legislative will. Therefore the former law is constructively repealed, since it cannot be supposed that the law-making power intended to enact or continue in force laws which are contradictions. The repugnancy being ascertained, the later act or provision in day or position has full force, and displaces by repeal whatever in the precedent law is inconsistent with it." 1 Lewis' Sutherland, Stat. Con. (2d Ed.) 461. Can section 4447 of the Revised Codes of 1905 and section 4449 of the same codes be reconciled so as to give effect to both laws? If not, it follows that the later in date of passage or approval by the governor must be held to have repealed the earlier in so far as they are in conflict. It is clear that these statutes are wholly repugnant, and cannot be harmonized. Section 4447 prohibits without qualification the transaction of hail insurance business in this state by foreign insurance companies organized on the mutual plan. Section 4449 imposes conditions upon compliance with which they may transact such business. Section 4449 was again before the legislature in 1907, and was then re-enacted without change, except that domestic companies were by the amendment authorized to deposit a bond in lieu of the money or state or national bonds required by the original enactment. It was evidently the intention of the legislature by the amendment of said section to relieve domestic companies of the necessity of investing $25,000 as required by the original act. It is presumed that said section 4449 was passed with due deliberation and with a knowledge of the existence of section 4447, and, although silent upon the subject of repeal, it is in such open conflict therewith that both sections cannot stand together, and is clearly appears that section 4449 was intended as a substitute for section 4447. If we had any doubt of such being the intention of the legislature, it would be removed by the re-enactment and amendment of said section 4449 by the legislative assembly of 1907. Although, as hereinbefore stated, repeals by implication are not favored, it is well settled that without a repealing clause two irreconcilable acts, passed at different times, cannot stand, and

the later operates to repeal the former. King v. Cornell, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60; Busby v. Riley, 6 S. D. 401, 61 N. W. 164; Nicol v. City of St. Paul, 80 Minn. 415, 83 N. W. 375; 1 Lewis' Sutherland, Stat. Con. (2d Ed.) section 247, and cases there cited. It therefore follows that foreign mutual insurance companies are authorized to transact the business of hail insurance in this state, and that defendant has power to receive and entertain the application of relator to transact such hail insurance business.

The judgment of the district court is reversed, and the cause remanded for further proceedings. All concur.

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

(120 N. W. 878.)

H. D. LANDIS v. ROY V. FYLES.

Opinion filed March 10, 1909.

Rehearing denied April 6, 1909.

Bills and Notes — Sufficiency of Evidence.

1. Action on a promissory note. Judgment for plaintiff. Evidence examined, and *held* sufficient to justify the judgment.

Trial — Requested Instructions.

2. Instructions must be given or refused as requested.

Same.

3. Failure to instruct that appellant was entitled to 7 per cent interest per annum on all counterclaims allowed him by the jury from maturity to the date of the verdict was not, under the circumstances, reversible error.

Same — Duty to Request More Specific Instructions.

4. If appellant desired more explicit instructions than were given by the court, they should have been presented to the court in writing, with the request that they be given.

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

Action by H. D. Landis against Roy V. Fyles. From a judgment for plaintiff, and an order denying a new trial, defendant appeals.

Affirmed.

O. S. Sen and *J. E. Bishop,* for appellant.

W. S. Lauder, for respondent.

CARMODY, J. This action was brought in the district court of Sargent county to recover on a promissory note for $151.61, dated January 1, 1905, due January 1, 1906, payable to respondent, signed and delivered by appellant. This note was given in part for money loaned in 1902, for a stove and other articles sold by respondent to appellant. It was a renewal of a couple of other notes. The complaint is in the ordinary form to recover on a promissory note. The answer admitted the execution and delivery of the note as alleged; but interposed six counterclaims. The first involves board and lodging furnished plaintiff in March and April, 1902, in the amount of $11.43; the second, board and lodging furnished respondent's wife in March and April, 1902, in the amount of $22.85; the third, board and lodging furnished respondent's two minor children in March and April, 1902, in the amount of $22.86; the fourth, barn room furnished respondent for his cow for five months, ending on May 1, 1903, in the amount of $5; the fifth, services rendered by the wife of appellant in nursing respondent's minor child two weeks in April and May, 1902, in the amount of $30, and assigned to appellant; the sixth, services rendered by Mrs. J. K. Taylor in keeping and caring for respondent's minor child Clara for four months, ending on January 12, 1904, in the amount of $40, and assigned to appellant. The case was tried in the district court of Sargent county before Judge Allen and a jury. It was admitted on the trial that plaintiff was entitled to recover the face of the note sued on, and interest, amounting in all to $180.78, subject to the counterclaims, amounting in all, with interest, to $174.40, as claimed by the defendant. The jury found a verdict for plaintiff for the sum of $108.95, allowing the defendant on his several counterclaims the sum of $71.83.

At the time the transactions involved in this action took place, the appellant and respondent were brothers-in-law, their respective wives being sisters, and were also sisters of Mrs. J. K. Taylor. The three families appear to have been on friendly terms. Later on the wife of respondent died. The evidence in this case shows that previous to March, 1902, respondent resided on a farm near Fairmount in this state. Appellant resided in the village of Milnor, Sargent county. In March, 1902, respondent rented his farm and

came to Milnor with his wife and three minor children, a boy, Arthur, aged 14 years, and two girls, Clara and May, aged respectively 7 and 2 years, and stayed with appellant during the time mentioned in the first three counterclaims. While there respondent's youngest daughter died. On the 15th day of April, 1902, respondent became proprietor of a hotel in Milnor, which he conducted until late in the fall of that year. During the time respondent lived on his farm appellant's wife visited there, remaining 8 or 9 days, after which respondent took her to the home of her parents, who resided a few miles distant. During the time respondent and his family stayed with appellant in the village of Milnor he furnished some of the provisions for the house. At the time respondent's cow occupied room in appellant's barn, as stated in his counterclaim, appellant had no cow, and the milk given by the cow was divided about equally between both families. While respondent was conducting the hotel, appellant's family and Mrs. Taylor frequently took meals there for which no charge was made. While respondent was keeping the hotel his minor daughter Clara was taken ill and, at his request, appellant's wife nursed and cared for her for two weeks, as stated in the fifth counterclaim. In September, 1903, respondent's wife died. His minor daughter, Clara, was then taken by Mrs. Taylor, and by her kept and cared for until January 12, 1904, Appellant contends that respondent at his own instance obtained the goods or things and services rendered him, as alleged in said counterclaims, the reasonable value thereof, with legal interest computed from the time each item became due to the date of the verdict, being $174.40, which sum is a legal set-off against the note sued on; while respondent contends that the things and services mentioned in the counterclaims were gratuitously furnished him by appellant, it being conceded that no special contract had been entered into between them, and that no claim had been made on respondent by appellant until just prior to the commencement of this action, which was January 30, 1906.

At the proper time appellant requested the court to give nine instructions, the second of which is as follows: "If you find from the evidence, in considering the first counterclaim, that the plaintiff, Mr. Landis, boarded with defendant between March 25, and April 14, 1902, both dates inclusive, as claimed by the defendant, for a period of two weeks and six days, then you will ascertain the reasonable value of such board per week, and upon the amount so found

you will figure the interest at the rate of 7 per cent per annum from and since the 14th day of April, 1902, to the present time, and you will set that down as the amount of the first counterclaim." The third, fourth, fifth, sixth and seventh requests are in practically the same language, and referred to the other five counterclaims. The court refused to give any of the nine instructions requested. The appellant assigns as error the refusal of the court to give these instructions, or the substance of them. This assignment is not well taken. If the court gave the instructions at all he would have to give them without modification or change, unless modified or changed by consent of appellant. Se section 7021, Rev. Codes, 1905, and cases cited in note thereto.

Request No. 1 was, in substance, given to the jury. The other eight requests were all incorrect, in that they all assumed that if appellant, his wife and Mrs. Taylor furnished respondent board and services, as alleged in the counterclaims, he would as a matter of law, be liable for the reasonable value of such board and services, and withdrew from the jury entirely the question as to whether they were rendered gratuitously or for pay. He also assigns as error the failure of the court to instruct that, if the jury found for defendant in any amount on all or any of the counterclaims, they should compute the interest on such amount, or amounts, from maturity thereof until the date of the verdict at the rate of 7 per cent. per annum. No proper request was made for such an instruction. It would have been proper for the court to instruct the jury that appellant was entitled to seven per cent interest on all items in the counterclaims allowed him, and it would undoubtedly have done so if properly requested. If appellant had desired more explicit instructions on the subject, they should have been properly presented to the court in writing with the request that they be given. Carr et al. v. Soo Ry. Co., 16 N. D. 217, 112 N. W. 972. Neither did he, on his motion for a new trial, call the court's attention to its failure to instruct the jury that appellant should be allowed interest on the counterclaims allowed him.

Appellant contends that the evidence is insufficient to justify the verdict. An examination of the record convinces us that he is in error, and that there is ample evidence to sustain such verdict.

Other errors, both as to the admission of evidence, and as to instructions given by the court to the jury, are assigned by appellant, but under our view of the case it is unnecessary to consider them.

We are fully satisfied that the charge of the court embraced a fair and impartial exposition of the law applicable to the facts in the case, and we are satisfied that no substantial rights of the appellant have been prejudiced, either by the court's instructions to the jury, or by its refusal to give instructions requested by appellant, or by its ruling on the admission of evidence.

The question as to whether appellant was entitled to anything on his counterclaim, and how much, was for the jury.

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

MORGAN, C. J., and FISK and SPALDING, JJ., concur.

ELLSWORTH, J. (dissenting). In this case the trial court instructed the jury that there was due upon the cause of action set out in the complaint the sum of $151.61 with interest at 8 per cent. per annum, amounting, at the time of trial, to $180.85. At the proper time in the course of the trial the defendant requested the court to give certain instructions in reference to his counterclaims, in all of which it was specified that the different causes of action set out as counterclaims should bear interest at the rate of 7 per cent. per annum from the time they accrued. The trial court refused to give each of these instructions, for the reason that each contained misstatements of the law applicable to the case. In the instruction given, however, the court, while instructing the jury that the counterclaims is sustained by the evidence might be allowed, entirely failed to mention that any sum recovered upon the counterclaims should bear interest at the rate of 7 per cent. per annum, or at any rate, from the time the cause of action accrued. My associates in their opinion find that it would have been proper for the court to instruct the jury that appellant was entitled to 7 per cent. interest on all items in the counterclaims allowed him, but hold that, before he can assign as error the failure of the court to so charge, it was his duty to call the court's attention to such instruction, by presenting to the court at the proper time a request in writing that such instruction be given. I cannot agree with my associates that it is incumbent upon a party, in the courts of this state, to request an instruction upon a material point of law applicable to the case. That the recovery of interest upon a debt arising out of contract, express or implied, is a proper and material point is conceded in the majority opinion. If the charge of the court had

fairly covered this point, and appellant desired more explicit instructions, it would unquestionably have been his duty to prepare them in proper form, and request the court to give them. The entire failure of the court, however, to instruct upon a material point whether requested or not, is error so affecting the rights of the appellant that, in my opinion, the judgment appealed from should be reversed.

By the law of this state a district court is not required to instruct upon the evidence or the facts of the case, except so far as it is necessary to bring clearly before the jury the points of law involved.

The statute provides in express terms, however, that "the court in charging a jury shall instruct as to the law of the case." Section 7021, Rev. Codes 1905. This means that "it is the duty of the court to present to the jury the substantial issues in the case, and to state to them the principles of law governing the rights of the parties, whether any specific instructions are requested by counsel or not." Barton v. Gray, 57 Mich. 622, 24 N. W. 638. It is therefore not optional or discretionary with the district court whether or not it will instruct upon law points applicable to the issues. The parties may expect such instruction as a matter of right, and a failure to give it is ground for new trial. When the question is raised as in this case that a material point of the law applicable to the case has not been touched by the charge of the court, it is not a sufficient answer to say that no such instruction has been requested. It is only in cases in which the charge as given can be said to fairly cover every point of law pertinent to the case that a request for further instruction is necessary in order to bring the matter to the attention of the court. The territorial Supreme Court has settled the law upon this point, in its holding that "it is the duty of the court to charge the jury, whether requested or not, upon every point material to the decision of the case upon which there is evidence, and to charge correctly and fully." Moline Plow Company v. Gilbert, 3 Dak. 239, 15 N. W. 1. The ruling in the case of Carr v. Railroad Company, 16 N. D. 217, 112 N. W. 972, cited in the majority opinion, is not in conflict with the rule last quoted, as in that case it is expressly found that the charge of the court fairly covered the law applicable to the case.

To hold that a district court is not required to instruct on one material point leads naturally and inevitably to the conclusion that it is not required to instruct on any material point; or, in other words,

that it may decline or neglect to instruct at all. It is needless to state that such a conclusion is wholly repugnant to our system of jurisprudence. "To submit a case to a jury without any directions to guide them from the court would be to reach a result almost as uncertain as the toss of a copper or the throw of dice. It may not be said that counsel did not request instructions, and that therefore it was not obligatory on the court to give any. Such a view does not accord with our conception of the functions and duties of the judge. He should see that every case goes to the jury so that they have clear and intelligent notions of precisely what it is that they are to decide. His charge is their chart and compass." Owen v. Owen, 22 Iowa, 270. While the trial court in the case at bar was justified in refusing to give the instructions requested by appellant, the repeated mention of interest in these instructions may be fairly said to have called the court's attention to the point that interest should be allowed upon any sum that appellant might recover upon his counterclaims. That the amount of interest which might have been allowed upon these counterclaims was perhaps trivial should not affect the principle that appellant was entitled to an instruction upon this as upon every other material point of law presented by his causes of action. The fact that such instruction was given with regard to plaintiff's cause of action, and omitted with reference to appellant's, is not wholly consistent with the absolute fairness which should characterize every charge to a jury.

I believe, therefore, that the judgment appealed from should be reversed, and a new trial ordered, and dissent from the contrary holding of my associates.

(120 N. W. 566.)

JOHN SCHNASE v. SAM GOETZ.

Opinion filed March 12, 1909.

Witnesses — Impeachment — Cross Examination as to Conviction.

1. It is competent to show on the cross-examination of a witness, for the purpose of discrediting him or lessening the weight of his testimony, that he has been arrested and convicted of a crime.

Same — Scope as to Matters Elicited on Direct.

2. A subject entered into in direct examination may be further inquired into and exhausted on cross-examination.

Same — Credibility — Contradiction as to Collateral Matters.

3. A party who, on cross-examination, inquires if the witness has not been engaged in an unlawful occupation, on being answered in the negative, is precluded from showing by other witnesses that the witness so testifying testified falsely, when the purpose of the questions relating to his occupation was to impeach or discredit him as a witness.

Appeal and Error — Harmless Error — Impeachment of Witness.

4. In this case the evidence as to the nature of the assault and the injuries inflicted by the appellant upon the respondent was conflicting. Impeaching testimony tending to show that one of appellant's witnesses testified falsely as to his having been engaged in an unlawful occupation was admitted over objection. *Held*, that under the circumstances this court cannot assume that the admission of such impeaching testimony was without prejudice to appellant, as the effect thereof may have been a controlling influence with the jury in determining the extent of the injury or the damages inflicted.

Action by John Schnase against Sam Goetz.

Verdict for plaintiff, and, from an order denying a new trial, defendant appeals.

Reversed, and a new trial granted.

Christianson & Weber, Engerud, Holt & Frame, of counsel, for appellant.

It is error to draw out irrelevant statements on cross-examination and then contradict them by other witnesses. People v. Hillhouse, 45 N. W. 484; George v. State, 20 N. W. 311; Morris v. Atlantic Railway Co., 116 N. Y. 552, 22 N. E. 1097; Madden v. Koester, 3 N. W. 790; Curran v. Percival, 32 N. W. 213; McDonald v. McDonald, 34 N. W. 276; McDuffee v. Bently, 43 N.

W. 123; Atchison, T. & S. F. Ry. Co. v. Townsend, 17 Pac. 804; Denver Tramway Co. v. Owens, 36 Pac. 848; Swanson v. French, 61 N. W. 407; Mullen v. McKim, 45 Pac. 416; Kennett v. Engle, 63 N. W. 1009; Evans v. De Lay, 22 Pac. 408; Pullen v. Pullen, 43 N. J. Eq. 136.

To permit impeachment on collateral matter is error. Becker v. Cain, 8 N. D. 615, 80 N. W. 805; State v. Haynes, 7 N. D. 70, 72 N. W. 923; State v. McGahey, 3 N. D. 293, 55 N. W. 753; McMillan v. Aitchison, 3 N. D. 183, 54 N. W. 1030.

John O. Hanchett, for respondent.

Witness can be impeached on cross-examination by showing his arrest for and conviction of a crime. State v. Adamson, 45 N. W. 152; State v. Taylor, 22 S. W. 806; State v. Miller, 13 S. W. 832; State v. Pratt, 26 S. W. 566; Childs v. State, 58 Ala. 349; McLaughlin v. Mencke, 80 Md. 83, 30 Atl. 603.

May be questioned as to his avocation. State v. Hack, 118 Mo. 92; State v. Pugsley, 38 N. W. 498; Cicero Street Ry. Co. v. Priest, 89 Ill. App. 304.

SPALDING, J. A verdict was rendered in respondent's favor for $320 in an action for damages resulting from an assault committed by the appellant. This appeal is from an order denying a motion for a new trial. Numerous errors are assigned, but it is not necessary to consider all of them.

1. The defendant testified on direct examination that, prior to the assault and on the same day, the plaintiff came to his blacksmith shop in Anamoose and accused him of having been one of a party who tore down and turned up his (plaintiff's) blacksmith shop in the summer of 1902. The court, over objection, permitted plaintiff's counsel to show on the cross-examination of defendant that he had been charged with being one of a party who burned down plaintiff's shop, and that he had been arrested and fined therefor. The admission of this evidence is assigned as error. It was clearly admissable under the rule that a witness may be discredited or impeached by showing on his cross-examination that he has been convicted of a crime. State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518. It was also proper cross-examination, in view of defendant having testified on his direct examination that plaintiff had accused him of being one of a party who burned down his shop. It is evident that he testified to this for the purpose of showing aggravation for the assault. The

subject was brought out in the direct examination, and the opposite party was entitled to exhaust the subject on cross-examination. State v. Kent, supra.

2. The defendant used one Clancey as a witness in his behalf. His testimony tended to break down the plaintiff's case, in that he denied certain material statements made by the plaintiff and some of his witnesses. He was not inquired of as to his occupation in the direct examination. On cross-examination he was asked, in substance, if during a part of the time he had resided at Anamoose he had not worked in the capacity of a bartender. To this, and other questions of the same nature, he answered "No." In rebuttal the plaintiff was permitted, over objection, to show by another witness that the witness Clancey, during the time to which reference had been made in his cross-examination, had been engaged in the selling of beer and whiskey at Anamoose. The same objection was made to evidence showing that another of defendant's witnesses, named Goodlaxen, had been engaged in selling beer and whiskey. It is clear that the purpose of this evidence was to discredit or impeach the witnesses Clancy and Goodlaxen, and its admission is assigned as error. In this the appellant is correct. When a witness is inquired of on cross-examination as to his occupation, for the purpose of showing that he has been engaged in an unlawful or degrading business, the party making inquiry does so at his peril, and cannot show by other witnesses that the answers of the witness on this collateral matter were untrue. It has been so held repeatedly by this court, and discussion of the subject is uncalled for. State v. McGahey, 3 N. D. 293, 55 N. W. 753; State v. Malmberg, 14 N. D. 523, 105 N. W. 614; State v. Haynes, 7 N. D. 70, 72 N. W. 923; Becker v. Cain, 8 N. D. 617, 80 N. W. 805. We cannot in this case presume that the admission of this impeaching testimony was without prejudice. It had no effect upon the question as to whether an assault had been committed because the defendant himself, as well as his witnesses, admitted an assault and it was conceded by counsel upon the trial of the case that a verdict must be rendered in plaintiff's favor; but the facts tending to show the extent of the assault and of the injury inflicted on plaintiff were in dispute. The defendant and his witnesses testified that he slapped the plaintiff while sitting in his buggy in the face or neck, and that he did not pull him from his buggy and beat and trample upon him after doing so. The plain-

tiff and his witnesses testified that he was sitting in his buggy with his son when he was struck in the face by defendant, seized from the rear and pulled from the buggy, and violently assaulted while on the ground. The two witnesses mentioned were among those who testified that he was not pulled from the buggy, and this court cannot say that impeaching testimony, or such testimony as tended to lessen the weight to be given the testimony of the two witnesses named, may not have had a marked influence on the jury in their efforts to weigh the conflicting evidence. The natural effect of such testimony would be to detract from the weight of the testimony given by the witnesses, and may have been a controlling influence in the minds of the jury in arriving at a determination as to the extent of the injuries.

It is urged by respondent that the circumstances surrounding the trial are such as to take this evidence from the rule laid down in State v. Malmberg, 14 N. D. 523, 105 N. W 614, in that the firm of which the state's attorney of McHenry county was a member were attorneys for the defendant on this trial, and that witnesses who had been engaged in the unlawful sale of intoxicating liquors would thereby be intimidated and prevented from freely telling the truth when questioned as to such occupation, or that they might be coerced by the state's attorney through fear of prosecution on the strength of their own admissions if the truth were told, and that therefore, on their denying having been engaged in such unlawful occupation, the rule does not apply, and that their occupation may be shown by other witnesses. While there may be some force in these suggestions, yet they appear to us to be too "far-fetched." If the rule does not apply in this case for this reason it would apply in no similar case, whether the state's attorney were engaged in the suit or not, because the witness cannot testify to these facts without the court being aware of the substance of his testimony, and it would be the duty of the court to notify the state's attorney to proceed by criminal information, and the witness would be in as great danger as though the state's attorney were actually present. We are of the opinion that the suggestion has not sufficient weight to create an exception to the rule.

Several other assignments of error are made, but as a new trial must be granted, and as these assignments relate to matters which can hardly occur in another trial it is not necessary to notice them further.

The order is reversed, and a new trial granted. All concur.

(120 N. W. 553.)

SUCKER STATE DRILL COMPANY, A CORPORATION, v. R. J. BROCK AND R. L. RICHARDSON, AS INDIVIDUALS AND AS A CO-PARTNERSHIP, DOING BUSINESS UNDER THE FIRM NAME OF BROCK & RICHARDSON.

Opinion filed April 14, 1909.

Appeal and Error — Appeal Bond — Review of Two or More Decisions.

On an appeal both from a final judgment and from an order denying a new trial, but one undertaking is required to perfect such appeals; but such undertaking must refer to each of the appeals, and, if it merely recites the appeal from the judgment, the appeal from the order is ineffectual, and may be dismissed on motion.

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

Action by the Sucker State Drill Company against R. J. Brock and R. L. Richardson, individually and as the firm of Brock & Richardson.

Judgment for defendants, and plaintiff appeals.

Dismissed.

See also 18 N. D. 8, 118 N. W. 348.

Christianson & Weber, for respondents.

FISK, J. Appellant appealed both from a judgment and from an order denying its motion for a new trial. But one notice of appeal and one undertaking on such appeal were filed. The undertaking merely refers to omission to be supplied from 120 N. W. 75, the appeal from the judgment, no mention being made of the appeal from the order. Respondents procured from this court an order to show cause, returnable on the first day of the present term, requiring appellant to show cause, if any there be, why its said appeal from the order should not be dismissed for its failure to give an undertaking as required by law. No appearance was made by apellant on the return day of the order to show cause, and no brief has been filed by it in opposition to the granting of the relief asked by respondent's counsel.

In the light of these facts we are not called upon to determine whether, under the provisions of section 7224, Revised Codes 1905, appellant might, on a proper showing of its omission through mistake or accident to furnish such undertaking, be permitted to file one at this time. The language of said section is very broad,

and materially differs from the California section, under which the authorities cited by respondent's counsel were decided. However this may be, we are confronted here with but the single question whether an appeal both from a judgment and an order is effectual as to such order when the only undertaking furnished on the appeal refers exclusively to the judgment. We are agreed that a negative answer must be made to this question. Section 7208 is specific to the effect that, to render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant, etc. Section 940 of the Code of Civil Procedure of California contains substantially the same provision, and the supreme court of that state has repeatedly held that while a single undertaking will suffice on an appeal from a final judgment, and also from an order denying a motion for a new trial, nevertheless, where the undertaking makes no reference to the appeal from the order denying a motion for a new trial, such appeal will be dismissed. Duncan v. Times Mirror Co., 109 Cal. 602, 42 Pac. 147, and cases cited; Granger v. Robinson, 114 Cal. 631, 46 Pac. 604; Rhoads v. Gray (Cal.) 48 Pac. 971; Dodge v. Kimple, 121 Cal. 580, 54 Pac. 94.

The reasoning in the foregoing cases meets with our approval, and under such rule it is entirely clear that the appeal from the order is wholly ineffectual; hence respondents' motion to dismiss the same is hereby granted, and such appeal dismissed, with $25 costs. All concur, except MORGAN, C. J., not participating on account of illness.

(120 N. W. 757.)

JOHN J. POWER v. P. F. KING.

Opinion filed March 11, 1909.

Deeds — Capacity of Grantor — Intoxication.

1. Before a deed or other contract will be set aside on the ground of the intoxication of the grantor or maker when the same was executed, the evidence must show that the grantor was in such a degree of intoxication at the time as to render him entirely incapable of understanding the nature and effect of the transaction.

Costs — Attorney's Fees.

2. It is error to tax an attorney's fee in an equitable action under section 7179, Rev. Codes 1905.

Deeds — Evidence — Intoxication of Grantor.

3. Evidence considered, and *held* to show that plaintiff was not rendered incompetent to enter into the contract involved in this action by reason of his intoxication.

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

Action by John J. Power against P. F. King.

Judgment for defendant. Plaintiff appeals.

Modified and affirmed.

Bosard & Ryerson, for appellant.

John E. Greene, Gray & Gray, and *Ben E. Combs*, for respondent.

MORGAN, C. J. This is an action to set aside a deed, a contract for the purchase of 160 acres of land, and a promissory note executed by the plaintiff on the 20th day of May, 1907. The facts, as shown by the record, are the following in substance: On the 20th day of May, 1907, the plaintiff and defendant met at Donnybrook, Ward county, N. D., and, after certain preliminary negotiations, agreed that the plaintiff would purchase 160 acres of land from the defendant, and that the defendant would purchase two lots in Donnybrook from the plaintiff. The consideration agreed upon for the land was the sum of $2,000. The plaintiff was to convey to the defendant the two lots at the agreed price of $500, and the plaintiff was to execute a promissory note for the sum of $1,500, and deliver the same to the defendant, and this note was to be secured by a mortgage to be executed by the plaintiff and his wife upon 160 acres of land. These papers were all signed by the plaintiff, and

were turned over to one Freeman, who sent them to a bank at Mohall, where the signature of the plaintiff's wife was to be procured to the mortgage and to the deed of the lots in Donnybrook. After these papers were sent to the bank at Mohall, and when the attention of the plaintiff was called to the fact that his wife's signature was to be procured, he repudiated the transaction entirely and refused to permit his wife to sign the same. Within a few days he brought this action to cancel and annul the deed and contract that had been signed by him, and to have them surrendered to him. After a trial the district court made findings of fact and conclusions of law in favor of the defendant, and refused to cancel the deed and other contracts, and granted the affirmative relief asked by the defendant for the specific performance of the contract that was entered into between the plaintiff and the defendant on Monday, May 20th. The plaintiff has appealed from the judgment of the district court, and asks for a review of the entire evidence under section 7229, Rev. Codes 1905.

The sole issue is whether the plaintiff was in such a state of intoxication at the time of the execution of these papers that he was incapable of understanding the nature and effect of the contract entered into at that time. The record shows, and it may be conceded, that Mr. Power had been drinking excessively on the Sunday prior to the making of the contract; but that fact does not alone warrant the setting aside of the contract executed by him about 10 o'clock of Monday morning. The evidence does not show that he drank anything prior to the signing of the papers on Monday. There is ample evidence that he drank heavily on that day after he left the bank where the contract was closed, so far as it was possible for him to close it on that day. The fact that he became intoxicated later in the day has no direct bearing on the issue as to his condition when he executed the note, deed and contract for the purchase of the 160 acres of land. The evidence of the plaintiff shows that he began to drink whiskey on Saturday about 7 o'clock p. m. at Minot. He left Minot for Donnybrook sometime during Saturday night and arrived at Donnybrook early Sunday morning. Some time after his arrival there he procured a pint or half pint of whiskey and drank some of it. After drinking this whiskey he testifies that he had no definite recollection of anything that transpired in Donnybrook until Wednesday morning. He has no recollection whatever of being in the bank where the papers were executed, or having talked with, or of doing any business with, the

defendant there. The defendant, the cashier of the bank, the keeper of the hotel where plaintiff stayed, and some of the boarders at the hotel were witnesses at the trial, and testified to his condition as to intoxication on Monday before and after the signing of the deed and other papers. From the testimony of these witnesses it is evident that he drank whiskey excessively on Sunday up to midnight, and on Monday afternoon and Tuesday. From this testimony, so far as facts are related, and not as conclusions, we think that it was clearly shown that he was not incompetent at that time to transact business, that he did transact by reason of having been under the influence of strong drink on the previous night.

In Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 845, the rule was laid down that, before a deed executed by a person while in a state of intoxication would be set aside on that ground, it must be shown that the grantor was so intoxicated as to be incapable of understanding the nature and effect of the transaction. In that case the following rule is laid down in 17 A. & E. Enc. Law, p. 401, was adopted: "Where a person seeks to avoid responsibility for a contract on the ground of intoxication alone, it must appear that the drunkeness was so excessive that he was utterly deprived of the use of his reason and understanding, and was altogether incapable of knowing the effect of what he was doing. Any degree of intoxication which falls short of this will furnish no ground for release, in the absence of fraud on the part of the other contracting party." Tested by this rule, we deem it clearly shown that the plaintiff was competent to execute the papers, and did fully understand their legal character and effect.

There is no claim of fraud or imposition against the defendant. The evidence is conflicting as to the value of the land and as to the value of the lots. The plaintiff claims that the lots are worth more than $500—the price agreed upon by him in the trade—and that the land is worth less than the price fixed. The trial court found the lots to be of the value of $300 and the land of the value of $1,700. These findings are sustained by the evidence, and accord with our conclusions as to the value of the property after a careful perusal of the evidence.

The trial court ordered the costs and disbursements of the action to be taxed in favor of the defendant, and an attorney's fee of $75 was ordered taxed against the plaintiff in addition to the costs and disbursements. This was error. There is no provision in the

statute authorizing the taxation of an attorney's fee in a case of this kind. Under section 7179, Rev. Codes 1905, the costs might have been taxed against the plaintiff in the discretion of the court. This identical question has been recently decided by this court in Engholm v. Ekrem (N. D.) 119 N. W. 35.

The judgment will be ordered modified by striking therefrom the $75 allowed as attorney's fees, and, as modified, the judgment is affirmed, with costs against the appellant.

Modified and affirmed. All concur.

(120 N. W. 543.)

Queen City Fire Insurance Company v. First National Bank of Hannaford, North Dakota, and A. O. Anderson.

Opinion filed March 6, 1909.

Insurance — Principle and Agent — Failure to Comply with Instructions.

1. Plaintiff sent to defendant, as its agent, the following letter of instructions: "The above indicated policy covers $2,000 on a grain elevator building, a class on which our maximum line is but $500. This policy was written last July at the authorization of our Mr. Fox, but at that time we had reinsurance facilities by which we could reduce our liability. Now it becomes necessary for us to cancel our reinsurance for the reason that the reinsurance law of North Dakota does not permit our reinsuring in any companies not admitted in this state, and unless we cancel this reinsurance, we will be liable to a fine. In view of this fact, we must request that you relieve us of $1,500 of the liability under the above policy at the earliest possible moment, and advise us of such relief, as we are now carrying $2,000, all in the Queen City on the elevator building." Defendant admitted receiving said letter a day or two after its date, December 20, 1905, and the undisputed evidence is that he neglected to comply with such instructions, and on January 15, 1906, the property covered by the policy of insurance was destroyed by fire, and plaintiff was required to and did discharge its liability under such policy by paying the sum of $1,752.29, and this action is to recover damages for defendant's negligence in disobeying such instructions. *Held:* (1) That such instructions being in writing and being clear and specific, it was defendant's duty, as such agent, to comply therewith without delay. (2) The facts not being in dispute, the question as to defendant's liability was for the court, and not the jury, to determine. (3) Such instructions were not reasonably susceptible to the construction placed upon them by defendant to the effect that he should relieve the plaintiff of its liability only at such time as he could place such insurance with another company.

Same — Measure of Damages.

2. The proper measure of damages is the amount with interest which plaintiff was obliged to pay to the insured under the policy over and above what it would have been obliged to pay had such instructions been complied with. This sum is $1,314.22, instead of $1,249.92, as the trial court charged the jury.

Action by the Queen City Fire Insurance Company against the First National Bank of Hannaford and A. O. Anderson. The action was dismissed as to the bank, and, from a judgment for defendant and an order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial, plaintiff appeals.

Reversed.

S. L. Glaspell, R. G. McFarland, and *U. S. G. Cherry,* for appellant.

Robert M. Pollock, for respondent.

FISK, J. This litigation arose in the district court of Griggs county, and resulted in a judgment in defendant's favor. Plaintiff moved for a new trial, which motion was denied, and this appeal is from the judgment as well as from the order denying such motion. The action was originally brought against the First National Bank of Hannaford and A. O. Anderson, but at the close of plaintiff's testimony, and on motion of defendant's counsel, the action was dismissed as to the defendant bank, and such ruling is not challenged in this court.

The facts necessary to a correct understanding of the questions involved are briefly as follows: During the years 1905 and 1906 plaintiff was doing a fire insurance business in this state, and defendant Anderson was the duly authorized and acting local agent for plaintiff until January 19, 1906, at Hannaford, with authority to issue and cancel policies of insurance. That in the month of July, 1905, Anderson, as such agent, issued and delivered to one Hyde, a policy in the sum of $2,000, covering an elevator then owned by Hyde. Such policy continued in force until the following 15th day of January, when such elevator was destroyed by fire, and plaintiff was required under its terms to pay thereunder to Hyde's grantee the sum of $1,752.29. On December 20, 1905, plaintiff sent or caused to be sent to Anderson the following letter of instructions relative to such policy, to wit: "December 20, 1905

A. O. Anderson, Hannaford, N. D., Policy No. 6650, W. S. Hyde. Dear Sir: The above indicated policy covers $2,000 on a grain elevator building, a class on which our maximum line is but $500. This policy was written last July at the authorization of our Mr. Fox, but at that time we had reinsurance facilities by which we could reduce our liability. Now it becomes necessary for us to cancel our reinsurance for the reason that the reinsurance law of North Dakota does not permit our reinsuring in any companies not admitted in that state, and unless we cancel this reinsurance we will be liable to a fine. In view of this fact we must request that you relieve us of $1,500 of our liability under the above policy at the earliest possible moment and advise us of such relief, as we are now carrying $2,000 all in the Queen City on the elevator building. Kindly give this matter your prompt attention and oblige Yours truly, A. H. Watson, Assistant Secretary." Anderson admits receiving such letter in due course of mail, but did not, as such letter requested, relieve the company of $1,500 of the liability under said policy. His contention is that he construed said instructions, and had reasonable ground for thus construing the same, to mean that he should relieve the company of its liability to the extent of $1,500 as soon as he could replace the same with another company, and that he, in good faith, endeavored, but failed in doing this. It is appellant's contention that these instructions were clear and specific, and that it was Anderson's duty to at once, on receipt of such letter, cancel such policy and issue another for only $500, and this is, in substance, the main controversy between these parties.

The trial court submitted the case to the jury upon the evident theory that it was for the jury to determine as a question of fact which of said theories were correct. We do not so construe the testimony. The instructions were clear and specific and were susceptible of but one construction, and defendant was bound at his peril to comply therewith without delay. By such letter defendant was, in effect, instructed to at once relieve appellant of its liability to the extent of $1,500. This he could do by canceling such policy and writing a new one for said amount. Appellant was not interested in having said $1,500 transferred to some other company, but it was vitally interested, for reasons stated in the letter, in causing its liability to be reduced $1,500. Defendant, as plaintiff's agent, owed it the duty of carrying out, promptly and in good

faith, its instructions relating to the subject of such agency. This duty defendant signally failed of performance. He admits receiving the letter of instructions on December 21st or 22d, and, although 24 days elapsed between such receipt and the fire, he failed and neglected to relieve the company of such liability as he was instructed to do, and while defendant no doubt was honestly mistaken in the purport of the instructions, and in good faith attempted to comply therewith as he construed the same, we are agreed that he was wholly unwarranted in placing such construction thereon, and hence he must respond to his principal for the damages suffered by it on account of his disobedience thereto. If the instructions had been couched in ambiguous language, and were reasonably susceptible of the construction contended for by defendant, an entirely different question would have been presented. The instructions being in writing and being clear and specific, it was the province of the court, and not the jury, to construe them. This is elementary, but we quote briefly from the authorities as follows: "It is firmly established and universally recognized that the judge is to construe and interpret the contracts and other written instruments of every description that are offered in evidence. Their instruction and interpretation are governed by established rules of law of which knowledge on the part of the jury cannot be presumed. And hence the question must be left to the court." 1 Jones on Ev., section 172, and cases cited. "As a general rule the interpretation or construction of written instruments, which are drawn in language so plain as not to require the aid of intrinsic evidence, is a question for the court, and it is error to submit such a question to the jury." 1 Thompson on Trials, section 1065; 1 Elliott on Ev., section 30; Hamilton v. Liverpool Insurance Co., 136 U. S. 255, 10 Sup. Ct. 945, 34 L. Ed. 419; Kraber's Ex'rs v. Union Ins. Co., 129 Pa. 8, 18 Atl. 491. In Halsey v. Adams, 63 N. J. Law 330, 43 Atl. 708, the letter of instruction to the agent was as follows: "With reference to Policy No. 51408, Citizens Ice and Cold Storage Co., after looking over the list of companies, and the amounts carried, we think our line is too large, and must ask you to reduce it to $1,500. In case of loss we do not care to have the Manufacturers' and Merchants' Fire Association quoted on the risk for $3,500, when all the large stock companies are writing but $1,250 and $1,500 apiece." And the court stated: "In Goddard v. Foster, 17 Wall. 123-142, 21 L. Ed. 58, 'the rule of law that the interpretation of written instruments

is a question of law for the court is applied in full force to agreements to be deduced from the correspondence of the parties, and the fact that the language of the letters containing the offer or acceptance is doubtful does not relieve the court of this duty, or make the question one of fact for the jury. It is only where terms are technical, or terms having a peculiar meaning in a particular trade or place, that the aid of a jury is invoked to ascertain their meaning.'" The court also said: "But, even if the letter of instruction was to be construed by the court, still it was error to direct a verdict for the defendants. Read in connection with the other documents in the cause and the undisputed facts, the letter may fairly be construed to be a direction to the agents to endeavor to agree with the insured in a reduction of the amount of the policy, and, if unsuccessful, to report to the managers, to the end that the policy might then be canceled according to its terms. In the absence of a report to the contrary, the managers could conclude that the reduction had been made, and a case existed for a jury whether the plaintiff had not sustained injury through a breach of the defendant's duty." This same case came before the New Jersey court later and is reported in 64 N. J. Law 724, 46 Atl. 773, where it was held, "that such instructions, according to the trade meaning of the word 'reduce,' required defendants to endeavor to induce the policy holders to consent to the required reduction, and if no such endeavor was made, or, if made, was ineffectual, to report the failure to the plaintiffs, who, by the terms of the policy, had power to cancel the policy and discharge their liability thereon; that defendants did not obey their instructions or report their omission to do so; and that plaintiffs were thereby left liable to, and, upon a loss occurring, were required to pay the amount of the policy. Upon the undisputed evidence there was no question for the jury." It was the undoubted legal right of the plaintiff insurance company to have the agency executed according to its instructions. It is also apparent that such instructions were not susceptible of a misinterpretation, and the undisputed evidence is that defendant neglected within a reasonable time, or at all, to comply therewith, and by such negligence he incurred a liability to his principal to respond in damages for such negligence.

This brings us to that portion of appellant's third assignment of errors, wherein is challenged that part of the instructions to the jury relating to the measure of damages, the trial court restricting

the amount to the sum of $1,249.92. This was clearly erroneous, as the undisputed evidence disclosed that plaintiff's liability and the amount which it paid under said policy was the sum of $1,752.29. If the policy had been reduced to $500 pursuant to the instructions, plaintiff's liability would have been but one-fourth of such amount, or $438.07. The difference between this sum and $1,752.29 is $1,314.22, which is the amount plaintiff was damaged as aforesaid.

It follows that the judgment and order appealed from were erroneous, and are accordingly reversed and a new trial ordered. All concur.

(120 N. W. 545.)

M. Ella Roberts v. C. B. Little.

Opinion filed March 6, 1909.

Claim and Delivery — Evidence.

1. Action in claim and delivery to recover possession of certain stock. Judgment for defendant. Evidence examined, and *held* insufficient to justify the judgment.

Same.

2. Admission of Exhibits A, B, F and G offered in evidence by defendant *held* error.

Pleading Estoppel.

3. Whether estoppel in claim and delivery is required to be pleaded not decided.

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

Action by M. Ella Roberts against C. B. Little.

Judgment for defendant, and plaintiff appeals.

Reversed.

Charles H. Stanley, for appellant.

To estop by silence, the person so estopped must know that others were relying or acting thereon. Vielle v. Judson, 82 N. Y. 32; Tarkington, v. Purvis, 9 L. R. A. 609, note; Reichort v. St. L. & S. F. R. Co., 5 L. R. A. 183.

To establish ratification it must appear that the person ratifying acted with full knowledge. Shevlin v. Shevlin, 105 N. W. 257.

Agent for managing business is not agent to mortgage property used in its management. Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205.

Particularly as a surety for third party. Ruppe v. Edwards, 52 Mich. 411; New York Iron Mine v. Negaunee First National Bank, 39 Mich. 644; Doan v. Duncan, 18 Ill. 96; Gullick v. Grover, 33 N. J. L. 463.

Default is a prerequisite condition to foreclosure. Madison Natl. Bank v. Farmer, 5 Dak. 282, 40 N. W. 345; Game v. Whaley, 45 N. W. 228.

Where the owner of property permits another to deal with it as his own, by selling and mortgaging it, he cannot assert his interest against those acting upon his conduct and acquiescence. 16 Cyc. 764; Miller, et al, v. Ross, 65 N. W. 562; Sayre v. Thompson, 24 N. W. 383; Hubbard v. Tenbrook, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823; Rogers v. Portland & B. Street Ry. Co., 100 Me. 86, 70 L. R. A. 574; Herman on Estoppel and Res Adjudicata, 914; Giffin v. Nichols, 51 Mich. 575; Anderson v. Hubble, 93 Ind. 570; Wrigley v. Watson, 83 N. W. 989; Christian v. Michigan Debenture Co., 96 N. W. 22.

CARMODY, J. This is an action in claim and delivery. The complaint is in the usual form, alleging that plaintiff is the owner and entitled to possession of 103 steers, and that the same are unlawfully detained by the defendant, that they were of the value of $2,000, to which complaint defendant interposed the following answer: "The defendant answers to the complaint, and denies: (1) That the plaintiff at the time stated in the complaint, or ever or at all, was in possession or entitled to the possession of the steers described in the complaint, or any of them. (2) Denies that said steers or any of them are or ever were the property of the plaintiff. (3) Denies that said steers are or were at the time alleged, or at any time since, of the value of two thousand ($2,000) dollars. Wherefore the defendant asks that the complaint of the plaintiff be dismissed, and that he be awarded a judgment against the plaintiff for his costs and disbursements herein." The case was tried by the district court of Logan county without a jury, a jury having been waived. "It was stipulated and admitted by both

parties in open court that prior to the commencement of this action the defendant took from Joseph Helmer's ranch in Kidder county, this state, 86 head of cattle branded 'YO' on the left ribs and now involved in this proceeding, and the 86 head so taken are the ones involved in this action, and were at that time and are now claimed by the plaintiff as her property, and prior to the commencement of this action she demanded the immediate delivery and possession of these cattle from the defendant, and such demand was refused; that at the time of the commencement of this action the plaintiff executed and delivered to the sheriff of this county, Logan, her undertaking in this action, and demanded that such sheriff take these cattle from the defendant; that such cattle were taken on her order and demand and that the defendant rebonded the same, and they have never been returned to the possssion of this plaintiff, and that said taking was without her consent."

It seems to be conclusively established by the evidence: That at the time of the commencement of this action, and for many years prior thereto, plaintiff and appellant owned and operated a cattle ranch in the county of Kidder, in this state, and lived thereon with her husband, Geo. S. Roberts. That for several years prior thereto one C. S. Budlong owned and operated a cattle ranch in the county of Logan, in this state. That in March, 1903, said Budlong owed this plaintiff over six hundred dollars for the care of his cattle, and that he purchased for her in South St. Paul, Minn., the cattle in controversy for about the sum of $1,169, and applied his indebtedness of $600 to plaintiff in making such purchase, that afterwards plaintiff paid the balance of the purchase price of $569 by borrowing the money from the Kidder County Bank, of Steele, giving a mortgage therefor on her real estate. That the plaintiff's cattle were not branded when she bought them, and that she had no stock mark of her own. That they were about the month of May, 1903, branded on the left ribs with Budlong's brand "YO." This brand on the Budlong cattle was upon the left hip. While plaintiff's husband, together with Budlong and two or three other men, were branding the cattle, plaintiff appeared and made objections. Her husband and Budlong told her they were doing it for convenience, as the cattle were going to herd together. The object of branding plaintiff's cattle on the ribs was so they could be distinguished from Budlong's cattle. That plaintiff's husband was her agent in taking care of her cattle and managing her cattle ranch.

That her cattle, as well as some of Budlong's cattle, were kept on her ranch part of the summer of 1903 and during the winter of 1903-4. That about the month of June 1904, her cattle, together with some of Budlong's cattle, were taken to Joseph Helmer's ranch in Kidder county, from which place they were taken by the defendant in October, 1904.

Over plaintiff's objection the court allowed defendant to show that on October 10, 1903, said C. S. Budlong delivered his promissory note for $10,204.43 to defendant, and secured the same by a chattel mortgage made by himself and wife, which was intended to cover all the cattle owned by said Budlong, and recited that said cattle were branded "YO" on either left side or hip; that such mortgage was foreclosed by order of defendant in October, 1904, and the cattle bid in for him. The court also allowed the defendant, over plaintiff's objection, to introduce in evidence Exhibits A, B, F, and G. Exhibit B, first in point of time, is an agreement between Budlong and plaintiff's husband, dated April 22, 1903, by which the latter, who claimed in that agreement, to be the owner of the cattle in controversy, agreed to assist Budlong in placing his brand "YO" on said cattle on left side between shoulder and hip, and also agreed that said Budlong could mortgage the said cattle; that the branding and mortgaging of said cattle was for accommodation only; and they were to be returned to said Roberts free and clear of all incumbrance not later than November 30, 1903. Exhibit A is a letter from Roberts to Budlong, dated October 10, 1903, by which Roberts, in substance, consents that Budlong may include these cattle in renewing the loan with the same understanding or terms of agreement as contained in Exhibit B. Exhibit F is the chattel mortgage hereinbefore mentioned given by Budlong and wife to defendant on the 10th day of October, 1903, which defendant claims covered the cattle in controversy. Exhibit G is an envelope in which was contained Exhibits A and B, indorsed as follows; "Deliver to C. S. Budlong, or Mrs. Budlong, or C. B. Little. Opened by N. C. Young." These rulings are each assigned as error, and will hereinafter be considered.

The findings of fact made by the trial court and which are now controverted are as follows, being the fifth, sixth, seventh, eighth, ninth and tenth:

"(5) That on the 10th day of October, 1903, C. S. Budlong executed his certain chattel mortgage to secure the payment of

a certain promissory note dated October 10, 1903, for the sum of $10,204.43, payable to the order of C. B. Little, defendant herein, which said chattel mortgage described with other property, the cattle involved herein, and constituted a valid and subsisting lien against the property involved in this action at the time of the execution thereof.

"(6) That at the time of the execution of said note and mortgage by the said C. S. Budlong he was in possession of and had good right and full authority to mortgage the said property involved in this action in the manner and form the same was so mortgaged, and did create thereby a valid and subsisting lien against said property for the payment of said debt. That the plaintiff was fully apprised of the execution of this mortgage and fully consented thereto.

"(7) That thereafter and on the 22nd day of October, 1904, the said chattel mortgage was duly foreclosed for non-payment of said indebtedness and said cattle involved in this action were duly sold to C. B. Little, the defendant herein, who thereby became the owner thereof.

"(8) That the value of said cattle at the time of the taking of the same and the foreclosure of said mortgage was $1,376.

"(9) That at the date of the commencement of this action the plaintiff had no right of possession of said property involved in this action, and has not now any right in or title to or ownership of any of the said property.

"(10) That the allegations of the plaintiff's complaint herein are not true, and the allegation of the defendant's answer herein of the ownership of all the cattle involved in this action, being 86 head of cattle branded 'YO' on the left ribs, is true."

Appellant's contention is that these findings of fact are not supported by the evidence. This contention must be sustained as to all the part of the fifth finding of fact, which reads as follows: "Which said chattel mortgage described with other property, the cattle involved herein, and constituted a valid and subsisting lien against the property involved in this action at the time of the execution thereof"—and as to all the sixth, seventh, ninth and tenth findings of fact, unless the appellant's husband as her agent had authority to execute Exhibits A and B, and to execute acommodation paper for her, or was the owner of said cattle, or unless she is estopped by her actions from maintaining this action or asserting

any claim against the respondent herein. The burden of proof is upon respondent to show that appellant's husband had authority from her to authorize Budlong to mortgage her cattle. An agent, as such, has no right to mortgage the property of his principal Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203, and even if he had he would have no right to bind his principal by indorsing or issuing accommodation paper Gulick v. Grover, 33 N. J. Law 463, 97 Am. Dec. 728. In this case the court says: "I take the rule to be well settled that the authority to sign accommodation paper, or as security for a third person, must be specially given, unless the authority of the agent is one of universal agency, and will not flow from any general authority to transact business for the principal. The making of accommodation paper, or the loan of one's name as security for another, does not fall within the ordinary business in which persons engage." "To validate such paper it must be shown that the agent was authorized to make use of his principal's name for that purpose, and his authority must either be express or implied from proof that he was accustomed, with the principal's consent, to use his name for the accommodation of others." North River Bank v. Aymar, 3 Hill (N. Y.) 262; Wallace v. Mobile Branch Bank, 1 Ala. 565. Even though an agent is authorized to draw and indorse notes, and to draw, indorse, and accept bills of exchange, he can act under such authority only to the extent of his principal's business, and is not authorized to draw, indorse, or accept them for the accommodation of mere strangers. Story on Agency, section 69; Odiorne v. Maxcy, 13 Mass. 178. We do not think it will be seriously claimed by respondent that appellant's husband was the owner of the cattle herein mentioned.

Respondent contends that the appellant herein, by her actions, during all the transactions recited in the record, waived her right to assert any claim to such stock, and is estopped by her conduct from maintaining this action. He claims that there is abundant evidence to show that appellant knew of the power to mortgage given by her husband April 22, 1903, and renewed October 10, 1903. We do not so read the evidence. Her testimony shows that she first learned, through her husband, in the latter part of October, 1903, that defendant claimed a mortgage on the property in controversy. She was also informed by her husband at the same time that he had loaned the cattle to Mr. Budlong. This evidence is

uncontradicted, and is corroborated by her husband. The objections by appellant to the introduction of Exhibits A, B, F, and G in evidence should have been sustained. There is no showing that appellant was connected with these exhibits in any way or knew of the existence of Exhibits A, B or G, until the trial of this action. She knew, in a general way, of the existence of Exhibit F, but it was not binding on her, and was not evidence that Budlong owned the cattle in controversy or had any right to mortgage them. Musser v. King, 40 Neb. 892, 59 N. W. 744, 42 Am. St. Rep. 700. In that case the court says: "The law, in the absence of all evidence on the subject, will not indulge in the presumption that one who made a mortgage on chattels was either the owner of or in possession of such property at the time he made such mortgage when the holder of such mortgage seeks to recover possession by replevin of such property from a third party." In the case at bar, appellant, who was owner of the cattle, was seeking to recover possession from the mortgagee and the same rule will apply.

The burden of proving an estoppel is on him who asserts it, and the evidence in this case falls far short of proving an estoppel on the part of the appellant. Appellant contends that respondent is not in position to avail himself of an estoppel on her part for the reason that he has not pleaded the same. While there is much force in this contention, it is not necessary to a decision of this case to pass on that question. There are other errors complained of by the appellant in the ruling of the court in admitting evidence, but in our view of the case it is unnecessary to pass upon them at the present time.

The order and judgment appealed from are reversed.

ELLSWORTH, J., concurs.

SPALDING, J., (concurring). The disregard in the trial of this case of the rules of pleading and of evidence has created great confusion in the record, and made it extremely difficult for me, at least, to arrive at a determination of the questions submitted. The complaint is in the usual form for actions for claim and delivery. The answer simply denies possession, or right to possession, or ownership, at any time in plaintiff. The evidence submitted by the defense was directed toward proving the estoppel of plaintiff to assert ownership as against the defendant. No proper objections were made to the admission of considerable evidence intended to

show estoppel, and it may be questioned whether the defendant after striking out incompetent and irrelevant testimony properly objected to establish estoppel. The burden of proof was on the defendant to establish such defense. Certain facts appear to be pretty clearly established by the evidence, among others that Mrs. Roberts owned the cattle in question in her own right, and it is not shown that she authorized the mortgage to Little, or knew that her husband had given permission to Budlong "to use them," until some time after the mortgage was given. Neither is it clear that she knew to whom they were mortgaged until after possession was taken for foreclosure.

The findings were drawn on the theory of the pleadings disregarding the theory on which the defense was in fact made, and some are in direct conflict. Many of the "findings of fact" are mere conclusions of law, and several material findings are wholly unsupported by evidence. When the unsupported findings are eliminated, those which remain do not warrant the judgment; and for this reason I concur in holding that a new trial should be granted.

MORGAN, C. J. (dissenting.) I think the judgment should be affirmed. The evidence, although not entirely satisfactory, warrants the finding of the lower court that the plaintiff authorized the giving of the mortgage. This is particularly a case where this court should give great weight to the findings of the trial court, and they should not be disturbed unless shown to be clearly and unquestionably against the preponderance of the evidence. Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717; Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58. The plaintiff's husband was her agent in all business matters. She knew that the possession of the stock was in her husband. She did not object to the branding of the cattle with what was practically the Budlong brand. She made no objection when informed that the husband had loaned the cattle to Budlong "to help him out," and never repudiated the mortgage until the trial. From the evidence it is difficult to see how she could have been ignorant of the giving of the mortgage when all these matters are taken into consideration, together with the intimate relations existing between husband and wife. If she was ignorant of the mortgage, I think she should be estopped by her actions from asserting that fact now. The fact of not pleading an estoppel is immaterial in this case

as there is not a sufficient objection to the evidence or to the answer on that ground, and its alleged insufficiency is first raised in this court.

FISK, J. I concur in the views of the CHIEF JUSTICE.

(120 N. W. 563.)

STATE OF NORTH DAKOTA v. SCHOOL DISTRICT NO. 50, BARNES COUNTY.

Opinion filed March 13, 1909.

Appeal and Error — Statement of Case — Specification of Error.

1. When the settled statement of case in an action properly triable to a jury contains no proper specifications of errors as required by Rev. Codes 1905, section 7058, the same must be disregarded by this court, as said section expressly provides that: "If no such specification is made, the statement shall be disregarded on motion for a new trial, and on appeal." No proper specification being found in the settled statement in this case, this court is restricted to a review of such errors, if any, as appear upon the face of the judgment roll proper.

Schools and School Districts — Bonds — Validity.

2. The municipal bonds of defendant school district which are sued upon in this case were issued without first submitting to the electors of the school district the question of their issuance, and, furthermore, the school district had no power to issue the same by the express provisions of the act under which it is claimed they were issued as there were not 25 legal votes cast in such district at the preceding annual school election therein. Chapter 11, page 39, Laws 1887, under which plaintiff contends such bonds were issued, is printed upon the back of the bonds, and section 9 thereof expressly provides that the question of refunding prior indebtedness shall be first submitted to a vote of the qualified electors of the district after giving certain notice therein prescribed of an election for such purpose, and that the proposition to issue such bonds must receive the affirmative votes of at least two-thirds of all the votes cast; also, that no school district in which less than 25 legal votes were cast at the annual school election next preceding the issuance of such bonds shall avail itself of the provisions of this act. *Held,* for these reasons, that such bonds are void.

Same — Refunding Indebtedness — Effect of Recitals in Bonds — Estoppel.

3. The bonds in suit contain a recital to the effect that they are issued for the purpose of refunding present indebtedness "as authorized by act of the legislative assembly approved March 11, 1887" (Laws 1887, page 39, chapter 11), entitled "An act to provide for refunding

the outstanding indebtedness which existed prior to July 30, 1886, of any incorporated board of education or school district in the territory of Dakota." *Held,* that such recital does not estop the school district from urging the defense, even as against an innocent purchaser, that such bonds were illegally issued.

Municipal Bonds — Bona Fide Purchasers — Effect of Recitals.

4. Every purchaser of municipal bonds acquires and holds them charged with full notice of the possession, or absence, of power in the first instance on the part of the public corporation to issue them; and the question of the authority of a public corporation to issue negotiable bonds cannot be concluded by mere recitals, even as against innocent purchasers thereof.

Schools and School Districts — Authority to Issue Bonds — Submission to Vote of District.

5. The school district possessed no implied authority to issue such bonds on account of the fact that they were refunding bonds and issued in lieu of presumably valid obligations of the district, because by the express provisions of section 9 aforesaid, their issuance was prohibited because of the fact that less than 25 legal votes were cast at the preceeding annual school election.

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

Action by the State of North Dakota against School District No. 50, of Barnes County. From a judgment for defendant and an order denying a new trial, plaintiff appeals.

Affirmed.

T. F. McCue, Atty Gen., and *Andrew Miller,* Asst. Atty. Gen., for the State.

An innocent purchaser has a right to presume that all conditions precedent to the issue of bonds are complied with. Bernards Twp. v. Morrison, 133 U. S. 523; Mont Clair v. Ramsdell, 107 U. S. 147, 27 L. Ed. 431; Knox Co. v. Aspinwall, 21 How. 539; Coler v. School Twp. 3 N. D. 249, 55 N. W. 587; Thompson v. Village of McCosta, 86 N. W. 1044; Huron v. Savings Bank, 49 L. R. A. 534; Hughes County v. Livingstone, 43 C. C. A. 550; Pierce v. Duncomb, 45 C. C. A. 503; Haskell County v. National L. Ins. Co., 32 C. C. A. 594; Pratt County v. Society for Savings, 32 C. C. A. 598; Clapp v. Ottoe County, 45 C. C. A. 587.

The bonds in question are negotiable instruments. Hegeler v. Comstock, 45 N. W. 331; First National Bank v. Flath, 10 N. D. 281, 86 N. W. 867.

Turner & Wright, for respondent.

Bare recitals will not preclude a school district from non-compliance with statute. Flagg v. School District, 4 N. D. 30, 58 N. W. 499; Lake County v. Graham, 130 U. S. 674. 9 Sup. Ct. 654. 32 L. Ed. 1065; Buchanan v. Litchville, 102 U. S. 276, 26 L. Ed. 138; Carroll Co. v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040.

Municipal corporations can issue bonds only upon specific grant of power. Hainer Municipal Securities, section 105; Harris Municipal Bonds, 26; 1 Dillon's Mun. Corp., section 125; Nashville v. Ray, 19 Wall. 468, 22 L. Ed. 164; City of Brenham v. Bank, 36 L. Ed. 390.

Recitals do not preclude pleading ultra vires against a bona fide purchaser. St. Joseph Twp. v. Rogers, 16 Wall. 644, 21 L. Ed. 328; South Ottawa v. Perkins, 94 U. S. 262, 24 L. Ed. 154; County of Davies v. Huidekoper, 98 U. S. 98, 25 L. Ed. 112; Dixin v. Field, 111 U. S. 83, 28 L. Ed. 360; Bank v. Porter Twp., 110 U. S. 608, 28 L. Ed. 258; City of Brenham v. German Am. Bank, 36 L. Ed. 390; 1 Abbot on Municipal Corporations, sections 209, 211; "The Floyd Acceptances," 7 Wall 666, 19 L. Ed. 169; Chisholm v. Montgomery, 2 Woods 584; Fed. Cases No. 2686; Pierre v. Duncomb, 45 C. C. A. 499.

Failure to submit question of issue to a vote renders bond invalid even against a bona fide purchaser. Carroll v. Smith, 111 U. S. 556, 28 L. Ed. 517.

FISK, J. This litigation arose in the district court of Barnes county, and plaintiff's cause of action is based upon 13 alleged negotiable bonds claimed to have been issued by defendant school district on June 28, 1892, aggregating the sum of $5,700, payable to one Miller, or bearer, and purchased before maturity for value by plaintiff, which bonds, it is claimed, were issued in accordance with the provisions of an act of the legislative assembly of the territory of Dakota, approved March 11, 1887 (Laws 1887, p. 39, c. 11), entitled "An act to provide for the refunding of the outstanding indebtedness which existed prior to July 30, 1886, for any incorporated board of education or school district in the territory of Dakota;" a copy of such act being printed on the back of such bonds. Among other defenses relied upon, defendant denies that the alleged bonds were issued to refund outstanding in-

debtedness of the defendant, and alleges that they were signed by the president of the defendant, and by another person pretending to be the clerk thereof, fraudulently and unlawfully, and with no consideration whatever received by the defendant school district therefor. The answer further alleges that no election was had for the purpose of determining the question of the issuance of said bonds, and that the same were signed and delivered without the authority either of the voters of the district as expressed at an election or by resolution or other expression of the board of directors of the district, and it is further alleged by defendant that it was wholly without authority to issue said bonds for the reason that at the annual school election next preceding the pretended issuance thereof less than 25 legal votes were cast. A jury was waived, and, at the close of the testimony, the trial court, among other things, found as a fact the following: "That each of said bonds purports on its face to have been issued by School District No. 50, Barnes County, State of North Dakota, for the purpose of redeeming present indebtedness as authorized by act of the legislative assembly approved March 18, 1887, entitled 'An act to provide for refunding the outstanding indebtedness which existed prior to July 30, 1886, of any incorporated board of education or school district in the Teritory of Dakota.' That a copy of said act is printed in full on the back of each of said bonds. The court further finds as a matter of fact that at the time of the purported execution of the bonds, to wit, on January 28, 1892, James E. Walks, who signed his name to said bonds as clerk of the defendant, did not reside within the territorial limits of the defendant, and did not at any time, either before or subsequent to that date, reside within the territorial limits of the defendant school district. * * * The court further finds that the question of issuing said bonds or of refunding the then existing indebtedness of the defendant school district, if any, was never submitted to a vote of the qualified electors of said school district. The court finds that less than 25 legal votes were cast at the annual school election next preceding the issuance of said bonds, and that less than 25 legal votes were cast at every school election held in said school district prior to the 28th day of January, 1892."

The trial court also made conclusions of law as follows:

"(1) The court holds as a matter of law that the above named James E. Walks was not the clerk of the defendant nor authorized to act as such at the time of the purported issuance of said bonds, nor at any time theretofore or thereafter.

"(2) That said bonds are wholly void as against the defendant upon the ground that the question of their issuance or of refunding the indebtedness of the district was not submitted to a vote of the qualified electors, and upon the further ground that the said school district was wholly without authority to issue said bonds in any event because of the fact that less than 25 legal votes were cast at the preceding annual election held therein."

Pursuant to such findings and conclusions judgment was ordered and entered in defendant's favor dismissing the action and for costs. In due time a statement of case was settled and a motion for a new trial was made and denied, and this appeal is from the judgment and also from the order denying such motion.

In disposing of this appeal, we are not at liberty to review any alleged error, unless it appears upon the face of the judgment roll proper. The statement of the case as settled contains no proper specification of errors of law occurring at the trial nor of the particulars in which it is claimed that the evidence is sufficient to sustain the findings. That such omission is fatal has repeatedly been held by this court. The statute (section 7058, Rev. Codes 1905) is explicit in requiring such specification of particulars to be incorporated in the statement, and that, "if no such specification is made, the statement shall be disregarded on motion for a new trial and on appeal." Furthermore, the notice of intention to move for a new trial contains no designation of the statutory grounds upon which the same will be made as required by section 7065, Rev. Codes 1905, and this omission is also fatal, and precludes us from examining the evidence.

From a careful examination of the judgment roll proper we fail to discover any reversible error therein. By the findings of the trial court, which must be accepted as final, such bonds had printed thereon the act in full under which it was claimed they were authorized to be issued as aforesaid. By section 9 of the act it is expressly provided that the question of refunding prior indebtedness shall be first submitted to a vote of the qualified electors of the district after giving certain notice therein prescribed of an election for such purpose, and that the proposition to issue such bonds must

receive the affirmative votes of at least two-thirds of all the votes cast. It is also expressly provided in said section that no school district in which less than 25 legal votes were cast at the annual school election next preceding the election therein provided for shall avail itself of the provisions of such act. Turning to the trial court's findings it appears that the question of issuing such bonds was never submitted to a vote of the electors of the district, and it further appears therefrom that less than 25 legal votes were cast at the annual school election next preceding the issuance of such bonds. The conclusion inevitably follows, therefore, that such bonds were issued in direct violation of the act under which it is claimed they were issued, and hence they are null and void, and no recovery can be had thereon unless the plaintiff can successfully invoke the doctrine of estoppel as against the defendant. Appellant's counsel contend that plaintiff, as an innocent purchaser, had a right in purchasing such bonds to rely upon the presumption that all the conditions precedent to the issuance of bonds had been done and performed, and that defendant is estopped by the recitals in the bonds to urge their invalidity. The fallacy of such contention is laid bare by an examination of the facts as found by the lower court, from which it appears that no recitals are contained in the bonds upon which an estoppel can be predicated. The only recital contained in the bond is, in effect, that they are issued for the purpose of refunding present indebtedness as authorized by the act therein referred to. There is no recital of any acts nor is the recital equivalent to a statement that such bonds are issued "in accordance with" or "in conformity to" or "in pursuance of" the act therein referred to. Regarding a similar case the supreme court of the United States in upholding a defense similar to the one here urged said: "We do not think the plaintiff in error is precluded from raising this question by any recitals in the bonds. They contain no statement of any election called or held, or of the vote by which the issue of such bonds was authorized. They do not embody even a general statement that the bonds were issued in pursuance of the statutes referred to. The utmost effect that can be given to them is that of a statement that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may lawfully have taken place. They say

nothing whatever as to any compliance with the requirements of the statute in respect to which the board of supervisors were authorized and appointed to determine and certify. They do not, therefore, within the rule of decision, acted on by this court, constitute an estoppel which prevents inquiry into the alleged invalidity of the bonds." The same court in a later case, in commenting upon the prior case of Knox County v. Aspinwall, 21 How. 539, 16 L. Ed. 208, relied on by appellant's counsel in the case at bar, took occasion to say: "In the first case dealing with this question (Knox County v. Aspinwall) it was said that a purchaser of such bonds had the right to assume that the conditions of their issue had been complied with merely from the facts of the subscription and issue. But in this case there was a recital, and subsequent cases have limited the adjudication to the precise point necessarily decided. Citizens Saving and Loan Ass'n v. Perry County, 156 U. S. 692, 15 Sup. Ct. 547, 39 L. Ed. 585." Quinlan v. Green County, 205 U. S. 410, 27 Sup. Ct. 505, 51 L. Ed. 860.

The general and we believe the correct rule regarding the binding effect of recitals in bonds is well stated in 1 Abbott's Municipal Corporations, section 209, as follows: "The doctrine as applied to recitals is substantially this: That where legislative authority has been given a public corporation or its officials the power to issue bonds upon the performance of some precedent condition, such as a particular manner of holding an election or the existence of some fact, and where it may be gathered from the legislative enactment that certain officials of the corporation are invested with the power to decide whether the conditions precedent have been complied with or such acts existed, their recitals or statement in the bonds issued by them that they have been so complied with, or that certain conditions exist, is conclusive of the fact and binding upon the corporation; for, as said by the Supreme Court of the United States: 'The recital is itself a decision of the fact by the appointed tribunal.' Such a recital or decision, as it is termed, is conclusive upon the corporation as to bonds in the hands of a bona fide holder, who, it is held, as to such matters, is not bound to look for further evidence of a compliance with the conditions of issue. The recitals or statements work no estoppel, however, except when made by those officials or that tribunal either as specially designated or having the general power to perform such acts. If not made by those having authority to decide and assert the facts

which constitute the conditions precedent to a legal issue of bonds, the recitals will not be accepted as a substitute for proof." In the following three sections the same author says: "The principle of estoppel does not apply, however, to recitals of authority, for in this respect it is held every purchaser of bonds acquires and holds them charged with full knowledge of the possession of power in the first instance on the part of the public corporation to issue them. The question of legislative authority in a public corporation to issue negotiable bonds cannot be concluded by mere recitals, even when the bonds have come into the hands of bona fide holders for value. The doctrine of recitals * * * has never been carried to the extreme of holding that such officials can by their recitals or decisions create a power on the part of the public corporation to issue bonds where none existed. * * * Where negotiable bonds are issued containing no recitals of authority, it is quite generally held that they are not unimpeachable in the hands of the bona fide holders." In speaking upon this question in Flagg v. School District, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363, Judge Corliss, among other things, said: "Some cases appear to hold that a mere recital that the bond was issued in pursuance of a particular statute is a sufficient recital of performance of all the conditions precedent prescribed by the statute. See Bernard's Tp. v. Morrison, 133 U. S. 523, 10 Sup. Ct. 333, 33 L. Ed. 726; Mont Clair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. 391, 27 Sup. Ct. 431; Knox Co. v. Aspinwall, 21 How. 539, 16 L. Ed. 208. We used language in Coler v. School Tp., 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649, indicating that such a recital would be sufficient to estop the municipality. What was said there was not necessary to the decision of the case, and the writer of this opinion in fact intended to say that a recital that the bond was issued in conformity with a particular statute would be a sufficient recital that all the terms of the statute had been complied with, so far as the officer making the statement had power to pass upon such questions. It might with much force be urged that a bare recital that the bond was issued in pursuance of a particular act would constitute no more than a mere reference to the law under which the bond was issued, and not a declaration that the terms of that law had been complied with. If such construction were to be placed upon these conditions, there would be nothing to estop the municipality, except the mere

fact of issuing the bonds. This is not sufficient to render the municipality liable against proof that the conditions of the statute have not been complied with"—citing Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; Buchanan v. Litchfield, 102 U. S. 278, 26 L. Ed. 138; Carroll County v. Smith, 111 U. S. 556, 4 Sup Ct. 539,28 L. Ed. 517; Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040. Tested by the foregoing rules, it is entirely clear that the recital in the bonds in the case at bar is insufficient upon which to predicate an estoppel against the school district. Not only is this true, but under the statute under which the bonds are claimed to have been issued there was no power in the district to issue the same; hence no recital of its officers could operate to estop the district from urging such defense. "There can be no estoppel by conduct or ratification where there is a want of power." 6 Cur. Law, 712, citing Wichman v. Placerville, 147 Cal. 162, 81 Pac. 537.

Respondent's counsel, in their printed brief, contend that chapter 11, p. 39, Laws 1887, was not in force at the date of the issuance of these bonds, as the same was impliedly repealed by chapter 62, p. 177, Laws 1890, and that under the latter act the bonds were clearly illegal under the decision of this court in case of Flagg v. School District, 4 N. D. 42, 58 N. W. 499, 25 L. R. A. 363, as well as numerous other authorities cited by them. It is unnecessary for us to determine this question in view of the conclusions above reached. If the act of 1890 aforesaid was in force, the bonds were clearly void, even in the hands of an innocent purchaser, as no election was held for the purpose of submitting to the electors of the district the question of the issuance thereof, and no certificate of the county auditor was placed upon the back of such bonds as required by said statute. On the oral argument counsel for appellant contended that notwithstanding the fact that defendant district was without power to issue the bonds in suit, yet having, presumably with authority, issued the original bonds, it had implied authority independent of any statute authorizing their issuance to issue refunding bonds in lieu of the original ones. The trouble with this argument is that it runs counter to the express provisions of the statute, which, in effect, prohibited the defendant district from issuing such refunding bonds for the reason that there were not 25 legal votes cast in said district at the preceding election therein. In the face of this express statutory inhibition,

there could be no implied authority for the issuance of said bonds.

It follows from what we have above said the judgment and order appealed from must be affirmed.

All concur.

(120 N. W. 555.)

INDEX.

ABUSE OF DISCRETION. See DISCRETION, 534.

ACCOUNTING. See PLEADING, 82.

1. An action for an accounting will not lie, in the absence of contract or fraud, to compel a redemptioner from a mortgage foreclosure sale, who thereafter obtained a sheriff's deed under his redemption, to account to the mortgagor for the difference between what was paid on the redemption and the value of the land. Barker v. More, 82.

ACTION.

1. Where plaintiff knows when his action is commenced, that specific performance could not be awarded, and a party to the contract, made defendant, died since the action was begun, whose heirs, devisees and executors have been substituted as defendants, his estate settled, jurisdiction will not be retained to assess damages, but the action will be dismissed as not properly brought. Knudtson v. Robinson et al., 12.

ADVERSE CLAIMS, See QUIETING TITLE, 166, 221; VENDOR & PURCHASER, 467.

ADVERSE POSSESSION. See QUIETING TITLE, 384; POSSESSION, 517.

1. Appellant and its grantor became mortgagees through an equitable assignment of a mortgage on property as the result of a defective foreclosure by advertisement, at which foreclosure such grantor became the purchaser, received a certificate of sale and sheriff's deed, and thereafter deeded the premises to appellant. For eleven and one-half years after such abortive foreclosure sale, the fee owner paid no taxes and exercised no acts of ownership over the property, while appellant, during such time, paid the taxes and for over ten years prior to the commencement of this action, they in good faith asserted claim thereto, hostile and adverse to the fee owners, with their implied knowledge and consent, during which time they had such actual possession as, in view of the nature of the property and all the circumstances disclosed by the evidence, was essential to constitute them adverse occupants. Mears v. Somers Land Co., 384.

AFFIDAVIT. See ATTACHMENT, 176.

ALIMONY. See DIVORCE, 525, 561.

AMENDMENT. See PLEADING, 82, 528.

1. Defects or omissions in an undertaking on appeal may be supplied by amendment or by giving a new undertaking, under the provisions of section 7224, Rev. Codes 1905. Sucker State Drill Co. v. Brock, 8.

ANIMALS. See Railroads, 462.

1. In an action for injuries inflicted by a vicious bull claimed to be the property of appellant and negligently suffered to escape from its enclosure and to trespass upon the ground where the injuries were inflicted. *Held,* that the evidence as to such ownership was sufficient to go to the jury, which found in plaintiff's favor, and the same will not be disturbed upon appeal. Peterson v. Conlan, 205.
2. Plaintiff neither owning nor in possession of real property on which the animal was trespassing and which inflicted an injury on the plaintiff, cannot recover for a trespass, and the instructions relative to this phase of the case constitutes reversible error. Peterson v. Conlan, 205.
3. The complaint was framed to embrace the following grounds of recovery: First, that the animal was vicious and known by its owner to be so, who kept and harbored the same in such a negligent manner as to permit its escape from his enclosure and to inflict the injury complained of. Second, that the animal was trespassing at the time of the injury, and hence its owner is liable for damages done by it. Third, negligence of the owner in permitting such escape. The court submitted the issues on the first two theories only. *Held,* conceding the evidence of the known viciousness of the animal to be sufficient to go to the jury, that a new trial must be ordered for errors in the instructions relative to the second ground; it being impossible to determine on which theory the verdict was rendered. Peterson v. Conlan, 205.
4. Certain instructions amounting to a peremptory charge to find for plaintiff, provided the jury found the appellant to be the owner of the animal inflicting injuries, regardless of the question of appellant's negligence, and also without regard to whether the particular injury complained of was proximately caused by such trespass, were erroneous. Section 6582, Rev. Codes 1905, restricts such recovery to damages proximately caused by the trespass. Peterson v. Conlan, 205.
5. Recovery cannot be sustained on the ground that the owner of a vicious animal was negligent in permitting it to trespass upon real estate, as the case was not tried, nor the jury instructed, on such theory. Nor for the same reason, can the recovery be sustained upon the theory that there was a statutory liability resting on defendant under sections 9405, 9408, Rev. Codes 1905. Peterson v. Conlan, 205.
6. That part of section 1937, Rev. Codes 1905, which provides the dimensions of a corral fence for inclosing stacks, outside of any lawful enclosure, its distance from the stack inclosed, distance of its posts apart, the number of strands of fence wire and its height, is applicable during the open season to counties in which the provisions of that section, permitting live stock to run at large from December first to April first of each year, have not been

ANIMALS—Continued.

abolished by an election held for that purpose. Johnson v. Rickford, 268.

7. In a county where section 1933, Rev. Codes 1905, is operative, a party can maintain an action against the owner of ranging animals for damages occasioned by breach of a lawful fence, under section 1940, Rev. Codes 1905, only upon showing that at the time of the alleged trespass he had secured his property by a strong and sufficient fence, and that, notwithstanding such fence, animals have breached or broken it, and destroyed property within the inclosure. Johnson v. Rickford, 268.
8. A good and sufficient fence to exclude ranging live stock between December first and April first in each year, in counties where section 1933, Rev. Codes 1905, is operative, must in height, strength and distance from enclosed stacks, comply with section 1939, Rev. Codes 1905, or present a barrier as effectual as the fence described in that section. Johnson v. Rickford, 268.
9. A party suing the owner of ranging animals during the open season for live stock, for breach of an inclosure under the provisions of section 1940, Rev. Codes 1905, and failing to show that he has secured his property by a fence sufficient to exclude animals, fails to establish a cause of action against the owner of such animals. Johnson v. Rickford, 268.

ANSWER. See Pleading, 82, 338.

1. In an action to determine adverse claims to real property, the burden is upon plaintiff to establish his title as alleged where it is put in issue. Young v. Engdahl, 166.

APPEAL AND ERROR. See Costs, 185; Statement of Case, 483; Witness, 594.

1. An appeal from a judgment and from two orders denying motions for a new trial, made upon same grounds, is not a double appeal. Sucker State Drill Co. v. Brock, 8.
2. Defects or omission in an undertaking on appeal may be supplied by amendment or by giving a new undertaking, under the provisions of section 7224, Rev. Codes 1905. Sucker State Drill Co. v. Brock, 8.
3. Where proof of a foreign record was erroneously rejected, it is without prejudice, if admitted, it would have failed to substantiate a cause of action by a fair preponderance of the evidence. Miller v. N. P. Ry. Co., 18.
4. The trial court found that on November 4th, 1905, there remained the sum of $1,430 due on an indebtedness and rendered judgment for the plaintiff. Held, that the evidence discloses that there was at least the sum of $1,900 still due on such original indebtedness, and appellant is liable for the amount recovered in the court below. Foster Co. Bank v. Hester, 135.

APPEAL AND ERROR—Continued.

5. The person who represented the plaintiff bank in accepting the new notes, testified positively that such new notes would be received only as collateral security to the indebtedness. Such fact was denied by C. The finding of the trial court upon this question was in plaintiff's favor, and such finding is sustained by this court. Foster Co. Bank v. Hester, 135.

6. Rev. Codes N. D., 1905, section 7968, which exempts an administrator, executor or guardian from the necessity of giving an undertaking on appeal in certain cases, does not apply to one who appeals from a decision of the county court revoking the probate of a will and also his letters of administration issued under such will. Ransier v. Hyndman, 197.

7. In an equity case tried and appealed under the provisions of Rev. Codes 1905, section 7229, a statement of the case is not required to enable this court to review questions appearing on the record proper. Brandenburg v. Phillips, 200.

8. The sole question which the appellate court is asked to review relates to the rate of interest which plaintiffs are entitled to recover. Held, that the findings of fact of the trial court disclose that plaintiffs had no cause of action at the time this action was commenced, and that, in any event, the rate allowed by the judgment below exceeds the amount called for by the contract between the parties; hence appellants have no cause for complaint. Brandenburg v. Phillips, 200.

9. In an action for injuries inflicted by a vicious bull claimed to be the property of appellant, and negligently suffered to escape from its enclosure, and to trespass upon the ground where the injuries were inflicted. *Held*, that the evidence as to such ownership was sufficient to go to the jury, which found in plaintiff's favor, the same will not be disturbed upon appeal. Peterson v. Conlan, 205.

10. The complaint was framed to embrace the following grounds of recovery: First, that the animal was vicious and known by its owner to be so, who kept and harbored the same in such a negligent manner as to permit its escape from his enclosure and to inflict the injury complained of. Second, that the animal was trespassing at the time of the injury, and hence its owner is liable for damages done by it. Third, negligence of the owner in permitting such escape. The court submitted the issues on the first two theories only. *Held*, conceding the evidence of the known viciousness of the animal to be sufficient to go to the jury, that a new trial must be ordered for errors in the instructions relative to the second ground; it being impossible to determine on which theory the verdict was rendered. Peterson v. Conlan, 205.

11. Plaintiff neither owning nor in possession of real property on which the animal was trespassing and which inflicted an injury on the plaintiff, cannot recover for a trespass, and the instructions rela-

APPEAL AND ERROR—Continued.

tive to this phase of the case constitute reversible error. Peterson v. Conlan, 205.

12. The parties to an action stipulated in writing the facts on which the case should be tried, agreeing therein that the facts therein stated were all the facts in the action, and such stipulation should be the evidence of the same and considered proven. After trial, arguments and submission of the case plaintiff moved for leave to take testimony upon questions not covered by the stipulation, which was granted and plaintiff only given leave to submit additional testimony. There was no fraud or deceit on the part of defendant relative to the stipulation. *Held*, to permit the plaintiff alone to take and submit additional evidence as to facts, not included in the stipulation without giving the right to rebut to the defendant or to submit evidence on the facts covered by the order, was error. Adams v. Hartzell, 221.

13. At close of plaintiff's case, defendant's motion for a directed verdict was denied and exception taken. At the close of the defendant's testimony and after both parties had rested, there were the same motion, ruling and exception. Plaintiff asked the court to instruct that the only question for the jury was of the extent of the injury and the amount of the damage; claimed the evidence conclusive in its favor on all other issues, which request was granted and defendant excepted. *Held* the ruling was prejudicial error, and defendant deprived of its right to a trial by jury of all the issues, which right had not been waived, and the court was not warranted in the assumption that defendant in making its motions waived the jury and submitted all issues to the court. Umsted v. Colgate El. Co., 309.

14. The answer was not demurred to nor the insufficiency suggested to the trial court, which proceeded upon the theory that issue was joined, the Supreme Court will not pass upon the sufficiency of the answer. Gooler v. Eidsness, 338.

15. Section 7325, Rev. Codes 1905, reads: "When an order of the district court is made, which under the laws regulating appeals to the Supreme Court is an appealable order, such order shall upon its face by apt words briefly describe the affidavits, documents, papers and evidence upon which the order is made and the judges may at their discretion refuse to sign orders not so framed, and the Supreme Court may at its discretion dismiss any appeal from an order which is not framed substantially in accordance with the requirements of this section." *Held*, that objection taken for the first time in this court to the order of the district court granting a new trial, such objection being upon the ground that the order does not enumerate the evidence and papers upon which it was granted, will not be considered by this court. Gooler v. Eidsness, 338.

16. When a new trial is granted by the district court, its order will be

APPEAL AND ERROR—Continued.

affirmed if any ground for sustaining it is found in the record. Gooler v. Eidsness, 338.

17. Where there is a direct conflict in the evidence on material questions, directing of a verdict for appellant was error and the district court was justified in granting a new trial. Gooler v. Eidsness, 338.

18. Section 6736, Rev. Codes 1905, defines "process" as a writ or summons issued in the course of judicial proceedings. *Held,* that the notice of appeal is not a writ or summons, and is therefore not "process," and need not be served in the same manner in which "process" is required to be served. Gooler v. Eidsness, 338.

19. Section 7205, Rev. Codes 1905, provides that an appeal must be taken by serving a notice in writing, etc., and by filing the same in the office of the clerk of court. Section 7332 provides for service of notice by mail when the person making the service and the persons upon whom it is made reside in different places between which there is regular communication by mail. *Held,* that notice of appeal is included in the sections referred to, and service by mail, when the facts specified exist, is valid service if other requirements are observed. Gooler v. Eidsness, 338.

20. Where police magistrates of cities in counties wherein the county courts have increased jurisdiction, retain jurisdiction to try and determine charges of misdemeanor, is not decided by assuming that they were without such jurisdiction, *held,* that by failing to object to the jurisdiction of the magistrate, and by appeal from his judgment to the district court, and participating in the trial therein and not objecting to the jurisdiction of either until after verdict of guilty, defendant waived all questions of jurisdiction not raised below and it was error in the district court to grant a motion in arrest of judgment and discharge the defendant. State v. Russell, 357.

21. A notice of appeal reciting that appeal is taken from a part of the decree rendered by a district court in an action tried to the court without a jury, under the provisions of section 7229, Rev. Codes 1905, will not authorize this court to review or retry any questions of fact specified on said appeal, or to affirm, modify or reverse the judgment of the district court, or to direct the entry of a new judgment, or to order a new trial of the action, or in any manner to finally dispose of the case on appeal, and an appeal so taken must be dismissed without further action. Tronsrud v. Land Co., 417.

22. In an action by a father for damages for the wrongful death of a daughter three months old, who is dangerously ill with uremia, when the wrongful act complained of was committed, the question of the pecuniary injury of the father by the death of such child, if caused by the wrongful act of defendants, is purely a matter of speculation, conjecture and guess work, and any verdict for

APPEAL AND ERROR—Continued.

more than nominal damages in favor of the father would necessarily be based upon conjecture or speculation. Scherer v. Schlaberg, 421.

23. Certain rulings on the evidence and instructions to the jury examined, and held non-prejudicial to defendant. Anderson v. Soo Ry. Co., 462.
24. *Held,* under the facts of this case, that no error was committed by the trial court in entering judgment cancelling an executory contract for purchase and sale of real estate. Martinson v. Regan, 467.
25. A notice of appeal from a judgment is ineffectual to review an order made after judgment denying a motion for a new trial, and such motion merely asks for a review of such order. And if the appeal bond makes no reference to such order, the attempted appeal was wholly abortive. Hedderich v. Hedderich, 488.
26. Where a motion for a new trial is made and denied after judgment and the appeal is from the judgment alone, the order denying the motion is conclusive as to all matters passed upon by the trial court on such motion, except errors properly appearing upon the judgment roll, which errors may always be reviewed on the appeal from the judgment. Hedderich v. Hedderich, 488.
27. Assignments of error, in order to be available to the appellant, must be based upon rulings which are reviewable in this court. It is accordingly held that the assignments relating to alleged insufficiency of the evidence and challenging the correctness of the order denying the motion for a new trial cannot be considered on this appeal. Hedderich v. Hedderich, 488.
28. Assignments based on alleged erroneous instructions to the jury where no exceptions were saved to such instructions, and assignments predicated on alleged erroneous rulings of the admission or rejection of testimony, where such testimony is not material in view of the other facts found by the jury, will not be considered. Hedderich v. Hedderich, 488.
29. Where the jury, by special verdict found that the execution of a will was the free act and deed of the testator, and not executed under undue influence exerted upon the testator's mind, that the interpleader, who claimed to be the lawful issue of the deceased, an Indian wife, and the sole heir of such deceased, was intentionally omitted by the testator as a devisee or legatee under the will; that the testator was of sound mind at the time of the execution of the will. Such findings eliminated as immaterial all other contested issues, hence alleged errors predicated upon the court's action with reference thereto need not be considered. Hedderich v. Hedderich, 488.
30. The question whether the testator was of sound mind at the time of executing his will was submitted to the jury, who reported their inability to agree as to the answer to be made, and the court, on

APPEAL AND ERROR—Continued.

motion of respondent's counsel directed an affirmative answer thereto. *Held,* not error, as there was no evidence upon which the jury could properly have made a negative answer to such question. Hedderich v. Hedderich, 488.

31. Assignments of error as to admission of non-expert testimony as to testator's mental condition when making his will are overruled. The erroneous rulings complained of not being prejudicial for reasons stated in the opinion. Hedderich v. Hedderich, 488.

32. Under section 7228, Rev. Codes 1905, when the Supreme Court orders a new trial or further proceedings in the court below, such proceedings must be had within one year from date of such order, and unless sufficient excuse for delay is shown the trial court will dismiss the action. Bessie v. N. P. Ry. Co., 507.

33. Admitting service of notice of trial after the expiration of one year from filing of the remittitur in the district court and the admission in certain letters mentioned in the opinion, and having his attorneys appear at the call of the calendar and ask that the case be set for trial, defendant does not waive right to insist upon a dismissal of the action. Bessie v. N. P. Ry. Co., 507.

34. Complaint, verified by plaintiff's attorney, contains matter inconsistent with the amended complaint and plaintiff's version of the transaction. The original complaint was offered in evidence as a part of the cross-examination, which offer was objected to and objection sustained. *Held,* not error, as proof was not proper cross-examination, but part of defendant's case, and its reception then was discretionary with the trial court. Leistikow v. Zuelsdorf, 511.

35. Certain other assignments, based upon rulings in the admission and rejection of testimony, examined, and such rulings held not prejudicial to appellant. Leistikow v. Zuelsdorf, 511.

36. Appellant having failed to assign errors in its brief as provided by rule 14 of the rules of this court (91 N. W. viii), and the record showing no reason for relaxing the rule, the judgment appealed from is affirmed. Sucker State Drill Co. v. Brock, 532.

37. The Supreme Court will not consider, as a ground for reversal of the judgment of the trial court and its order denying a new trial, a point not raised in the trial court. Poirier Mfg. Co. v. Kitts, 556.

38. Failure to instruct that appellant was entitled to 7 per cent interest per annum on all counterclaims allowed him by the jury from maturity to the date of the verdict was not, under the circumstances, reversible error. Landis v. Fyles, 587.

39. On an appeal both from a final judgment and from an order denying a new trial, but one undertaking is required to perfect such appeals; but such undertaking must refer to each of the appeals, and, if it merely recites the appeal from the judgment, the appeal

APPEAL AND ERROR—Continued.
from the order is ineffectual, and may be dismissed on motion. Sucker State Drill Co. v. Brock, 598.
40. It is error to tax an attorney's fee in an equitable action under section 7179, Rev. Codes 1905. Power v. King, 600.
41. Admission of exhibits A, B, F and G, offered in evidence by defendant held error. Roberts v. Little, 638.
42. When the settled statement of case in an action properly triable to a jury contains no proper specifications of errors as required by Rev. Codes 1905, section 7058, the same must be disregarded by this court, as said section expressly provides that: "If no such specification is made, the statement shall be disregarded on motion for a new trial and on appeal." No proper specification being found in the settled statement in this case, this court is restricted to a review of such errors, if any, as appear upon the face of the judgment roll proper. State v. School District, 616.

ARREST OF JUDGMENT. See Appeal and Error, 357.

ASSESSMENT. See Taxation, 246.

ASSIGNMENT. See Insolvency, 221.
1. Parties to a written assignment of a contract for the sale of real estate which was made for security purpose, can annul the same and make such assignment absolute by a subsequent contract of assignment. Barker v. More, 82.
2. Parties may agree to change an assignment for security to one absolute in form and effect. Barker v. More, 82.

ASYLUMS FOR FEEBLE MINDED. See Statutory Construction, 125.

ASYLUMS FOR INSANE. See Statutory Construction, 125.

ATTACHMENT.
1. An affidavit for an attachment, which states in the language of the statute, that the debtors "have sold, assigned, transferred, secreted or otherwise disposed of, or are about to sell, assign, transfer, secrete or otherwise dispose of their property with intent to cheat or defraud their creditors," states but one ground for attachment. McCarthy Bros. Co. v. Elevator Co., 176.
2. The use of the disjunctive conjunction "or" in subdivision 4, section 6938, Rev. Codes 1905, is not to connect two grounds for an attachment, but said subdivision states one ground only consisting of different phases of facts or conditions, intimately related, pertaining to that one ground. McCarthy Bros. Co. v. Elevator Co., 176.

ATTORNEY GENERAL. See Venue, Change of, 534.

ATTORNEY, POWER OF. See Insolvency, 221.

ATTORNEY'S FEES. See Costs, 185.

AUDITOR. See Officers, 289.

BANKRUPTCY.

1. St. Wis. 1898, chapter 80, with the acts amendatory thereof and supplemental thereto, which provide that, when a resident of that state has made an assignment of his property for the benefit of creditors, the proceedings thereunder shall be under the jurisdiction of the circuit court, and that the assignee may be removed, and the creditors may elect a successor, and for the discharge of the debts of the assignor, is a state bankruptcy or insolvency law. Adams v. Hartzell, 221.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS, 45, 500, 587.

BOARD OF EQUALIZATION. See TAXATION, 390.

BONA FIDE PURCHASER. See NEGOTIABLE INSTRUMENTS, 45; BONDS, 616.

BONDS. See MUNICIPAL CORPORATIONS, 289; VOTERS AND ELECTIONS, 616.

1. The test whether questions submitted include one purpose or more is whether the objects for which bonds are to be issued have a natural or necessary connection with each other; and, if they have not, two purposes cannot be made one by verbal connection. Stern v. Fargo, 289.
2. Section 183 of the constitution, and the statute, provide a debt limit, for general purposes of cities, of 5 per cent, with power to incur additional indebtedness equalling 3 per cent of the assessed valuation on a two-thirds vote, making a possible indebtedness for general purposes of 8 per cent. It is also provided that a city, when authorized by a majority vote, may increase its indebtedness, not exceeding 4 per cent, without regard to existing indebtedness, for the construction or purchase of waterworks or constructing sewers, and for no other purpose whatever.

   Query: Can a city issue bonds for the construction of waterworks or sewers in such a manner as to necessarily include the amount of such bonds in the 5 per cent provision for the construction of waterworks and sewers? If they must be so issued as to admit of their being included within the 4 per cent special waterworks provision, the connection of an electric light plant, or of any other subject except sewers, with waterworks in the issuance of bonds, furnishes an additional reason for holding the proposed issue under consideration illegal. Stern v. Fargo, 289.
3. Under a statute providing for an election for the issue of bonds for a courthouse or jail or both, requiring a notice of such election to state its object, the amount of bonds to be issued, the denominations of such bonds, the length of time for which they shall run, and rate of interest which they shall bear, a notice which fails to so state renders the election invalid and the bonds issued pursuant to such election are illegal. Hughes v. Horsky, 474.
4. Under a statute providing for the issuance of bonds for county build-

BONDS—Continued.

ings, providing for the submission of the question of the issuance of bonds for a courthouse, or jail, or both, held, that when the erection of a courthouse and jail in one building is contemplated, and the notice so indicates, the question of issuing bonds may be submitted and voted upon as one question, but that when two separate buildings are planned, two questions are presented, and although they may be submitted in the same notice, it must be so done that each voter may vote for or against each proposition independently of the other. Hughes v. Horsky, 474.

5. The municipal bonds of defendant school district which are sued upon in this case were issued without first submitting to the electors of the school district the question of their issuance, and, furthermore, the school district had no power to issue the same by the express provisions of the act under which it is claimed they were issued, as there were not twenty-five legal votes cast in such district at the preceding annual school election therein. Chapter 11, page 39, Laws 1887, under which plaintiff contends such bonds were issued, is printed upon the back of the bonds, and section 9 thereof expressly provides that the question of refunding prior indebtedness shall be first submitted to a vote of the qualified electors of the district after giving certain notice therein prescribed of an election for such purpose, and that the proposition to issue such bonds must receive the affirmative votes of at least two-thirds of all the votes cast; also, that no school district in which less than twenty-five legal votes were cast at the annual school election next preceding the issuance of such bonds shall avail itself of the provisions of this act. *Held*, for these reasons, that such bonds are void. State v. School District, 616.

6. The bonds in suit contain a recital to the effect that they are issued for the purpose of refunding present indebtedness "as authorized by act of the legislative assembly approved March 11, 1887" (Laws 187, page 39, chapter 11), entitled "An act to provide for refunding the outstanding indebtedness which existed prior to July 30, 1886, of any incorporated board of education or school district in the territory of Dakota." *Held*, that such recital does not estop the school district from urging the defense, even as against an innocent purchaser, that such bonds were illegally issued. State v. School District, 616.

7. Every purchaser of municipal bonds acquires and holds them charged with full notice of the possession, or absence, of power in the first instance on the part of the public corporation to issue them; and the question of the authority of a public corporation to issue negotiable bonds cannot be concluded by mere recitals, even as against innocent purchasers thereof. State v. School District, 616.

BRIEF, SEE APPEAL AND ERROR, 532.

BROKERS.

1. A contract between a land owner and a broker provided, that the latter should have exclusive sale of lands for ten years at prices as he deemed best, provided that none should be sold for less than the appraised value named in the schedule attached to the contract. From sales a stipulated amount was to be paid the land owner, and the balance equally divided between the parties to the contract. *Held,* that the broker could fix the selling price of land, provided it was not less than the appraised value, and that the land owner could not refuse to approve sales because the price was not satisfactory to him. Young v. Metcalf Land Co., 441.
2. The dealer having been prevented by the landowner from making the sales is entitled to the profits he would have made had the offers been accepted and sales approved by the landowner. Young v. Metcalf Land Co., 441.

BURDEN OF PROOF. See Evidence, 45, 135, 166, 409.

BY-LAWS. See Corporations, 253.

CASES CRITICISED, MODIFIED AND OVERRULED.

1. State ex rel. McCue, Attorney General, v. Blaisdell, Secretary of State et al. (N. D.) 119 N. W. 360, distinguished. State v. Wing, 242.

CERTIORARI. See Supreme Court, 233.

CHANGE OF VENUE. See Venue, Change of, 534.

CHATTEL MORTGAGES.

1. Where a crop contract reserves title in the owner of the land to the crops until a division thereof, such owner, by taking a mortgage in the third year of the crop of that year, would not thereby waive or abandon title to the crops; such chattel mortgage is merely a contract for a lien when the mortgagor acquired title, and in accepting the same the plaintiff's act was not inconsistent with such reservation of title. McFadden v. Thorpe El. Co., 93.
2. The question of waiver is largely one of intent, and, under the evidence, it is apparent that no such waiver was intended by the acceptance of the chattel mortgage. McFadden v. Thorpe El. Co., 93.
3. In plaintiff's original complaint, he based his right of recovery upon the chattel mortgage, claiming merely a special property in the grain. Subsequently he was permitted to amend his complaint by abandoning such theory, and alleging ownership of the grain by virtue of the farm contract. *Held,* that, by adopting the theory of recovery set forth in the original complaint, plaintiff did not thereby preclude himself from receding therefrom, nor did such act evince an intention on plaintiff's part to waive his legal title under the contract. He had no election of remedies, as his only cause of action was grounded upon his title under the farm contract; the chattel mortgage not having at-

CHATTEL MORTGAGES—Continued.

tached to the grain at the date of the conversion. Plaintiff was merely mistaken in attempting to pursue a remedy which he did not have, and this cannot be construed as an election to waive or abandon the only remedy which he possessed. McFadden v. Thorpe El. Co., 93.

4. The stipulation in a farm contract reserving title to the crops in plaintiff did not constitute a chattel mortgage; hence the filing of such contract was unnecessary as against innocent purchasers of the grain, following Angell v. Egger, 6 N. D. 391, 71 N. W. 547. McFadden v. Thorpe El. Co., 93.

CIRCUMSTANTIAL EVIDENCE. See Evidence, 462.

CITIES. See Municipal Corporations, 289.

CITY AUDITOR. See Officers, 289.

CLAIM AND DELIVERY.

1. Action in claim and delivery to recover possession of certain stock. Judgment for defendant. Evidence examined, and held insufficient to justify the judgment. Roberts v. Little, 608.
2. Whether estoppel in claim and delivery is required to be pleaded not decided. Roberts v. Little, 608.

COLLATERAL MATTER. See Witness, 594.

COLLATERAL SECURITY. See Guaranty, 135.

COMMON CARRIERS.

1. A contract entered into for carriage of freight from a point in one state to a point in another state will, in the absence of proof of a contrary intention, be governed by the law of the place where the contract was entered into. Hanson v. Gt. N. Ry. Co., 324.
2. By statute in this state a common carrier may, by special contract signed by the consignor or consignee, limit or modify its common liability, except that it cannot exonerate itself from liability for loss or damage resulting from the negligence, fraud or willful wrong of itself or servants. Prior to the enactment of chapter 57, page 83, Laws 1907, it was lawful by special contract, when signed by the consignor or consignee, to exonerate such carrier from liability, except for its or its servants' gross negligence, fraud or willful wrong. Hanson v. Gt. N. Ry. Co., 324.
3. Such special contract will not be enforced except when fairly entered into and when just and reasonable in the eye of the law. Stipulation fixing a mere arbitrary valuation upon goods for the sole purpose of limiting the carrier's liability in case of loss or damage are not just and reasonable in the eye of the law. Hanson v. Gt. N. Ry. Co., 324.
4. Whether the carrier may by special contract fixing the value of goods for shipment, when fairly made, limit or restrict its liability for negligence to the value thus agreed upon, is not determined. Hanson v. Gt. N. Ry. Co., 324.

COMMON CARRIERS—Continued.

5 Tested by the foregoing rules, the special contract in the case at bar, which fixes the value of the household goods at $5 per hundredweight, is for reasons stated in the opinion, contrary to the public policy of this state, and hence will not be enforced here. Hanson v. Gt. N. Ry. Co., 324.

COMMON LAW. See REGISTER OF DEEDS, 478.

1. In the absence of proof to the contrary, the presumption prevails that the common law is in force in a foreign jurisdiction. Hanson v. Gt. N. Ry. Co., 324.

COMPLAINT. See PLEADING, 550.

CONDITIONAL SALE. See SALES, 556.

CONFIDENTIAL RELATIONS. See FRAUD, 550.

CONSIDERATION. See NEGOTIABLE INSTRUMENTS, 45; CONTRACTS, 214; DEEDS, 409.

CONSTITUTIONAL LAW. See VOTERS AND ELECTIONS, 31; STATUTORY CONSTRUCTION, 289; JURY, 309.

1. A "roadway," within the constitution, section 179, providing for taxation of the franchise, roadway, etc., of all railroads, includes not only the strip of ground on which the main line is constructed, but all grounds necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses and other accommodations reasonably necessary to accomplish the object of their incorporation. Soo Ry. Co. v. Oppegard, 1.
2. A majority of the votes cast upon a question submitted to a vote, if in the affirmative, carries it, unless the legislative will to the contrary is clearly expressed in the constitution or the law. State v. Blaisdell, 31.
3. Legislative construction, when followed by years of harmonious subsequent legislation, is entitled to great weight in determining the construction of constitutional provisions. State v. Blaisdell, 31.
4. The provisions of the primary election law requiring legislative candidates to take and subscribe an oath and pledge, that they will support and vote for the candidate for United States senator receiving a majority of the party vote at the primary election and the succeeding general election, is violative of section 211 of the constitution of North Dakota; but the choice of such senator may be sustained regardless of the invalidity of such other provisions. State v. Blaisdell, 55.
5. The primary election law permitting electors to designate their choice of United States senator does not amount to an election by the people, and does not violate the federal constitution, providing for the election of United States senators by the legislature; but if they do, no constitutional right of the citizen is violated. It is not a judicial question; the United States senate is the tribunal to determine the same. State v. Blaisdell, 55.

CONSTITUTIONAL LAW—Continued.

6. The provisions of the primary election law relating to the nomination and election of United States senators are germane to the subject embraced in the title of the act. State v. Blaisdell, 55.
7. Section 2, chapter 136, page, 244, Laws 1905, providing that no appointment to any of the departmental offices of the state militia shall be for a longer period than two years, is germane to the subject and general purpose expressed in the title, "An act providing that all appointments to the various departments of the National Guard of the state of North Dakota shall be made from officers of the field and line," and does not contravene the provision of section 61, article 2, of the state constitution, requiring that the subject of an act shall be expressed in the title. (Morgan, C. J., and Fisk, J., dissenting.) State v. Peake, 101.
8. In determining the constitutionality of a legislative act under section 61, article 2 of the state constitution, the title of the act is to be construed in the light of the general object and purpose of the act; and if, so construed, the provisions of the act appear to be in furtherance of the general purpose expressed in the title, the act will be upheld. State v. Peake, 101.
9. The legislature may provide for the indigent insane and feeble-minded by general taxation, and to relieve the counties from such burden. It may require each county to maintain its own indigent persons, or to reimburse the state in whole or in part for so doing. There is nothing in the provisions of section 174 of the constitution that deprives the legislature of such power. State v. Lewis, 125.
10. Chapter 237, Laws of 1907, relating to maintenance of state institutions for the insane and feeble-minded is not unconstitutional. State v. Lewis, 125.
11. Arguments as to the expediency and reasons for a law, are properly addressed to the legislature and will not justify the appellate court, because the most expedient method has not been provided, in holding the provisions of a law invalid. State v. Anderson, 149.
12. The legislature has the power to legislate on subjects not prohibited, either in express terms or by necessary implication, by the constitution. State v. Anderson, 149.
13. Sections 86 and 87 of the constitution of North Dakota constitute a grant of power to the Supreme Court, and, the language thereof being restrictive in its terms, this court has such jurisdiction, and only such, as is expressly or by necessary implication, therein granted. State v. Nuchols, 233.
14. By section 86 of the constitution the Supreme Court is granted appellate jurisdiction only, "except as otherwise provided in this constitution," together with a general superintending control over all inferior courts. * * *" Section 87 is the only place in the constitution where it is otherwise provided. This section grants

CONSTITUTIONAL LAW—Continued.

power to the Supreme Court "to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction." *Held,* that the writ of prohibition not being one of the enumerated writs, this court is without jurisdiction to issue the same, except where its issuance is necessary to the proper exercise of its jurisdiction is a pending cause, or to effectuate this court's general superintending control over inferior courts. State v. Nuchols, 233.

15. A writ of prohibition not being one of the enumerated writs that the Supreme Court is authorized to issue, such court is without jurisdiction to issue the same, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending case, and to effectuate such court's general superintending control over inferior courts. State v. Nuchols, 233.

16. A courtmartial is not an inferior court within the meaning of section 86 of the constitution; it not belonging to the judicial, but to the executive department of the government. The inferior courts referred to in section 86 are the courts enumerated in section 85, which belong to the judicial department. State v. Nuchols, 233.

17. In a mandamus proceeding, instituted by a private party against county officers to compel them to change the location of their offices as such officers, such proceeding not being maintained in the name of the state, or on behalf of the citizens of such county, the court will not determine the constitutionality of an act of the legislature providing for a vote upon the re-location of the county seat. Dean v. Dimmick, 397.

18. In an information entitled in the name of the State of North Dakota, wherein the case is designated as "State of North Dakota, plaintiff, v. Charley Bednar, defendant," shows that the case is prosecuted "in the name and by the authority of the state of North Dakota," as provided by section 97, article 1 of the constitution, especially where the information recites "state's attorney in and for Pierce county, in the state of North Dakota, in the name and by the authority of the state, gives this court to understand and be informed." State v. Bednar, 484.

19. Section 111 of the constitution provides that county courts shall have jurisdiction of certain civil and criminal causes "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 that court increased." *Held,* that the words "majority vote" mean a majority of all votes cost on the question of increased jurisdiction, and not a majority of all the votes cast at the election. State v. Fabrick, 402.

CONSTRUCTIVE FRAUD. SEE FRAUD, 185, 550..

CONTRACTS. See Landlord and Tenant, 93, Vendor and Purchaser, 467, Sales, 556.

1. Mutuality of obligation is essential to the enforcement of a specific performance of a contract under section 6610, Rev. Codes 1905. Knudtson v. Robinson et al., 12.
2. In cases where specific performance of a contract will not lie on account of the absence of mutuality in the contract, the principle of compensation for deficiency or abatement of price has no application. Knudtson v. Robinson et al., 12.
3. Parties to a written assignment of a contract for the sale of real estate, which was made for security purposes, can annul the same and make such assignment absolute by a subsequent contract or assignment. Barker v. More, 82.
4. An action for an accounting will not lie, in the absence of contract or fraud, to compel a redemptioner from a mortgage foreclosure sale, who thereafter obtained a sheriff's deed under his redemption, to account to the mortgagor for the difference between what was paid on the redemption and the value of the land. Barker v. More, 82.
5. Where husband and wife make a verbal agreement to sell their homestead, and the purchaser pays part of the purchase price, enters into possession, makes permanent improvements thereon, with full knowledge and acquiescence of such husband and wife, the purchaser becomes the equitable owner of such premises and the sellers by their acts are estopped to question the validity of such agreement. Engholm v. Ekrem, 185.
6. Upon the dissolution of a partnership between S. and M., it was agreed that the latter's interest was $1,100, and in consideration of S. paying M. said sum, M. agreed "not to engage for the next two years" in the same business in the same city, "in the matter aforesaid or with any partner, partners, firm, company or corporation for the period aforesaid." *Held*, that such contract was upon a sufficient consideration, legal and enforceable. Seigel v. Marcus, 214.
7. Upon the dissolution of a partnership between S. and M., M. agreed "not to engage for the next two years in the same business, either with any partner, partners, firm, company or corporation for a certain period," M., after dissolution entered the employ as a clerk, of one E., whom he procured to open a rival business adjacent to that of S. M. attended to the purchase of stock for such rival business and was active managing agent for E., therein. *Held*, that M. thereby violated the terms of his agreement and should be enjoined from so doing. Seigel v. Marcus, 214.
8. A contract entered into for carriage of freight from a point in one state to a point in another state will, in the absence of proof of a contrary intention, be governed by the law of the place where the contract was entered into. Hanson v. Gt. N. Ry. Co., 324.
9. Where, however, such contract is against the established public

CONTRACTS—Continued.

policy of this state, it will not be enforced by our courts. Hanson v. Gt. N. Ry. Co., 324.

10. By statute in this state a common carrier may, by special contract, signed by the consignor or consignee, limit or modify its common law liability, except that it cannot exonerate itself from liability for loss or damage resulting from the negligence, fraud or willful wrong of itself or servants. Prior to the enactment of chapter 57, page 83, Laws 1907, it was lawful by special contract, when signed by the consignor or consignee, to exonerate such carrier from liability except for its or its servants' gross negligence, fraud or willful wrong. Hanson v. Gt. N. Ry. Co., 324.
11. Such special contract will not be enforced except when fairly entered into and when just and reasonable in the eye of the law. Stipulation fixing a mere arbitrary valuation upon goods for the sole purpose of limiting the carrier's liability in case of loss or damage are not just and reasonable in the eye of the law. Hanson v. Gt. N. Ry. Co., 324.
12. Whether the carrier may by special contract fixing the value of goods for shipment, when fairly made, limit or restrict its liability for negligence to the value thus agreed upon, is not determined. Hanson v. Gt. N. Ry. Co., 324.
13. Tested by the foregoing rules, the special contract in the case at bar, which fixes the value of the household goods at $5 per hundredweight, is for reasons stated in the opinion, contrary to the public policy of this state, and hence will not be enforced here. Hanson v. Gt. N. Ry. Co., 324.
14. A contract between a land owner and a broker provided that the latter should have exclusive sale of lands for ten years at prices as he deemed best, provided that none should be sold for less than the appraised value named in the schedule attached to the contract. From sales a stipulated amount was to be paid the land owner, and the balance equally divided between the parties to the contract. *Held,* that the broker could fix the selling price of land, provided it was not less than the appraised value, and that the land owner could not refuse to approve sales because the price was not satisfactory to him. Young v. Metcalf Land Co., 441.
15. A contract must be interpreted to effectuate the mutual intention of the parties at the time it was made so far as the same is ascertainable and lawful; and it must be so interpreted as to make it lawful, operative, definite, reasonable and capable of being carried into effect. Young v. Metcalf Land Co., 441.
16. The dealer having been prevented by the land owner from making the sales, is entitled to the profits he would have made had the offers been accepted, and sales approved by the landowner. Young v. Metcalf Land Co., 441.
17. The commencement of an action against the vendor and vendee in an executory contract for sale of land, to determine adverse claims

CONTRACTS—Continued.

the complaint being in statutory form under section 7522, Rev. Codes 1905, does not of itself furnish grounds or reasons excusing the vendee from performance, especially when the vendee in negotiating for extensions of payment, never gave the commencement of such action as excuse for failing to make payments. Martinson v. Regan, 467.

18. Where a contract within the statute of frauds is declared on, the court will presume that it was in writing, unless the complaint shows that it was not. Hanson v. Svarverud, 550.
19. In such case the agreement is enforced as based on the confidence imposed which makes the refusal to comply with the contract a constructive fraud. Hanson v. Svarverud, 550.
20. Under such circumstances, an allegation of actual fraud is not essential, as the refusal to comply with the agreement is constructively fraudulent, in view of the alleged confidential relations. Hanson v. Svarverud, 550.
21. Where the refusal of a grantee to carry out the terms of a trust agreement in reference to conveying real estate is actually or constructively fraudulent, a court of equity will enforce the agreement, although the same is not in writing. Hanson v. Svarverud, 550.
22. An offer to rescind a contract of sale on the ground of a breach of warranty, coupled with conditions as to payment of freight and storage, and to return only a portion of the property purchased, is not such an unconditional offer to rescind as can be sustained to defeat an action for the purchase price. Poirier Mfg. Co. v. Kitts, 556.
23. The facts disclosed in the record in this case show an affirmance of the contract by the appellant. Poirier Mfg. Co. v. Kitts, 556.
24. Before a deed or other contract will be set aside on the ground of the intoxication of the grantor or maker when the same was executed, the evidence must show that the grantor was in such a degree of intoxication at the time as to render him entirely incapable of understanding the nature and effect of the transaction. Power v. King, 600.
25. Evidence considered, and held to show that plaintiff was not rendered incompetent to enter into the contract involved in this action by reason of his intoxication. Power v. King, 600.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 478, 309, 367, 421.

COUNTERCLAIM. See PLEADING, 528, INTEREST, 587.

1. A counterclaim for damages for refusal to deliver certain repairs for machinery ordered by defendant from plaintiff, which order plaintiff accepted and agreed to fill, considered, and held not to state facts sufficient to entitle defendant to substantial damages. Scully Co. v. Hann, 528.

COUNTIES. See Voters and Elections, 474.

1. A vote to change county boundaries cast at a general election, is the holding of a "separate election," although held in connection with the general election. State v. Blaisdell, 31.
2. The elector who does not participate in an election acquiesces in the result of the votes by those who do, and to hold that section 168 of the constitution requires more than half as many affirmative votes in favor of a change in boundaries as are cast on any other subject at the same election, would be to give as much effect to the act of an elector, not voting on such change as to that of one voting in the negative, and render the statutory provision for negative votes useless. State v. Blaisdell, 31.
3. The meaning of words in a statute must often be determined by the subject matter in relation to which they are used; and, as section 168 relates only to the change of county boundaries, the words "votes cast" should be limited to that subject. State v. Blaisdell, 31.
4. On the question of the division of a county submitted at a general election, 4207 were in favor of the division, 4024 in opposition, while in the county 9259 votes were cast for the candidates for governor. *Held,* that the change voted upon was effected. State v. Blaisdell, 31.
5. Legislature may provide for the indigent insane and feeble-minded by general taxation, and to relieve the counties from such burden. It may require each county to maintain its own indigent persons, or to reimburse the state in whole or in part for so doing. There is nothing in the provisions of section 174 of the constitution that deprives the legislature of such power. State v. Lewis, 125.

COUNTY COMMISSIONERS. See Newspapers, 246.

COUNTY COURT. See Courts, 197.

1. Section 111 of the constitution provides that county courts shall have jurisdiction of certain civil and criminal cases "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 that court increased." *Held,* that the words "majority vote" mean a majority of all votes cast on the question of increased jurisdiction, and not a majority of all the votes cast at the election. State v. Fabrick, 402.

COUNTY JUDGES.

1. Chapter 68, page 81, Laws 1899, section 6615, Rev. Codes 1899, and chapter 78, page 169, Laws 1905, construed, and held to limit the maximum salary of county judges in counties having increased jurisdiction to the sum of $2,500. State v. Fabrick, 402.

COUNTY SEAT.

1. In a mandamus proceeding, instituted by a private party against county officers to compel them to change the location of their offices as such officers, such proceeding not being maintained in the name of the state, or on behalf of the citizens of such county, the court will not determine the constitutionality of an act of the legislature providing for a vote upon the re-location of the county seat. Dean v. Dimmick, 397.

CORPORATIONS. See Railroads, 1; Insurance, 253.

1. The by-laws of a corporation have much the same force and effect as between the members and officers in the conduct of the corporation's affairs, that a statute has, unless in conflict therewith, and can only be repealed or amended in a manner provided by law. Lamb v. Insurance Co., 253.
2. The statutes under which a domestic mutual fire insurance company is organized, its articles of incorporation, or charter, and by-laws, all enter into the contract of insurance, and are binding, not only on the organization, but on each member thereof. Lamb v. Insurance Co., 253.
3. While the officers of a domestic mutual fire insurance company whose by-laws are required by law to be adopted by a vote of the members, may waive many irregularities, they cannot waive matters of substance contained in such by-laws, including definite terms which provide under what circumstances and for what time credit may be given members for premiums or assessments, or to give such credit otherwise than is provided by such by-laws. Lamb v. Insurance Co., 253.
4. Section 4449, Rev. Codes 1905, as amended by chapter 153, page 245, Laws 1907, repealed section 4447 of said Codes, and foreign mutual insurance companies are authorized to do hail insurance business in this state by complying with the provisions of said section 4449, so far as it applies to them. State v. Cooper, 583.

COURTHOUSE. See Voters and Elections, 474.

COURTS. See Supreme Court, 233, 556, Statutory Construction, 289; Contracts, 324; Appeal and Error, 338; Jurisdiction, 525; Equity, 550; Jury, 603.

1. The opinion of the court that simpler, more effectual or reasonable rules and regulations covering primary elections might have been provided than the legislature did provide, will not justify the courts holding the regulations made invalid. State v. Anderson, 149.
2. Arguments as to the expediency and reasons for a law, are properly addressed to the legislature and will not justify the appellate court, because the most expedient method has not been provided, in holding the provisions of a law invalid. State v. Anderson, 149.

COURTS—Continued.

3. Rev. Codes N. D., 1905, section 7968, which exempts an administrator, executor or guardian from the necessity of giving an undertaking on appeal in certain cases, does not apply to one who appeals from a decision of the county court revoking the probate of a will and also his letters of administration issued under such will. Ransier v. Hyndman, 197.
4. Sections 86 and 87 of the constitution of North Dakota constitute a grant of power to the Supreme Court, and, the language thereof being restrictive in its terms, this court has such jurisdiction, and only such, as is expressly or by necessary implication, therein granted. State v. Nuchols, 233.
5. A writ of prohibition not being one of the enumerated writs that the Supreme Court is authorized to issue, such court is without jurisdiction to issue the same, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending case, and to effectuate such court's general superintending control over inferior courts. State v. Nuchols, 233.
6. A courtmartial is not an inferior court within the meaning of section 86 of the constitution; it not belonging to the judicial, but to the executive department of the government. The inferior courts referred to in section 86 are the courts enumerated in section 85, which belong to the judicial department. State v. Nuchols, 233.

COURTS-MARTIAL. See Military Law, 233.

COVENANT. See Damages, 478.

COSTS.

1. Costs are purely the creature of statute to be awarded only when expressly authorized by law. Allowances of attorney's fees, not authorized by law, should be eliminated from a judgment. Engholm v. Ekrem, 185.
2. It is error to tax an attorney's fee in an equitable action under section 7179, Rev. Codes 1905. Power v. King, 600.

CRIMINAL LAW. See Venue, Change of, 534; Witness, 594.

1. In a prosecution for embezzlement of a certain check, the information described the check as drawn by "Stromen Bros." to "Bovey-Shute Lumber Company," while the proof disclosed that the same was drawn by "Stromen Bros. by Ed. T. Stromen, by A. T. Stromen," to "Bovey-Shute Lumber Company.' *Held*, that the variance was immaterial. State v. Laechelt, 88.
2. The function of a criminal information is to advise the accused of the nature of the charge against him that he may prepare for defense. Under an information for embezzlement of a check other embezzlements by the accused cannot be shown, nor that he used the same to cover up prior embezzlements. Where such proof is relied upon for conviction, the defendant should be apprised thereof by the information. State v. Laechelt, 88 .

CRIMINAL LAW—Continued.

3. Evidence examined in prosecution for embezzlement, and held insufficient to support the conviction. State v. Laechelt, 88.
4. Where police magistrates of cities in counties wherein the county courts have increased jurisdiction, retain jurisdiction to try and determine charges of misdemeanor, is not decided by assuming that they were without such jurisdiction, *held,* that by failing to object to the jurisdiction of the magistrate, and by appeal from his judgment to the district court, and participating in the trial therein and not objecting to the jurisdiction of either until after verdict of guilty, defendant waived all questions of jurisdiction not raised below and it was error in the district court to grant a motion in arrest of judgment and discharge of defendant. State v. Russell, 357.
5. Following the rule announced in State v. Ely, 16 N. D. 569, 113 N. W. 711, 14 L. R. A. (N. S.) 638. *Held,* that Hon. A. G. Burr, who presided as judge at the trial of the issues in a criminal action against appellant, was at the date of such trial a de facto judge of the district court in and for Pierce county, and as such his acts are not subject to attack by a private suitor. State v. Bednar, 484.
6. In an information entitled in the name of the State of North Dakota wherein the case is designated as "State of North Dakota, plaintiff, v. Charley Bednar, defendant," shows that the case is prosecuted "in the name and by the authority of the State of North Dakota," as provided by section 97, article 1 of the constitution, especially where the information recites "state's attorney in and for Pierce county, in the state of North Dakota, in the name and by the authority of the state, gives this court to understand and be informed." State v. Bednar, 484.
7. Appellant was charged with the crime of shooting at another with a firearm with intent to kill, and the jury found him guilty of assault with a dangerous weapon by shooting at the complaining witness with a firearm with intent to injure him. *Held,* that the crime of which he was charged is included within that charged in the information. State v. Bednar, 484.
8. Section 9931, Rev. Codes 1905, providing for change of venue in criminal cases, on application of state's attorney, construed, *held* that the granting or denying of such change on application of attorney general is within the sound discretion of the court, and its ruling will not be disturbed except for an abuse of discretion. State v. Winchester, 534.

CROP CONTRACTS. See Waiver, 93.

CROSS-EXAMINATION. See Trial, 511; Witness, 594.

DAMAGES. See Common Carriers, 324; Death by Wrongful Act, 367; Insurance, 603.

DAMAGES—Continued.

1. Where plaintiff knows when his action is commenced, that specific performance could not be awarded, and a party to the contract, made defendant, died since the action was begun, whose heirs, devisees and executors have been substituted as defendants, his estate settled, jurisdiction will not be retained to assess damages, but the action will be dismissed as not properly brought. Knudtson v. Robinson et al., 12.
2. Certain instructions amounting to a peremptory charge to find for plaintiff, provided the jury found the appellant to be the owner of the animal inflicting injuries, regardless of the question of appellant's negligence, and also without regard to whether the particular injury complained of was proximately caused by such trespass, were erroneous. Section 6582, Rev. Codes 1905, restricts such recovery to damages proximately caused by the trespass. Peterson v. Conlan, 205.
3. The measure of damages recoverable by the father, for the death of a minor child, is the probable value of the child's services during minority, considering cost of its support and maintenance during the early and helpless part of its life. Scherer v. Schlaberg, 421.
4. In an action by a father for damages for the wrongful death of a daughter three months old, who is dangerously ill with uremia, when the wrongful act complained of was committed, the question of the pecuniary injury of the father by the death of such child, if caused by the wrongful act of defendants, is purely a matter of speculation, conjecture and guesswork, and any verdict for more than nominal damages in favor of the father would necessarily be based upon conjecture or speculation. Scherer v. Schlaberg, 421.
5. The child, damages for whose death by wrongful act of defendants are sought in this action by the father, was a girl three months old, dangerously ill with uremia. A physician was called, and left with the parents a prescription on defendant's drug store for medicine. By mistake of the defendant druggists, medicine was given plaintiff containing one-eighth of a grain of morphine in each dose directed to be given. The infant afterward died. *Held,* under the evidence, that the jury, had the case been submitted to it for a verdict, could only have found a verdict for plaintiff based upon pure speculation and surmise as to the cause of the child's death. Scherer v. Schlaberg, 421.
6. The dealer having been prevented by the landowner from making the sales, is entitled to the profits he would have made had the offers been accepted, and sales approved by the land owner. Young v. Metcalf Land Co., 441.
7. The register of deeds is a ministerial officer, liable at common law, in the absence of an express statute for damages caused by failure or neglect of official duty or negligent or illegal performance thereof. Rising v. Dickinson, 478.
8. In an action against a register of deeds for failure to index a

DAMAGES—Continued.

mortgage by a person holding under a warranty deed, claiming damage for such officer's neglect, the insolvency for the mortgagor must be shown to have existed at the time of the negligent act; and must be proven by other than mere conclusions of a witness. Rising v. Dickinson, 478.

9. A counterclaim for damages for refusal to deliver certain repairs for machinery ordered by defendant from plaintiff, which order plaintiff accepted and agreed to fill, considered, and held not to state facts sufficient to entitle defendant to substantial damages. Scully Co. v. Hann, 528.

10. Where the agent of an insurance company fails to cancel a policy upon instructions from his principal and a loss occurs under such policy, the proper measure of damages is the amount with interest which plaintiff was obliged to pay to the insured under the policy over and above what it would have been obliged to pay had such instructions been complied with. This sum is $1,314.22, instead of $1,249.92, as the trial court charged the jury. Queen Insurance Co. v. Bank, 603.

DEATH BY WRONGFUL ACT.

1. In an action for damages for death of plaintiff's father caused by a train on defendant's track backing against him while he was on its right of way or track, it is held, under the evidence that deceased was not a trespasser and defendant owed him the duty of ordinary care and diligence to avoid injurying him. Kunkel v. Soo Ry. Co., 367.

2. *Held,* further, that the questions of the negligence of the defendant and the contributory negligence of the deceased were, under the evidence in this case, for the jury. Kunkel v. Soo Ry. Co., 367.

3. The measure of damages recoverable by the father, for the death of a minor child, is the probable value of the child's services during minority, considering cost of its support and maintenance during the early and helpless part of its life. Scherer v. Schlaberg, 421.

4. In an action by a father for damages for the wrongful death of a daughter three months old, who is dangerously ill with uremia when the wrongful act complained of was committed, the question of the pecuniary injury of the father by the death of such child, if caused by the wrongful act of defendants, is purely a matter of speculation, conjecture and guesswork, and any verdict for more than nominal damages in favor of the father would necessarily be based upon conjecture or speculation. Scherer v. Schlaberg, 421.

5. The child, damages for whose death by wrongful act of defendants are sought in this action by the father, was a girl three months old, dangerously ill with uremia. A physician was called, and left with the parents a prescription on defendant's drug store for medicine. By mistake of the defendant druggists, medicine was

DEATH BY WRONGFUL ACT—Continued.

given plaintiff containing one-eighth of a grain of morphine in each dose directed to be given. The infant afterward died. *Held*, under the evidence, that the jury, had the case been submitted to it for a verdict, could only have found a verdict for plaintiff based upon pure speculation and surmise as to the cause of the child's death. Scherer v. Schlaberg, 421.

6. In an action under the statute providing for the recovery of damages for death by wrongful act of defendant, the contributory negligence of the plaintiff is a defense. Scherer v. Schlaberg, 421.
7. The prescription of an attending physician called for medicine in the form of a powder, to be given, one every three hours, to an infant three months old. The prescription was left with the mother of the child, and she was informed by the physician that it would be in powder form, and to give a dose once in three hours. By mistake of the defendant druggist, medicine, put up for another customer, in liquid form, the label on the bottle being marked with the name of the party for whom it was prescribed, and containing directions to give one teaspoonful every two hours until relieved, was delivered. The plaintiff father was not present when the information and the directions were given the mother by the doctor, but before any of the medicine was given was informed by the mother what the directions were. He also read the directions on the bottle, and knew that the prescription given had been for a powder. He was present when the liquid was administered to the child and permitted it to be done. After the first dose was given, and when nearly time for the second dose to be administered, he suspected something wrong in the medicine, and telephoned to the doctor from the residence of a neighbor. He left his home to telephone without imparting his suspicions to his wife, or directing her to delay the second dose until he had heard from the doctor, and the second dose was given before his return. *Held*, that under these facts, and others disclosed by the record, the plaintiff was guilty of contributory negligence in law. Scherer v. Schlaberg, 421.

DEEDS. See Quieting Title, 166; Taxation, 246; Register of Deeds, 478; Recording Transfers, 517.

1. A deed of assignment for the benefit of creditors, under a foreign state insolvency law, has no extra territorial effect upon, and does not convey title to, real estate situated in North Dakota. Adams v. Hartzell, 221.
2. Where a deed of assignment for the benefit of creditors contained a power authorizing the assignee to execute, acknowledge and deliver all necessary deeds, instruments and conveyances in assignor's name to such instruments when necessary to carry into effect the object, design and purpose of the trust. *Held*, that such power gave no authority to execute deeds in the name of the

DEEDS—Continued.

principal to real estate not conveyed by the deed of assignment; hence a deed by such assignee in the name of his assignor, and as his attorney in fact, conveyed no title to land in North Dakota not conveyed by the deed of assignment. Adams v. Hartzell, 221.

3. A deed granting, selling, remising and releasing to the grantee the premises described, although containing the word "quitclaim," conveys title on which an action to determine adverse claims to real property may be maintained. Adams v. Hartzell, 221.

4. There is no presumption that a deed from a wife to her husband is not valid, but upon a showing of mistake, fraud or undue influence through which the husband secures the wife's signature to a deed when she is sick and weak through continued sickness, the burden of showing an adequate consideration, or that no mistake, fraud or imposition was exercised, is on the husband, and if he fails to show, in view of the relations of confidence existing on account of the marital relation, that no fraud was practiced, and that the deed was understandingly and voluntarily exercised, and that the consideration was fair and adequate, the deed will be set aside. Massey v. Rae, 409.

5. Evidence considered, and *held* to show that a deed from the wife to the husband was executed under such circumstances that required the husband to show that no imposition or undue influence was exercised, and that the consideration was adequate, and that the deed was executed understandingly. Massey v. Rae, 409.

6. Evidence of a lost unrecorded deed and its contents, can only be given on laying a proper foundation by proving its execution, validity, tenor, delivery, loss and diligent search for it. Enderlin Inv. Co. v. Nordhagen, 517.

7. An allegation in a complaint that a grantor in a deed was in possession of the land conveyed when the deed was executed and delivered, and thereafter, is sufficient as an allegation of the ownership of the land by the grantor when the deed was delivered. Hanson v. Svarverud, 550.

8. A complaint alleging that a deed, absolute in form, from parents to their sons was executed solely in reliance on the confidence existing between them and their sons, and in reliance on their sons' promise to accept the deed in trust for the use of the grantors while they lived, and after their death to convey the land equally among all the children of the grantors, states a cause of action for declaring the deed to have been executed in trust for said purpose, and a court of equity will enforce the promise, as the refusal to carry it out is constructively fraudulent. Hanson v. Svarverud, 550.

9. Before a deed or other contract will be set aside on the ground of the intoxication of the grantor or maker when the same was exe-

DAMAGES—Continued.
cuted, the evidence must show that the grantor was in such a degree of intoxication at the time as to render him entirely incapable of understanding the nature and effect of the transaction. Power v. King, 600.

DE FACTO OFFICER. See Officers, 484.
1. Acts of a de facto judge are not subject to attack by a private suitor. State v. Bednar, 484.

DEMAND.
1. Under the evidence of the case sufficient demand was made. McFadden v. Thorpe El. Co., 93.

DEMURRER. See Pleading, 338; Specific Performance, 360.
1. More liberality is allowed in favor of the allegations of a pleading where objected to for the first time at the trial than when attacked by demurrer. Walter v. Rock, 45.
2. Plaintiff demurred to the counterclaim as first pleaded, which demurrer was sustained. Afterwards an amendment was permitted, but which amendment did not cure the defect. To such amended counterclaim plaintiff replied, both denying the facts alleged and demurring to their sufficiency in the same pleading. *Held*, that plaintiff by thus replying did not waive his right to challenge the sufficiency of the facts therein alleged to constitute a cause of action, and the court did not err in thereafter sustaining the demurrer and giving plaintiff judgment upon the note as prayed for in the complaint. Scully v. Hann, 528.

DEPOSITION.
1. A written motion to suppress a deposition as a whole is too late when filed with the clerk after the trial court has ordered a jury called, although the clerk has not drawn or called the name of a juror. Walters v. Rock, 45.
2. Objections to, and notice to suppress depositions, must be made before the commencement of the trial; construction of the statute, that the trial was commenced when a jury is called, is reasonable. Walters v. Rock, 45.
3. Where notice to take depositions gives initials of Christian names only, while the name in the deposition and signature of witnesses is by Christian names, the first letters of which were the same as the initials given in the notice, extrinsic proof is unnecessary to show the witness testifying is the same as described in the notice, especially where the notary indorses the same name on the envelope returning such deposition as the one given in the notice. Walters v. Rock, 45.

DESCENT AND DISTRIBUTION. See Homestead, 561.

DISCRETION.
1. Complaint, verified by plaintiff's attorney, contains matter inconsistent with the amended complaint and plaintiff's version of the

DISCRETION—Continned.

transaction. The original complaint was offered in evidence as a part of the cross-examination, which offer was objected to and objection sustained. *Held*, not error, as proof was not proper cross-examination, but part of defendant's case, and its reception then was discretionary with the trial court. Leistikow v. Zuelsdorf, 511.

2. Section 9931, Rev. Codes 1905, providing for change of venue in criminal cases, on application of state's attorney, construed, *held*, that the granting or denying of such change on application of attorney general is within the sound discretion of the court and its ruling will not be disturbed except for an abuse of discretion. State v. Winchester, 534.
3. Upon the showing in this case this court is not prepared to say that there was an abuse of discretion in denying the motion of the attorney general for a change of venue. State v. Winchester, 534.

DISJUNCTIVE. See Attachment, 176.

DISTRICT COURT. See Jurisdiction, 242.

DISTRICT JUDGE.

1. Following the rule announced in State v. Ely, 16 N. D. 569, 113 N. W. 711, 14 L. R. A. (N. S.) 638. *Held*, that Hon. A. G. Burr, who presided as judge at the trial of the issues in a criminal action against appellant, was at the date of such trial a de facto judge of the district court in and for Pierce county, and as such his acts are not subject to attack by a private suitor. State v. Bednar, 484.

DIVORCE.

1. Alimony, suit money and counsel fees cannot be allowed to the husband in this state. State v. Templeton, 525.
2. Jurisdiction in matters relating to divorce and alimony is conferred by statute, and the power of the courts to deal with such matters must find support in the statute, or it does not exist. State v. Templeton, 525.
3. Section 4071, Rev. Codes 1905, which provides that "the court may in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action," was intended to be exclusive and to embrace the entire subject-matter of the allowance of alimony, etc., pendente lite. State v. Templeton, 525.
4. A divorced husband who, by the decree of divorce, has been deprived of the custody of his minor children, and who, by such decree, is required to pay to the mother a stated sum for the support and education of such children, which allowance is, by the decree, made a lien upon the real property theretofore used as the homestead, is thereafter no longer the head of a family, and is not

DIVORCE—Continued.

entitled to a homestead exemption when he does not have residing on the premises with him and under his care and maintenance one or more of the persons mentioned in subdivision 2, section 5070, aforesaid. Holcomb v. Holcomb, 561.

ELECTION OF REMEDY.

1. In plaintiff's original complaint, he based his right of recovery upon the chattel mortgage, claiming merely in a special property in the grain. Subsequently he was permitted to amend his complaint by abandoning such theory, and alleging ownership of the grain by virtue of the farm contract. *Held,* that, by adopting the theory of recovery set forth in the original complaint, plaintiff did not thereby preclude himself from receding therefrom, nor did such act evince an intention on plaintiff's part to waive his legal title under the contract. He had no election of remedies, as his only cause of action was grounded upon his title under the farm contract; the chattel mortgage not having attached to the grain at the date of the conversion. Plaintiff was merely mistaken in attempting to pursue a remedy which he did not have, and this cannot be construed on as election to waive or abandon the only remedy which he possessed. McFadden v. Thorpe El. Co., 93.
2. The vendor, on breach of the terms of the conditional sale contract by the vendee, may elect to recover possession of the property, or waive his title, and sue for the value or selling price, but he cannot do both. Poirier Mfg. Co. v. Kitts, 556.

EMBEZZLEMENT. See CRIMINAL LAW, 88.

EQUITABLE MORTGAGES. See MORTGAGES, 82.

EQUITY. See COSTS, 600.

1. In an action for specific performance upon the facts stated in the opinion, *held,* that the allegations of the answer standing admitted on demurrer show title in the plaintiff to land in dispute, and that (as far as pleadings show) his only ground and complaint is that he received title through Patterson instead of direct from the vendor of scrip used in the purchase, and further that a court of equity looking to substance rather than form will take cognizance of this variance in the method of obtaining title from that alleged to have been agreed upon, and the part of the answer demurred to states a defense. Zellmer v. Patterson, 360.
2. When it clearly appears that the vendee cannot comply in any manner with the terms of a contract for purchase of real estate, and due service of notice to perform, followed by notice of cancellation, was made, a court of equity will not under most circumstances grant further time to the vendee for performance. Martinson v. Regan, 467.
3. A complaint alleging that a deed, absolute in form, from parents to their sons was executed solely in reliance on the confidence exist-

EQUITY—Continued.

ing between them and their sons, and in reliance on their sons' promise to accept the deed in trust for the use of the grantors while they lived, and after their death to convey the land equally among all the children of the grantors, states a cause of action for declaring the deed to have been executed in trust for said purpose, and a court of equity will enforce the promise, as the refusal to carry it out is constructively fraudulent. Hanson v. Svarverud, 550.

4. Where the refusal of a grantee to carry out the terms of a trust agreement in reference to conveying real estate is actually or constructively fraudulent, a court of equity will enforce the agreement, although the same is not in writing. Hanson v. Svarverud, 550.

ESTOPPEL.

1. Under the facts stated in the opinion, *held*, that the city of Minot is estopped by its long acquiescence from questioning the validity of the method adopted by the council in attempting to segregate certain territory from its corporate limits. State v. Willis, 76.
2. Where husband and wife make a verbal agreement to sell their homestead, and the purchaser pays part of the purchase price, enters into possession, makes permanent improvements thereon, with full knowledge and acquiescence of such husband and wife, the purchaser becomes the equitable owner of such premises and the sellers by their acts are estopped to question the validity of such agreement. Engholm v. Ekrem, 185.
3. The doctrine of equitable estoppel by conduct applies as against married women the same as against all persons sui juris. Engholm v. Ekrem, 185.
4. Neither the statute of frauds nor the various statutory provisions enacted for the protection of homestead claimants can be held to do away with the general equity doctrine of estoppel in pais. Engholm v. Ekrem, 185.
5. Actual fraud at the time of the act set up as constituting the estoppel is not essential to the application of the doctrine of estoppel, it being sufficient that the act relied on constitutes constructive fraud. Engholm v. Ekrem, 185.
6. Whether estoppel in claim and delivery is required to be pleaded not decided. Roberts v. Little, 608.
7. The bonds in suit contain a recital to the effect that they are issued for the purpose of refunding present indebtedness "as authorized by act of the legislative assembly approved March 11, 1887" (Laws 1887, page 39, chapter 11), entitled "An act to provide for refunding the outstanding indebtedness which existed prior to July 30, 1886, of any incorporated board of education or school district in the territory of Dakota." *Held*, that such recital does not estop the school district from urging the defense, even as against an

ESTOPPEL—Continued.

innocent purchaser, that such bonds were illegally issued. State v. School District, 616.

EVIDENCE. See Trover and Conversion, 93; Trial, 221; Death by Wrongful Act, 367; Appeal and Error, 488.

1. A public record kept pursuant to the law of a sister state, when properly proved, is admissible in evidence in the courts of this state as prima facie proof of the facts therein recorded. Miller v. N. P. Ry. Co., 18.
2. Where proof of a foreign record was erroneously rejected, it is without prejudice, if admitted, it would have failed to substantiate a cause of action by a fair preponderance of the evidence. Miller v. N. P. Ry. Co., 18.
3. Where fraud in the inception of a promissory note is alleged and established, the burden is upon the indorsee to show his purchase thereof in good faith for value and before maturity. Walters v. Rock, 45.
4. Payment of value on a purchase of negotiable paper before maturity constitutes prima facie a bona fide purchaser, but no more. Walters v. Rock, 45.
5. Circumstances may rebut the prima facie presumption arising from payment of value for negotiable paper before maturity. Walters v. Rock, 45.
6. If the purchaser does not expressly state that he purchased in good faith it is not necessarily fatal to a showing of good faith, but the omission may be considered with other facts to show its absence in the purchase. Walters v. Rock, 45.
7. Good faith in the purchase of a note is ordinarily a question for the jury, and it is *held* in this case that the verdict was sustained by evidence on the question of bad faith. Walters v. Rock, 45.
8. Where notice to take depositions gives initials of Christian names only, while the name in the deposition and signature of witnesses is by Christian names, the first letters of which were the same as the initials given in the notice, extrinsic proof is unnecessary to show the witness testifying is the same as described in the notice, especially where the notary indorses the same name on the envelope returning such deposition as the one given in the notice. Walters v. Rock, 45.
9. An expert witness may give an opinion based in part on what was stated to him by the patient. Walters v. Rock, 45.
10. An expert may give an opinion based on the testimony of other witnesses that he has heard, or that has been read to him, in case there is no conflict in the facts testified to by such other witnesses. Walters v. Rock, 45.
11. The function of a criminal information is to advise the accused of the nature of the charge against him, that he may prepare for defense. Under an information for embezzlement of a check,

EIVDENCE—Continued.

other embezzlements by the accused cannot be shown, nor that he used the same to cover up prior embezzlements. Where such proof is relied upon for conviction, the defendant should be apprized thereof by the information. State v. Laechelt, 88

12. Evidence examined in prosecution for embezzlement and held insufficient to support the conviction. State v. Laechelt, 88.
13. Burden is on plaintiff to show how much of said original indebtedness it has been unable to collect. Foster Co. Bank v. Hester, 135.
14. The trial court found that on November 4, 1905, there remained the sum of $1,430 due on such indebtedness and rendered judgment for the plaintiff. *Held,* that the evidence discloses that there was at least the sum of $1,000 still due on such original indebtedness and appellant is liable for the amount recoverd in the court below. Foster Co. Bank v. Hester, 135.
15. The person who represented the plaintiff bank in accepting the new notes testified positively that such new notes would be received only as collateral security to the indebtedness. Such fact was denied by C. The finding of the trial court upon this question was in plaintiff's favor, and such finding is sustained by this court. Foster Co. Bank v. Hester, 135.
16. In an action to determine adverse claims to real property the burden is upon plaintiff to establish his title as alleged where it is put in issue. Young v. Engdahl, 166.
17. In an action to quiet title plaintiff's sole proof of his ownership was a transcript of the record of a lost quitclaim deed; *held,* that such transcript merely proved a prima facie case for the plaintiff, the presumption being that the original was the genuine deed of the grantor therein; but held further, that such evidence was completely overthrown and disproved by the evidence in the record clearly showing that the owner of the property and grantor in such quitclaim deed did not execute it. Young v. Engdahl, 166.
18. In an action for injuries inflicted by a vicious bull claimed to be the property of appellant, and negligently suffered to escape from its enclosure and to trespass upon the ground where the injuries were inflicted, *held,* that the evidence as to the ownership was sufficient to go to the jury, which found in plaintiff's favor, the same will not be disturbed upon appeal. Peterson v. Conlan, 295.
19. The complaint was framed to embrace the following grounds of recovery: First, that the animal was vicious and known by its owner to be so, who kept and harbored the same in such a negligent manner as to permit its escape from his enclosure and to inflict the injury complained of. Second, that the animal was trespassing at the time of the injury, and hence its owner is liable for damages done by it. Third, negligence of the owner in permitting such escape. The court submitted the issues on the first two theories only. *Held,* conceding the evidence of the known

EIVDENCE—Continued.

viciousness of the animal to be sufficient to go to the jury, that a new trial must be ordered for errors in the instructions relative to the second ground; it being impossible to determine on which theory the verdict was rendered. Peterson v. Conlan, 205.

20. A contract entered into for carriage of freight from a point in one state to a point in another state will, in the absence of proof of a contrary intention, be governed by the law of the place where the contract was entered into. Hanson v. Gt. N. Ry. Co., 324.
21. In the absence of proof to the contrary, the presumption prevails that the common law is in force in a foreign jurisdiction. Hanson v. Gt. N. Ry. Co., 324.
22. Where there is a direct conflict in the evidence on material questions, directing of a verdict for appellant was error and the district court was justified in granting a new trial. Gooler v. Eidsness, 338.
23. Even if the merits were with the appellants, the evidence was too uncertain to enable the jury or the court to fix the amount which plaintiff is entitled to recover. Gooler v. Eidsness, 338.
24. The law presumes that a person who has suffered death by accident was, at the time, in the exercise of ordinary care and diligence, and this presumption is not overcome by the mere fact of the accident, which no one saw. Kunkel v. Soo Ry. Co., 367.
25. There is no presumption that a deed from a wife to her husband is not valid, but upon a showing of mistake, fraud or undue influence through which the husband secures the wife's signature to a deed when she is sick and weak through continued sickness, the burden of showing an adequate consideration, or that no mistake, fraud or imposition was exercised, is on the husband, and if he fails to show, in view of the relations of confidence existing on account of the marital relation, that no fraud was practiced, and that the deed was understandingly and voluntarily executed, and that the consideration was fair and adequate, the deed will be set aside. Massey v. Rae, 409.
26. Evidence considered, and *held,* to show that a deed from the wife to the husband was executed under such circumstances that required the husband to show that no imposition or undue influence was exercised, and that the consideration was adequate, and that the deed was executed understandingly. Massey v. Rae, 409.
27. Relations of confidence will be presumed to exist between husband and wife in the absence of a showing to the contrary. The evidence in this case does not show that no confidential relations existed between the parties. Massey v. Rae, 409.
28. The child, damages for whose death by wrongful act of defendants are sought in this action by the father, was a girl three months old, dangerously ill with uremia. A physician was called, and left with the parents a prescription on defendant's drug store for medicine. By mistake of the defendant druggists, medicine

EIVDENCE—Continued.

was given plaintiff containing one-eighth of a grain of morphine in each dose directed to be given. The infant afterward died. *Held,* under the evidence, that the jury, had the case been submitted to it for a verdict, could only have found a verdict for plaintiff based upon pure speculation and surmise as to the cause of the child's death. Scherer v. Schlaberg, 421.

29. When the nature of the evidence, in an action for damages, is such that no verdict for the plaintiff can be returned except based upon mere conjecture, surmise or speculation, it is proper for the trial court to direct a verdict for the defendant. Scherer v. Schlaberg, 421.

30. In an action for damages for injuries to plaintiff's horse by defendant's locomotive or cars, direct evidence is not the only evidence which may be used to prove defendant's liability; circumstances surrounding the location and finding of the horse, its tracks in the snow, the nature of its injuries, may as unmistakably prove the injury by such locomotive or cars as the direct testimony of witnesses, and if in conflict with the testimony of witnesses may be sufficient to sustain a verdict for plaintiff. Anderson v. Soo Ry. Co., 462.

31. Plaintiff's horse, missing for two days, was found on the evening of the second day in a ditch near the end of the ties of defendant's tracks, under circumstances which the jury may have found unexplainable on any theory except that defendant's train inflicted the injury which necessitated its killing. The verdict may be sustained on either of two theories: (a) That, if the jury considered the evidence given by the trainmen as overcoming the statutory presumption of negligence on the part of defendant as to trains on the second day, no evidence was submitted to overcome such presumption relating to trains which may have passed over the defendant's road on the first day that the horse was missing. (b) That the jury may have found, from the circumstances, that the train passing on the evening of the second day, respecting which evidence was submitted, did inflict the injuries, notwithstanding the positive statements of the trainmen to the contrary, and that the train before reaching it should be disregarded, in which case the statutory presumption was not overcome. This court cannot determine which theory the jury adopted. Anderson v. Soo Ry. Co., 462.

32. Certain rulings on the evidence and instructions to the jury examined, and held nonprejudicial to defendant. Anderson v. Soo Ry. Co., 462.

33. In an action against a register of deeds for failure to index a mortgage by a person holding under a warranty deed, claiming damage for such officer's neglect, the insolvency of the mortgagor must be shown to have existed at the time of the negligent act;

EVIDENCE—Continued.

and must be proven by other than mere conclusions of a witness. Rising v. Dickinson, 478.

34. The question, whether the testator was of sound mind at the time of executing his will was submitted to the jury, who reported their inability to agree as to the answer to be made, and the court, on motion of respondent's counsel directed an affirmative answer thereto. *Held,* not error, as there was no evidence upon which the jury could properly have made a negative answer to such question. Hedderich v. Hedderich, 488.

35. Assignments of error as to admission of non-expert testimony as to testator's mental condition when making his will are overruled. The erroneous rulings complained of not being prejudicial for reasons stated in the opinion. Hedderich v. Hedderich, 488.

36. Certain assignments, based upon rulings in the admission and rejection of testimony, examined, and such rulings held not prejudicial to appellant. Leistikow v. Zuelsdorf, 511.

37. Evidence examined, and *held* that the issue whether defendant became primarily liable to plaintiff for the payment of certain merchandise by reason of his having purchased the same from plaintiff, or whether such sale was made to one R., and the payment of the purchase price merely guaranteed by defendant, was properly submitted to the jury. Leistikow v. Zuelsdorf, 511.

38. Complaint, verified by plaintiff's attorney, contains matter inconsistent with the amended complaint and plaintiff's version of the transaction. The original complaint was offered in evidence as a part of the cross-examination, which offer was objected to and objection sustained. *Held,* not error, as proof was not proper cross-examination, but part of defendant's case, and its reception then was discretionary with the trial court. Leistikow v. Zuelsdorf, 511.

39. The title to premises on which execution was levied stood in the name of Carl Nordhagen, the son of Ellef Nordhagen and Rande Nordhagen. All these parties, together with other brothers and sisters of Carl, all over 21 years of age, resided together upon the premises sold. The evidence fails to disclose any facts indicating that any one of the parties might not have claimed possession with as much reasons as did the defendant Rande, the mother of Carl. *Held,* that the evidence is insufficient to constitute notice of the claim of Rande, the mother, to title in the land through an unrecorded deed, as against a title derived from such levy. Enderlin Inv. Co. v. Nordhagen, 517.

40. Evidence of a lost unrecorded deed and its contents, can only be given on laying a proper foundation by proving its execution, validity, tenor, delivery, loss and diligent search for it. Enderlin Inv. Co. v. Nordhagen, 517.

41. To render possession adverse, it must not only be actual, but also open, continual, notorious, distinct and hostile, and of such a

EVIDENCE—Continued.

character as to unmistakably indicate an assertion of claim of ownership by the occupant. *Held,* under the evidence of this case, that the defendant, Rande Nordhagen, is not shown to have been in such possession as to defeat a title under a judgment against her son Carl to the premises, resided upon by both. Enderlin Inv. Co. v. Nordhagen, 517.

42. The placing of structures appurtenant to a station, within the limits of the right of way of a railroad, is not of itself evidence of appropriation of any land for station uses outside of the right of way. Comford v. Gt. N. Ry. Co., 570.

43. Action on a promissory note. Judgment for plaintiff. Evidence examined, and *held* sufficient to justify the judgment. Landis v. Fyles, 587.

44. It is competent to show on the cross-examination of a witness, for the purpose of discrediting him or lessening the weight of his testimony, that he has been arrested and convicted of a crime. Schnase v. Goetz, 594.

45. A subject entered into in direct examination may be further inquired into and exhausted on cross-examination. Schnase v. Goetz, 594.

46. Where a witness, on cross-examination, was asked if he had not been engaged in an unlawful occupation, answered in the negative, it cannot be shown by other witnesses that he testified falsely, where the purpose is to impeach or discredit him as a witness. Schnase v. Goetz, 594.

47. Where the evidence as to the nature of the assault and injuries suffered by respondent was conflicting, and impeaching testimony to show that a witness testified falsely as to his having been in an unlawful occupation was admitted over objection, *held,* that the appellate court cannot assume that the admission of such testimony was without prejudice, as its effect may have been the controlling influence with the jury in determining the extent of injury or damages. Schnase v. Goetz, 594.

48. Before a deed or other contract will be set aside on the ground of the intoxication of the grantor or maker when the same was executed, the evidence must show that the grantor was in such a degree of intoxication at the time as to render him entirely incapable of understanding the nature and effect of the transaction. Power v. King, 600.

49. Evidence considered, and *held* to show that plaintiff was not rendered incompetent to enter into the contract involved in this action by reason of his intoxication. Power v. King, 600.

50. Action in claim and delivery to recover possession of certain stock. Judgment for defendant. Evidence examined, and *held* insufficient to justify the judgment. Roberts v. Little, 608.

51. Admission of Exhibits A, B, F and G, offered in evidence by defendant, held error. Roberts v. Little, 608.

EXCEPTIONS. See Appeal and Error, 488.

EXECUTION.

1. Section 8452, Rev. Codes 1905, does not prohibit transcripting of a judgment entered in justice court after the expiration of five years and within ten years from its entry, and the district court to which such judgment is transcripted may issue execution thereon at any time before the expiration of ten years from the entry of such judgment in the justice court. Enderlin Inv. Co. v. Nordhagen, 517.
2. The title to premises on which execution was levied stood in the name of Carl Nordhagen, the son of Ellef Nordhagen and Rande Nordhagen. All these parties, together with other brothers and sisters of Carl, all over 21 years of age, resided together upon the premises sold. The evidence fails to disclose any facts indicating that any one of the parties might not have claimed possession with as much reasons as did the defendant Rande, the mother of Carl. *Held,* that the evidence is insufficient to constitute notice of the claims of Rande, the mother, to title in the land through an unrecorded deed, as against a title derived from such levy. Enderlin Inv. Co. v. Nordhagen, 517.

EXECUTORS AND ADMINISTRATORS. See Specific Performance, 12.

1. Rev. Codes N. D., 1905, section 7968, which exempts an administrator, executor or guardian from the necessity of giving an undertaking on appeal in certain cases, does not apply to one who appeals from a decision of the county court revoking the probate of a will and also his letters of administration issued under such will. Ransier v. Hyndman, 197.

EXEMPTIONS.

1. A debtor, desiring to avail himself of the additional exemptions allowed under section 7117, Rev. Codes 1905, must make a schedule of all his personal property, of every kind and character, including money on hand and debts due and owing to him, as required by section 7119, Rev. Codes 1905, and a failure to substantially comply with the provisions of such section will defeat his claim to such exemptions. Pfeifer v. Hatton, 144.
2. The purported schedule made by plaintiff in this case examined, and *held,* not a substantial compliance with the statute, as it does not purport to list all of his personal property. Pfeifer v. Hatton, 144.
3. By section 5049, Rev. Codes 1905, the homestead of every head of a family, not exceeding a certain value and a designated extent of territory, is made exempt from judgment lien and from execution or forced sale, except as otherwise specially provided, and by section 5070 the phrase "head of a family," is defined to mean: "(1) The husband or wife when the claimant is a married person. (2) Every person who has residing on the premises with him or her and under his or her care and maintenance, either:

EXEMPTIONS—Continued.

(a) His or her child or the child or his or her deceased wife or husband, whether by birth or adoption. (b) A minor brother or sister or the minor child of a deceased brother or sister. (c) A father, mother, grandfather or grandmother. (d) The father or mother, grandfather or grandmother of a deceased husband or wife. (e) An unmarried sister or any other relative mentioned in this section who have attained the age of majority and are unable to take care of or support themselves." *Held*, that a divorced husband who, by the decree of divorce, has been deprived of the custody of his minor children, and who, by such decree, is required to pay to the mother a stated sum for the support and education of such children, which allowance is, by the decree, made a lien upon the real property theretofore used as the homestead, is thereafter no longer the head of a family, and is not entitled to a homestead exemption when he does not have residing on the premises with him and under his care and maintenance one or more of the persons mentioned in subdivision 2, section 5070, aforesaid. Holcomb v. Holcomb, 561.

EXPERT TESTIMONY. See EVIDENCE, 45.

FARM LABOR. See LIENS, 182.

FEDERAL CONSTITUTION. See CONSTITUTIONAL LAW, 55.

FENCE LAWS. See ANIMALS, 268.

FENCES.

1. A good and sufficient fence to exclude ranging live stock between December 1st and April 1st in each year, in counties where section 1933, Rev. Codes 1905, is operative, must in height, strength and distance from enclosed stacks, comply with section 1939, Rev. Codes 1905, or present a barrier as effectual as the fence described in that section. Johnson v. Rickford, 268.
2. A party suing the owner of ranging animals during the open season for live stock, for breach of an inclosure under the provisions of section 1940, Rev. Codes 1905, and failing to show that he has secured his property by a fence sufficient to exclude animals, fails to establish a cause of action against the owner of such animals. Johnson v. Rickford, 268.

FINDINGS OF FACT. See APPEAL AND ERROR, 200.

1. Where both parties move for a directed verdict and he against whom the verdict is directed, requests the submission of any question to the jury, he does not thereby waive findings by the jury. Gooler v. Eidsness, 338.
2. The trial court found that on November 4, 1905, there remained the sum of $1,430 due on such indebtedness and rendered judgment for the plaintiff. *Held*, that the evidence discloses that there was at least the sum of $1,000 still due on such original indebtedness, and appellant is liable for the amount recovered in the court below. Foster Co. Bank v. Hester, 135.

FINDINGS OF FACT—Continued.

3. The person who represented the plaintiff bank in accepting the new notes testified positively that such new notes would be received only as collateral security to the indebtedness. Such fact was denied by C. The finding of the trial court upon this question was in plaintiff's favor, and such finding is sustained by this court. Foster Co. Bank v. Hester, 135.

FIRE INSURANCE. See INSURANCE, 253.

FORECLOSURE. See MORTGAGES, 82, 384.

FOREIGN CORPORATIONS. See CORPORATIONS, 583.

FOREIGN STATUTE. See STATUTORY CONSTRUCTION, 31.

FRAUD. See APPEAL AND ERROR, 200; STATUTORY CONSTRUCTION, 289; COMMON CARRIERS, 324; HUSBAND AND WIFE, 409.

1. Where fraud in the inception of a promissory note is alleged and established, the burden is upon the indorsee to show his purchase thereof in good faith for value and before maturity. Walters v. Rock, 45.
2. A promise by a payee of a note in reference to the consideration thereof, that he does not intend to fulfill, constitutes fraud; and will defeat the note except as to an innocent holder. Walters v. Rock, 45.
3. An action for an accounting will not lie, in the absence of contract or fraud, to compel a redemptioner from a mortgage foreclosure sale, who thereafter obtained a sheriff's deed under his redemption, to account to the mortgagor for the difference between what was paid on the redemption and the value of the land. Barker v. More, 82.
4. Actual fraud at the time of the act set up as constituting the estoppel is not essential to the application of the doctrine of estoppel, it being sufficient that the act relied on constitutes constructive fraud. Engholm v. Ekrem, 185.
5. Where husband and wife make a verbal agreement to sell their homestead, and the purchaser pays part of the purchase price, takes possession, makes permanent improvements thereon, with full knowledge and acquiescence of the sellers, it would operate as a constructive fraud upon his rights to permit the sellers to divest him of such ownership. Engholm v. Ekrem, 185.
6. The homestead laws should not be construed so as to permit the owners of homesteads to perpetrate a fraud, effectual or constructive, on the rights of others. Engholm v. Ekrem, 185.
7. A complaint alleging that a deed, absolute in form, from parents to their sons was executed solely in reliance on the confidence existing between them and their sons, and in reliance on their sons' promise to accept the deed in trust for the use of the grantors while they lived, and after their death to convey the land equally among all the children of the grantors, states a

FRAUD—Continued.

cause of action for declaring the deed to have been executed in trust for said purpose, and a court of equity will enforce the promise, as the refusal to carry it out is constructively fraudulent. Hanson v. Svarverud, 550.

8. In such case the agreement is enforced as based on the confidence imposed, which makes the refusal to comply with the contract a constructive fraud. Hanson v. Svarverud, 550.
9. Under such circumstances, an allegation of actual fraud is not essential, as the refusal to comply with the agreement is constructively fraudulent, in view of the alleged confidential relations. Hanson v. Svarverud, 550.
10. Where the refusal of a grantee to carry out the terms of a trust agreement in reference to conveying real estate is actually or constructively fraududent, a court of equity will enforce the agreement, although the same is not in writing. Hanson v. Svarverud, 550.

FRAUDS, STATUTE OF.

1. Neither the statute of frauds nor the various statutory provisions enacted for the protection of homestead claimants can be held to do away with the general equity doctrine of estoppel *in pais*. Engholm v. Ekrem, 185.
2. Where a contract within the statute of frauds is declared on, the court will presume that it was in writing, unless the complaint shows that it was not. Hanson v. Svarverud, 550.
3. Under such circumstances, an allegation of actual fraud is not essential, as the refusal to comply with the agreement is constructively fraudulent, in view of the alleged confidential relations. Hanson v. Svarverud, 550.
4. Where the refusal of a grantee to carry out the terms of a trust agreement in reference to conveying real estate is actually or constructively fraudulent, a court of equity will enforce the agreement, although the same is not in writing. Hanson v. Svarverud, 550.

GOOD WILL. See PARTNERSHIP, 214.

GUARANTY.

1. H. assigns to M. the following guaranty:

"Whereas, among the bills receivable in the Foster County State Bank of Carrington, North Dakota, there are notes and obligations secured by certain chattel property, and executed and delivered by George D. Corliss, amounting to the sum of $2,400.00; and,

"Whereas said bank is about to be transferred to T. F. McCue and other stockholders:

"Now, therefore, I, P. J. Hester, do hereby guarantee and agree to pay the difference between $1,430.00 and the sum of $2,430.00, in the event that same cannot be realized out of the

GUARANTY—Continued.

said George D. Corliss, and I hereby waive protest, notice of protest and presentment for payment upon this obligation, also time of the collection of the original indebtedness, with the exception that the said bank shall use ordinary means to recover the debt out of said Corliss and the above mentioned securities, otherwise this guaranty shall be absolute and payable to the said Foster County State Bank, its successors or assigns.

"Dated this 16th day of November, A. D. 1903.

"P. J. HESTER."

Held, that the same was intended as a guaranty of collection of the entire indebtedness of $2,430 with a limitation of liability under the guaranty to the sum of $1,000. Foster Co. Bank v. Hester, 135.

2. Burden is on plaintiff to show how much of said original indebtedness it has been unable to collect. Foster Co. Bank v. Hester, 135.
3. Where one accepts notes from the principal debtor as collateral security under the expressed condition that such acceptance shall not operate to extend the time of payment of the original indebterness, or affect the guarantor's liability for such extension, does not release the guarantor. Foster Co. Bank v. Hester, 135.
4. New notes representing the indebtedness, although made payable at a date later than the date of the maturity thereof, will not operate to extend the time of such indebtedness, so as to exonerate a guarantor, where a contrary expressed intent is shown. Foster Co. Bank v. Hester, 135.
5. The person who represented the plaintiff bank in accepting the new notes testified positively that such new notes would be received only as collateral security to the indebtedness. Such fact was denied by C. The finding of the trial court upon this question was in plaintiff's favor, and such finding is sustained by this court. Foster Co. Bank v. Hester, 135.
6. Evidence examined and held that the issue whether defendant became primarily liable to plaintiff for the payment of certain merchandise by reason of his having purchased the same from plaintiff, or whether such sale was made to one R., and the payment of the purchase price merely guaranteed by defendant, was properly submitted to the jury. Leistikow v. Zuelsdorf, 511.

GUARDIAN AND WARD.

1. Rev. Codes N. D., 1905, section 7968, which exempts an administrator, executor or guardian from the necessity of giving an undertaking on appeal in certain cases, does not apply to one who appeals from a decision of the county court revoking the probate of a will and also his letters of administration issued under such will. Ransier v. Hyndman, 197.

HABEAS CORPUS. See Supreme Court, 233.

HOMESTEAD. See Public Lands, 570.

1. Where husband and wife make a verbal agreement to sell their homestead, and the purchaser pays part of the purchase price, enters into possession, makes permanent improvements thereon, with full knowledge and acquiescence of such husband and wife, the purchaser becomes the equitable owner of such premises, and the sellers by their acts are estopped to question the validity of such agreement. Engholm v. Ekrem, 185.
2. Neither the statute of frauds nor the various statutory provisions enacted for the protection of homestead claimants can be held to do away with the general equity doctrine of estoppel in pais. Engholm v. Ekrem, 185.
3. Where husband and wife make a verbal agreement to sell their homestead, and the purchaser pays part of the purchase price, takes possession, makes permanent improvements thereon, with full knowledge and acquiescence of the sellers it would operate as a constructive fraud upon his rights to permit the sellers to divest him of such ownership. Engholm v. Ekrem, 185.
4. The homestead laws should not be construed so as to permit the owners of homesteads to perpetrate a fraud, effectual or constructive, on the rights of others. Engholm v. Ekrem, 185.
5. By section 5049, Rev. Codes 1905, the homestead of every head of a family, not exceeding a certain value and a designated extent of territory, is made exempt from judgment lien and from execution or forced sale, except as otherwise specially provided, and by section 5070 the phrase "head of a family" is defined to mean; "(1) The husband or wife when the claimant is a married person. (2) Every person who has residing on the premises with him or her and under his or her care and maintenance, either: (a) His or her child or the child of his or her deceased wife or husband, whether by birth or adoption. (b) A minor brother or sister or the minor child of a deceased brother or sister. (c) A father, mother, grandfather or grandmother. (d) The father or mother, grandfather or grandmother of a deceased husband or wife. (e) An unmarried sister or any other relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves." *Held*, that a divorced husband, who, by the decree of divorce, has been deprived of the custody of his minor children, and who, by such decree, is required to pay to the mother a stated sum for the support and education of such children, which allowance is, by the decree, made a lien upon the real property theretofore used as the homestead, is thereafter no longer the head of a family, and is not entitled to a homestead exemption when he does not have residing on the premises with him and under his care and maintenance one or more of the persons mentioned in subdivision 2, section 5070, aforesaid. Holcomb v. Holcomb, 561.
6. Under section 5071, Rev. Codes 1905, *held*, that when the decedent

HOMESTEAD—Continued.

at the time of his death was not entitled to a homestead exemption, no homestead estate can survive, descend or be distributed to any of the persons therein mentioned. Holcomb v. Holcomb, 561.

HUSBAND AND WIFE. See Divorce, 525.

1. Where husband and wife make a verbal agreement to sell their homestead, and the purchaser pays part of the purchase price, enters into possession, makes permanent improvements thereon, with full knowledge and acquiescence of such husband and wife, the purchaser becomes the equitable owner of such premises, and the sellers by their acts are estopped to question the validity of such agreement. Engholm v. Ekrem, 185.
2. The doctrine of equitable estoppel by conduct applies as against married women the same as against all persons sui juris. Engholm v. Ekrem, 185.
3. Where husband and wife make a verbal agreement to sell their homestead, and the purchaser pays part of the purchase price, takes possession, makes permanent improvements thereon, with full knowledge and acquiescence of the sellers it would operate as a constructive fraud upon his rights to permit the sellers to divest him of such ownership. Engholm v. Ekrem, 185.
4. Where a husband, without the consent and against the protests of the wife, contracts for and purchases material to paint a dwelling house on land owned by the wife, who, having no knowledge of where he purchased the materials, did not give notice of her objection to the improvements on the dwelling house to the party who furnished said materials, the materialman, under the evidence in this case, acquires no lien under section 6237 of said Rev. Codes of 1905 for the materials furnished. Christianson v. Hughes, 282.
5. There is no presumption that a deed from a wife to her husband is not valid, but upon a showing of mistake, fraud or undue influence through which the husband secures the wife's signature to a deed when she is sick and weak through continued sickness, the burden of showing an adequate consideration, or that no mistake, fraud or imposition was exercised, is on the husband, and if he fails to show, in view of the relations of confidence existing on account of the marital relation, that no fraud was practiced, and that the deed was understandingly and voluntarily executed, and that the consideration was fair and adequate, the deed will be set aside. Massey v. Rae, 409.
6. Evidence considered, and *held* to show that a deed from the wife to the husband was executed under such circumstances that required the husband to show that no imposition or undue influence was exercised, and that the consideration was adequate, and that the deed was executed understandingly. Massey v. Rae, 409.

HUSBAND AND WIFE—Continued.

7. Relations of confidence will be presumed to exist between husband and wife in the absence of a showing to the contrary. The evidence in this case does not show that no confidential relations existed between the parties. Massey v. Rae, 409.
8. Alimony, suit money, and counsel fees cannot be allowed to the husband in this state. State v. Templeton, 525.
9. Section 4071, Rev. Codes 1905, which provides that "the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action," was intended to be exclusive and to embrace the entire subject-matter of the allowance of alimony, etc., pendente lite. State v. Templeton, 525.
10. A divorced husband who, by the decree of divorce, has been deprived of the custody of his minor children, and who, by such decree, is required to pay to the mother a stated sum for the support and education of such children, which allowance is, by the decree, made a lien upon the real property theretofore used as the homestead, is thereafter no longer the head of a family, and is not entitled to a homestead exemption when he does not have residing on the premises with him and under his care and maintenance one or more of the persons mentioned in subdivision 2, section 5070, Rev. Codes 1905. Holcomb v. Holcomb, 561.

IMPEACHMENT. See Witness, 594.

INDICTMENT AND INFORMATION.

1. In a prosecution for embezzlement of a certain check, the information described the check as drawn by "Stromen Bros." to "Bovey-Shute Lumber Company," while the proof disclosed that the same was drawn by "Stromen Bros., by Ed. T. Stromen, by A. T. Stromen," to "Bovey-Shute Lumber Company." *Held,* that the variance was immaterial. State v. Laechelt, 88.
2. The function of a criminal information is to advise the accused of the nature of the charge against him that he may prepare for defense. Under an information for embezzlement of a check other embezzlements by the accused cannot be shown, nor that he used the same to cover up prior embezzlements. Where such proof is relied upon for conviction, the defendant should be apprised thereof by the information. State v. Laechelt, 88.
3. In an information entitled in the name of the State of North Dakota, wherein the case is designated as "State of North Dakota, plaintiff, v. Charley Bednar, defendant," shows that the case is prosecuted "in the name and by the authority of the State of North Dakota," as provided by section 97, article 1 of the constitution, especially where the information recites "state's attorney in and for Pierce county, in the state of North Dakota, in the name and by the authority of the state, gives this court to understand and be informed." State v. Bednar, 484.

INDICTMENT AND INFORMATION—Continued.

4. Appellant was charged with the crime of shooting at another with a firearm with intent to kill, and the jury found him guilty of assault with a dangerous weapon by shooting at the complaining witness with a firearm with intent to injure him. *Held*, that the crime of which he was charged is included within that charged in the information. State v. Bednar, 484.

INFANTS. See Master and Servant, 309; Minors, 421.

INJUNCTION.

1. Certain preliminary questions of practice, urged by defendant pertaining to relator's right to make the application, considered, and disposed of adversely to his contention. State v. Blaisdell, 55.
2. Upon the dissolution of a partnership between S. and M., M. agreed "not to engage for the next two years in the same business either with any partner, partners, firm, company or corporation for a certain period," M., after dissolution, entered the employ as a clerk of one E. whom he procured to open a rival business adjacent to that of S. M. attended to the purchase of stock for such rival business and was active managing agent for E. therein. *Held*, that M. thereby violated the terms of his agreement and should be enjoined from so doing. Seigel v. Marcus, 214.

INSOLVENCY. See Bankruptcy, 221.

1. A deed of assignment for the benefit of creditors, under a foreign state insolvency law, has no extra territorial effect upon, and does not convey title to, real estate situated in North Dakota. Adams v. Hartzell, 221.
2. Where a deed of assignment for the benefit of creditors contained a power authorizing the assignee to execute, acknowledge and deliver all necessary deeds, instruments and conveyances in assignor's name to such instruments when necessary to carry into effect the object, design and purpose of the trust. *Held*, that such power gave no authority to execute deeds in the name of the principal to real estate not conveyed by the deed of assignment; hence a deed by such assignee in the name of his assignor, and as his attorney in fact, conveying no title to land in North Dakota not conveyed by the deed of assignment. Adams v. Hartzell, 221.

INSURANCE.

1. The powers of the officers of a domestic mutual fire insurance company are more limited than those possessed by like officers of stock companies. Lamb v. Insurance Co., 253.
2. All policy holders of a mutual fire insurance company under the laws of this state are members, and each one has the same proportionate interest that every other member has and is liable to the same proportionate extent. Lamb v. Insurance Co., 253.
3. Members of a mutual fire insurance company under the laws of this state, are all entitled to the same treatment, and its officers

INSURANCE—Continued.

cannot favor one member at the expense of another, as this would contravene the principle of mutuality, the foundation of mutual insurance. Lamb v. Insurance Co., 253.

4. The statutes under which a domestic mutual fire insurance company is organized, its articles of incorporation or charter, and by-laws, all enter into the contract of insurance, and are binding not only on the organization, but on each member thereof. Lamb v. Insurance Co., 253.
5. While the officers of a domestic mutual fire insurance company, whose by-laws are required by law to be adopted by a vote of the members, may waive many irregularities, they cannot waive matters of substance contained in such by-laws, including definite terms which provide under what circumstances and for what time credit may be given members for premiums or assessments, or to give such credit otherwise than is provided by such by-laws. Lamb v. Insurance Co., 253.
6. The by-laws of a domestic fire insurance company printed upon the policy in suit, provide that, if the premium remained unpaid for thirty days after the taking effect of the policy, such policy should be suspended until the payment by the policy holder and the receipt and acceptance by the company of such premium, and during such period the policy should be unenforceable and the company not liable theron, and if such suspension remained for sixty days, it should be cancelled without notice. *Held,* that the delinquent holder of such policy cannot recover for loss occurring after the expiration of such period and the cancellation of the policy and before the payment of premium. Lamb v. Insurance Co., 253.
7. Plaintiff was the owner of a building and stock of goods located in what is called the old town of G., which it insured in defendant company. Afterwards, and contrary to the provisions of the policy it removed the property insured to the new town of G., four miles distant, obtained additional insurance, and installed a gasoline lighting plant. After the removal to the new location the plaintiff delivered the policy to one Robinson, who was the legal soliciting agent of defendant, and requested him to have the insurance company make an indorsement on the policy to cover the property at its new location. Through a misunderstanding, Robinson sent the policy to defendant at its home office, with the written request that it cancel the same, which the company did, and retained the policy, but did not notify the plaintiff. The building and stock of merchandise were afterwards destroyed by fire caused by the gasoline lighting plant. The company returned the proofs with a letter denying any liability on the ground that the policy had been cancelled before the fire. *Held,* that the rejection of the claim on the ground stated in defendant's letter did not constitute a waiver of the conditions of the policy. Taylor-Baldwin Company v. Insurance Co., 343.

INSURANCE—Continued.

8. Section 4449, Rev. Codes 1905, as amended by chapter 153, page 245, Laws 1907, repealed section 4447 of said Codes and foreign mutual insurance companies are authorized to do hail insurance business in this state by complying with the provisions of said section 4449, so far as it applies to them. State v. Cooper, 583.
9. Plaintiff sent to defendant, as its agent, the following letter of instructions: "The above indicated policy covers $2,000 on a grain elevator building, a class on which our maximum line is but $500. This policy was written last July at the authorization of our Mr. Fox, but at that time we had reinsurance facilities by which we could reduce our liability. Now it becomes necessary for us to cancel our reinsurance for the reason that the reinsurance law of North Dakota does not permit our reinsuring in any companies not admitted in this state, and unless we cancel this reinsurance, we will be liable to a fine. In view of this fact, we must request that you relieve us of $1,500 of the liability under the above policy at the earliest possible moment, and advise us of such relief, as we are now carrying $2,000, all in the Queen City, on the elevator building." Defendant admitted receiving said letter a day or two after its date, December 20, 1905, and the undisputed evidence is that he neglected to comply with such instructions, and on January 15, 1906, the property covered by the policy of insurance was destroyed by fire, and plaintiff was required to and did discharge its liability under such policy by paying the sum of $1,752.29, and this action is to recover damages for defendant's negligence in disobeying such instructions. *Held*: (1) That such instructions being in writing and being clear and specific, it was defendant's duty, as such agent, to comply therewith without delay. (2) The facts not being in dispute, the question as to defendant's liability was for the court, and not the jury, to determine. (3) Such instructions were not reasonably susceptible to the construction placed upon them by defendant to the effect that he should relieve the plaintiff of its liability only at such time as he could place such insurance with another company. Queen Insurance Co. v. Bank, 603.
10. Where the agent of an insurance company fails to cancel a policy upon instructions from his principal and a loss occurs under such policy, the proper measure of damages is the amount with interest which plaintiff was obliged to pay to the insured under the policy over and above what it would have been obliged to pay had such instructions been complied with. This sum is $1,314.22, instead of $1,249.92, as the trial court charged the jury. Queen Insurance Co, v. Bank. 603.

INSTRUCTIONS. See INSURANCE, 603.

1. The complaint was framed to embrace the following grounds of recovery: First, that the animal was vicious and known by its owner to be so, who kept and harbored the same in such a neg-

INSTRUCTIONS—Continued.

ligent manner as to permit its escape from his enclosure and to inflict the injury complained of. Second, that the animal was trespassing at the time of the injury, and hence its owner is liable for damages done by it. Third, negligence of the owner in permitting such escape. The court submitted the issues on the first two theories only. *Held,* conceding the evidence of the known viciousness of the animal to be sufficient to give to the jury, that a new trial must be ordered for errors in the instructions relative to the second ground; it being impossible to determine on which theory the verdict was rendered. Peterson v. Conlan, 205.

2. Plaintiff neither owning nor in possession of real property on which the animal was trespassing and which inflicted an injury on the plaintiff, cannot recover for a trespass, and the instructions relative to this phase of the case constitute reversible error. Peterson v Conlan, 205.
3. Certain instructions amounting to a peremptory charge to find for plaintiff, provided the jury found the appellant to be the owner of the animal inflicting injuries, regardless of the question of appellant's negligence, and also without regard to whether the particular injury complained of was proximately caused by such trespass, were erroneous. Section 6582, Rev. Codes 1905, restricts such recovery to damages proximately caused by the trespass. Peterson v. Conlan, 205.
4. Recovery cannot be sustained on the ground that the owner of a vicious animal was negligent in permitting it to trespass upon real estate, as the case was not tried, nor the jury instructed, on such theory. Nor for the same reason can the recovery be sustained upon the theory that there was a statutory liability resting on defendant under sections 9405, 9408, Rev. Codes 1905. Peterson v. Conlan, 205.
5. Assignments based on alleged erroneous instructions to the jury where no exceptions were saved to such instructions, and assignments predicated on alleged erroneous rulings of the admission or rejection of testimony, where such testimony is not material in view of the other facts found by the jury, will not be considered. Hedderich v. Hedderich, 488.
6. Certain rulings on the evidence and instructions to the jury examined, and held nonprejudicial to defendant. Anderson v. Soo. Ry Co., 462.
7. Instructions must be given or refused as requested. Landis v. Fyles, 587.
8. Failure to instruct that appellant was entitled to 7 per cent interest per annum on all counterclaims allowed him by the jury from maturity to the date of the verdict was not, under the circumstances, reversible error. Landis v. Fyles, 587.
9. If appellant desired more explicit instructions than were given by the court, they should have been presented to the court in writing, with the request that they be given. Landis v. Fyles, 587.

INTEREST.

1. The sole question which the appellate court is asked to review relates to the rate of interest which plaintiffs are entitled to recover. *Held,* that the findings of fact of the trial court disclose that plaintiffs had no cause of action at the time this action was commenced, and that, in any event, the rate allowed by the judgment below exceeds the amount called for by the contract between the parties; hence appellants have no cause for complaint. Brandenburg v. Phillips, 200.
2. Failure to instruct that appellant was entitled to 7 per cent interest per annum on all counterclaims allowed him by the jury from maturity to the date of the verdict was not, under the circumstances, reversible error. Landis v. Fyles, 587.

INTERPRETATION OF CONTRACTS. SEE CONTRACTS, 441.

INTOXICATION.

1. Before a deed or other contract will be set aside on the ground of the intoxication of the grantor or maker when the same was executed, the evidence must show that the grantor was in such a degree of intoxication at the time as to render him entirely incapable of understanding the nature and effect of the transaction. Power v. King, 600.
2. Evidence considered, and held to show that plaintiff was not rendered incompetent to enter into the contract involved in this action by reason of his intoxication. Power v. King, 600.

JAIL. SEE VOTERS AND ELECTIONS, 474.

JUDGMENT. SEE APPEAL AND ERROR, 8; COSTS, 185; INTEREST, 200.

1. Section 8452, Rev. Codes 1905, does not prohibit transcripting of a judgment entered in justice court after the expiration of five years and within ten years from its entry, and the district court to which such judgment is transcripted may issue execution thereon at any time before the expiration of ten years from the entry of such judgment in the justice court. Enderlin Inv. Co. v. Nordhagen, 517.
2. Under section 5038, Rev. Codes 1905, which makes every conveyance by deed void as against the lien of any judgment obtained against the person in whose name the title appears of record prior to the recording of such conveyance, an execution legally levied and a sale thereon, and sheriff's deed issued at the expiration of the redemption period to the purchaser convey good title, as against title derived from a prior unrecorded deed, of which the judgment creditor and purchaser had notice. Enderlin Inv. Co. v. Nordhagen, 517.
3. To render possession adverse, it must not only be actual, but also open, continual, notorious, distinct and hostile, and of such a character as to unmistakably indicate an assertion of claim of ownership by the occupant. *Held,* under the evidence of thi-

JUDGMENT—Continued.

case, that the defendant Rande Nordhagen is not shown to have been in such possession as to defeat a title under a judgment against her son Carl to the premises, resided upon by both. Enderlin Inv. Co. v. Nordhagen, 517.

4. Action on a promissory note. Judgment for plaintiff. Evidence examined, and held sufficient to justify the judgment. Landis v. Fyles, 587.
5. Action in claim and delivery to recover possession of certain stock. Judgment for defendant. Evidence examined and *held*, insufficient to justify the judgment. Roberts v. Little, 608.

JURY. See Master and Servant, 309; Negligence, 367; Evidence, 462, 511, 594; Verdict, 488; Interest, 587.

1. Good faith in the purchase of a note is ordinarily a question for the jury, and it is held in this case that the verdict was sustained by evidence on the question of bad faith. Walters v. Rock, 45.
2. A written motion to suppress a deposition as a whole is too late when filed with the clerk after the trial court has ordered a jury called, although the clerk has not drawn or called the name of a juror. Walters v. Rock, 45.
3. Objections to, and notice to suppress depositions, must be made before the commencement of the trial; construction of the statute, that the trial was commenced when a jury is called, is reasonable. Walters v. Rock, 45.
4. In an action for injuries inflicted by a vicious bull claimed to be the property of appellant, and negligently suffered to escape from its enclosure, and to trespass upon the ground where the injuries were inflicted, *held*, that evidence as to such ownership was sufficient to go to the jury, which found in plaintiff's favor, and the same will not be disturbed upon appeal. Peterson v. Conlan, 205.
5. The complaint was framed to embrace the following grounds of recovery: First, that the animal was vicious and known by its owner to be so, who kept and harbored the same in such a negligent manner as to permit its escape from his enclosure and to inflict the injury complained of. Second, that the animal was trespassing at the time of the injury, and hence its owner is liable for damages done by it. Third, negligence of the owner in permitting such escape. The court submitted the issues on the first two theories only. *Held*, conceding the evidence of the known viciousness of the animal to be sufficient to go to the jury, that a new trial must be ordered for errors in the instructions relative to the second ground; it being impossible to determine on which theory the verdict was rendered. Peterson v. Conlan, 205.
6. Plaintiff neither owning nor in possession of real property on which the animal was trespassing and which inflicted an injury on the

JURY—Continued.

plaintiff, cannot recover for a trespass, and the instructions relative to this phase of the case constitute reversible error. Peterson v. Conlan, 205.

7. A minor was injured while in defendant's employ in attempting to operate a dangerous contrivance installed by defendant's manager for pulling cars into position for loading grain at defendant's elevator; a description of such contrivance is found in opinion; *held,* that the questions of defendant's negligence, and of plaintiff's contributory negligence, and his assumptions of the risks, were, under the facts, properly for the jury. Umsted v. Colgate El. Co., 309.

8. At close of plaintiff's case, defendant's motion for a directed verdict was denied and exception taken. At the close of defendant's testimony and after both parties had rested, there were the same motion, ruling and exception. Plaintiff asked the court to instruct that the only question for the jury was of the extent of the injury and the amount of the damage; claiming the evidence conclusive in its favor on all other issues, which request was granted and defendant excepted. *Held,* the ruling was prejudicial error, and defendant deprived of its right to a trial by jury of all the issues, which right had not been waived, and the court was not warranted in the assumption that defendant in making its motions waived the jury and submitted all issues to the court. Umsted v. Colgate El. Co., 309.

9. Where both parties move for a directed verdict and he against whom the verdict is directed requests the submission of any question to the jury, he does not thereby waive findings by the jury. Gooler v. Eidsness, 338.

10. Even if the merits were with the appellants, the evidence was too uncertain to enable the jury or the court to fix the amount which plaintiff is entitled to recover. Gooler v. Eidsness, 338.

11. The question, whether the testator was of sound mind at the time of executing his will was submitted to the jury, who reported their inability to agree as to the answer to be made, and the court on motion of respondent's counsel, directed an affirmative answer thereto. *Held,* not error, as there was no evidence upon which the jury could properly have made a negative answer to such question. Hedderich v. Hedderich, 488.

12. The fact that the defendant as sheriff subpoenaed the jury might be sufficient cause for a challenge to the panel, but is not cause for a change of venue. State v. Winchester, 534.

13. While the facts are not in dispute, the question as to defendant's liability is for the court, not the jury, to determine. Queen Insurance Co. v. Bank, 603.

JURISDICTION. See Supreme Court, 233; Taxation, 390; County Judge, 402.

JURISDICTION—Continued.

1. Sections 86 and 87 of the Constitution of North Dakota constitute a grant of power to the Supreme Court, and, the language thereof being restrictive in its terms, this court has such jurisdiction, and only such, as is expressly or by necessary implication, therein granted. State v. Nuchols, 233.
2. A writ of prohibition not being one of the enumerated writs that the Supreme Court is authorized to issue, such court is without jurisdiction to issue the same, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending case, and to effectuate such court's general superintending control over inferior courts. State v. Nuchols, 233.
3. The question of the division of a county and the creation of a new one, does not call for the exercise of the original jurisdiction of the Supreme Court by mandamus, unless the circumstances are of such an exceptional character that adequate relief cannot be obtained in the district court. State v. Wing, 242.
4. Under the circumstances disclosed by the record, *held,* that no emergency or exigency exists in the present instance warranting the Supreme Court in taking original jurisdiction to issue its writ of mandamus. State v. Wing, 242.
5. In the absence of proof to the contrary, the presumption prevails that the common law is in force in a foreign jurisdiction. Hanson v. Gt. N. Ry. Co., 324.
6. Whether police magistrates of cities in counties wherein the county courts have increased jurisdiction, retain jurisdiction to try and determine charges of misdemeanor, is not decided, but assuming that they were without such jurisdiction, *held,* that by failing to object to the jurisdiction of the magistrate, and by appeal from his judgment to the district court, and participating in the trial therein and not objecting to the jurisdiction of either until after verdict of guilty, defendant waived all questions of jurisdiction not raised below, and it was error in the district court to grant a motion in arrest of judgment and discharge of defendant. State v. Russell, 357.
7. Section 111 of the constitution provides that county courts shall have jurisdiction of certain civil and criminal causes "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 that court increased." *Held,* that the words "majority vote" mean a majority of all votes cast on the question of increased jurisdiction, and not a majority of all the votes cast at the election. State v. Fabrick, 402.
8. The Supreme Court has no jurisdiction to enlarge the time within which a proposed statement of the case may be prepared and served and to stay proceedings until such statement is settled. Aultman-Taylor v. Clausen, 483.
9. Jurisdiction in matters relating to divorce and alimony is conferred

JURISDICTION—Continued.

by statute, and the power of the courts to deal with such matters must find support in the statute, or it does not exist. State v. Templeton, 525.

JUSTICE OF THE PEACE.

1. Section 8452, Rev. Codes 1905, does not prohibit transcripting of a judgment entered in justice court after the expiration of five years and within ten years from its entry, and the district court to which such judgment is transcripted may issue execution thereon at any time before the expiration of ten years from the entry of such judgment in the justice court. Enderlin Inv. Co. v. Nordhagen, 517.

LAND GRANTS. See PUBLIC LANDS, 570.

LANDLORD AND TENANT.

1. Where a crop contract reserves title in the owner of the land to the crops until a division thereof, such owner by taking a mortgage in the third year on the crop of that year, would not thereby waive or abandon title to the crops; such chattel mortgage is merely a contract for a lien when the mortgagor acquired title, and in accepting the same the plaintiff's act was not inconsistent with such reservation of title. McFadden v. Thorpe El. Co., 93.

LEGISLATURE. See CONSTITUTIONAL LAW, 31; ELECTIONS, 55; STATUTORY CONSTRUCTION, 289.

1. A majority of the votes cast upon a question submitted to a vote, if in the affirmative, carries it, unless the legislative will to the contrary is clearly expressed in the constitution or the law. State v. Blaisdell, 31.
2. The provisions of the primary election law requiring legislative candidates to take and subscribe an oath and pledge, that they will support and vote for the candidate for United States senator receiving a majority of the party vote at the primary election and the succeeding general election, is violative of section 211 of the constitution of North Dakota; but the provisions of said act providing a method for electors to designate their choice of such senator may be sustained regardless of the invalidity of such other provisions. State v. Blaisdell, 55.
3. The primary election law is not an unlawful delegation of power granted to the legislature by the federal constitution. State v. Blaisdell, 55.
4. The primary election law does not unlawfully attempt to bind successive legislatures. State v. Blaisdell, 55.
5. Legislature may provide for the indigent insane and feeble minded by general taxation, and to relieve the counties from such burden. It may require each county to maintain its own indigent persons, or to reimburse the state in whole or in part for so

LEGISLATURE—Continued.
doing. There is nothing in the provisions of section 174 of the constitution that deprives the legislature of such power. State v. Landis, 125.
6. The legislature has the power to legislate on subjects not prohibited, either in express terms or by necessary implication, by the constitution. State v. Anderson, 149.
7. It is competent for the legislature to provide for the nomination of party candidates for elective offices by a direct vote of the members of the different political parties at an election held for that purpose. State v. Anderson, 149.
8. While the legislature has the power to provide for nominations by a direct vote, and to prescribe rules and regulations for the conduct of primary elections and the government of political parties, such rules and regulations must be reasonable, and operate on voters and candidates of the same class with substantial equality, but absolute equality in all things is not a necessary requirement. State v. Anderson, 149.
9. The opinion of the court that simpler, more effectual or reasonable rules and regulations covering primary elections might have been provided than the legislature did provide, will not justify the courts holding the regulations made invalid. State v. Anderson, 149.
10. Arguments as to the expediency and reasons for a law are properly addressed to the legislature and will not justify the appellate court, because the most expedient method has not been provided, in holding the provisions of a law invalid. State v. Anderson, 149.

LIENS. See Mechanic's Liens 282.
1. A woman employed to do housework on a farm and to cook meals for farm laborers, is not a "farm laborer," within the meaning of section 6277, Rev. Codes 1905, giving a lien for the wages of farm laborers. Lowe v. Abrahamson, 182.

LIMITATION OF ACTIONS. See Adverse Possession, 384.
1. In an action to quiet title, evidence examined and *held*, to establish that appellant and his grantor were for more than ten years immediately prior to the commencement of such action, mortgagees in possession, with the implied knowledge and consent of, and holding adversely to the fee owners, and that their remedies to recover such possession or to assert their rights are barred by the statute of limitations, and such bar divested them of all title, and vested the same in such adverse occupant. Mears v. Somers Land Co., 384.

MANDAMUS. See Statutory Construction, 125; Supreme Court, 233.
1. The question of the division of a county and the creation of a new one, does not call for the exercise of the original jurisdiction of the Supreme Court by mandamus, unless the circum-

MANDAMUS—Continued.

stances are of such an exceptional character that adequate relief cannot be obtained in the district court. State v. Wing, 242.

2. Under the circumstances disclosed by the record, *held*, that no emergency or exigency exists in the present instance warranting the Supreme Court in taking original jurisdiction to issue its writ of mandamus. State v. Wing, 242.
3. In a mandamus proceeding, instituted by a private party against county officers to compel them to change the location of their offices as such officers, such proceeding not being maintained in the name of the state, or on behalf of the citizens of such county, the court will not determine the constitutionality of an act of the legislature providing for a vote upon the relocation of the county seat. Dean v. Dimmick, 397.

MARRIED WOMEN. See Husband and Wife, 185.

MASTER AND SERVANT.

1. A minor was injured while in defendant's employ in attempting to operate a dangerous contrivance installed by defendant's manager for pulling cars into position for loading grain at defendant's elevator; a description of such contrivance is found in opinion. *Held*, that the questions of defendant's negligence, and of plaintiff's contributory negligence, and his assumptions of the risks were, under the facts, properly for the jury. Umsted v. Colgate El. Co., 309.
2. The rules of law relative to the respective duties and rights of master and servant regarding obvious risks of the service and in respect to negligence, assumption of risk, and contributory negligence are stated at length in the opinion. Umsted v. Colgate El. Co., 309.
3. By statute in this state a common carrier may, by special contract, signed by the consignor or consignee, limit or modify its common law liability, except that it cannot exonerate itself from liability for loss or damage resulting from the negligence, fraud or willful wrong of itself or servants. Prior to the enactment of chapter 57, page 83, Laws 1907, it was lawful by special contract, when signed by the consignor or consignee, to exonerate such carrier from liability except for its or its servants' gross negligence, fraud or willful wrong. Hanson v. Gt. N. Ry Co., 324.

MEASURE OF DAMAGES. See Damages, 421, 441, 603.

MECHANIC'S LIEN.

1. Where a husband, without the consent and against the protests of the wife, contracts for and purchases material to paint a dwelling house on land owned by the wife, who, having no knowledge of where he purchased the materials, did not give notice of her objections to the improvements on the dwelling house to the party who furnished said materials, the materialman, under the

MECHANIC'S LIEN—Continued.

evidence in this case, acquires no lien under section 6237 of said Rev. Codes of 1905, for the materials furnished. Christianson v. Hughes, 282.

MILITARY LAW.

1. Section 2, chapter 136, page 244, Laws of 1905, providing that no appointment to any of the departmental offices of the state militia shall be for a longer period than two years, is germane to the subject and general purpose expressed in the title, "An act providing that all appointments to the various departments of the National Guard of the State of North Dakota shall be made from officers of the field and line," and does not contravene the provision of section 61, article 2, of the state constitution, requiring that the subject of an act shall be expressed in the title. State v. Peake, 101.
2. A court-martial is not an inferior court within the meaning of section 86 of the constitution, it not belonging to the judicial, but to the executive, department of the government. The inferior courts referred to in section 86 are the courts enumerated in section 85, which belong to the judicial department. State v. Nuchols, 233.

MINORS. See Master and Servant, 309; Death by Wrongful Act, 421.

MISTAKE. See Husband and Wife, 409; Death by Wrongful Act, 421.

MORTGAGEE IN POSSESSION. See Mortgages, 384.

1. One who takes assignment of a certificate of mortgage sale from the purchaser at an abortive foreclosure and afterwards gets a sheriff's deed thereon, is a mortgagee in possession. Mears v. Somers Land Co., 384.

MORTGAGES.

1. Parties to a written assignment of a contract for the sale of real estate which was made for security purpose, can annul the same and make such assignment absolute by a subsequent contract or assignment. Barker v. More, 82.
2. An action for an accounting will not lie, in the absence of contract or fraud, to compel a redemptioner from a mortgage foreclosure sale, who thereafter obtained a sheriff's deed under his redemption, to account to the mortgagor for the difference between what was paid on the redemption and the value of the land. Barker v. More, 82.
3. Parties may agree to change an assignment for security to one absolute in form and effect. Barker v. More, 82.
4. B and son owed plaintiff $40,000, secured partly on lands in North Dakota and partly on lands in Minnesota and part was unsecured. Wishing to divide this indebtedness, B and son arranged

MORTGAGES—Continued.

with plaintiff for B to assume $24,500 secured on the lands in North Dakota. The son assumed $15,500 secured on the Minnesota lands. Plaintiff surrendered the old notes and satisfied the mortgage on the Minnesota lands but did not discharge the old mortgage on the North Dakota lands. *Held,* under the evidence, that the old indebtedness was paid and cancelled, that the North Dakota lands were released from the mortgage executed by B and son. After the execution of the first mortgage by B and son to plaintiff and before the execution of the second mortgage by B to plaintiff, he executed one to W. H. & G. on the North Dakota land. *Held,* that such mortgage was prior and superior to plaintiff's mortgage. Kidder v. Barnes, 276.

5. In an action to quiet title, evidence examined and *held,* to establish that appellant and his grantor were for more than ten years immediately prior to the commencement of such action, mortgagees in possession, with the implied knowledge and consent of, and holding adversely to the fee owners, and that their remedies to recover such possession or to assert their rights are barred by the statute of limitations, and such bar divested them of all title, and vested the same in such adverse occupant. Mears v. Somers Land Co., 384.

6. Appellant and its grantor became mortgagees through an equitable assignment of a mortgage on property as the result of a defective forelosure by advertisement, at which foreclosure such grantor became the purchaser, received a certificate of sale and sheriff's deed, and thereafter deeded the premises to appellant. For eleven and one-half years after such abortive foreclosure sale, the fee owners paid no taxes and exercised no acts of ownership over the property, while appellant, during such time, paid the taxes and for over ten years prior to the commencement of this action, then in good faith asserted claim thereto, hostile and adverse to the fee owners, with their implied knowledge and consent, during which time they had such actual possession as, in view of the nature of the property, and all circumstances disclosed by the evidence, was essential to constitute them adverse occupants. Mears v. Somers Land Co., 384.

MOTION. See Appeal and Error, 8, 357.

MUNICIPAL BONDS. See Bonds, 616.

MUNICIPAL CORPORATIONS. See Bonds, 616.

1. Under the facts stated in the opinion, held, that the city of Minot is estopped by its long acquiescece from questioning the validity of the method adopted by the council in attempting to segregate certain territory from its corporate limits. State v. Willis, 76.

2. Cities have only the following powers: (a) Those granted in express words. (b) Those necessarily implied or incident to the powers expressly granted. (c) Those essential to the declared

MUNICIPAL CORPORATIONS—Continued.

objects and purposes of the corporation—not simply convenient, but indispensable. Stern v. City of Fargo, 289.

3. Doubtful claims of power, or doubt or ambiguity in the terms used by the legislature, are resolved against the corporation. Stern v. Fargo, 289.
4. The constitution and statutes providing for the issuance of municipal bonds are more strictly construed in actions to prevent their issuance than in actions to prevent their payment after they have been issued and negotiated. Stern v. Fargo, 289.
5. A statute enumerating the powers of cities, providing how and for what purpose bonds may be issued, and requiring that the question of issuing them for the construction or purchase of waterworks shall be submitted to the voters of the city at an election after twenty days' notice stating the purpose of the issue and the amount thereof. Thereunder it is *held*, that a resolution of a city council, providing for the issuance of $100,000 in bonds, or such part thereof as may be required, and a notice of an election to submit such issuance to the voters, in the same language as the resolution, did not state the amount of bonds to be voted upon, and that without such statement the question of the issuance of bonds is not fairly presented to the electors, who are entitled to know definitely what is proposed in the way of increasing the indebtedness of the city. Stern v. Fargo, 289.
6. The duties of the auditor in issuing the notice of such an election are purely ministerial, and such notice must follow the terms and conditions of the resolution authorizing the election. Stern v. Fargo, 289.
7. The power to authorize the issuance of bonds is vested in the voters, and they cannot delegate such power to the city council. Stern v. Fargo, 289.
8. The object of the notice of election, and the requirement that the amount of the bonds be stated, is to give the voters and taxpayers such information as will enable them to consider, weigh and discuss the merits of the proposition, and to avail themselves of the opportunity so given to acquire information as to the necessity of the proposed expenditure and the amount of the indebtedness necessary to incur to enable the city council to carry out its plans. When the notice fails to state the amount of indebtedness proposed to be incurred by the issuance of bonds, opportunity is not afforded the voters to inform themselves so as to be able to vote intelligently. Stern v. Fargo, 289.
9. An election for the issuance of bonds, under the provision of section 183 of the constitution and section 2678, Rev. Codes 1905, for the construction of part of a waterworks system, on a notice which did not state the amount of the bonds to be issued, is invalid, and the council is not authorized thereby to issue bonds voted. Stern v. Fargo, 289.

MUNICIPAL CORPORATIONS—Continued.

10. A resolution of a city council, providing for an election, and a notice of such an election, under section 2678, Rev. Codes 1905, must state the purpose for which it is proposed to issue bonds. Stern v. Fargo, 289.
11. The legislature, by the provisions which it has made for the issuance of bonds by cities, has not provided for submitting the question of their issuance to the voters in such a manner as to permit only a vote for or against the issuance of bonds for two or more purposes on a single vote. Stern v. Fargo, 289.
12. Under our system of elections, every voter is entitled to the opportunity to vote for or against any question submitted, separately and independently from his vote for or against any other proposition submitted. Stern v. Fargo, 289.
13. The test whether questions submitted include one purpose or more is whether the objects for which bonds are to be issued have a natural or necessary connection with each other; and, if they have not, two purposes cannot be made one by verbal connection. Stern v. Fargo, 289.
14. The fact that one construction of a statute of doubtful import, if it be conceded that the meaning of the statute in question is doubtful, would admit of the submission of a question devoid of merit in connection with another of unquestioned merit, and the adoption of a weak proposition by reason of its submission in connection with a meritorious one, furnishes a strong reason for the rule of construction stated in paragraph 11, and this reason applies notwithstanding no question is made in this case as to the good faith or merits of either proposition submitted by the city council. Stern v. Fargo, 289.
15. A resolution adopted by the city council, providing for an election to vote on the issuance of bonds, and a notice by the city auditor of such election, which state the purposes of the proposed bond issue to be "to defray the cost of building and constructing a new waterworks pumping station and installing therein a new high duty pump and necessary steam boilers, and for the purpose of installing an electric light plant in connection with said pumping station for furnishing street and other lights and power," state two purposes, and an election held pursuant to such resolution and notice is illegal, and a majority vote in favor of issuing bonds for the purposes stated does not authorize or empower the city council to issue them. Stern v. Fargo, 289.
16. Section 183 of the constitution, and the statute, provide a debt limit for general purposes of cities, of 5 per cent, with power to incur additional indebtedness equaling 3 per cent of the assessed valuation on a two-thirds vote, making a possible indebtedness for general purposes of 8 per cent. It is also provided that a city, when authorized by a majority vote, may increase its indebtedness, not exceeding 4 per cent, without re-

MUNICIPAL CORPORATIONS—Continued.

gard to existing indebtedness, for the construction or purchase of waterworks or constructing sewers, and for no other purpose whatever. Query: Can a city issue bonds for the construction of waterworks or sewers in such a manner as to necessarily include the amount of such bonds in the 5 per cent or 8 per cent debt limit provided for ordinary purposes, or must they be issued in such a manner as to be included within the 4 per cent provision for the construction of waterworks and sewers? If they must be so issued as to admit of their being included within the 4 per cent special waterworks provision, the connection of an electric light plant or of any other subject except sewers, with waterworks in the issuance of bonds, furnishes an additional reason for holding the proposed issue under consideration illegal. Stern v. Fargo, 289.

NAMES.

1. Where notice to take depositions gives initials of Christian names only, while the name in the deposition and signature of witnesses is by Christian names, the first letters of which were the same as the initials given in the notice, extrinsic proof is unnecessary to show the witness testifying is the same as described in the notice, especially where the notary indorses the same name on the envelope returning such deposition as the one given in the notice. Walters v. Rock, 45.

NATIONAL GUARD. See Military Law, 101.

NEGLIGENCE. See Common Carriers, 324.

1. The complaint was framed to embrace the following grounds of recovery: First, that the animal was vicious and known by its owner to be so, who kept and harbored the same in such a negligent manner as to permit its escape from his enclosure and to inflict the injury complained of. Second, that the animal was trespassing at the time of the injury, and hence its owner is liable for damages done by it. Third, negligence of the owner in permitting such escape. The court submitted the issues on the first two theories only. *Held,* conceding the evidence of the known viciousness of the animal to be sufficient to give to the jury, that a new trial must be ordered for errors in the instructions relative to the second ground; it being impossible to determine on which theory the verdict was rendered. Peterson v. Conlan, 205.
2. Certain instructions amounting to a peremptory charge to find for plaintiff, provided the jury found the appellant to be the owner of the animal inflicting injuries, regardless of the question of appellant's negligence, and also without regard to whether the particular injury complained of was proximately caused by such trespass, were erroneous. Section 6582, Rev. Codes 1905, re-

NEGLIGENCE—Continued.

stricts such recovery to damages proximately caused by the trespass. Peterson v. Conlan, 205.

3. A minor was injured while in defendant's employ in attempting to operate a dangerous contrivance installed by defendant's manager for pulling cars into position for loading grain at defendant's elevator; a description of such contrivance is found in opinion; *held,* that the questions of defendant's negligence, and of plaintiff's contributory negligence, and his assumptions of the risks were, under the facts, properly for the jury. Umsted v. Colgate El. Co., 309.
4. The rules of law relative to the respective duties and rights of master and servant regarding obvious risks of the service and in respect to negligence, assumption of risk, and contributory negligence are stated at length in the opinion. Umsted v. Colgate El. Co., 309.
5. In an action for damages for death of plaintiff's father caused by a train on defendant's track backing against him while he was on its right of way or track, it is *held,* under the evidence that deceased was not a trespasser and defendant owed him the duty of ordinary care and diligence to avoid injurying him. Kunkel v. Soo Ry. Co., 367.
6. *Held,* further, that the questions of the negligence of the defendant and the contributory negligence of the deceased were, under the evidence in this case, for the jury. Kunkel v. Soo Ry. Co., 367.
7. In an action under the statute providing for the recovery of damages for death by wrongful act of defendant, the contributory negligence of the plaintiff beneficiary is a defense. Scherer v. Schlaberg, 421.
8. The prescription of an attending physician called for medicine in the form of a powder, to be given, one every three hours, to an infant three months old. The prescription was left with the mother of the child, and she was informed by the physician that it would be in powder form, and to give a dose once in three hours. By mistake of the defendant druggist, medicine, put up for another customer, in liquid form, the label on the bottle being marked with the name of the party for whom it was prescribed, and containing directions to give one teaspoonful every two hours until relieved, was delivered. The plaintiff father was not present when the information and the directions were given the mother by the doctor, but before any of the medicine was given was informed by the mother what the directions were. He also read the directions on the bottle, and knew that the prescription given had been for a powder. He was present when the liquid was administered to the child, and permitted it to be done. After the first dose was given, and when nearly time for the second dose to be administered, he suspected something wrong in the medicine and telephoned the doctor from the resi-

NEGLIGENCE—Continued.

dence of a neighbor. He left his home to telephone without imparting his suspicions to his wife, or directing her to delay the second dose until he had heard from the doctor, and the second dose was given before his return. *Held*, that under these facts, and others disclosed by the record, the plaintiff was guilty of contributory negligence in law. Scherer v. Schlaberg, 421.

9. Under sections 2452-2453, Rev. Codes 1905, it is the duty of the register of deeds to keep a numerical index in his office and note therein opposite each description of each tract, the volume and page of each instrument affecting the title thereto. *Held*, that defendant's failure after an instrument is duly recorded, to note the same in such numerical index, is negligence, rendering him liable to one who in reliance on such index buys the property, and sustains damage by such official neglect. Rising v. Dickinson, 478.
10. It is not contributory negligence for a searcher of the record of real estate transfers not to examine the grantor and grantee index. He has a right to rely on the numerical index. Rising v. Dickinson, 478.
11. The register of deeds is a ministerial officer, liable at common law, in the absence of an express statute for damages caused by failure or neglect of official duty or negligent or illegal performance thereof. Rising v. Dickinson, 478.

NEGOTIABLE INSTRUMENTS. See GUARANTY, 135.

1. Where fraud in the inception of a promissory note is alleged and established, the burden is upon the indorsee to show his purchase thereof in good faith for value and before maturity. Walters v. Rock, 45.
2. A promise by a payee of a note in reference to the consideration thereof, that he does not intend to fulfill constitutes fraud; and will defeat the note except as to an innocent holder. Walters v. Rock, 45.
3. If a purchaser of a note for value before maturity has notice of facts tending to show defenses, he cannot purposely refrain from making inquiries and be a bona fide purchaser. Walters v. Rock, 45.
4. Payment of value on a purchase of negotiable paper before maturity constitutes prima facie a bona fide purchaser, but no more. Walters v. Rock, 45.
5. Circumstances may rebut the prima facie presumption arising from payment of value for negotiable paper before maturity. Walters v. Rock, 45.
6. If the purchaser does not expressly state that he purchased in good faith it is not necessarily fatal to a showing of good faith, but the omission may be considered with other facts to show its absence in the purchase. Walters v. Rock, 45.

NEGOTIABLE INSTRUMENTS—Continued.

7. Good faith in the purchase of a note is ordinarily a question for the jury, and it is held in this case that the verdict was sustained by evidence on the question of bad faith. Walters v. Rock, 45.
8. If a purchaser have knowledge of defenses before he pays for a note, he is not a bona fide purchaser, although it may have been indorsed and delivered to him before such knowledge. Walters v. Rock, 45.
9. Plaintiff, being an indorsee of a note before maturity for a valuable consideration and without notice, took notes free from any lien upon appellant's interest in certain crops and land, for reasons stated in the opinion. Bank v. Cullen, 500.
10. Action on a promissory note. Judgment for plaintiff. Evidence examined and *held* sufficient to justify the judgment. Landis v. Fyles, 587.

NEWSPAPERS.

1. A paper published each week under the name of the "Bismarck Weekly Tribune," by the same parties who publish a daily paper under the name of the "Bismarck Daily Tribune," such weekly being composed of matter printed in the Daily Tribune and set out from day to day for publication in the weekly, is a weekly edition of the Bismarck Daily Tribune within the meaning of section 1259, Rev. Codes 1899. Griffin v. Denison Land Co., 246.
2. Section 1259, Rev. Codes 1899, relating to the publication of the delinquent tax list and notice of sale, provides that: "The county auditor under the direction of the county commissioners or a majority thereof, shall give notice of the sale of real property by publication thereof once a week for three consecutive weeks, in such newspaper as may be designated by said commissioners for that purpose in the county. In counties having daily papers, the delinquent list shall be published in one issue of the daily edition and in two issues of the weekly edition of the same paper so selected by the board of county commissioners." By resolution the board of county commissioners of Burleigh county directed the publication of the delinquent tax list and notice of sale for 1898 taxes in the Bismarck Daily Tribune. *Held*, that such resolution and publication was compliance with the statutory provisions quoted, and the publication so made valid. Griffin v. Denison Land Co., 246.

NEW TRIAL. See APPEAL AND ERROR, 338, 417, 556.

1. An appeal from a judgment and from two orders denying motions for a new trial, made upon same grounds, is not a double appeal. Sucker State Drill Co. v. Brock, 8.
2. The complaint was framed to embrace the following grounds of recovery: First, that the animal was vicious and known by its owner to be so, who kept and harbored the same in such a negligent manner as to permit its escape from his enclosure and

NEW TRIAL—Continued.

to inflict the injury complained of. Second, that the animal was trespassing at the time of the injury, and hence its owner is liable for damages done by it. Third, negligence of the owner in permitting such escape. The court submitted the issues on the first two theories only. *Held,* conceding the evidence of the known viciousness of the animal to be sufficient to give to the jury, that a new trial must be ordered for errors in the instructions relative to the second ground; it being impossible to determine on which theory the verdict was rendered. Peterson v. Conlan, 205.

3. When a new trial is granted by the district court its order will be affirmed if any ground for sustaining it is found in the record. Gooler v. Eidsness, 338.
4. Where there is a direct conflict in the evidence on material questions, directing of a verdict for appellant was error and the district court was justified in granting a new trial. Gooler v. Eidsness, 338.
5. Even if the merits were with the appellants, the evidence was too uncertain to enable the jury or the court to fix the amount which plaintiff is entitled to recover. Gooler v. Eidsness, 338.
6. A new trial may be granted in cases tried under section 7229, Rev. Codes 1905, in furtherance of justice, where the action was dismissed on motion at the close of plaintiff's case, and final disposition of the case cannot for that reason be made. Massey v. Rae, 409.
7. A notice of appeal from a judgment is ineffectual to review an order made after judgment denying a motion for a new trial, and such motion merely asks for a review of such order. And if the appeal bond makes no reference to such order, the attempted appeal was wholly abortive. Hedderich v. Hedderich, 488.
8. Where a motion for a new trial is made and denied after judgment and the appeal is from the judgment alone, the order denying the motion is conclusive as to all matters passed upon by the trial court on such motion, except errors properly appearing upon the judgment roll, which errors may always be reviewed on the appeal from the judgment. Hedderich v. Hedderich, 488.
9. Assignments or error, in order to be available to the appellant, must be based upon rulings which are reviewable in this court. It is accordingly held that the assignments relating to alleged insufficiency of the evidence and challenging the correctness of the order denying the motion for a new trial cannot be considered on this appeal. Hedderich v. Hedderich, 468.

NOMINAL DAMAGES. See Damages, 421.

NOTICE. See Newspapers, 246; Appeal and Error, 417; Schools and School Districts, 616.

NOTICE—Continued.

1. If a purchaser of a note for value before maturity has notice of facts tending to show defenses, he cannot purposely refrain from making inquiries and be a bona fide purchaser. Walters v. Rock, 45.
2. Objections to and notice to suppress depositions, must be made before the commencement of the trial; construction of the statute, that the trial was commenced when a jury is called, is reasonable. Walters v. Rock, 45.
3. Where notice to take depositions gives initials of Christian names only, while the name in the deposition and signature of witnesses is by Christian names, the first letters of which were the same as the initials given in the notice, extrinsic proof is unnecessary to show the witness testifying is the same as described in the notice, especially where the notary indorses the same name on the envelope returning such deposition as the one given in the notice. Walters v. Rock, 45.
4. A statute enumerating the powers of cities, providing how and for what purpose bonds may be issued, and requiring that the question of issuing them for the construction or purchase of waterworks shall be submitted to the voters of the city at an election after twenty days' notice stating the purpose of the issue and the amount thereof. Thereunder it is *held*, that a resolution of a city council, providing for the issuance of $100,000 in bonds, or such part thereof as may be required, and a notice of an election to submit such issuance to the voters, in the same language as the resolution, did not state the amount of bonds to be voted upon, and that without such statement the question of the issuance of bonds is not fairly presented to the electors, who are entitled to know definitely what is proposed in the way of increasing the indebtedness of the city. Stern v. Fargo, 289.
5. The object of the notice of election, and the requirement that the amount of the bonds be stated, is to give the voters and taxpayers such information as will enable them to consider, weigh and discuss the merits of the proposition, and to avail themselves of the opportunity so given to acquire information as to the necessity of the proposed expenditure and the amount of the indebtedness necessary to incur to enable the city council to carry out its plans. When the notice fails to state the amount of indebtedness proposed to be incurred by the issuance of bonds, opportunity is not afforded the voters to inform themselves so as to be able to vote intelligently. Stern v. Fargo, 289.
6. An election for the issuance of bonds, under the provision of section 183 of the constitution and section 2678, Rev. Codes 1905, for the construction of part of a waterworks system, on a notice which did not state the amount of the bonds to be issued, is invalid, and the council is not authorized thereby to issue bonds voted. Stern v. Fargo, 289.
7. A resolution of a city council, providing for an election, and a

NOTICE—Continued.

notice of such an election, under section 2678, Rev. Codes 1905, must state the purpose for which it is proposed to issue bonds. Stern v. Fargo, 289.

8. A resolution adopted by the city council, providing for an election to vote on the issuance of bonds, and a notice by the city auditor of such election, which state the purposes of the proposed bond issue to be "to defray the cost of building and constructing a new waterworks pumping station and installing therein a new high duty pump and necessary steam boilers, and for the purpose of installing an electric light plant in connection with said pumping station for furnishing street and other lights and power." state two purposes and an election held pursuant to such resolution and notice is illegal, and a majority vote in favor of issuing bonds for the purposes stated does not authorize or empower the city council to issue them. Stern v. Fargo, 289.

9. Section 6738, Rev. Codes 1905, defines "process" as a writ or summons issued in the course of judicial proceedings. *Held*, that the notice of appeal is not a writ or summons, and is therefore not "process," and need not be served in the same manner in which "process" is required to be served. Gooler v. Eidsness, 338.

10. Section 7205, Rev. Codes 1905, provides that an appeal must be taken by serving a notice in writing, etc., and by filing the same in the office of the clerk of court. Section 7332 provides for service of notice by mail when the person making the service and the persons upon whom it is made reside in different places between which there is a regular communication by mail. *Held*, that notice of appeal is included in the sections referred to, and service by mail, when the facts specified exist, is valid service if other requirements are observed. Gooler v. Eidsness, 338.

11. Where a contract for the sale and purchase of land requires the vendee to pay the taxes, without stating any date for such payment, but being of the essence thereof, a notice requiring the vendee to perform, served thirty-four days after the taxes were delinquent, is given in a reasonable time and without such delay as to be a waiver of performance, where it appears that the vendee was not prejudiced by the lapse of the time mentioned. Martinson v. Regan, 467.

12. When it clearly appears that the vendee cannot comply in any manner with the terms of a contract for purchase of real estate, and due service of notice to perform, followed by notice of cancellation, was made, a court of equity will not under most circumstances grant further time to the vendee for performance. Martinson v. Regan, 467.

13. Under a statute providing for an election for the issue of bonds for a court house or jail or both, requiring a notice of such election to state its object, the amount of bonds to be issued, the denominations of such bonds, the length of time for which they

NOTICE—Continued.

shall run, and rate of interest which they shall bear. A notice which fails to so state renders the election invalid and the bonds issued pursuant to such election are illegal. Hughes v. Horsky, 474.

14. Under a statute providing for the issuance of bonds for county buildings, providing for the submission of the question of the issuance of bonds for a courthouse, or jail, or both, *held*, that when the erection of a courthouse and jail, in one building is contemplated, and the notice so indicates, the question of issuing bonds may be submitted and voted upon as one question; but that when two separate buildings are planned, two questions are presented, and although they may be submitted in the same notice, it must be so done that each voter may vote for or against each proposition independently of the other. Hughes v. Horsky, 474.

15. Under section 5038, Rev. Codes 1905, which makes every conveyance by deed void as against the lien of any judgment obtained against the person in whose name the title appears of record prior to the recording of such conveyance, an execution legally levied, and a sale thereon, the sheriff's deed issued at the expiration of the redemption period to the purchaser conveys good title, as against title derived from a prior unrecorded deed, of which the judgment creditor and purchaser had no notice. Enderlin Inv. Co. v. Nordhagen, 517.

16. The title to premises on which execution was levied stood in the name of Carl Nordhagen, the son of Ellef Nordhagen and Rande Nordhagen. All these parties, together with other brothers and sisters of Carl, all over 21 years of age, resided together upon the premises sold. The evidence fails to disclose any facts indicating that any one of the parties might not have claimed possession with as much reasons as did the defendant Rande, the mother of Carl. *Held*, that the evidence is insufficient to constitute notice of the claim of Rande, the mother, to title in the land through an unrecorded deed, as against a title derived from such levy. Enderlin Inv. Co. v. Nordhagen, 517.

NOTICE OF APPEAL. See Notice, 338; Appeal and Error, 417.

NOTICE OF TRIAL. See Appeal and Error, 507.

OFFER OF PERFORMANCE.

1. Performance within the meaning of section 6610, Rev. Codes 1905, is not complied with by an offer or tender of performance. Knudtson v. Robinson et al., 12.

OFFICERS. See County Judges, 402; Register of Deeds, 478.

1. The duties of the auditor in issuing the notice of an election are purely ministerial, and such notice must follow the terms and

OFFICERS—Continued.
conditions of the resolution authorizing the election. Stern v. Fargo, 289.
2. The register of deeds is a ministerial officer, liable at common law, in the absence of an express statute for damages caused by failure or neglect of official duty or negligent or illegal performance thereof. Rising v. Dickinson, 478.
3. Following the rule announced in State v. Ely, 16 N. D. 569, 113 N. W. 711, 14 L. R. A. (N. S.) 638, *held*, that Hon. A. G. Burr, who presided as judge at the trial of the issues in a criminal action against appellant, was at the date of such trial a de facto judge of the district court in and for Pierce county, and as such his acts are not subject to attack by a private suitor. State v. Bednar, 484.

ORDER. See Appeal and Error, 8.

PARTIES. See Mandamus, 397.

PARTNERSHIP.
1. Upon the dissolution of a partnership between S., and M., it was agreed that the latter's interest was $1,100, and in consideration of S., paying M., said sum, M. agreed "not to engage for the next two years" in the same business in the same city, "in the matter aforesaid or with any partner, partners, firm, company or corporation for the period aforesaid." *Held*, that such contract was upon a sufficient consideration, legal and enforceable. Seigel v. Marcus, 214.
2. Upon the dissolution of a partnership between S. and M., M. agreed "not to engage for the next two years in the same business either with any partner, partners, firm, company or corporation for a certain period," M., after dissolution, entered the employ as a clerk of one E., whom he procured to open a rival business adjacent to that of S.; M. attended to the purchase of stock for such rival business and was active managing agent for E., therein. *Held*, that M., thereby violated the terms of his agreement and should be enjoined from so doing. Seigel v. Marcus, 214.

PAYMENT.
1. If a purchaser have knowledge of defenses before he pays for a note he is not a bona fide purchaser, although it may have been indorsed and delivered to him before such knowledge. Walters v. Rock, 45.

PENALTIES AND FORFEITURE.
1. Penalties provided by section 7325 are not applicable to the facts of this case. Gooler v. Eidsness, 338.

PERFORMANCE.
1. "Performance" means the doing or completing of an act. Knudtson v. Robinson et al., 12.

PERSONAL PROPERTY. See Exemptions, 144.

PHYSICIANS. See Death by Wrongful Act, 421.

PLEADING. See Indictment and Information, 484; Evidence, 511.

1. More liberality is allowed in favor of the allegations of a pleading where objected to for the first time at the trial than when attacked by demurrer. Walters v. Rock, 45.
2. An amendment to an answer to conform to the facts in an action for an accounting may be permitted, although not requested until after the evidence is all in. Barker v. More, 82.
3. An amendment to an answer may be made, during or at the close of a trial to conform to the facts proven, unless the defense is thereby substantially changed. Barker v. More, 82.
4. In plaintiff's original complaint, he based his right of recovery upon the chattel mortgage, claiming merely in a special property in the grain. Subsequently he was permitted to amend his complaint by abandoning such theory, and alleging ownership of the grain by virtue of the farm contract. *Held*, that, by adopting the theory of recovery set forth in the original complaint, plaintiff did not thereby preclude himself from receding therefrom, nor did such act evince an intention on plaintiff's part to waive his legal title under the contract. He had no election of remedies, as his only cause of action was grounded upon his title under the farm contract; the chattel mortgage not having attached to the grain at the date of the conversion. Plaintiff was merely mistaken in attempting to pursue a remedy which he did not have, and this cannot be construed as an election to waive or abandon the only remedy which he possessed. McFadden v. Thorpe El. Co., 93.
5. The answer was not demurred to nor the insufficiency suggested to the trial court, which proceeded upon the theory that issue was joined, the Supreme Court will not pass upon the sufficiency of the answer. Gooler v. Eidsness, 338.
6. A counterclaim for damages for refusal to deliver certain repairs for machinery ordered by defendant from plaintiff, which order plaintiff accepted and agreed to fill, considered, and *held*, not to state facts sufficient to entitle defendant to substantial damages. Scully Co. v. Hann, 528.
7. Plaintiff demurred to the counterclaim as first pleaded, which demurrer was sustained. Afterwards an amendment was permitted, but which amendment did not cure the defect. To such amended counterclaim plaintiff replied, both denying the facts alleged and demurring to their sufficiency in the same pleading. *Held*, that plaintiff by thus replying did not waive his right to challenge the sufficiency of the facts therein alleged to constitute a cause of action, and the court did not err in thereafter sustaining the demurrer and giving plaintiff judgment upon the note as prayed for in the complaint. Scully v. Hann, 528.

PLEADING—Continued.

8. Where a contract within the statute of frauds is declared on, the court will presume that it was in writing, unless the complaint shows that it was not. Hanson v. Svarverud, 550.
9. An allegation in a complaint that a grantor in a deed was in possession of the land conveyed when the deed was executed and delivered and thereafter, is sufficient as an allegation of the ownership of the land by the grantor when the deed was delivered. Hanson v. Svarverud, 550.
10. A complaint alleging that a deed, absolute in form, from parents to their sons was executed solely in reliance on the confidence existing between them and their sons, and in reliance on their sons' promise to accept the deed in trust for the use of the grantors while they lived, and after their death to convey the land equally among all the children of the grantors, states a cause of action for declaring the deed to have been executed in trust for said purpose, and a court of equity will enforce the promise, as the refusal to carry it out is constructively fraudulent. Hanson v. Svarverud, 550.
11. Under such circumstances, an allegation of actual fraud is not essential, as the refusal to comply with the agreement is constructively fraudulent, in view of the alleged confidential relations. Hanson v. Svarverud, 550.
12. Whether estoppel in claim and delivery is required to be pleaded not decided. Roberts v. Little, 608.

POLICE MAGISTRATES.

1. Where police magistrates of cities in counties wherein the county courts have increased jurisdiction, retain jurisdiction to try and determine charges of misdemeanor, is not decided by assuming that they were without such jurisdiction, *held*, that by failing to object to the jurisdiction of the magistrate, and by appeal from his judgment to the district court, and participating in the trial therein and not objecting to the jurisdiction of either until after verdict of guilty, defendant waived all questions of jurisdiction not raised below and it was error in the district court to grant a motion in arrest of judgment and discharge of defendant. State v. Russell, 357.

POLITICAL PARTIES. See Voters and Elections, 149.

POSSESSION. See Mortgages, 384.

1. The title to premises on which execution was levied stood in the name of Carl Nordhagen, the son of Ellef Nordhagen and Rande Nordhagen. All these parties, together with other brothers and sisters of Carl, all over 21 years of age, resided together upon the premises sold. The evidence fails to disclose any facts indicating that any one of the parties might not have claimed possession with as much reason as did the defendant Rande, the

POSSESSION—Continued.
mother of Carl. *Held,* that the evidence is insufficient to constitute notice of the claim of Rande, the mother, to title in the land through an unrecorded deed, as against a title derived from such levy. Enderlin Inv. Co. v. Nordhagen, 517.
2. To render possession adverse, it must not only be actual but also open, continual, notorious, distinct and hostile, and of such a character as to unmistakably indicate an assertion of claim of ownership by the occupants. *Held,* under the evidence of this case, that the defendant Rande Nordhagen is not shown to have been in such possession as to defeat a title under a judgment against her son Carl to the premises, resided upon by both. Enderlin Inv. Co. v. Nordhagen, 517.
3. An allegation in a complaint that a grantor in a deed was in possession of the land conveyed when the deed was executed and delivered, and thereafter, is sufficient as an allegation of the ownership of the land by the grantor when the deed was delivered. Hanson v. Svarverud, 550.

PRACTICE. See TRIAL, 45, 82.
1. A written motion to suppress a deposition as a whole is too late when filed with the clerk after the trial court has ordered a jury called, although the clerk has not drawn or called the name of a juror. Walters v. Rock, 45.
2. Objections to, and notice to suppress depositions, must be made before the commencement of the trial; construction of the statute, that the trial was commenced when a jury is called, is reasonable. Walters v. Rock, 45.
3. Certain preliminary questions of practice, urged by defendant pertaining to relator's right to make the application, considered, and disposed of adversely to his contention. State v. Blaisdell, 55.
4. Section 7325, Rev. Codes 1905, reads: "When an order of the district court is made, which under the laws regulating appeals to the Supreme Court is an appealable order, such order shall upon its face by apt words briefly describe the affidavits, documents, papers and evidence upon which the order is made and the judges may at their discretion refuse to sign orders not so framed and the Supreme Court may at its discretion dismiss any appeal from an order which is not framed substantially in accordance with the requirements of this section." *Held* that objection taken for the first time in this court to the order of the district court granting a new trial, such objection being upon the ground that the order does not enumerate the evidence and papers upon which it was granted, will not be considered by this court. Gooler v. Eidsness, 338.
5. Where both parties move for a directed verdict and he against whom the verdict is directed, requests the submission of any question to the jury, he does not thereby waive findings by the jury. Gooler v. Eidsness, 338.

PRACTICE—Continued.

6. Section 7205, Rev. Codes 1905, provides that an appeal must be taken by serving a notice in writing, etc., and by filing the same in the office of the clerk of court. Section 7332 provides for service of notice by mail when the person making the service and the persons upon whom it is made reside in different places between which there is a regular communication by mail. *Held,* that notice of appeal is included in the sections referred to, and service by mail, when the facts specified exist, is valid service if other requirements are observed. Gooler v. Eidsness, 338.
7. Under section 7228, Rev. Codes 1905, when the Supreme Court orders a new trial or further proceedings in the court below, such proceedings must be had within one year from date of such order, and unless sufficient excuse for delay is shown the trial court will dismiss the action. Bessie v. N. P. Ry. Co., 597.
8. Admitting service of notice of trial after the expiration of one year from filing of the remittittur in the district court and the admission in certain letters as mentioned in the opinion, and having his attorneys appear at the call of the calendar and ask that the case be set for trial, defendant does not waive right to insist upon a dismissal of the action. Bessie v. N. P. Ry. Co., 507.

PRAETERMITTED HEIR, See Wills, 488.

PREROGATIVE WRIT. See Supreme Court, 233, 242.

PRESUMPTIONS. See Evidence, 45, 166, 367, 409.

1. In the absence of proof to the contrary, the presumption prevails that the common law is in force in a foreign jurisdiction. Hanson v. Gt. N. Ry. Co., 324.
2. There is no presumption that a deed from a wife to a husband is not valid. Massey v. Rae, 409.
3. Where a contract within the statute of frauds is declared on, the court will presume that it was in writing, unless the complaint shows that it was not. Hanson v. Svarverud, 550.

PRIMA FACIE EVIDENCE. See Evidence, 166.

PRIMARY ELECTION. See Voters and Elections, 55, 147, 149.

PRINCIPAL AND AGENT. See Sales, 556.

1. Plaintiff sent to defendant, as its agent, the following letter of instructions: "The above indicated policy covers $2,000 on a grain elevator building, a class on which our maximum line is but $500. This policy was written last July at the authorization of our Mr. Fox, but at that time we had reinsurance facilities by which we could reduce our liability. Now it becomes necessary for us to cancel our reinsurance for the reason that the reinsurance law of North Dakota does not permit our reinsuring in any companies not admitted in this state, and unless we cancel this reinsurance, we will be liable to a fine. In view of this

PRINCIPAL AND AGENT—Continued.

fact, we must request that you relieve us of $1,500 of the liability under the above policy at the earliest possible moment, and advise us of such relief, as we are now carrying $2,000, all in the Queen City on the elevator building." Defendant admitted receiving said letter a day or two after its date, December 20, 1905, and the undisputed evidence is that he neglected to comply with such instructions, and on January 15, 1906, the property covered by the policy of insurance was destroyed by fire, and plaintiff was required to and did discharge its liability under such policy by paying the sum of $1,752.29, and this action is to recover damages for defendant's negligence in disobeying such instructions. *Held*: (1) That such instructions being in writing and being clear and specific, it was defendant's duty, as such agent, to comply therewith without delay. (2) The facts not being in dispute, the question as to defendant's liability was for the court, and not the jury, to determine. (3) Such instructions were not reasonably susceptible to the construction placed upon them by defendant to the effect that he should relieve the plaintiff of its liability only at such time as he could place such insurance with another company. Queen Insurance Co. v. Bank, 603.

2. Where the agent of an insurance company fails to cancel a policy upon instructions from his principal, and a loss occurs under such policy, the proper measure of damages is the amount with interest which plaintiff was obliged to pay to the insured under the policy, over and above what it would have been obliged to pay had such instructions been complied with. This sum is $1,314.22, instead of $1,249.92, as the trial court charged the jury. Queen Insurance Co. v. Bank, 603.

PRINCIPAL AND SURETY. See GUARANTY, 135.

PROCESS.

1. Section 6738, Rev. Codes 1905, defines "process" as a writ or summons issued in the course of judicial proceedings. *Held*, that the notice of appeal is not a writ of summons, and is therefore not "process," and need not be served in the same manner in which "process" is required to be served. Gooler v. Eidsness, 338.
2. Section 7205, Rev. Codes 1905, provides that an appeal must be taken by serving a notice in writing, etc., and by filing the same in the office of the clerk of court. Section 7332 provides for service of notice by mail when the person making the service and the person upon whom it is made reside in different places between which there is a regular communication by mail. *Held*, that notice of appeal is included in the sections referred to, and service by mail, when the facts specified exist, is valid service if other requirements are observed. Gooler v. Eidsness, 338.

PROHIBITION. See PROHIBITION, WRIT OF, 233.

PROHIBITION, WRIT OF.

1. A writ of prohibition not being one of the enumerated writs that the Supreme Court is authorized to issue, such court is without jurisdiction to issue the same, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending case, and to effectuate such court's general superintending control over inferior courts. State v. Nuchols, 233.

PUBLIC LANDS.

1. The grant of right of way and station grounds upon public lands becomes operative only when the railroad company has definitely located its right of way and station grounds adjacent thereto. Such location is made either by acts of the company which operate as unmistakable evidence of appropriation such as the construction of its railroad, station buildings, and other appurtenances, or by filing in the land office where the land is located a profile of its route and station grounds, approved by the secretary of the interior. Comford v. Gt. N. Ry. Co., 570.
2. Actual construction of a railroad definitely locates only a right of way extending to a distance of 100 feet on each side of the central line of track. Definite location of station grounds outside of, and adjacent to, such right of way must be made, if at all, by other and further acts of the railroad company which operate as unmistakable notice to an intending settler of an appropriation by the railroad company of certain grounds for such purpose. Comford v. Gt. N. Ry. Co., 570.
3. A homesteader who settles upon public lands prior to the time that a railroad company has selected a part of such lands outside of, and adjacent to, its right of way as station grounds, has rights superior to those of the railroad company unless prior to his settlement the company has done acts that operate as unmistakable evidence and notice of its intention to appropriate a portion of said lands for station grounds. Comford v. Gt. N. Ry. Co., 570.
4. The placing of structures appurtenant to a station, within the limits of the right of way of a railroad, is not of itself evidence of appropriation of any land for station uses outside of the right of way. Comford v. Gt. N. Ry. Co., 570.

PUBLIC POLICY.

1. Where a contract is against the established public policy of this state, it will not be enforced by our courts. Hanson v. Gt. N. Ry. Co., 324.
2. Tested by the foregoing rule, the special contract in the case at bar, which fixes the value of the household goods at $5 per hundredweight, is for reasons stated in the opinion, contrary to the public policy of this state, and hence will not be enforced here. Hanson v. Gt. N. Ry. Co., 324.

QUIETING TITLE.

1. In an action to determine adverse claims to real property the burden is upon plaintiff to establish his title as alleged where it is put in issue. Young v. Engdahl, 166.
2. In an action to quiet title plaintiff's sole proof of his ownership was a transcript of the record of a lost quitclaim deed; *held,* that such transcript merely proved a prima fact case for the plaintiff, the presumption being that the original was the genuine deed of the grantor therein; but *held,* further, that such evidence was completely overthrown and disproved by the evidence in the record clearly showing that the owner of the property and grantor in such quitclaim deed did not execute it. Young v. Engdahl, 166.
3. A deed granting, selling, remising and releasing to the grantee the premises described, although containing the word "quitclaim," conveys title on which an action to determine adverse claims to real property may be maintained. Adams v. Hartzell, 221.
4. In an action to quiet title, evidence examined and *held,* to establish that appellant and his grantor were for more than ten years immediately prior to the commencement of such action, mortgagees in possession, with the implied knowledge and consent of, and holding adversely to the fee owners, and that their remedies to recover such possession or to assert their rights are barred by the statute of limitations, and such bar divested them of all title, and vested the same in such adverse occupant. Mears v. Somers Land Co., 384.

QUITCLAIM. See DEEDS, 221.

QUO WARRANTO. See SUPREME COURT, 233.

RAILROADS. See COMMON CARRIERS, 324.

1. Railway company's telegraph line used for commercial purposes for compensation, paid by patrons, is not exempt from taxation as reasonably necessary for transaction of railroad business. Soo Ry. Co. v. Oppegard, 1.
2. A railway company not having a separate franchise to do a telegraph business for pay, where it has assumed such franchise, is estopped to show, as against the state, such lack of franchise as a defense to a franchise tax, and tax on other property used in the telegraph business. Soo Ry. Co. v. Oppegard, 1.
3. A "roadway," within the constitution, section 179, providing for taxation of the franchise, roadway, etc., of all railroads, includes not only the strip of ground on which the main line is constructed but all grounds necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and other accommodations reasonably necessary to accomplish the object of their incorporation. Soo Ry. Co. v. Oppegard, 1.
4. In an action for damages for death of plaintiff's father caused by a train on defendant's track backing against him while he was on its right of way or track, it is *held,* under the evidence that

RAILROADS—Continued.

deceased was not a trespasser and defendant owed him the duty of ordinary care and diligence to avoid injuring him. Kunkel v. Soo Ry. Co., 367.

5. *Held,* further, that the questions of the negligence of the defendant and the contributory negligence of the deceased were, under the evidence in this case, for the jury. Kunkel v. Soo. Ry. Co., 367.

6. In an action for damages for injuries to plaintiff's horse by defendant's locomotive or cars, direct evidence is not the only evidence which may be used to prove defendant's liability; circumstances surrounding the location and finding of the horse, its tracks in the snow, the nature of its injuries, may as unmistakably prove the injury by such locomotive or cars as the direct testimony of witnesses, and if in conflict with the testimony of witnesses may be sufficient to sustain a verdict for plaintiff. Anderson v. Soo Ry. Co., 462.

7. Plaintiff's horse, missing for two days, was found on the evening of the second day in a ditch near the end of the ties of defendant's tracks, under circumstances which the jury may have found unexplainable on any theory except that defendant's train inflicted the injury which necessitated its killing. The verdict may be sustained on either of two theories: (a) That, if the jury considered the evidence given by the trainmen as overcoming the statutory presumption of negligence on the part of defendant as to trains on the second day, no evidence was submitted to overcome such presumption relating to trains which may have passed over the defendant's road on the first day that the horse was missing. (b) That the jury may have found, from the circumstances, that the train passing on the evening of the second day, respecting which evidence was submitted, did inflict the injuries, notwithstanding the positive statements of the trainmen to the contrary, and that the train before reaching it should be disregarded, in which case the statutory presumption was not overcome. This court cannot determine which theory the jury adopted. Anderson v. Soo Ry. Co., 462.

8. The grant of right of way and station grounds upon public lands becomes operative only when the railroad company has definitely located its right of way and station ground adjacent thereto. Such location is made either by acts of the company which operate as unmistakable evidence of appropriation such as the construction of its railroad, station buildings, and other appurtenances, or by filing in the land office where the land is located a profile of its route and station grounds, approved by the secretary of the interior. Comford v. Gt. N. Ry. Co., 570.

9. Actual construction of a railroad definitely locates only a right of way extending to a distance of 100 feet on each side of the central line of track. Definite location of station grounds outside of, and adjacent to, such right of way must be made, if at all,

RAILROADS—Continued.

by other and further acts of the railroad company which operate as unmistakable notice to an intending settler of an appropriation by the railroad company of certain grounds for such purposes. Comford v. Gt. N. Ry. Co., 570.

10. A homesteader who settles upon public lands prior to the time that a railroad company has selected a part of such lands outside of, and adjacent to, its right of way as station grounds, has rights superior to those of the railroad company unless prior to his settlement the company has done acts that operate as unmistakeable evidence and notice of its intention to appropriate a portion of said lands for station grounds. Comford v. Gt. N. Ry. Co., 570.
11. The placing of structures appurtenant to a station, within the limits of the right of way of a railroad, is not of itself evidence of appropriation of any land for station uses outside of the right of way. Comford v. Gt. N. Ry. Co., 570.

REAL ESTATE. See Quieting Title, 166; Trespass, 205; Brokers, 441; Vendor and Purchaser, 467.

1. A deed of assignment for the benefit of creditors, under a foreign state insolvency law, has no extra territorial effect upon, and does not convey title to, real estate situated in North Dakota. Adams v. Hartzell, 221.
2. A deed granting, selling, remising and releasing to the grantee the premises described, although containing the word "quitclaim," conveys title on which an action to determine adverse claims to real property may be maintained. Adams v. Hartzell, 221.

RECORDING TRANSFERS.

1. The stipulation in the farm contract reserving title to the crops in plaintiff did not constitute a chattel mortgage; hence the filing of such contract was unnecessary as against innocent purchasers of the grain, following Angell v. Egger, 6 N. D. 391, 71 N. W. 547. McFadden v. Thorpe El. Co., 93.
2. Under section 2452-2453, Rev. Codes 1905, it is the duty of the register of deeds to keep a numerical index in his office and note therein opposite each description of each tract, the volume and page of each instrument affecting the title thereto. *Held*, that defendant's failure after an instrument is duly recorded, to note the same in such numerical index, is negligence, rendering him liable to one who in reliance on such index buys the property, and sustains damage by such official neglect. Rising v. Dickinson, 478.
3. It is not contributory negligence for a searcher of the record of real estate transfers not to examine the grantor and grantee index. He has a right to rely on the numerical index. Rising v. Dickinson, 478.
4. Under section 5038, Rev. Codes 1905, which makes every convey-

RECORDING TRANSFERS—Continued.

ance by deed void as against the lien of any judgment obtained against the person in whose name the title appears of record prior to the recording of such conveyance, an execution legally levied, and a sale thereon, the sheriff's deed issued at the expiration of the redemption period to the purchaser conveys good title, as against title derived from a prior unrecorded deed, of which the judgment creditor and purchaser had no notice. Enderlin Inv. Co. v. Nordhagen, 517.

5. The title to premises on which execution was levied stood in the name of Carl Nordhagen, the son of Ellef Nordhagen and Rande Nordhagen. All these parties, together with other brothers and sisters of Carl, all over 21 years of age, resided together upon the premises sold. The evidence fails to disclose any facts indicating that any one of the parties might not have claimed possession with as much reasons as did the defendant Rande, the mother of Carl. *Held,* that the evidence is insufficient to constitute notice of the claim of Rande, the mother, to title in the land through an unrecorded deed, as against a title derived from such levy. Enderlin Inv. Co. v. Nordhagen, 517.

RECORDS.

1. A public record kept pursuant to the law of a sister state, when properly proved, is admissible in evidence in the courts of this state as prima facie proof of the facts therein recorded. Miller v. N. P. Ry. Co., 18.

REDEMPTION. See MORTGAGES, 82.

REGISTER OF DEEDS.

1. Under section 2452, 2453, Rev. Codes 1905, it is the duty of the register of deeds to keep a numerical index in his office and note therein opposite each description of each tract, the volume and page of each instrument affecting the title thereto. *Held,* that defendant's failure after an instrument is duly recorded, to note the same in such numerical index, is negligence, rendering him liable to one who in reliance on such index buys the property, and sustains damage by such official neglect. Rising v. Dickinson, 478.
2. The register of deeds is a ministerial officer, liable at common law, in the absence of an express statute, for damages caused by failure or neglect of official duty or negligent or illegal performance thereof. Rising v. Dickinson, 478.
3. In an action against a register of deeds for failure to index a mortgage by a person holding under a warranty deed, claiming damage for such officer's neglect, the insolvency of the mortgagor must be shown to have existed at the time of the negligent act; and must be proven by other than mere conclusions of a witness. Rising v. Dickinson, 478.

REPEAL BY IMPLICATION. See Statutory Construction, 390.

REPLEVIN. See Claim and Delivery, 608.

REPLY. See Pleading, 528.

RESCISSION. See Contract, 556.

RULES OF COURT.

1. Appellant having failed to assign errors in its brief as provided by rule 15 of the rules of this court (91 N. W. viii), and the record showing no reason for relaxing the rule, the judgment appealed from is affirmed. Sucker State Drill Co. v. Brock, 532.

SALARIES. See County Judges, 402.

SALES. See Brokers, 441; Vendor and Purchaser, 467.

1. Evidence examined, and held that the issue whether defendant became primarily liable to plaintiff for the payment of certain merchandise by reason of his having purchased the same from plaintiff, or whether such sale was made to one R., and the payment of the purchase price merely guaranteed by defendant, was properly submitted to the jury. Leistikow v. Zuelsdorf, 511.
2. A counterclaim for damages for refusal to deliver certain repairs for machinery ordered by defendant from plaintiff, which order plaintiff accepted and agreed to fill, considered, and *held* not to state facts sufficient to entitle defendant to substantial damages. Scully Co. v. Hann, 528.
3. A "conditional sale" is a sale in which the transfer of the title in the thing sold to the purchaser, or his retention of it, is made to depend upon the performance of some condition. Poirier Mfg. Co. v. Kitts, 556.
4. Contract examined and *held* to be a conditional sale contract, and not an agency contract. Poirier Mfg. Co. v. Kitts, 556.
5. The vendor, on breach of the terms of the conditional sale contract, by the vendee, may elect to recover possession of the property, or waive his title, and sue for the value or selling price, but he cannot do both. Poirier Mfg. Co. v. Kitts, 556.

SCHOOLS AND SCHOOL DISTRICTS.

1. The municipal bonds of defendant school district which are sued upon in this case were issued without first submitting to the electors of the school district the question of their issuance, and, furthermore, the school district had no power to issue the same by the express provisions of the act under which it is claimed they were issued as there were not twenty-five legal votes cast in such district at the preceding annual school election therein. Chapter 11, page 39, Laws 1887, under which plaintiff contends such bonds were issued, is printed upon the back of the bonds, and section 9 thereof expressly provides that the question of refunding prior indebtedness shall be first submitted to a vote

SCHOOLS AND SCHOOL DISTRICTS—Continued.

of the qualified electors of the district after giving certain notice therein prescribed of an election for such purpose, and that the proposition to issue such bonds must receive the affirmative votes of at least two-thirds of all the votes cast; also, that no school district in which less than twenty-five legal votes were cast at the annual school election next preceding the issuance of such bonds shall avail itself of the provisions of this act. *Held*, for these reasons, that such bonds are void. State v. School District, 616.

2. The bonds in suit contain a recital to the effect that they are issued for the purpose of refunding present indebtedness "as authorized by act of the legislative assembly approved March 11, 1887" entitled "An act to provide for refunding the outstanding indebtedness which existed prior to July 30, 1886, of any incorporated board of education or school district in the territory of Dakota." *Held*, that such recital does not estop the school district from urging the defense, even as against an innocent purchaser, that such bonds were illegally issued. State v. School District, 616.
3. The school district possessed no implied authority to issue such bonds on acount of the fact that they were refunding bonds and issued in lieu of presumably valid obligations of the district, because by the express provisions of section 9 aforesaid, their issuance was prohibited because of the fact that less than twenty-five legal votes were cast at the preceding annual school election. State v. School District, 616.

SHERIFF.

1. The fact that the defendant as sheriff subpoenaed the jury might be sufficient cause for a challenge to the panel, but is not cause for a change of venue. State v. Winchester, 534.

SPECIFICATIONS OF ERROR. See Statement of Case, 616.

SPECIFIC PERFORMANCE.

1. Mutuality of obligation is essential to the enforcement of a specific performance of a contract under section 6610, Rev. Codes 1905. Knudtson v. Robinson et al., 12.
2. Performance within the meaning of section 6610, Rev. Codes 1905, is not complied with by an offer or tender of performance. Knudtson v. Robinson et al., 12.
3. In cases where specific performance of a contract will not lie on account of the absence of mutuality in the contract, the principle of compensation for deficiency or abatement of price has no application. Knudtson v. Robinson et al., 12.
4. Where plaintiff knows when his action is commenced that specific performance could not be awarded, and a party to the contract, made defendant, died since the action was begun, whose heirs, devisees and executors have been substituted as defendants, his

SPECIFIC PERFORMANCE—Continued.

estate settled, jurisdiction will not be retained to assess damages, but the action will be dismissed as not properly brought. Knudtson v. Robinson et al., 12.

5. In an action for specific performance upon the facts stated in the opinion, *held*, that the allegations of the answer standing admitted on demurrer show title in the plaintiff to land in dispute, and that (as far as pleadings show) his only ground and complaint is that he received title through Patterson instead of direct from the vendor of scrip used in the purchase, and further that a court of equity looking to substance rather than form will take cognizance of this variance in the method of obtaining title from that alleged to have been agreed upon, and the part of the answer demurred to states a defense. Zellmer v. Patterson, 360.

STATEMENT OF CASE.

1. In an equity case tried and appealed under the provisions of Rev. Codes 1905, section 7229, a statement of the case is not required to enable this court to review questions appearing on the record proper. Brandenburg v. Phillips, 200.
2. The Supreme Court has no jurisdiction to enlarge the time within which a proposed statement of the case may be prepared and served and to stay proceedings until such statement is settled. Aultman-Taylor v. Clausen, 483.
3. When the statement of case in an action triable to a jury contains no proper specifications of errors, the same must be disregarded by the Supreme Court. State v. School District, 616.

STATE MILITIA. See MILITARY LAW, 101.

STATUTES.

1. Defects and omissions in an appeal bond may be supplied by amendment or a new undertaking, under section 7224, Rev. Codes 1905. Sucker State Drill Co. v. Brock, 8.
2. Under section 6610, Rev. Codes 1905, where there is no mutuality of remedy between the parties to a contract, specific performance will not lie in favor of a party who has not performed his part of the contract, or who cannot be compelled to specifically perform. Knudtson v. Robinson, 12.
3. Chapter 109, page 151, Laws 1907, known as the Primary Election Law, relating to nomination and election of United States senator, *held*, constitutional. State v. Blaisdell, 55.
4. Section 13, chapter 109, page 157, Laws 1907, relating to the nomination and election of United States senators, construed. State v. Blaisdell, 55.
5. Section 2, chapter 136, page 244, Laws 1905, relating to appointments in the state militia, is germane to the subject and general purposes expressed in the title, and not in violation of section 61, article 2, of the state constitution. State v. Peake, 101.
6. Chapter 23, page 18, Laws 1907, relating to maintenance of the

STATUTES—Continued.

Institution for Feeble-minded at Grafton, and chapter 237, page 374, Laws 1907, providing for the support of persons admitted to such institution by those legally responsible, when construed together, clearly disclose the legislative intent that the appropriations for maintenance should be supplemented by those required under the provisions of said chapter 237. State v. Lewis, 125.

7. The fact that such institution has sufficient money from the appropriation and voluntary payments made under chapter 237, page 374, Laws 1907, is no defense to a proceeding by mandamus to compel the county auditor to transmit his warrant to the institution as required by said chapter 237. State v. Lewis, 125.
8. Chapter 237, page 374, Laws 1907, is not violative of sections 69, 172, 174 and 186 of the state constitution. State v. Lewis, 125.
9. A claimant of additional exemptions under section 7117, Rev. Codes 1905, must schedule all his personal property including money and debts due him, as required by section 7119, Rev. Codes 1905, and failure to do so defeats his claim. Pfeifer v. Hatton, 144.
10. Section 12, chapter 109, page 157, Laws 1907 (the primary election law), construed. *Held*, that the proviso therein limits the application of the 30 per cent rule, construed in State v. Anderson, 18 N. D. 149, to candidates for offices for which there is not more than one of the same name to be filled. State v. Anderson, 147.
11. Section 12, chapter 109, page 157, Laws 1907, the primary election law, construed and held, (a) that the 30 per cent requirement therein applies to county and district offices as well as to other offices; (b) under its terms, candidates of a subdivision of the state for local offices must receive 30 per cent of the party vote of their party cast at the last general election for secretary of state within such subdivision or no nomination is made. State v. Anderson, 147.
12. In subdivision 4, section 6938, Rev. Codes 1905, the disjunctive conjunction "or" is not to connect two grounds for an attachment, but said subdivision states one ground only, consisting of different phases, pertaining to that ground. McCarthy Bros. Co. v. Elevator Co., 166.
13. A woman employed upon the farm to do ordinary house work and to assist in cooking meals for laborers on the farm is not a "farm laborer" under section 6277, Rev. Codes 1905, relating to farm laborers' lien. Lowe v. Abrahamson, 182.
14. Rev. Codes N. D., 1905, section 7968, exempting administrators, executors or guardians from giving an undertaking on appeal in certain cases, does not apply to one who appeals from a decision of the county court revoking the probate of a will and his letters of administration issued thereunder. Ransier v. Hyndman, 197.
15. In an equity case tried and appealed under section 7229, Rev.

STATUTES—Continued.

Codes 1905, a statement of the case is not required to enable the Supreme Court to review questions appearing upon the record proper. Brandenburg v. Phillips, 200.

16. Section 6582, Rev. Codes 1905, restricts a recovery to damages proximately caused by the trespass of animals; recovery cannot be sustained upon the theory that there is a statutory liability on defendant under sections 9405, 9408, Rev. Codes 1905. Peterson v. Conlan, 205.
17. Under section 1259, Rev. Codes 1899 (section 1574, Rev. Codes 1905), the Bismarck Weekly Tribune (the Bismarck Daily Tribune being published by the same person), is a weekly edition of the Bismarck Daily Tribune, within the meaning of such section. Griffin v. Denison Land Co., 246.
18. By resolution the county commissioners of Burleigh county directed the publishing of the delinquent tax list and notice of sale for taxes in the Bismarck Daily Tribune. They were published in one issue of the Bismarck Daily Tribune, and in two issues of the Bismarck Weekly Tribune. *Held*, construing section 1259, Rev. Codes 1899 (section 1574, Rev. Codes 1905), that such resolution and publication were in compliance therewith and the publication valid. Griffin v. Denison Land Co., 246.
19. Section 1480, Rev. Codes 1905 (section 1176, Rev. Codes 1899), defines "tract" when that word is used in the revenue law, as any contiguous quantity of land in the possession of or owned by, or recorded as the property of, the same person; *held*, that the word "contiguous" means land which touches on the sides and not at the corners. Griffin v. Denison Land Co., 246.
20. That part of section 1939, Rev. Codes 1905 (section 6, chapter 69, page 102, Laws 1895), providing for a corral fence inclosing stacks, etc. is applicable during the "open season" in counties where the provisions of section 1933, Rev. Codes 1905, permitting stock to run at large from the first day of December until the first day of April, have not been abolished by an election held for that purpose. Johnson v. Rickford, 268.
21. Where section 1933, Rev. Codes 1905, is operative, a party can maintain an action against the owner of ranging animals for damages by breach of a lawful fence, under section 1940, Rev. Codes 1905, only by showing that he had secured his property at the time of the trespass, by a strong and sufficient fence against the intrusion of live stock and that, notwithstanding such fence, the animals have broken it and destroyed property within the inclosure. Johnson v. Rickford, 268.
22. A good and sufficient fence under section 1933, Rev. Codes 1905, must in height, strength and distance from stacks inclosed, comply with the provisions of section 1939, Rev. Codes 1905, or present a barrier as effective as the fence described in that section. Johnson v. Rickford, 268.

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23. One suing for breach of an inclosure under the provisions of section 1940, Rev. Codes 1905, who does not show that at the time of the alleged trespass, that he has secured his property by a fence deemed in law sufficient to exclude the trespassing animals, fails to establish a cause of action against the owner of such animals. Johnson v. Rickford, 268.

24. Where the husband without the wife's consent and against her protests purchase material to paint a dwelling house on her land, she having no knowledge of where he purchased the material, did not give notice of her objection to the improvements to the party furnishing such materials, the materialman acquires no lien under section 6237 of the Rev. Codes 1905, for the materials furnished. Christianson v. Hughes, 282.

25. Under section 2678, Rev. Codes 1905, a notice of an election submitting to the voters the question of the issuance of bonds for waterworks, not stating the amount of bonds to be voted upon, does not fairly present the question of the issuance of bonds to the electors. Stern v. Fargo, 289.

26. Prior to the enactment of chapter 57, page 83, Laws 1907, it was lawful by special contract when signed by the consignor or consignee to exonerate such carrier from liability except for its or its servants' gross negligence, fraud or willful wrong. Hanson v. Gt. N. Ry. Co., 324.

27. Under section 7325, Rev. Codes 1905, "when an order of the district court is made which under the laws regulating appeals to the Supreme Court is an appealable order, such order shall upon its face by apt words briefly describe the affidavits, documents, papers and evidence upon which the order is made, and the judges may at their discretion refuse to sign orders not so framed, and the Supreme Court may at its discretion dismiss an appeal from an order which is not framed substantially in accordance with the requirements of this section." *Held*, that objection taken for the first time in the Supreme Court, based upon failure to enumerate evidence, and papers, under these provisions, will not be sustained. Gooler v. Eidsness, 338.

28. Under the facts of the case, penalties provided by section 2325, Rev. Codes 1905, are not applicable. Gooler v. Eidsness, 338.

29. Section 6738, Rev. Codes 1905, defines "process" as a writ or summons issued in the course of judicial proceedings. *Held*, that notice of appeal is not a writ or summons, nor "process," and need not be served as "process" is required to be served. Gooler v. Eidsness, 338.

30. Under section 7205, Rev. Codes 1905, an appeal must be taken by serving the notice in writing, etc., and filing it with the clerk of court. Section 7332 provides for service of notice by mail when the person making the service and the persons served reside in different places between which there is regular communication by

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mail. *Held,* that notice of appeal when the facts specified exist, may be served by mail. Gooler v. Eidsness, 338.

31. Prior to the amendment of the revenue law in 1897, the county board of review and equalization had the power, and it was its duty, to equalize assessments throughout the county by raising or reducing values upon classes of property and also by changing individual assessments, and by such amendment it was the legislative intent to adopt a system whereby the local board of review, where there are such boards, shall equalize assessments as between individual taxpayers, the county board of equalization as between the several assessment districts, and the state board as between the several counties. The old system was retained to the extent only of permitting the county board to act as board of review in districts having no local board of review. Bank v. Lewis, 391.

32. In making such change certain provisions of the old law inconsistent with the law as amended were continued and re-enacted in the law of 1897, and, in so far as such inconsistent provisions cannot be harmonized with the statute as amended, they are deemed repealed by implication. Bank v. Lewis, 391.

33. Section 2722, Rev. Codes 1905, which expressly provides that no changes shall be made in individual assessments as returned by the city board of equalization, by the county board, was not repealed by the amendment made in 1897, but is still in full force and effect. Bank v. Lewis, 391.

34. Chapter 68, page 81, Laws 1899, construed, and *held,* to limit the maximum salaries of county judges in counties having increased jurisdiction to the sum of $2,500. State v. Fabrick, 402.

35. A new trial may be granted in cases tried under section 7229, Rev. Codes 1905, in furtherance of justice, where the action was dismissed on motion at close of plaintiff's case, and final disposition of the case cannot for that reason be made. Massey v. Rae, 409.

36. A notice of appeal reciting that appeal is taken from a part of the decree rendered by a district court in an action tried to the court under section 7229, Rev. Codes 1905, formerly section 5630, Rev. Codes 1899, will not authorize the Supreme Court to review or retry any question of fact specified on such appeal, or to affirm, modify or reverse the judgment of the district court, or direct the entry of a new judgment, or to order a new trial of the action or in any way to finally dispose of the case on appeal, which must be dismissed without further action. Tronsrud v. Farm Land & Finance Co., 417.

37. The commencement of an action against the vendor and vendee in a contract of sale of land, to determine adverse claims, complaint being in the form prescribed by section 7522, Rev. Codes 1905, does not excuse the vendee from performance, especially

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so when the vendee, in negotiation for extensions of payment, never gave as an exuse, for failing to make payments, the commencement of such action. Martinson v. Regan, 467.

38. Under section 2452, 2453, Rev. Codes 1905, the register of deeds is required to keep a numerical index in which shall be noted, opposite the description of each tract, the volume and page of each instrument affecting the title thereto. Failure for over two months after an instrument is recorded to note the same in such numerical index, is negligence *per se*, rendering an officer liable to one relying on such index and purchasing the property and sustaining damage as the necessary and proximate result of such negligence. Rising v. Dickinson, 478.

39. Under section 7228, Rev. Codes 1905, every case on appeal, in which there is ordered a new trial or further proceedings in the court below, such proceedings should be had within one year from the date of such order, no sufficient excuse for plaintiff's delay was shown and the action should have been dismissed. Bessie v. N. P. Ry. Co., 507.

40. Section 8452, Rev. Codes 1905, does not prohibit the transcripting of a judgment entered in justice court after the expiration of five years, and within ten years from its entry, and the district court to which it is transcripted may issue an execution thereon before the expiration of ten years from its entry in the justice court. Enderlin Inv. Co. v. Nordhagen, 517.

41. Section 4071, Rev. Codes 1905, providing for alimony pending an action for divorce, was intended to be exclusive to embrace the entire subject-matter of the allowance of alimony, etc, pendente lite. State v. Templeton, 525.

42. Construing section 9931, Rev. Codes 1905, providing for change of venue at the instance of the state, *held*, that the granting or denying of such change, on the ground that an impartial trial cannot be had in the county where the case is pending is a matter within the sound discretion of the trial court and its ruling will not be disturbed except for abuse. State v. Winchester, 534.

43. By section 5049, Rev. Codes 1905, the homestead of every head of a family is exempt from judgment lien and execution sale except as otherwise specially provided, and by section 5070 the phrase "head of a family" is defined; *held*, that a divorced husband, deprived by the decree of the custody of his minor children and required to pay the mother a stated sum for support of their children, which sum is made a lien upon the real property formerly used as their homestead, is no longer the head of a family and entitled to a homestead exemption, when he does not have living on the premises with him under his care and maintenance, one or more of the persons mentioned in said section. Holcomb v. Holcomb, 561.

44. On appeal from an order dissolving an attachment where the affi-

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davit for publication of summons neither states, nor the complaint shows, that defendant has property within this state, or debts owing to him from residents thereof as required by section 6840, Rev. Codes 1905, *held,* for reasons stated in the opinion, that the ground is not tenable. Hemmi v. Grover, 578 .

45. Section 4449, Rev. Codes 1905, as amended by chapter 153, page 245, Laws 1907, repealed section 4447, Rev. Codes, and foreign mutual insurance companies are authorized to do hail insurance business in this state by complying with the provisions of section 4449 so far as it applies to such companies. State v. Cooper, 583.

46. When the settled statement of case in an action triable to a jury contains no proper specifications of errors as required by Revised Codes 1905, section 7058, the same will be disregarded by the Supreme Court. State v. School District, 616.

47. The municipal bonds of a school district were issued without first submitting to the electors thereof the question of their issuance, and the school district was forbidden to issue them by the express provisions of the act under which they were claimed to be issued, because there were not twenty-five legal votes cast in such district at the preceding annual school election, although chapter 11, page 39, Laws 1887, under which they were issued, was printed upon the back of the bonds. *Held,* for these reasons, that such bonds are void. State v. School District, 616.

48. The bonds in suit contain a recital that they are issued to refund present indebtedness, "as authorized by act of the legislative assembly approved March 11, 1887 (Laws 1887, page 39, chapter 11). *Held,* that such recital does not estop the school district from urging the defense even as against an innocent purchaser, that such bonds were illegally issued. State v. School District, 616.

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STATUTORY CONSTRUCTION. See CONSTITUTIONAL LAW, 101, 125.

1. Defects or omission in an undertaking on appeal may be supplied by amendment or by giving a new undertaking, under the pro-

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visions of section 7224, Rev. Codes, 1905. Sucker State Drill Co. v. Brock, 8.

2. Mutuality of obligation is essential to the enforcement of a specific performance of a contract under section 6610, Rev. Codes 1905. Knudtson v. Robinson et al., 12.
3. Neither the statute of frauds nor the various statutory provisions enacted for the protection of homestead claimants can be held to do away with the general equity doctrine of estoppel in pais. Engholm v. Ekrem, 18.
4. The meaning of words in a statute must often be determined by the subject matter in relation to which they are used, and, as section 168 relates only to the change of county boundaries, the words "votes cast," should be limited to that subject. State v. Blaisdell, 31.
5. A legislative body, in adopting a foreign statute which has been construed by the courts of the state from which it comes, is presumed to have adopted the construction there given it. State v. Blaisdell, 31.
6. Objections to, and notice to suppress depositions, must be made before the commencement of the trial; construction of the statute, that the trial was commenced when a jury is called, is reasonable. Walters v. Rock, 45.
7. The provisions of the primary election law as to ballot to be used at the general election for determining the choice by the candidates for United States senator, require that the candidate of each political party shall be placed on the ballot separate and apart from candidates of other political parties. State v. Blaisdell, 55.
8. The general election so far as it relates to United States senator, is a continuation of the primary election, and the provisions of the primary election law designed to safeguard the rights of parties and to prevent members of one party participating in the nominations by another, apply. State v. Blaisdell, 55.
9. Section 129 of the constitution of North Dakota, guaranteeing a secret ballot, is not infringed by the provisions of the primary election law. State v. Blaisdell, 55.
10. The primary election law is not an unlawful delegation of power granted to the legislature by the federal constitution. State v. Blaisdell, 55.
11. By chapter 23, page 18, Laws 1907, the legislature appropriated the total sum of $86,600 for the purpose, as stated, "of paying the current and contingent expenses and for permanent improvements of the Institution for the Feeble Minded at Grafton, for the period beginning March 1, 1907, and ending March 1, 1909." Out of such sum but $11,500 was appropriated for maintenance of said institution. By chapter 237, page 374, Laws 1907, "the person legally responsible for the support of any person admitted to said institution shall pay semi-annually to said institution the sum of

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fifty dollars; but, if the person so liable be unable to pay such sum it is hereby made a charge upon the county." Such act requires the county auditor, when furnished with certain proof therein required, to transmit to the superintendent of such institution his warrant as such auditor for the sum of $50 every six months, such payments, or so much thereof as may be necessary, to be expended in providing suitable clothing for the inmate, any excess remaining to be covered into the state treasury at stated times and credited to the fund for the maintenance of the institution. *Held,* that said acts are in *pari materia,* and, when construed together, they clearly disclose the legislative intent that the appropriation of $11,500 for maintenance of such institution should be supplemented to the extent of payments required to be made under the provisions of chapter 237 aforesaid. State v. Lewis, 125.

12. The fact that such institution has sufficient money in its maintenance fund derived from the appropriation and voluntary payments made pursuant to the provisions of chapter 237, page 374, Laws 1907, by other counties and by persons legally liable for the support of inmates, is no defense in a proceeding by mandamus to compel the county auditor of C. county to transmit his warrant to the superintendent of such institution, as required by chapter 237 aforesaid. State v. Lewis, 125.

13. A debtor, desiring to avail himself of the additional exemptions allowed under section 7117, Rev. Codes 1905, must make a schedule of all his personal property, of every kind and character, including money on hand and debts due and owing to him, as required by section 7119, Rev. Codes 1905, and a failure to substantially comply with the provisions of such section will defeat his claim to such exemptions. Pfeifer v. Hatton, 144.

14. Section 12, chapter 109, page 157, Laws 1907 (the primary election law), reads as follows: "If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided or shall equal less than 30 per cent of the total number of votes cast for secretary of state of the political party he or they represented at the last general election, no nomination shall be made in that party or such office, but if 30 per cent or more of such vote is cast and there is more than one candidate, for any such office, the person receiving the highest number of votes shall be declared the nominee of such party for such office; provided, further, that where there is more than one person to be elected to the same office, the persons to the number to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such offices." *Held* (a) that the 30 per cent requirement therein contained applies to county and district offices as well as to other offices; (b) that under its terms candidates of a subdi-

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vision of the state for a local office must receive 30 per cent of the party vote of their party cast at the last general election for the condidate of such party for secretary of state within such subdivision, or no nomination is made. State v. Anderson, 149.

15. A woman employed to do housework on a farm and to cook meals for farm laborers, is not a "farm laborer," within the meaning of section 6277, Rev. Codes 1905, giving a lien for the wages of farm laborers. Lowe v. Abrahamson, 182.
16. Costs are purely the creature of statute to be awarded only when expressly authorized by law. Allowances of attorney's fees, not authorized by law, should be eliminated from a judgment. Engholm v. Ekrem, 185.
17. Rev. Codes N. D., 1905, section 7968, which exempts an administrator, executor or guardian from the necessity of giving an undertaking on appeal in certain cases, does not apply to one who appeals from a decision of the county court revoking the probate of a will and also his letters of administration issued under such will. Ransier v. Hyndman, 197.
18. In an equity case tried and appealed under the provisions of Rev. Codes 1905, section 7229, a statement of the case is not required to enable this court to review questions appearing on the record proper. Brandenburg v. Phillips, 200.
19. Certain instructions amounting to a peremptory charge to find for plaintiff, provided the jury found the appellant to be the owner of the animal inflicting injuries, regardless of the question of appellant's negligence, and also without regard to whether the particular injury complained of was proximately caused by such trespass, were erroneous. Section 6582, Rev. Codes 1905, restricts such recovery to damages proximately caused by the trespass. Peterson v. Conlan, 205.
20. Recovery cannot be sustained on the ground that the owner of a vicious animal was negligent in permitting it to trespass upon real estate, as the case was not tried, nor the jury instructed, on such theory. Nor for the same reason, can the recovery be sustained upon the theory that there was a statutory liability resting on defendant under sections 9405, 9408, Rev. Codes 1905. Peterson v. Conlan, 205.
21. St. Wis. 1898, chapter 80, with the acts amendatory thereof and supplemental thereto, which provide that, when a resident of that state has made an assignment of his property for the benefit of creditors, the proceedings thereunder shall be under the jurisdiction of the circuit court, and that the assignee may be removed, and the creditors may elect a successor, and for the discharge of the debts of the assignor, is a state bankruptcy or insolvency law. Adams v. Hartzell, 221.
22. A deed of assignment for the benefit of creditors, under a foreign state insolvency law, has no extra territorial effect upon, and

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does not convey title to, real estate situated in North Dakota. Adams v. Hartzell, 221.

23. Section 1259, Rev. Codes 1899, relating to the publication of the delinquent tax list and notice of sale, provides that: "The county auditor under the direction of the board of county commissioners or a majority thereof, shall give notice of the sale of real property by publication thereof once a week for three consecutive weeks, in such newspaper as may be designated by the county commissioners for that purpose in the county. In counties having daily papers, the delinquent list shall be published in one issue of the daily edition and in two issues of the weekly edition of the same paper so selected by the board of county commissioners." By resolution the board of county commissioners of Burleigh county directed the publication of the delinquent tax list and notice of sale for 1908 taxes in the Bismarck Daily Tribune. Such list and notice were published in one issue of the Bismarck Daily Tribune and in two issues of the Bismarck Weekly Tribune. *Held,* that such resolution and publication was compliance with the statutory provision quoted, and the publication so made valid. Griffin v. Denison Land Co., 246.

24. Section 1480, Rev. Codes 1905, defines "tract," as applied to land, when that word is used in the revenue law, as any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person, or company. *Held,* that the word "contiguous" in that connection means land which touches on the sides, and that two quarters of the same section, which only touch at the corner, do not constitute for the purpose of taxation, one tract or parcel of land. Griffin v. Denison Land Co., 246.

25. The statutes under which a domestic mutual fire insurance company is organized, its articles of incorporation or charter, and by-laws, all enter into the contract of insurance, and are binding, not only on the organization, but on each member thereof. Lamb v. Insurance Co., 253.

26. That part of section 1937, Rev. Codes 1905, which provides the dimensions of a corral fence for enclosing stacks, outside of any lawful enclosure, its distance from the stack inclosed, distance of its posts apart, the number of strands of fence wire and its height, is applicable during the open season to counties in which the provisions of that section, permitting live stock to run at large from December first to April first of each year, have not been abolished by an election held for that purpose. Johnson v. Rickford, 268.

27. In a county where section 1933, Rev. Codes 1905, is operative, a party can maintain an action against the owner of ranging animals for damages occasioned by breach of a lawful fence, under

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section 1940, Rev. Codes 1905, only upon showing that at the time of the alleged trespass he had secured his property by a strong and sufficient fence, and that, notwithstanding such fence, animals have breached or broken it, and destroyed property within the enclosure. Johnson v. Rickford, 268.

28. A good and sufficient fence to exclude ranging live stock between December 1st and April first in each year, in counties where section 1933, Rev. Codes 1905, is operative, must in height, strength, and distance from enclosed stacks, comply with section 1939, Rev. Codes 1905, or present a barrier as effectual as the fence described in that section. Johnson v. Rickford, 268.

29. A party suing the owner of ranging animals during the open season for live stock, for breach of an inclosure under the provisions of section 1940, Rev. Codes 1905, and fails to show that he has secured his property by a fence sufficient to exclude animals, fails to establish a cause of action against the owner of such animals. Johnson v. Rickford, 268.

30. Where husband, without the consent and against the protests of the wife, contracts for and purchases material to paint a dwelling house on land owned by the wife, who, having no knowledge of where he purchased the materials, did not give notice of her objection to the improvements on the dwelling house to the party who furnished said materials, the materialman, under the evidence in this case, acquires no lien under section 6237 of said Rev. Codes of 1905, for the materials furnished. Christianson v. Hughes, 282.

31. Doubtful claims of power, or doubt or ambiguity in the terms used by the legislature, are resolved against the corporation. Stern v. Fargo, 289.

32. The constitution and statutes providing for the issuance of municipal bonds are more strictly construed in actions to prevent their issuance than in actions to prevent their payment after they have been issued and negotiated. Stern v. Fargo, 289.

33. A statute enumerating the powers of cities, providing how and for what purpose bonds may be issued, and requiring that the question of issuing them for the construction or purchase of waterworks shall be submitted to the voters of the city at an election after twenty days' notice stating the purpose of the issue and the amount thereof, thereunder it is *held*, that a resolution of a city council, providing for the issuance of $100,000 in bonds, or such part thereof as may be required, and a notice of an election to submit such issuance to the voters, in the same language as the resolution, did not state the amount of bonds to be voted upon, and that without such statement the question of the issuance of bonds is not fairly presented to the electors, who are entitled to know definitely what is proposed in the way of increasing the indebtedness of the city. Stern v. Fargo, 289.

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34. A resolution of a city council, providing for an election, and a notice of such an election, under section 2678, Rev. Codes 1905, must state the purpose for which it is proposed to issue bonds. Stern v. Fargo, 289.

35. When the meaning of a statute is doubtful, so that either of two constructions may with propriety be adopted by the court, it is the duty of the court to adopt that construction best calculated to protect the public against fraud and imposition, even though in individual instances such construction may work slight hardship. Stern v. Fargo, 289.

36. The fact that one construction of a statute of doubtful import, if it be conceded that the meaning of the statute in question is doubtful, would admit of the submission of a question devoid of merit in connection with another of unquestioned merit, and the adoption of a weak proposition by reason of its submission in connection with a meritorious one, furnishes a strong reason for the rule of construction stated in paragraph 11, and this reason applies notwithstanding no question is made in this case as to the good faith or merits of either proposition submitted by the city council. Stern v. Fargo, 289.

37. Section 183 of the constitution, and the statute, provide a debt limit, for general purposes of cities, of 5 per cent, with power to incur additional indebtedness equaling 3 per cent of the assessed valuation on a two-thirds vote, making a possible indebtedness for general purposes of 8 per cent. It is also provided that a city, when authorized by a majority vote, may increase its indebtedness, not exceeding 4 per cent, without regard to existing indebtedness, for the construction or purchase of waterworks or constructing sewers, and for no other purpose whatever. Query: Can a city issue bonds for the construction of waterworks or sewers in such a manner as to necessarily include the amount of such bonds in the 5 per cent or 8 per cent debt limit provided for ordinary purposes, or must they be issued in such a manner as to be included within the 4 per cent provision for the construction of waterworks and sewers? If they must be so issued as to admit of their being included within the 4 per cent special waterworks provision, the connection of an electric light plant, or of any other subject except sewers, with waterworks in the issuance of bonds, furnishes an additional reason for holding the proposed bond issue under consideration illegal. Stern v. Fargo, 289.

38. Section 7325, Rev. Codes 1905, reads: "When an order of the district court is made, which under the laws regulating appeals to the Supreme Court is an appealable order, such order shall upon its face by apt words briefly describe the affidavits, documents, papers and evidence upon which the order is made, and the judges may at their discretion refuse to sign orders not so

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framed, and the Supreme Court may at its discretion dismiss any appeal from an order which is not framed substantially in accordance with the requirements of these sections." *Held,* that objection taken for the first time in this court to the order of the district court granting a new trial, such objection being upon the ground that the order does not enumerate the evidence and papers upon which it was granted, will not be considered by this court. Gooler v. Eidsness, 338.

39. Penalties provided by section 7325 are not applicable to the facts of this case. Gooler v. Eidsness, 338.

40. Section 6738, Rev. Codes 1905, defines "process" as a writ or summons issued in the course of judicial proceedings. *Held,* that the notice of appeal is not a writ or summons, and is therefore not "process," and need not be served in the same manner in which "process" is required to be served. Gooler v. Eidsness, 338.

41. Section 7205, Rev. Codes 1905, provides that an appeal must be taken by serving a notice in writing, etc., and by filing the same in the office of the clerk of court. Section 7332 provides for service of notice by mail when the person making the service and the persons upon whom it is made reside in different places between which there is a regular communication by mail. *Held,* that notice of appeal is included in the sections referred to, and service by mail, when the facts specified exist, is valid service if other requirements are observed. Gooler v. Eidsness, 338.

42. Prior to the amendment of the revenue law in 1897 (Laws 1897, page 256, chapter 126), such board had the power, and it was its duty, to equalize assessments throughout the county by raising or reducing valuations upon classes of property, and also by changing individual assessments, but by such amendment it was the legislative intent to adopt a scheme or system whereby the local boards of review, where there are such boards, shall equalize the assessments as between individual taxpayers, the county board of equalization as between the several assessment districts, and the state board as between the several counties. The old system was retained to the extent only of permitting the county board to act as a board of review in districts having no local board of review. Bank v. Lewis, 390.

43. In making such change, certain provisions of the old statute, which are inconsistent with the law as amended were continued and reenacted in the law of 1897 (Laws 1897, page 256, chapter 126); and, in so far as such inconsistent provisions cannot be harmonized with the statute as amended, they are deemed repealed by necessary implication. Bank v. Lewis, 390.

44. Section 2722, Rev. Codes 1905, which expressly provides that no changes shall be made in individual assessment as returned by the city board of equalization, by the county board, was not repealed by the amendment made in 1897 (Laws 1897, page 256,

STATUTORY CONSTRUCTION—Continued.

chapter 126), but is still in full force and effect. Bank v. Lewis, 390.

45. Chapter 68, page 81, Laws 1899, section 6615, Rev. Codes 1899, and chapter 78, page 160, Laws 1905 construed and *held* to limit the maximum salary of county judges in counties having increased jurisdiction to the sum of $2,500. State v. Fabrick, 402.

46. Under section 7228, Rev. Codes 1905, when the Supreme Court orders a new trial or further proceedings in the court below, such proceedings must be had within one year from date of such order and unless sufficient excuse for delay is shown the trial court will dismiss the action. Bessie v. N. P. Ry. Co., 507.

47. By section 5049, Rev. Codes 1905, the homestead of every head of a family, not exceeding a certain value and a designated extent of territory, is made exempt from judgment lien and from execution or forced sale, except as otherwise specially provided, and by section 5070 the phrase "head of a family" is defined to mean: "(1) The husband or wife when the claimant is a married person. (2) Every person who has residing on the premises with him or her and under his or her care and maintenance, either: (a) His or her child or the child of his or her deceased wife or husband, whether by birth or adoption. (b) A minor brother or sister or the minor child of a deceased brother or sister. (c) A father, mother, grandfather or grandmother. (d) The father or mother, grandfather or grandmother of a deceased husband or wife. (e) An unmarried sister or any other relative mentioned in this section who have attained the age of majority and are unable to take care of or support themselves." *Held,* that a divorced husband who, by the decree of divorce, has been deprived of the custody of his minor children, and who, by such decree, is required to pay to the mother a stated sum for the support and education of such children, which allowance is, by the decree, made a lien upon the real property theretofore used as the homestead, is thereafter no longer the head of a family, and is not entitled to a homestead exemption when he does not have residing on the premises with him and under his care and maintenance one or more of the persons mentioned in subdivision 2, section 5070, aforesaid. Holcomb v. Holcomb, 561.

48. Although repeals by implication are not favored, two irreconcilably repugnant acts passed at different times relative to the same subject cannot stand together, and the later operates to repeal the former. State v. Cooper, 583.

49. Section 4449, Rev. Codes 1905, as amended by chapter 153, page 245, Laws 1907, repealed section 4447 of said Codes, and foreign mutual insurance companies are authorized to do hail insurance business in this state by complying with the provisions of said section 4449, so far as it applies to them. State v. Cooper, 583.

50. It is error to tax an attorney's fee in an equitable action under section 7179, Rev. Codes 1905. Power v. King, 600.

STATUTORY CONSTRUCTION—Continued.

51. When the settled statement of case in an action properly triable to a jury contains no proper specifications of errors as required by Rev. Codes 1905, section 7058, the same must be disregarded by this court, as said section expressly provides that: "If no such specification is made, the statement shall be disregarded on motion for a new trial, and on appeal." No proper specification being found in the settled statement in this case, this court is restricted to a review of such errors, if any, as appear upon the face of the judgment roll proper. State v. School District, 616.

STATUTORY LIABILITY.

1. Recovery cannot be sustained on the ground that the owner of a vicious animal was negligent in permitting it to trespass upon real estate, as the case was not tried, nor the jury instructed, on such theory. Nor for the same reason, can the recovery be sustained upon the theory that there was a statutory liability resting on defendant under sections 9405, 9408, Rev. Codes 1905. Peterson v. Conlan, 205.

STIPULATION.

1. The parties to an action stipulated in writing the facts on which the case should be tried, agreeing therein that the facts therein stated were all the facts in the action, and such stipulation should be the evidence of the same and considered proven. After trial, arguments and submission of the case plaintiff moved for leave to take testimony upon questions not covered by the stipulation, which was granted and plaintiff only given leave to submit additional testimony. There was no fraud or deceit on the part of defendant relative to the stipulation. *Held*, to permit the plaintiff alone to take and submit additional evidence as to facts, not included in the stipulation without giving the right to rebut to the defendant or to submit evidence on the facts covered by the order, was error. Adams v. Hartzell, 321.

SUPREME COURT. See Appeal and Error, 200, 338, 488; Statement of Case, 616.

1. Sections 86 and 87 of the constitution of North Dakota constitute a grant of power to the Supreme Court, and, the language thereof being restrictive in its terms, this court has such jurisdiction, and only such, as is expressly or by necessary implication, therein granted. State v. Nuchols, 233.

2. By section 86 of the constitution the Supreme Court is granted appellate jurisdiction only, "except as otherwise provided in this constitution, together with a general superintending control over all inferior courts." Section 87 is the only place in the constitution where it is otherwise provided. This section grants power to the Supreme Court "to issue writs of habeas corpus, mandamus, quo warranto, certiorari,. injunction, and such other

SUPREME COURT—Continued.

original and remedial writs as may be necessary to the proper exercise of its jurisdiction." *Held*, that the writ of prohibition not being one of the enumerated writs, this court is without jurisdiction to issue the same, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending cause, or to effectuate this court's general superintending control over inferior courts. State v. Nuchols, 233.

3. A writ of prohibition not being one of the enumerated writs that the Supreme Court is authorized to issue, such court is without jurisdiction to issue the same, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending case, and to effectuate such court's general superintending control over inferior courts. State v. Nuchols, 233.
4. The question of the division of a county and the creation of a new one, does not call for the exercise of the original jurisdiction of the Supreme Court by mandamus, unless the circumstances are of such an exceptional character that adequate relief cannot be obtained in the district court. State v. Wing, 242.
5. Under the circumstances disclosed by the record, *held*, that no emergency or exigency exists in the present instance warranting the Supreme Court in taking original jurisdiction to issue its writ of mandamus. State v. Wing, 242.
6. The Supreme Court has no jurisdiction to enlarge the time within which a proposed statement of the case may be prepared and served and to stay proceedings until such statement is settled. Aultman-Taylor v. Clausen, 483.
7. Under section 7228, Rev. Codes 1905, when the Supreme Court orders a new trial or further proceedings in the court below, such proceedings must be had within one year from date of such order and unless sufficient excuse for delay is shown the trial court will dismiss the action. Bessie v. N. P. Ry. Co., 507.
8. The Supreme Court will not consider a point not raised in the trial court. Poirier Mfg. Co. v. Kitts, 556.

TAXATION. See Railroads, 1; Newspapers, 246.

1. Railway company's telegraph line used for commercial purposes for compensation, paid by patrons, is not exempt from taxation as reasonably necessary for transaction of railroad business. Soo Ry. Co. v. Oppegard, 1.
2. A railway company not having a separate franchise to do a telegraph business for pay, where it has assumed such franchise, is estopped to show, as against the State, such lack of franchise as a defense to a franchise tax, and tax on other property used in the telegraph business. Soo Ry. Co. v. Oppegard, 1.
3. Section 1259, Rev. Codes 1899 (section 1574, Rev. Codes 1905), relating to the publication of the delinquent tax list and notice of sale, provides that: "The county auditor under the direction of

TAXATION—Continued.

the board of county commissioners or a majority thereof, shall give notice of the sale of real property by publication thereof once a week for three consecutive weeks, in such newspaper as may be designated by the county commissioners for that purpose in the county. In counties having daily papers, the delinquent list shall be published in one issue of the daily edition and in two issues of the weekly edition of the same paper so selected by the board of county commissioners." By resolution the board of county commissioners of Burleigh county directed the publication of the delinquent tax list and notice of sale for 1898 taxes in the Bismarck Daily Tribune. Such list and notice were published in one issue of the Bismarck Daily Tribune and in two issues of the Bismarck Weekly Tribune. *Held,* that such resolution and publication was compliance with the statutory provisions quoted, and the publication so made valid. Griffin v. Denison Land Co., 246.

4. The correct description of the land assessed is essential to a valid tax. Griffin v. Denison Land Co., 246.

5. Section 1480, Rev. Codes 1905 (section 1176, Rev. Codes 1899), defines "tract" as applied to land, when that word is used in the revenue law, as any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person, or company. *Held* that the word "contiguous" in that connection means land which touches on the sides, and that two quarters of the same section, which only touch at the corner, do not constitute, for the purpose of taxation, one tract or parcel of land. Griffin v. Denison Land Co., 246.

6. The assessment of two tracts of land as one tract renders the entire tax proceeding void. State Finance Co. v. Beck et al., 15 N. D. 374, 109 N. W. 357. Hence the assessment of two quarters of the same section, which touch only at corners, is a void assessment and renders all proceedings based thereon invalid, and the holder of a tax deed resting on a sale for unpaid taxes levied under such assessment cannot recover from the owner of the land the taxes paid under claim of ownership based upon such tax deed. Griffin v. Denison Land Co., 246.

7. The county board of review and equalization acts in a dual capacity: First, as a board of review to review and adjust assessments in districts having no local board of review; and, second, as a board of equalization to equalize the assessments merely between the various assessment districts. As a board of review, it may raise or lower valuations upon classes of property, and also upon individual property; but as a board of equalization, it may raise or lower the valuation of classes of property only so as to equalize the assessments as between the assessment districts. Bank v. Lewis, 390.

8. Prior to the amendment of the revenue law in 1897 (Laws 1897,

TAXATION—Continued.

page 256, chapter 126), such board had the power, and it was its duty, to equalize assessments throughout the county by raising or reducing valuations upon classes of property, and also by changing individual assessments, but by such amendment it was the legislative intent to adopt a scheme or system whereby the local boards of review, where there are such boards, shall equalize the assessments as between individual taxpayers, the county board of equalization as between the several assessment districts, and the state board as between the several counties. The old system was retained to the extent only of permitting the county board to act as a board of review in districts having no local board of review. Bank v. Lewis, 390.

9. In making such change, certain provisions of the old statute, which are inconsistent with the law as amended were continued and re-enacted in the law of 1897 (Laws 1897, page 256, chapter 126); and, in so far as such inconsistent provisions cannot be harmonized with the statute as amended, they are deemed repealed by necessary implication. Bank v. Lewis, 390.
10. Section 2722, Rev. Codes 1905, which expressly provides that no changes shall be made in individual assessments, as returned by the city board of equalization, by the county board, was not repealed by the amendment made in 1897 (Laws 1897, page 256, chapter 126), but is still in full force and effect. Bank v. Lewis, 390.

TAXES. See Vendor and Purchaser, 467.

TELEGRAPH AND TELEPHONE.

1. Railway company's telegraph line used for commercial purposes for compensation, paid by patrons, is not exempt from taxation as reasonably necessary for transaction of railroad business. Soo Ry. Co. v. Oppegard, 1.
2. A railway company not having a separate franchise to do a telegraph business for pay, where it has assumed such franchise, is estopped to show, as against the state, such lack of franchise as a defense to a franchise tax, and tax on other property used in the telegraph business. Soo Ry. Co. v. Oppegard, 1.

TENDER. See Offer of Performance, 12.

TIME. See Execution, 517.

TRESPASS. See Animals, 268.

1. In an action for injuries inflicted by a vicious bull claimed to be the property of appellant, and negligently suffered to escape from its inclosure and to trespass upon the ground where the injuries were inflicted. *Held*, that the evidence as to such ownership was sufficient to go to the jury, which found in plaintiff's favor, the same will not be disturbed upon appeal. Peterson v. Conlan, 205.
2. The complaint was framed to embrace the following grounds of

TRESPASS—Continued.

recovery: First, that the animal was vicious and known by its owner to be so, who kept and harbored the same in such a negligent manner as to permit its escape from his enclosure and to inflict the injury complained of. Second, that the animal was trespassing at the time of the injury, and hence its owner is liable for damages done by it. Third, negligence of the owner in permitting such escape. The court submitted the issues on the first two theories only. *Held,* conceding the evidence of the known viciousness of the animal to be sufficient to give to the jury, that a new trial must be ordered for errors in the instructions relative to the second ground; it being impossible to determine on which theory the verdict was rendered. Peterson v. Conlan, 295.

3. Plaintiff neither owning nor in possession of real property on which the animal was trespassing and which inflicted an injury on the plaintiff, cannot recover for a trespass, and the instructions relative to this phase of the case constitute reversible error. Peterson v. Conlan, 205.
4. Certain instructions amounting to a peremptory charge to find for plaintiff, provided the jury found the appellant to be the owner of the animal inflicting injuries, regardless of the question of appellant's negligence, and also without regard to whether the particular injury complained of was proximately caused by such trespass, were erroneous. Section 6582, Rev. Codes 1905, restricts such recovery to damages proximately caused by the trespass. Peterson v. Conlan, 205.
5. Recovery cannot be sustained on the ground that the owner of a vicious animal was negligent in permitting it to trespass upon real estate, as the case was not tried, nor the jury instructed, on such theory. Nor for the same reason, can the recovery be sustained upon the theory that there was a statutory liability resting on defendant under sections 9405, 9408, Rev. Codes 1905. Peterson v. Conlan, 205.
6. In an action for damages for death of plaintiff's father caused by a train on defendant's track backing against him while he was on its right of way or track, it is *held,* under the evidence that deceased was not a trespasser, and defendant owed him the duty of ordinary care and diligence to avoid injuring him. Kunkel v. Soo Ry. Co., 367.
7. *Held,* further, that the questions of the negligence of defendant and the contributory negligence of the deceased were, under the evidence in this case, for the jury. Kunkel v. Soo Ry. Co., 367.

TRIAL. SEE PRACTICE, 45; EVIDENCE, 517.

1. More liberality is allowed in favor of the allegations of a pleading where objected to for the first time at the trial than when attacked by demurrer. Walters v. Rock, 45.
2. An amendment to an answer to conform to the facts in an action

TRIAL—Continued.

for an accounting may be permitted, although not requested until after the evidence is all in. Barker v. More, 82.

3. An amendment to an answer may be made, during or at the close of a trial to conform to the facts proven, unless the defense is thereby substantially changed. Barker v. More, 82.
4. Recovery cannot be sustained on the ground that the owner of a vicious animal was negligent in permitting it to trespass upon real estate, as the case was not tried, nor the jury instructed, on such theory. Nor for the same reason, can the recovery be sustained upon the theory that there was a statutory liability resting on defendant under section 9405, 9408, Rev. Codes 1905. Peterson v. Conlan, 205.
5. The parties to an action stipulated in writing the facts on which the case should be tried, agreeing therein that the facts therein stated were all the facts in the action, and such stipulation should be the evidence of the same and considered proven. After trial, arguments and submission of the case, plaintiff moved for leave to take testimony upon questions not covered by the stipulation, which was granted, and plaintiff only given leave to submit additional testimony. There was no fraud or deceit on the part of the defendant relative to the stipulation. *Held*, to permit the plaintiff alone to take and submit additional evidence as to facts, not included in the stipulation, without giving the right to rebut to the defendant or to submit evidence on the facts covered by the order, was error. Adams v. Hartzell, 221.
6. At close of plaintiff's case, defendant's motion for a directed verdict was denied and exception taken. At the close of defendant's testimony and after both parties had rested, there were the same motion, ruling and exception. Plaintiff asked the court to instruct that the only question for the jury was of the extent of the injury and the amount of the damage, claiming the evidence conclusive in its favor on all other issues, which request was granted and defendant excepted. *Held*, the ruling was prejudicial error, and defendant deprived of its right to a trial by jury of all the issues, which right had not been waived, and the court was not warranted in the assumption that defendant in making its motions waived the jury and submitted all issues to the court. Umsted v. Colgate El. Co., 309.
7. The answer was not demurred to nor the insufficiency suggested to the trial court, which proceeded upon the theory that issue was joined, the Supreme Court will not pass upon the sufficiency of the answer. Gooler v. Eidsness, 338.
8. Where both parties move for a directed verdict and he against whom the verdict is directed, requests the submission of any question to the jury, he does not thereby waive findings by the jury. Gooler v. Eidsness, 338.
9. Where there is a direct conflict in the evidence on material ques-

TRIAL—Continued.

tions, directing of a verdict for appellant was error and the district court was justified in granting a new trial. Gooler v. Eidsness, 338.

10. Even if the merits were with the appellants, the evidence was too uncertain to enable the jury or the court to fix the amount which plaintiff is entitled to recover. Gooler v. Eidsness, 338.
11. The question, whether the testator was of sound mind at the time of executing his will was submitted to the jury, who reported their inability to agree as to the answer to be made; and the court, on motion of respondent's counsel, directed an affirmative answer thereto. *Held,* not error, as there was no evidence upon which the jury could properly have made a negative answer to such question. Hedderich v. Hedderich, 488.
12. Complaint, verified by plaintiff's attorney, contained matter inconsistent with the amended complaint and plaintiff's version of the transaction. The original complaint was offered in evidence as a part of the cross-examination, which offer was objected to and objection sustained. *Held,* not error, as proof was not proper cross-examination, but part of defendant's case, and its reception then was discretionary with the trial court. Leistikow v. Zuelsdorf, 511.
13. If appellant desired more explicit instruction than were given by the court, they should have been presented to the court in writing, with the request that they be given. Landis v. Fyles, 587.
14. A subject entered into in direct examination may be further inquired into and exhausted on cross-examination. Schnase v. Goetz, 594.
15. Where a witness, on cross-examination, was asked if he had not been engaged in an unlawful occupation, answered in the negative, it cannot be shown by other witnesses that he testified falsely, where the purpose is to impeach or discredit him as a witness. Schnase v. Goetz, 594.
16. While the facts are not in dispute, the question as to defendant's liability is for the court, not the jury, to determine. Queen Insurance Co. v. Bank, 603.

TRIAL BY JURY. See Jury, 309.

TROVER AND CONVERSION.

1. Under the evidence of the case sufficient demand was made. McFadden v. Thorpe El. Co., 93.

TRUSTS AND TRUSTEES.

1. A complaint alleging that a deed, absolute in form, from parents to their sons, was executed solely in reliance on the confidence existing between them and their sons, and in reliance on their sons' promise to accept the deed in trust for the use of the grantors while they lived, and after their death to convey the land equally among all the children of the grantors, states a cause

TRUSTS AND TRUSTEES—Continued.

of action for declaring the deed to have been executed in trust for said purpose, and a court of equity will enforce the promise, as the refusal to carry it out is constructively fraudulent. Hanson v. Svarverud, 550.

2. In such case the agreement is enforced as based on the confidence imposed, which makes the refusal to comply with the contract a constructive fraud. Hanson v. Svarverud, 550.
3. Where the refusal of a grantee to carry out the terms of a trust agreement in reference to conveying real estate is actually or constructively fraudulent, a court of equity will enforce the agreement, although the same is not in writing. Hanson v. Svarverud, 550.

UNDERTAKING ON APPEAL. See Appeal and Error, 598.

UNDUE INFLUENCE. See Husband and Wife, 409.

UNITED STATES SENATOR. See Voters and Elections, 55.

VARIANCE. See Indictment and Information, 88; Specific Performance, 360.

VENDOR AND PURCHASER. See Quieting Title, 166.

1. The commencement of an action against the vendor and vendee in an executory contract for sale of land, to determine adverse claims, the complaint being in statutory form under section 7522, Rev. Codes 1905, does not of itself furnish grounds or reasons excusing the vendee from performance, especially when the vendee in negotiating for extensions of payment, never gave the commencement of such action as excuse for failing to make payments. Martinson v. Regan, 467.
2. Where a contract for sale of land is made in good faith, the vendor need not be in a situation to perform at the time it is entered into, provided he is able at the proper time. Martinson v. Regan, 467.
3. Where a contract for the sale and purchase of land requires the vendee to pay the taxes, without stating any date for such payment, but time being of the essence thereof, a notice requiring the vendee to perform, served thirty-four days after the taxes were delinquent, is given in a reasonable time and without such delay as to be a waiver of performance, where it appears that the vendee was not prejudiced by the lapse of the time mentioned. Martinson v. Regan, 467.
4. When it clearly appears that the vendee cannot comply in any manner with the terms of a contract for purchase of real estate, and due service of notice to perform, followed by notice of cancellation, was made, a court of equity will not under most circumstances grant further time to the vendee for performance. Martinson v. Regan, 467.
5. *Held*, under the facts of this case, that no error was committed by

VENDOR AND PURCHASER—Continued.

the trial court in entering judgment cancelling an executory contract for purchase and sale of real estate. Martinson v. Regan, 467.

6. Plaintiff, being an indorsee of a note before maturity for a valuable consideration, and without notice, took notes free from any lien upon appellant's interest in certain crops and land, for reasons stated in the opinion. Bank v. Cullen, 500.

VENUE, CHANGE OF.

1. Section 9931, Rev. Codes 1905, providing for change of venue in criminal cases, on application of state's attorney, construed, *held* that the granting or denying of such change on application of attorney general is within the sound discretion of the court, and its ruling will not be disturbed except for an abuse of discretion. State v. Winchester, 534.
2. The fact that the defendant as sheriff subpoenaed the jury might be sufficient cause for a challenge to the panel, but is not cause for a change of venue. State v. Winchester, 534.
3. Upon the showing in this case this court is not prepared to say that there was an abuse of discretion in denying the motion of the attorney general for a change of venue. State v. Winchester, 534.

VERDICT. See Jury, 205.

1. Recovery cannot be sustained on the ground that the owner of a vicious animal was negligent in permitting it to trespass upon real estate, as the case was not tried, nor the jury instructed, on such theory. Nor, for the same reason, can the recovery be sustained upon the theory that there was a statutory liability resting on defendant under sections 9405, 9408, Rev. Codes 1905. Peterson v. Conlan, 205.
2. At close of plaintiff's case, defendant's motion for a directed verdict was denied and exception taken. At the close of defendant's testimony and after both parties had rested, there were the same motion, ruling and exception. Plaintiff asked the court to instruct that the only question for the jury was the extent of the injury, and the amount of the damage; claiming the evidence conclusive in its favor on all other issues, which request was granted and defendant excepted. *Held*, the ruling was prejudicial error, and defendant deprived of its right to a trial by jury of all the issues, which right had not been waived, and the court was not warranted in the assumption that defendant in making its motions waived the jury and submitted all issues to the court. Umsted v. Colgate El. Co., 309.
3. Where both parties move for a directed verdict and he against whom the verdict is directed, requests the submission of any question to the jury, he does not thereby waive findings by the jury. Gooler v. Eidsness, 338.
4. Where there is a direct conflict in the evidence on material questions, directing of a verdict for appellant was error and the dis-

VERDICT—Continued.

trict court was justified in granting a new trial. Gooler v. Eidsness, 338.

5. Even if the merits were with the appellants, the evidence was too uncertain to enable the jury or the court to fix the amount which plaintiff is entitled to recover. Gooler v. Eidsness, 338.
6. In an action by a father for damages for the wrongful death of a daughter three months old, who is dangerously ill with uremia when the wrongful act complained of was committed, the question of the pecuniary injury of the father by the death of such child, if caused by the wrongful act of defendants, is purely a matter of speculation, conjecture and guesswork, and any verdict for more than nominal damages in favor of the father would necessarily be based upon conjecture or speculation. Scherer v. Schlaberg, 421.
7. The child, damages for whose death by wrongful act of defendants are sought in this action by the father, was a girl three months old, dangerously ill with uremia. A physician was called, and left with the parents a prescription on defendant's drug store for medicine. By mistake of the defendant druggists, medicine was given plaintiff containing one-eighth of a grain of morphine in each dose directed to be given. The infant afterward died. *Held*, under the evidence, that the jury, had the case been submitted to it for a verdict, could only have found a verdict for plaintiff based upon pure speculation and surmise as to the cause of the child's death. Scherer v. Schlaberg, 421.
8. When the nature of the evidence, in an action for damages, is such that no verdict for the plaintiff can be returned except based upon mere conjecture, surmise or speculation, it is proper for the trial court to direct a verdict for the defendant. Scherer v. Schlaberg, 421.
9. In an action for damages for injures to plaintiff's horse by defendant's locomotive or cars, direct evidence is not the only evidence which may be used to prove defendant's liability; circumstances surrounding the location and finding of the horse, its tracks in the snow, the nature of its injuries, may as unmistakably prove the injury by such locomotive or cars as the direct testimony of witnesses, and if in conflict with the testimony of witnesses may be sufficient to sustain a verdict for plaintiff. Anderson v. Soo Ry. Co., 462.
10. Plaintiff's horse missing for two days, was found on the evening of the second day in a ditch near the end of the ties of defendant's tracks, under circumstances which the jury may have found unexplainable on any theory except that defendant's train inflicted the injury which necessitated its killing. The verdict may be sustained on either of two theories: (a) That, if the jury considered the evidence given by the trainmen as overcoming the statutory presumption of negligence on the part of de-

VEVRDICT—Continued.

fendant as to trains on the second day, no evidence was submitted to overcome such presumption relating to trains which may have passed over the defendant's road on the first day that the horse was missing. (b) That the jury may have found, from the circumstances, that the train passing on the evening of the second day, respecting which evidence was submitted, did inflict the injuries, notwithstanding the positive statement of the trainmen to the contrary, and that the train before reaching it should be disregarded, in which case the statutory presumption was not overcome. This court cannot determine which theory the jury adopted. Anderson v. Soo Ry. Co., 462.

11. Where the jury, by special verdict found that the execution of a will was the free act and deed of the testator, and not executed under undue influence exerted upon the testator's mind; that the interpleader, who claimed to be the lawful issue of the deceased, an Indian wife, and the sole heir of such deceased, was intentionally omitted by the testator as a devisee or legatee under the will; that the testator was of sound mind at the time of the execution of the will. Such findings eliminated as immaterial all other contested issues; hence alleged errors predicated upon the court's action with reference thereto need not be considered. Hedderich v. Hedderich, 488.

12. The question, whether the testator was of sound mind at the time of executing his will was submitted to the jury, who reported their inability to agree as to the answer to be made, and the court, on motion of respondent's counsel, directed an affirmative answer thereto. *Held,* not error, as there was no evidence upon which the jury could properly have made a negative answer to such question. Hedderich v. Hedderich, 488.

13. Failure to instruct that appellant was entitled to 7 per cent interest per annum on all counterclaims allowed him by the jury from maturity to the date of the verdict was not, under the circumstances, reversible error. Landis v. Fyles, 587.

VOTERS AND ELECTIONS. See Municipal Corporations, 289; Schools and School Districts, 616.

1. Section 168 of the constitution reads: "All changes in the boundaries of organized counties, before taking effect, shall be submitted to the electors of the county or counties to be affected thereby at a general election and be adopted by a majority of all the legal votes cast in each county at such election."

Held: (a) That the word "electors" as used in said section means all persons possessing the qualifications as to residence, age and citizenship prescribed by section 121 of the constitution as necessary to entitle them to vote.

(b) "Shall be submitted to the electors" means that all persons who are qualified to vote in the given county, or counties,

VOTERS AND ELECTIONS—Continued.

shall, in a legal manner, be given an opportunity to vote on the question of a change in the boundaries.

(c) That a "vote" is the registration in accordance with law of the preference or choice of an elector on a given subject.

(d) That "votes cast" are the totals of the separate votes or expression of voters' preferences for or against a change in boundaries. State v. Blaisdell, 31.

2. A "ballot" as distinguished from a "vote," is a sheet of paper on which the voter expresses his choice of candidates, or for or against a proposition, or both. State v. Blaisdell, 31.
3. A "voter" as distinguished from an elector, is an elector who actually votes. State v. Blaisdell, 31.
4. A majority of the votes cast upon a question submitted to a vote, if in the affirmative, carries it, unless the legislative will to the contrary is clearly expressed in the constitution or the law. State v. Blaisdell, 31.
5. A vote to change county boundaries cast at a general election, is the holding of a "separate election," although held in connection with the general election. State v. Blaisdell, 31.
6. The elector who does not participate in an election acquiesces in the result of the votes by those who do, and to hold that section 168 of the constitution requires more than half as many affirmative votes in favor of a change in boundaries as are cast on any other subject at the same election, would be to give as much effect to the act of an elector not voting on such change as to that of one voting in the negative, and render the statutory provision for negative votes useless. State v. Blaisdell, 31.
7. On the question of the division of a county submitted at a general election, 4207 were in favor of the division, 4024 in opposition, while in the county 9257 votes were cast for the candidates for governor. *Held,* that the change voted upon was effected. State v. Blaisdell, 31.
8. The provisions of the primary election law requiring legislative candidates to take and subscribe an oath and pledge, that they will support and vote for the candidate for United States senator receiving a majority of the party vote at the primary election and the succeeding general election, is violative of section 211 of the constitution of North Dakota, but the provisions of said act providing a method for electors to designate their choice of such senator may be sustained regardless of the invalidity of such other provisions. State v. Blaisdell, 55.
9. The primary election law, permitting electors to designate their choice of United States senator, does not amount to an election by the people, and does not violate the federal constitution, providing for the election of United States senators by the legislature; but if they do, no constitutional right of the citizen is

VOTERS AND ELECTIONS—Continued.

violated. It is not a judicial question; the United States senate is the tribunal to determine the same. State v. Blaisdell, 55.

10. The provisions of the primary election law relating to the nomination and election of United States senators are germane to the subject embraced in the title of the act. State v. Blaisdell, 55.
11. The provisions of the primary election law as to ballots to be used at the general election for determining the choice by the candidates for United States senator, require that the candidate of each political party shall be placed on the ballot separate and apart from candidates of other political parties. State v. Blaisdell, 55.
12. The general election so far as it relates to United States senator, is a continuation of the primary election, and the provisions of the primary election law designed to safeguard the rights of parties and to prevent members of one party participating in the nominations by another, apply. State v. Blaisdell, 55.
13. Section 129 of the constitution of North Dakota, guaranteeing a secret ballot, is not infringed by the provisions of the primary election law. State v. Blaisdell, 55.
14. The primary election law is not an unlawful delegation of power granted to the legislature by the federal constitution. State v. Blaisdell, 55.
15. The primary election law does not unlawfully attempt to bind successive legislatures. State v. Blaisdell, 55.
16. Section 12, chapter 109, page 157, Laws 1907 (it being the Primary Election Law), reads: "12. Percentage of Votes Required for Nomination. If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than 30 per cent of the total number of votes cast for secretary of state, of the political party he or they represented at the last general election, no nomination shall be made in that party for such office, but if 30 per cent or more or such vote is cast and there is more than one candidate for any such office, the person receiving the highest number of votes shall be declared the nominee of such party for such office; provided, further, that where there is more than one person to be elected to the same office the persons to the number to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such office." *Held*, that the proviso limits the application of the 30 per cent rule, construed in State ex rel. Montgomery v. Anderson, 118 N. W. 149, to candidate for nomination to offices of which there is not more than one of the same name to be filled at the succeeding election. State v. Anderson, 147.
17. Under such proviso, when more than one office of the same name, within the same territory or subdivision, is to be filled, candidates for nomination to the number to be nominated, receiving the

VOTERS AND ELECTIONS—Continued.

highest number of votes of the party which they represent, are the nominees of such party. State v. Anderson, 147.

18. It is competent for the legislature to provide for the nomination of party candidates for elective offices by a direct vote of the members of the different political parties at an election held for that purpose. State v. Anderson, 149.

19. While the legislature has the power to provide for nominations by a direct vote, and to prescribe rules and regulations for the conduct of primary elections, and the government of political parties, such rules and regulations must be reasonable, and operate on voters and candidates of the same class with substantial equality, but absolute equality in all things is not a necessary requirement. State v. Anderson, 149.

20. The opinion of the court that simpler, more effectual or reasonable rules and regulations covering primary elections might have been provided than the legislature did provide, will not justify the courts holding the regulations made invalid. State v. Anderson, 149.

21. The 30 per cent requirement in said section is intended (a) to prevent the nomination of candidates to represent a party by accident, or when the party did not intend to make a nomination; (b) to restrain the action of voters, at primary elections, within the parties to which they belong; (c) to define and fix the number of votes necessary to constitute an expression of the party, and to determine what is the act of a party as a party. State v. Anderson, 149.

22. When only one office of the same name is to be filled at an election, and candidates for nomination for such office at the preceding primary election fail to receive 30 per cent of the party vote designated, no party nomination is made for such office. State v. Anderson, 149.

23. Section 12, chapter 109, page 157, Laws 1907 (the primary election law), reads as follows: "If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided or shall equal less than 30 per cent of the total numbers of votes cast for secretary of state of the political party he or they represented at the last general election, no nomination shall be made in that party for such office, but if 30 per cent or more of such vote is cast and there is more than one candidate, for any such office, the person receiving the highest number of votes shall be declared the nominee of such party for such office; provided, further, that where there is more than one person to be elected to the same office the persons to the number to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such offices." *Held*, (a) that the 30 per cent requirement therein contained applies to county and district offices as well as to other

offices; (b) that under its terms candidates of a subdivision of a state for a local office must receive 30 per cent of the party vote of their party cast at the last general election for the candidate of such party for secretary of state within such subdivision, or no nomination is made. State v. Anderson, 149.

24. The duties of the auditor in issuing the notice of such an election are purely ministerial, and such notice must follow the terms and conditions of the resolution authorizing the election. Stern v. Fargo, 289.

25. The object of the notice of election, and the requirement that the amount of the bonds be stated, is to give the voters and taxpayers such information as will enable them to consider, weigh, and discuss the merits of the proposition, and to avail themselves of the opportunity so given to acquire information as to the necessity of the proposed expenditure and the amount of the indebtedness necessary to incur to enable the city council to carry out its plans. When the notice fails to state the amount of indebtedness proposed to be incurred by the issuance of bonds, opportunity is not afforded the voters to inform themselves so as to be able to vote intelligently. Stern v. Fargo, 289.

26. The fact that one construction of a statute of doubtful import, if it be conceded that the meaning of the statute in question is doubtful, would admit of the submission of a question devoid of merit in connection with another of unquestioned merit, and the adoption of a weak proposition by reason of its submission in connection with a meritorious one, furnishes a strong reason for the rule of construction stated in paragraph 11, and this reason applies notwithstanding no question is made in this case as to the good faith or merits of either proposition submitted by the city council. Stern v. Fargo, 289.

27. A resolution adopted by the city council, providing for an election to vote on the issuance of bonds, and a notice by the city auditor of such election, which state the purposes of the proposed bond issue to be "to defray the cost of building and constructing a new waterworks pumping station and installing therein a new high duty pump and necessary steam boilers, and for the purpose of installing an electric light plant in connection with said pumping station for furnishing street and other lights and power," state two purposes and an election held pursuant to such resolution and notice is illegal, and a majority vote in favor of issuing bonds for the purposes stated does not authorize or empower the city council to issue them. Stern v. Fargo, 289.

28. Section 111 of the constitution provides that county courts shall have jurisdiction of certain civil and criminal causes "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 that court increased." *Held*, that the words "majority

VOTERS AND ELECTIONS—Continued.

vote" mean a majority of all votes cast on the question of increased jurisdiction, and not a majority of all the votes cast at the election. State v. Fabrick, 402.

29. Under a statute providing for an election for the issue of bonds for a court house or jail, or both, requiring a notice of such election to state its object, the amount of bonds to be issued, the denominations of such bonds, the length of time for which they shall run, and rate of interest which they shall bear, a notice which fails to so state renders the election invalid and the bonds issued pursuant to such election are illegal. Hughes v. Horsky, 474.
30. Under a statute providing for the issuance of bonds for county buildings providing for the submission of the question of the issuance of bonds for a courthouse, or jail, or both, *held*, that when the erection of a courthouse and jail in one building is contemplated, and the notice so indicates, the question of issuing bonds may be submitted and voted upon as one question; but that when two separate buildings are planned, two questions are presented, and although they may be submitted in the same notice, it must be so done that each voter may vote for or against each proposition independently of the other. Hughes v. Horsky, 474.
31. The school district possessed no implied authority to issue such bonds on account of the fact that they were refunding bonds and issued in lieu of presumably valid obligations of the district, because by the express provisions of section 9 aforesaid, their issuance was prohibited because of the fact that less than twenty-five legal votes were cast at the preceding annual school election. State v. School District, 616.

WAIVER. See Sales, 556.

1. Where a crop contract reserves title in the owner of the land to the crops until a division thereof, such owner by taking a mortgage in the third year on the crop of that year, would not thereby waive or abandon title to the crops; such chattel mortgage is merely a contract for a lien when the mortgagor acquired title, and in accepting the same the plaintiff's act was not inconsistent with such reservation of title. McFadden v. Thorpe El. Co., 93.
2. The question of waiver is largely one of intent, and, under the evidence, it is apparent that no such waiver was intended by the acceptance of the chattel mortgage. McFadden v. Thorpe El. Co., 93.
3. Where plaintiff was mistaken in attempting to pursue a remedy which he did not have, this cannot be construed as an election to waive or abandon the only remedy which he possessed. McFadden v. Thorpe El. Co., 93.
4. While the officers of a domestic mutual fire insurance company, whose by-laws are required by law to be adopted by a vote of the members, may waive many irregularities, they cannot waive mat-

WAIVER—Continued.

ters of substance contained in such by-laws, including definite terms which provide under what circumstances and for what time credit may be given members for premiums or assessments, or to give such credit otherwise than is provided by such by-laws. Lamb v. Insurance Co., 253.

5. Where both parties move for a directed verdict and he against whom the verdict is directed, requests the submission of any question to the jury, he does not thereby waive findings by the jury. Gooler v. Eidsness, 338.

6. At close of plaintiff's case, defendant's motion for a directed verdict was denied and exception taken. At the close of defendant's testimony and after both parties had rested, there were the same motion, ruling and exception. Plaintiff asked the court to instruct that the only question for the jury was of the extent of the injury and the amount of the damage, claiming the evidence conclusive in its favor on all other issues, which request was granted and defendant excepted. *Held,* the ruling was prejudicial error, and defendant deprived of its right to a trial by jury of all the issues, which right had not been waived, and the court was not warranted in the assumption that defendant in making its motions waived the jury and submitted all issues to the court. Umsted v. Colgate El. Co., 309.

7. Plaintiff was the owner of a building and stock of goods located in what is called the old town of G., which it insured in defendant company Afterwards, and contrary to the provisions of the policy it removed the property insured to the new town of G., four miles distant, obtained additional insurance, and installed a gasoline lighting plant. After the removal to the new location, the plaintiff delivered the policy to one Robinson, who was the legal soliciting agent of defendant, and requested him to have the insurance company make an indorsement on the policy to cover the property at its new location. Through a misunderstanding, Robinson sent the policy to defendant at its home office, with the written request that it cancel the same, which the company did, and retained the policy, but did not notify the plaintiff. The building and stock of merchandise were afterwards destroyed by fire caused by the gasoline lighting plant. The company returned the proofs with a letter denying any liability on the ground that the policy had been cancelled before the fire. *Held,* that the rejection of the claim on the ground stated in defendant's letter did not constitute a waiver of the conditions of the policy. Taylor-Baldwin Co. v. Insurance Co., 343.

8. Where police magistrates of cities in counties wherein the county courts have increased jurisdiction, retain jurisdiction to try and determine charges of misdemeanor, is not decided by assuming that they were without such jurisdiction, *held,* that by failing to object to the jurisdiction of the magistrate, and by appeal from

WAIVER—Continued.

his judgment to the district court, and participating in the trial therein and not objecting to the jurisdiction of either until after verdict of guilty, defendant waived all questions of jurisdiction not raised below, and it was error in the district court to grant a motion in arrest of judgment and discharge of defendant. State v. Russell, 357.

9. Where a contract for the sale and purchase of land requires the vendee to pay the taxes, without stating any date for such payment, but time being of the essence thereof, a notice requiring the vendee to perform, served thirty-four days after the taxes were delinquent is given in a reasonable time and without such delay as to be a waiver of performance, where it appears that the vendee was not prejudiced by the lapse of the time mentioned. Martinson v. Regan, 467.
10. Admitting service of notice of trial after the expiration of one year from filing of the remittitur in the district court and the admission in certain letters as mentioned in the opinion, and having his attorneys appear at the call of the calendar and ask that the case be set for trial, defendant does not waive right to insist upon a dismissal of the action. Bessie v. N. P. Ry. Co., 507.
11. Plaintiff demurred to the counterclaim as first pleaded, which demurrer was sustained. Afterwards an amendment was permitted, but which amendment did not cure the defect. To such amended counterclaim plaintiff replied, both denying the facts alleged and demurring to their sufficiency in the same pleading. *Held*, that plaintiff by thus replying did not waive his right to challenge the sufficiency of the facts therein alleged to constitute a cause of action, and the court did not err in thereafter sustaining the demurrer and giving plaintiff judgment upon the note as prayed for in the complaint. Scully v. Hann, 528.

WARRANTY. SEE SALES, 556.

WILLS.

1. Rev. Codes N. D., 1905, section 7968, which exempts an administrator, executor or guardian from the necessity of giving an undertaking on appeal in certain cases, does not apply to one who appeals from a decision of the county court revoking the probate of a will and also his letters of administration issued under such will. Ransier v. Hyndman, 197.
2. Where the jury, by special verdict, found that the execution of a will was the free act and deed of the testator, and not executed under undue influence exerted upon the testator's mind; that the interpleader, who claimed to be the lawful issue of the deceased, an Indian wife, and the sole heir of such deceased, was intentionally omitted by the testator as a devisee or legatee under the will; that the testator was of sound mind at the time of the execution of the will. Such findings eliminated as im-

WILLS—Continued.

material all other contested issues; hence alleged errors predicated upon the court's action with reference thereto need not be considered. Hedderich v. Hedderich, 488.

3. The question, whether the testator was of sound mind at the time of executing his will was submitted to the jury, who reported their inability to agree as to the answer to be made, and the court, on motion of respondent's counsel, directed an affirmative answer thereto. *Held*, not error, as there was no evidence upon which the jury could properly have made a negative answer to such question. Hedderich v. Hedderich, 488.
4. Assignments of error as to admission of non-expert testimony as to testator's mental condition when making his will are overruled. The erroneous rulings complained of not being prejudicial for reasons stated in the opinion. Hedderich v. Hedderich, 488.

WITNESS.

1. Where notice to take depositions gives initials of Christian names only, while the name in the deposition and signature of witnesses is by Christian names, the first letters of which were the same as the initials given in the notice, extrinsic proof is unnecessary to show the witness testifying is the same as described in the notice, especially where the notary indorses the same name on the envelope returning such deposition as the one given in the notice. Walters v. Rock, 45.
2. An expert witness may give an opinion based in part on what was stated to him by the patient. Walters v. Rock, 45.
3. An expert may give an opinion based on the testimony of other witnesses that he has heard, or that has been read to him, in case there is no conflict in the facts testified to by such other witnesses. Walters v. Rock, 45.
4. In an action for damages for injuries to plaintiff's horse by defendant's locomotive or cars, direct evidence is not the only evidence which may be used to prove defendant's liability; circumstances surrounding the location and finding of the horse, its tracks in the snow, the nature of its injuries, may as unmistakably prove its injury by such locomotive or cars as the direct testimony of witnesess, and if in conflict with the testimony of witnesses may be sufficient to sustain a verdict for plaintiff. Anderson v. Soo Ry. Co., 462.
5. It is competent to show on the cross-examination of a witness, for the purpose of discrediting him or lessening the weight of his testimony, that he has been arrested and convicted of a crime. Schnase v. Goetz, 594.
6. A subject entered into in direct examination may be further inquired into and exhausted on cross-examination. Schnase v. Goetz, 594.
7. Where a witness, on cross-examination, was asked if he had not been engaged in an unlawful occupation, answered in the negative, it cannot be shown by other witnesses that he testified falsely,

WITNESS—Continued.

where the purpose is to impeach or discredit him as a witness. Schnase v. Goetz, 594.

8. Where the evidence as to the nature of the assault and injuries suffered by respondent was conflicting, and impeaching testimony to show that a witness testified falsely as to his having been in an unlawful occupation was admitted over objection, *held,* that the appellate court cannot assume that the admission of such testimony was without prejudice, as its effect may have been the controlling influence with the jury in determing the extent of the injury or damages. Schnase v. Goetz, 594.

WORDS AND PHRASES. SEE MILITARY LAW, 233.

1. A "roadway," within constitution, section 179, providing for taxation of the franchise, roadway, etc,, of all railroads, includes not only the strip of ground on which the main line is constructed, but all grounds necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and other accommodations reasonably necessary to accomplish the object of their incorporation. Soo Ry. Co. v. Oppegard, 1.
2. "Performance" means the doing or completing of an action. Knudtson v. Robinson, et al., 12.
3. Section 168 of the constitution reads: "All changes in the boundaries of organized counties, before taking effect, shall be submitted to the electors of the county or counties to be affected thereby at a general election, and be adopted by a majority of all the legal votes cast in each county at such election."

   Held,

   (a) That the word "electors" as used in said section means all persons possessing the qualifications as to residence, age and citizenship prescribed by section 121 of the constitution as necessary to entitle them to vote.

   (b) "Shall be submitted to the electors," means that all persons who are qualified to vote in the given county, or counties, shall, in a legal manner, be given an opportunity to vote on the question of a change in the boundaries.

   (c) That a "vote" is the registration in accordance with law of the preference or choice of an elector on a given subject.

   (d) That "votes cast" are the totals of the separate votes or expressions of voters' preferences for or against a change in boundaries. State v. Blaisdell, 31.
4. A "ballot" as distinguished from a "vote," is the sheet of paper on which the voter expresses his choice of candidates, or for or against a proposition, or both. State v. Blaisdell, 31.
5. A "voter" as distinguished from an elector, is an elector who actually votes. State v. Blaisdell, 31.
6. A vote to change county boundaries, cast at a general election is the holding of a separate election," although held in connection with the general election. State v. Blaisdell, 31.

WORDS AND PHRASES—Continued.

7. The meaning of words in a statute must often be determined by the subject-matter in relation to which they are used; and as section [illegible] relates only to the change of county boundaries, the words "votes cast" should be limited to that subject. State v. [illegible], [illegible]

8. A woman employed to do housework on a farm and to cook meals for farm laborers is not a "farm laborer" within the meaning of section [illegible], Rev. Codes 1899, giving a lien for the wages of farm laborers. Lowe v. Abrahamson, [illegible]

9. A [illegible] is not an inferior court within the meaning of section [illegible] of the constitution, it not belonging to the judicial, but to the executive department of the government. The inferior courts referred to in section [illegible] are the courts enumerated in section [illegible], which belong to the judicial department. State v. [illegible], [illegible]

10. A paper published each week under the name "The Bismarck Weekly Tribune," by the same parties who publish a daily paper under the name "The Bismarck Daily Tribune," such weekly being composed of matter printed in the Daily Tribune and set up from day to day for publication in the weekly, is a weekly edition of The Bismarck Daily Tribune within the meaning of section [illegible], Rev. Codes 1899. [illegible] v. [illegible] Land Co., [illegible]

11. Section [illegible], Rev. Codes 1899, defines "tract" [illegible] applied to land when that word is used in the revenue law, as any contiguous quantity of land in the possession of, owned by, or recorded as the property of, the same claimant, person, or company. Held, that the word "contiguous" in that connection means [illegible], and that two [illegible] of the same section [illegible] for the purpose of [illegible] the tract or parcel of land. [illegible] v. [illegible] Land Co., [illegible]

12. Section [illegible] [illegible]

13. Section [illegible] [illegible]

14. [illegible]

WITNESS—Continued.

where the purpose is to impeach or discredit him as a witness. Schnase v. Goetz, 594.

8. Where the evidence as to the nature of the assault and injuries suffered by respondent was conflicting, and impeaching testimony to show that a witness testified falsely as to his having been in an unlawful occupation was admitted over objection, *held,* that the appellate court cannot assume that the admission of such testimony was without prejudice, as its effect may have been the controlling influence with the jury in determing the extent of the injury or damages. Schnase v. Goetz, 594.

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Held,

(a) That the word "electors" as used in said section means all persons possessing the qualifications as to residence, age and citizenship prescribed by section 121 of the constitution as necessary to entitle them to vote.

(b) "Shall be submitted to the electors," means that all persons who are qualified to vote in the given county, or counties, shall, in a legal manner, be given an opportunity to vote on the question of a change in the boundaries.

(c) That a "vote" is the registration in accordance with law of the preference or choice of an elector on a given subject.

(d) That "votes cast" are the totals of the separate votes or expressions of voters' preferences for or against a change in boundaries. State v. Blaisdell, 31.

4. A "ballot" as distinguished from a "vote," is the sheet of paper on which the voter expresses his choice of candidates, or for or against a proposition, or both. State v. Blaisdell, 31.
5. A "voter" as distinguished from an elector, is an elector who actually votes. State v. Blaisdell, 31.
6. A vote to change county boundaries, cast at a general election is the holding of a separate election," although held in connection with the general election. State v. Blaisdell, 31.

WORDS AND PHRASES—Continued.

7. The meaning of words in a statute must often be determined by the subject-matter in relation to which they are used; and, as section 168 relates only to the change of county boundaries, the words "votes cast" should be limited to that subject. State v. Blaisdell, 31.

8. A woman employed to do housework on a farm and to cook meals for farm laborers, is not a "farm laborer" within the meaning of section 6277, Rev. Codes 1905, giving a lien for the wages of farm laborers. Lowe v. Abrahamson, 182.

9. A courtmartial is not an inferior court within the meaning of section 86 of the constitution, it not belonging to the judicial, but to the executive department of the government. The inferior courts referred to in section 86 are the courts enumerated in section 85, which belong to the judicial department. State v. Nuchols, 233.

10. A paper published each week under the name "The Bismarck Weekly Tribune," by the same parties who publish a daily paper under the name "The Bismarck Daily Tribune," such weekly being composed of matter printed in the Daily Tribune and set out from day to day for publication in the weekly, is a weekly edition of The Bismarck Daily Tribune within the meaning of section 1259, Rev. Codes 1899. Griffin v. Dension Land Co., 246.

11. Section 1480, Rev. Codes 1905, defines "tract" as applied to land, when that word is used in the revenue law, as any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person, or company. *Held,* that the word "contiguous" in that connection means land which touches on the sides, and that two quarters of the same section, which only touch at the corner, do not constitute for the purpose of taxation, one tract or parcel of land. Griffin v. Denison Land Co., 246.

12. Section 6738, Rev. Codes 1905, defines "process" as a writ or summons issued in the course of judicial proceedings. *Held,* that the notice of appeal is not a writ or summons, and is therefore not "process," and need not be served in the same manner in which "process" is required to be served. Gooler v. Eidsness, 338.

13. Section 111 of the constitution provides that county courts shall have jurisdiction of certain civil and criminal causes "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 that court increased." *Held,* that the words "majority vote" mean a majority of all votes cast on the question of increased jurisdiction, and not a majority of all the votes cast at the election. State v. Fabrick, 402.

14. A "conditional sale" is a sale in which the transfer of the title in the thing sold to the purchaser, or his retention of it, is made to depend upon the performance of some condition. Poirier Mfg. Co. v. Kitts, 556.

WORDS AND PHRASES—Continued.

15. The phrase "head of a family" is defined to mean: "(1) The husband or wife when the claimant is a married person. (2) Every person who has residing on the premises with him or her, and under his or her care and maintenance, either: (a) His or her child or the child of his or her deceased wife or husband, whether by birth or adoption. (b) A minor brother or sister or the minor child of a deceased brother or sister. (c) A father, mother, grandfather or grandmother. (d) The father or mother, grandfather or grandmother of a deceased husband or wife. (e) An unmarried sister or any other relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves." Holcomb v. Holcomb, 561.