REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

MAY 1911, to FEBRUARY, 1912.

H. A. LIBBY
REPORTER

VOLUME 22

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1913.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. BURLEIGH F. SPALDING, Chief Justice.[1]
HON. CHARLES J. FISK, Judge.
HON. EDWARD T. BURKE, Judge.
HON. EVAN B. GOSS, Judge.
HON. ANDREW A. BRUCE, Judge.[2]

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

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[1] Hon. David E. Morgan, Chief Justice, resigned October 31, 1911.
[2] Hon. Andrew A. Bruce appointed Judge October 31, 1911.

PRESENT JUDGES OF THE DISTRICT COURTS.

District No. One,
Hon. Charles M. Cooley.
District No. Two,
Hon. Charles W. Buttz.
District No. Three,
Hon. Charles A. Pollock.
District No. Four,
Hon. Frank P. Allen.
District No. Five,
Hon. J. A. Coffey.
District No. Six,
Hon. W. L. Nuessle.
District No. Seven,
Hon. W. J. Kneeshaw.
District No. Eight,
Hon. K. E. Leighton.
District No. Nine,
Hon. A. G. Burr,
District No. Ten,
Hon. W. C. Crawford.
District No. Eleven,
Hon. Frank Fisk.
District No. Twelve,
Hon. S. L. Nuchols.

OFFICERS OF THE BAR ASSOCIATION.

Hon. A. G. Divet, President, Wahpeton.
Hon. John Knauf, Vice President, Jamestown.
Hon. W. H. Stutsman, Secretary and Treasurer, Mandan.

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

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

COUNTY COURTS.

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

Constitutional Provisions.

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

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

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

Statutory Provisions.

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

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

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

CASES REPORTED IN THIS VOLUME.

DAKOTA CASES CITED IN OPINIONS.

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

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TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

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Y

IN MEMORIAM.

DAVID E. MORGAN.

At the opening of the Supreme Court at Bismarck, North Dakota, on October 1, 1912, the following proceedings were had, and a record thereof preserved in said court.

Introductory by BURLEIGH F. SPALDING, Chief Justice.

Since the last session of this court convened the State has lost one of its most useful and honored citizens. David E. Morgan served as judge of the Second Judicial District from the first day of statehood until November, 1900, when he was elected a judge of this court.

He sat on this bench until the 31st day of October, 1911, when failing health and his sense of duty impelled him to resign.

He shortly visited California, where it was hoped he might recover from the malady with which he was afflicted. Medicine, surgery, and climate alike failed to afford permanent relief, and he passed away at Banning, California, May 11th last.

The service which he rendered the state on this bench, the honor and esteem in which he was held by the bar, and the love borne him by his colleagues, render it highly proper that an opportunity be given for expressions of regard on the part of those familiar with his life and public service in the forum over which he presided as Chief Justice seven years.

Accordingly this, the opening day of a new term, has been set apart for that purpose.

BIOGRAPHICAL:

Ex-Chief Justice David E. Morgan was born at Coalport, Ohio, on November 8, 1849. He was of Welsh extraction, both his father, Evan

P. Morgan, and his mother, Ann Evans, being natives of Wales. His parents became residents of Wisconsin when he was a child, and he was brought up in that State, being educated in the common schools, at Spring Green Academy, and at Plattville State Normal School, and taking a special course for a year in the Wisconsin State University. As a young man, both before and after his graduation from college, he taught school for a period at Ironton, Wisconsin, and later was principal of the Chilton schools. He was thrice elected clerk of the court of Sauk county, and during his service he read law with Judge Remington and Judge Barker of Baraboo. He was admitted to practice in 1879, and resigned the office of clerk of court the following year, and, having made up his mind to cast his fortunes with that of the new Northwest, he became a resident of Dakota in 1881, forming a law partnership with Judge A. H. Noyes. In 1883, when Devils Lake was at the end of the Great Northern line, he located there, forming a partnership with Judge John F. McGee. He was elected State's Attorney of Ramsey county in 1884 and again in 1886, and in 1890 was elected judge of the newly created Second Judicial District. For eleven years he held that position and was elected to the supreme bench in 1900 and re-elected without opposition in 1906.

He was fraternally associated with the Masons and the Elks, being an honorary Thirty-third Degree Mason.

Honorable John E. Greene, President, Bar Association:

On behalf of the Bar Association of the State of North Dakota, I present the following resolutions, and move that the same be spread upon the permanent records of the court:

"Be it resolved by the Bar Association of North Dakota:

"In the death of David E. Morgan, for eleven years a justice of the Supreme Court of North Dakota, for seven years its Chief Justice, the State has suffered a great loss.

"As members of the Bar we have lost a sincere friend, and as citizens of the commonwealth we have lost the guiding light of his maturity and judgment in the settling of troublesome questions affecting the public welfare.

"As advocates at the Bar of the Supreme Court, we will long miss

and ever remember the great kindness of disposition and never failing patience with which he received our efforts.

"We regret the passing of the man of noble character, and the just and fearless judge. We regret that his life and official career could not have been prolonged, to the end that his influence might be felt, in the court over which he so long presided, in the settling of new and vexing questions certain to arise incident to the new thoughts and ideas so rapidly developing in our political and industrial life.

"The great wisdom of the greatest judges of our country he may not have possessed, but legal learning and breadth of thought sufficient to comprehend underlying principles, together with a broad sense of justice, a full grasp of large equities, and abundant common sense, guided him instinctively to the right, and contributed to the decisions in thirteen volumes of our reports, from which it will be said in the years to come, he was sound, able, and honest.

"Reviewing his twenty-two years of judicial experience, we do highly resolve to pay to his memory the tribute: With all his sympathies and love of humanity he was never so much the man that he forgot his duty as a judge, and with all his knowledge of law and precedent he was never so much the judge that he forgot his duty as a man."

In presenting these resolutions I cannot refrain from brief comment thereon. The resolutions, besides expressing the universal sentiment of sorrow and regret for the death of Judge Morgan, also express the composite judgment of the Bar upon the man and the judge. But to some there was vouchsafed the privilege of a closer knowledge of the man,—a knowledge which revealed his daily practice of those virtues, and disclosed the multitude of rare traits of character which combined and served to mark his public and official life and labors with a grace and rectitude to which all men yielded homage and respect.

There was something more than his personal virtues and his public service which makes it appropriate and just to honor and perpetuate his memory. He was the ideal American citizen. He revered the Constitution, as a citizen should, and his official oath to support and defend it imposed on him no new or added obligation. His respect for the law was demonstrated by his fearless administration of it, whether or not, in every instance, it conformed to his ideas of justice; and herein he set a noble example for his fellow citizens. So long as the statute

did not overreach the limitations of legislative power, fixed by the people in their Constitution, no matter how repugnant it was to his own sense of justice, his sense of duty as a citizen and as a judge forbade interpretation or construction which warped the law to meet the exigencies of the case. And so his judgments clarified justice under wise laws, and left the responsibility for unwise laws where it belonged,—on the shoulders of sovereignty itself.

His high office enabled him to teach, and his exemplary life embellished, the lesson of submission and obedience to the law, with faith that whatever might seem amiss therein would be remedied by the power that made it whenever the abuses under it were sufficiently revealed.

Such I conceive to be one of the highest essentials of good citizenship; such was one of the principles exemplified in his life and labors; and if this high Court could, by some supreme decree, compel each citizen of our commonwealth to shape his course of civic duty in conformity with the model of the life now ended, it would serve as a sheet-anchor for our ship of State against which the waves and storms of impulse and sedition could never prevail.

HONORABLE M. H. BRENNAN:

Where thou didst arbitrate, there Justice reigned,
Through struggles oft where force and fraud were rife;
And at the close of fierce forensic strife,
The ermine from thy shoulders fell unstained.

They falsely speak who say thou art no more;
Thy kindly spirit lights the darkest night,
Those eyes that lit the forum for the right
Smile friendly counsel from the other shore.

Farewell, fond, faithful friend of many years;
Bright angels tend thee on the distant way;
The hearts that once beneath thy spell were gay
Are bowed in silent grief too deep for tears.

HONORABLE A. G. BURR:

May it please the Court: In seconding these resolutions I consider it a privilege to be permitted to speak at this memorial service in honor of Judge Morgan. In our reflective moments, when we meditate on the permanent things of life, we have the growing conviction that the character and soul of the individual, with his impress of influence on the world around, are the enduring things,—not the ancestry, the position he may have attained, nor the wealth accumulated,—these are but the working tools of life which may enable a man to construct more largely and more permanently. Some may think that on an occasion like this, there is a tendency to fulsome flattery; yet it is hard to overstate the debt we owe to the men and women who rise above their fellows, and impress themselves on the character of their day and age. Take from our own experience the measure of kindliness, chivalric thought, and noble action which has come into our lives from the life of Judge Morgan, and how much poorer would we be. It is fitting, therefore, that in a grave, dignified, generous manner, befitting the man and his position, we should bear a loving tribute to his personality and influence; and, if in the different addresses reference be made to the same features, is it not proof that these are the predominating traits of character?

Canon Farrar, in his eulogy on General Grant, said: "Every true man derives his patent of nobleness direct from God." The sign manual of the king cannot give a man the knightliness of true chivalry and breeding, nor the "pith o' sense and pride o' worth." There must be that innate spiritual essence, which, permeating the whole being, is expressed in thought and deed. Judge Morgan possessed the true nobility of character required of Nature's noblemen and which placed him in the peerage of our state. To a great extent, man is permitted to fashion himself. Toil and difficulty but mold his character and nurse his greatness. The position which he occupies is both the arena in which he displays and enlarges his talents and the reward for the faithful discharge of duty. Judge Morgan was a splendid exponent of the principle that in a democracy the people will pass true judgment on the character of the man, and by their choice not only pay him the compliment of reposing confidence in him, but reward him for the capable, constructive work already done. His service to the

state was rendered during the constructive period when private interests and political jealousies seemed to touch all public affairs; yet through all the turmoil and struggle, he preserved that calm, impartial, unprejudiced spirit, which can come alone from strict fidelity to principle. No matter how bitter was the strife, nor how far reaching the issue, by his well-known integrity he maintained the confidence of the State, and this is not surprising, for he expanded with the opportunity. I cannot do better than quote from one of our nation's great writers: "The mind grappling with great aims, and wrestling with mighty impediments, grows by a certain necessity to their stature. Scarce anything so convinces me of the capacity of the human intellect for indefinite expansion in the different stages of its being, as this power of enlarging itself to the heights and compass of surmounting emergencies." To Judge Morgan, however, fidelity to principle was no task. As Pericles says: "The love of honor is the only feeling that never grows old," and so as the years went by, and the occasions came and went, his standard of action became so habitual as to need only an opportunity for expression. As a man meeting his fellowmen, his charm of manner was magnetic. With no ostentation and with no subterfuge, the natural tendencies of the heart were permitted full expression, and all the generous emotions of the soul came into play. The breadth of view which was part of his nature bred that tolerance for others, or rather that belief in the rights of another, which was so distinguishing a characteristic of his nature,—for habit becomes a mighty power,—and the realm of mind in which he dwelt contained no place for the mean and petty things of life. Never forward, he was content to permit character and merit to work their way, until, in all this State, I doubt if there was another man who had as wide a circle of sincere friends, with so little criticism. A Gladstone or a Bryan may magnetize a country, and by means of their talents, energy, and character create a multitude of enthusiastic friends, with undying attachments, yet enemies are aroused, and criticism is hostile. Judge Morgan's friends were created by reason of his mild, true manhood, and criticism disarmed because of the sincerity of his nature.

But it is as a judge he stood before the people. From the day of the birth of the State, almost to the day of his death, the people commanded his services in the application of truth and justice to the af-

fairs of men. He lived on no low altitude of thought, but on the mountain top, where the administration of law became to him but part of the mighty purpose of the Divine, and the strifes and contentions of his fellowmen, as they passed before him in the great panorama, afforded him a field for the display of Truth as revealed to him. Circumspect and careful in his bearing, for the higher the position the less liberty there is, his ambition was centered in his profession and his position. I believe he realized to a great degree the necessity of maintaining through all his judicial acts that spirit of justice and truth that approaches the Infinite, so that righteousness might flourish and truth expand. His treatment of the Bar is one of his most enduring memories. As a crude, embarrassed young lawyer, I appeared before him, practically an utter stranger; but his kindliness and sympathy and passion for truth and justice soon set me at ease, and I felt I was in the presence of one whose helpfulness of nature and kindly consideration would not permit the frailty of the medium to hamper truth. The unconscious dignity of manner was never sacrificed, and the air of justice was always present. To the young struggling lawyer, unfamiliar with the strange surroundings, embarrassed by the weightiness and novelty of his position, Judge Morgan always proved a real friend. This manner was not mere habit; but came from "the genial current of the soul," and as years rolled around the same friendly interest in the success of others still lived, with no forgetfulness and no jealousy.

I need not refer to the opinions he wrote while a member of this Court. They speak for themselves. Yet I cannot refrain from calling attention to them as the result of a sound mind. Only when the mind is unfettered can the reasoning be sound, and his beautifully impartial nature rendered him competent to bring sound reasoning to bear on the problems presented. But mere knowledge of right is not sufficient for this position, unless there is clearness of expression; and his opinions furnish us ample proof of the presence of this fundamental requirement. Lord Mansfield, on being presented with a set of Dallas Reports, gave expression of appreciation in words applicable to Judge Morgan's opinions. He said: "They show readiness in practice, liberality in principle, strong reason, and legal learning; the method,

too, is clear and the language plain." I believe all will agree that these words are clearly descriptive of Judge Morgan's opinions.

In measuring the civilization of a country I know of no better test than its obedience to law of the highest type. When people rule themselves, and have sufficient self-control to submit their controversies to impartial tribunals and abide the result, a high standard has been reached, and necessarily there must be some Court of final authority—some Supreme Court. It is said that "the Supreme Court is the conscience of the people,—the spirit and tone of the people in their best moments." This, it seems to me, expressed Judge Morgan's estimation of the high and honorable position he filled. He felt the responsibility, and rose to the position. As the solid rock sits secure and immovable in the ocean, lashed by the storms, so sits the Supreme Court firm and steadfast in the turbulent sea of life, placed there by the people, as the ever present monitor proclaiming their liberties even when threatened by themselves. There is no liberty without law; there is no action that is not the result of following some law. The mob, frenzied by passion, and determined to wreak vengeance on some prisoner, is following law,—an elemental law. The swollen Mississippi rushing over its banks, carrying destruction and death, is following the law of gravity. The Supreme Court is the tribute of a free people to the supremacy of the law believed to be founded on immutable principles, and as a member thereof Judge Morgan typified the ideal judge. Sometimes it may be unfair to judge a man by his works that we see. Character and merit are not always so clearly expressed that we may safely form conclusive opinions. We live too close to the events sometimes, to draw accurate conclusions, yet we feel assured that as "Time dissipates to shining ether the solid angularity of facts," and actions are carried into the past, the irregularities pass from view, and human frailties and weaknesses disappear—the marks of the artist's brush—leaving the splendid picture of an enduring life. So the memory of Judge Morgan remains with us, with his works as his monument to ennoble life and to set a mark of attainment not easily surpassed.

As we step from the shade of tender melancholy which these memorial exercises throw around our spirits, into the clear sunshine of hope and inspiration radiating from the sun created by the memories

of a well-spent life, and recall the sudden termination of a life at the close of his public career, how fitting is the expression of the great Apostle: "After he had served his own generation, by the will of God fell on sleep and was laid unto his fathers."

HONORABLE M. A. HILDRETH:

In the physical world we live only as we die. The moment we cease dying, that moment we cease living. But notwithstanding the body perishes and becomes traceless in the grave, we yet live in the memory of our friends, and they who are great enough live in song and story, but all have a history in this life, either for good or for evil. No man lives altogether to himself alone. He exerts an influence on his fellow men which will last sometimes until the last syllable of recorded time.

Manly virtues when found in men are God's sublimest truth set to music of human faith and human hope. These virtues live after death. They dispel the tempest of the fear of the all conquering Enemy, and lead each of us into the summer of the world.

Life is a great battle, a struggle between conflicting passions, a war between good and evil. These contending forces are the mighty armies which seek to destroy youth, leave scars upon manhood, and seize upon old age with the grim terror of the merciless rider upon his white charger.

But death does not end all. There comes a time when the record must be made up; and while it is true that impartial history of the deeds and records of men comes only after death to speak to the coming generations, yet after all it becomes a question of the honest performance of the duties of this life. Not all men are born to be great; not all men occupy position and power; but each, as an atom in the Mosaic of the universe, fills his niche and in his time plays his part. A distinguished jurist once said that the test of true greatness is not ability merely, but it is ability combined with opportunity correctly employed for the good of our fellow men.

There is no possible scale by which to measure character in life, much less in death. Sentiment commands, in considering the lives of those who have passed away, to eulogize their characters and to give expression to all their virtues. But it must needs be said that if we

are just to truth we shall only speak the truth, because no life can ever wholly be redeemed from the pitiless scorn of dishonesty and infamy. Therefore when we offer our tribute for the dead, we should speak calmly, justly, and, above all, truthfully.

Keeping this great fact constantly before us, I am here to testify as a friend of the late Chief Justice David E. Morgan; to speak briefly of his worth as a judge, to lend my tribute of praise to his honesty, and I do not mean that common honesty which is a disgrace for any man not to have, but honesty in the highest, noblest sense, because no suitor at the bar where Judge Morgan presided, even though he was defeated, could ever deny that he did not receive at the hands of this judge the full measure of justice that was his due.

The State of Wisconsin holds the sacred remains of our friend, but North Dakota is the richer because he has left to this State the legacy of his life's work. For nearly a quarter of a century he served the State in the office of District Attorney, District Judge, and finally as Chief Justice of the Supreme Court. The work he wrought out here in molding the jurisprudence of this young State will last throughout the coming history of this commonwealth. In every place that he filled, he earned it by honest human effort. He was never a self-seeker for advancement. He loved the law and believed with his whole heart in fidelity to the cause of justice. He believed in the stability of this great department of government, and he could truthfully say by every word and by every deed of his life that he felt, like the great Chief Justice Marshall, that "the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or dependent judiciary." Judge Morgan believed that upon the courts of the State and Nation rested the liberties of a mighty people, and he ever kept in mind the cardinal principles so necessary in a free government, that not even a judge is above the law, but that he is only a minister in the enforcement of the law. His heart was in his work. He had reached step by step the pinnacle of judicial honor, but he realized that he owed a like duty to those who had honored him with a position of great trust and power. He was, therefore, a hard worker, anxious above all things to reach the haven of a correct decision in the administering of justice. Upon the Bench he was always dignified, courteous, kind, firm, always a judge. If he asked counsel a question

during argument, it was to the point, and left no sting. And now, as one reads his opinions that he has given, how clearly do they read! There is a straight line between his premise and his conclusion, never a crooked one. Judge Morgan was a true servant of the people of the State, conscientious, faithful. It is hard to give him his just due.

But, aside from being a judge, he did not forget that he also had imposed upon him the duties of true citizenship. He was interested in the welfare of others. He had that great quality which is always a blessing to any man, a solemnity of faith; and he mingled with the sturdy citizens of this commonwealth, with a pride in their advancement, and with full confidence in the stability of the institutions that belong to the common masses.

He loved duty, and with a serene and just purpose he went about his task. Always a broad man in his sympathies, the poor, the rich, the learned, or the unlearned, at this bar of public justice received, so far as it was in his power, their just dues in the forum of human jurisprudence.

He loved this great country, and every emotion of his heart beat for its advancement and its glory; and when in time of war his personal friends were clear across the seas upholding the supremacy of the Republic's laws and the honor of her flag, he did not forget to give them an encouraging word of sympathy and a heartfelt expression of patriotism and love for country. He had a keen affection for this State, and looked out upon its broad prairies ripening with the golden grain of harvest, with an ecstacy of youth and oftentimes with that adoration which comes only from the depth of a great soul. We might sum up his character, with honesty of purpose, sincerity, wisdom, generosity, and justice, pity and power, all joined and blended into a noble character, willing to be consecrated to the performance of every just and honorable duty.

When disease had fixed upon him, and he realized that his days of usefulness to the commonwealth were so encumbered as to prevent him from giving back that service which he loved as a compensation for the honor that the citizens had bestowed upon him as a judge, he tendered back to this commonwealth his commission, and sought a distant clime in a sister State, hoping that he might regain that which he had lost, good health and ability to render future service to his fellow

men. But it was not to be. The hand of death was upon David E. Morgan, and above the strife and the din of the world's turmoil, above the prejudices and contests of conflicting emotions, above the hand of sympathy of those who were near and dear to him, he heard the summons of the Master, and prepared to enter the boundless field of universal equity, that field where the great and the powerful must lie down with the just and the unjust.

But now as we look back over the life of this good citizen, this kind lawyer, this eminent judge, let us say as it was said of one of old, that he ever obeyed the injunction laid upon the judges of Israel by their great Lawgiver: "Ye shall not respect persons in judgment, but ye shall hear the small as well as the great. Ye shall not be afraid of the faces of men, for the judgment is God."

May it please the Court: This is the tribute I ask to be placed upon the record of this Court in honor of one who has heard the Master's summons; but let us believe that the Master had inscribed upon it, "Well done, thou good and faithful servant, enter thou into the joy of the Supreme Ruler of the world, the joy of thy God."

HONORABLE A. G. DIVET:

A memorial exercise is always an occasion of sorrow and of satisfaction,—sorrow, because of the loss of which the occasion is born; satisfaction, in the knowledge of a memory so cherished and respected as to bring together a band of mourning friends.

There are those here to-day—and there are others scattered throughout the State—who are paying tribute to the memory of Judge Morgan, whose thoughts and words reflect sentiments, the growth of an acquaintance of many years. They tell of associations in the days before they had grown old together. On this occasion I wish to render the tribute of the younger members of the Bar of this State. I always entertained an admiration and affection for Judge Morgan. To us younger men, it has always seemed as though he was interested in us; that he took pains to smooth the rough places in practice; that he was ever ready with a kindly suggestion to prevent a wrong step that would require retracing. Our mistakes he seemed to look upon with indulgence and toleration, setting us right with a way of kindness we cannot forget.

I knew him first as a District Judge, called to preside over a court in which I occupied the humble position of reporter. We worked together for several weeks; and, in that time, I learned to know, to admire, and respect him for his sterling character and large, full manhood.

Ere I began the practice of law, he was on the Supreme Bench, and my first case in this Court was argued before him.

As I recall my visits to the capitol, it seems to me that the door of his chambers stood always open, and that I never passed it without receiving his hearty greeting and friendly beckon in. My experience was not different from that of other young men in the profession.

And now he is dead; and we are here to do him honor, in his memory. I do not believe these demonstrations of sorrow are mere idle expressions of politeness or duty; but, feeling as I do, it seems to me that every heart within this room must beat with a sadder throb because of the taking away of this neighbor. As at the setting of the sun we unconsciously draw our garments closer to shut out the possible chill of evening, so, at the going out of the light of the life of our friend, we feel the chill of loss to the community.

On an occasion somewhat similar to this, Mr. Ryan, afterward Wisconsin's great judge, delivered himself of the beautiful philosophy, "We love the dead because they are not dead; and they love us because we shall never die." "Were it elsewhere lacking, here is nature's proof of man's immortality; for there is no room in nature for love of the inanimate, yet our love goes beyond the grave."

The thought was a true one. While love may be said to exist among the lower animals,—while the mother beast has an affection for her cub and the mother bird for her hatchling, it lasts only through life. Dead, the beast or bird is left alone and uncared for by its kind.

While he did not live to old age, our departed friend did not die too young to fix the imprint of his life on the world. The length of the day is measured by its fullness; so, too, may be measured—in part, at least—the long day of life.

The idea of life going hand in hand with sunshine and day, while death keeps step with darkness and night, has always appealed strongly to my imagination. We watch the sun as it rises in the radiance of morning, and mounts through the passing hours, until, at midday, it

shines down upon us in all the strength and vigor of perfect day; then slowly down the incline of afternoon until it passes away and leaves the world in darkness. So, we see the rosy dawn of infancy; the dancing, laughing morning of childhood; the forenoon of youth; the midday of manhood; then the declining hours of age, the sunset of life, and the dark blackness of the grave.

To the unthinking, there is something terrible about this passing away; and, as a child shrinks back in terror from the darkness of night, so do they shrink from the hour of death; but, with the philosopher, it is not so.

Could a child be born, grown to manhood, equipped with a fully developed reasoning mind and mature appreciation of the beauties of the world, all in the span of a single day, he might well be excused did he shrink back in horror at the approach of night or cower before the hidden mysteries of the shades of darkness as they came creeping along, shutting from sight one by one the things that, to his eyes, made up the all of a beautiful world. Well might he quake and tremble at the uncertainty as to what lay hidden by the impenetrable curtains of blackness that shut him out from the life he knew.

Well might a beautiful, loving soul, who has spent the hours of a summer's day in contemplation of the wonders of nature, cry out in alarm at the coming of night, shutting from sight the beauties of the world, and leaving in their stead solitude and darkness, were it not for the fact he knows that, when the splendors of sunlit-day are hidden, the glories of night will appear,—that under nature's law of compensation nothing will be taken away but that something will be given its place to fill. It has well been said: "The night hath glories that the day can never reveal." It tells of the grandeur and immensity of nature,—it shows the immeasurable extent of the universe; heaven's vault filled with stars, each a moving world, driven on and on through space by an unknown and unknowable force for an unknown and unknowable purpose.

The night tells us, as the day never can, of immensity of solitude, of mystery and eternity. As man has come to know these things, and to understand that the day does not hold all that is worth the knowing and the seeing, he awaits the coming of the night, strong in the faith that, while it is a change, it is not the end.

So it is with life, for life is but a day. When the heathen savage came to die, he saw but shadows approaching to shut him out from that which he had known; but, to the man possessed of all the lights of reason and intelligence, who knows of the working of things eternal, it is not so. When he sees the end of his day on earth, and sees glimmering the last rays of the light of his life, he knows there is something more which, while he does not understand it in full, causes him to pass peacefully out of the light of day into the shadows of evening, strong in the belief that the night of his death holds glories that the day of his life has never revealed.

So, as we gather here for the last time to pay tribute to the brother who has already passed from the light of day into the mysteries of the Great Beyond, we console ourselves with the knowledge that the closing of his eyes on the beauties of the day spoke not of the end, but of the passing to a higher and better condition that we know not of.

In the light of this knowledge, why then should we grieve at all? Men are measured and judged by their deeds. Upon their achievements depend the admiration and respect of their fellow men. The idle, the slothful, the inactive, find no places reserved in the halls of the world's esteem. God made men to progress. He made them to build up a better and higher civilization, and to help extend its influence over the earth. He made them to render what service they can to their community, their State, their country, and their fellow men. In these things Judge Morgan had his part. He has written a long line of decisions, and participated in many more, that have helped to settle not only the law, but the policies of this great State for years and years to come; and, if none of his writings are entitled to a place among the masterpieces of legal literature, none of them can be pointed to as not entitled to respect or tending to lower the standard of a court of good repute.

I freely predict that, as time goes by, the decisions of Judge Morgan will grow, and not fall away, in respect; and that, ere a score of years have passed over our heads, they will be cited and commented upon as among the simplest and soundest pronouncements in our reports.

It may be well said of a man—who has lived beyond middle life and passed away leaving a monument of public service such as this,

and a host of friends such as to-day cherish the memory of our brother —that he has lived well, and not in vain.

HONORABLE TRACY R. BANGS:

May it please the Court: I crave but a few minutes of your time in which to join with yours my efforts, feeble though they may be, in writing this day's record of love and veneration,—a tribute to the memory of a distinguished citizen, a noble man, a sincere friend.

Words are puny things at best; but it is not until one attempts to express the sorrow incident to the loss of such a man as David E. Morgan, that one becomes fully conscious of the utter inadequacy of human language to give voice to the feelings.

He was one of the first men with whom I became acquainted upon coming to the territory of Dakota. He was then a young man with but little experience in the battle of life, yet the influence of his strong mind, great heart, and noble soul was felt on every hand. I sought and gained his friendship; and I am sure you will excuse this personal reference, when, with pardonable pride, I say that from the time of our meeting to the day of his death there was no break in our friendship.

As the days and years rolled on, I observed him from the view-point of a fellow practitioner,—of a practitioner before him on the District Bench, and as a practitioner before him on the Supreme Bench, as well as from the view-point of a fellow citizen. And to-day, after all of these years, looking back and searching industriously the record, I am unable to find that there was ever recorded an unworthy act or thought on the part of our beloved friend.

It is not for me, in the brief time vouchsafed, to speak in detail of his life. Had I the time I would dwell upon the faithful labor performed by him as judge of the District Court, in what was known as the Devils Lake District, comprising in area a veritable empire. At the time of his election to the District Bench, there were but few railroads west of the Red River Valley. The counties of his district were large, and county seats widely separated. The task of carrying justice to the people of such a district would have appalled many a man. But nothing ever deterred him when duty called. Summer heat, winter storms, and the beautiful Indian summer were all the

same. He was as ready to go into the one as the other, if his work called him there.

It is given to but few men to enter upon a judicial career so well equipped as he. With a clear, logical mind,—with firm convictions, yet an ever present desire for further enlightenment,—with a profound knowledge of the law, and a keen intuition and knowledge of human nature,—with a wealth of charity and a great ambition to do and be right, he approached near to the ideal judge.

As a trial judge his reputation spread throughout the State, until the people demanded that his service should be given in a bigger and broader field, and he was elevated to the Supreme Bench. Of his particular service there, his biographers will speak. Of him generally, I can say that there never was one, and in all probability there never will be one, who will bring to the discharge of his duties as Supreme Court Justice more of the qualities that go to make a just judge,—that go to build up a court that will stand the scrutiny of all the people,—that go to establish, in the minds of the people, that regard and reverence for the decisions of the Court, which is so necessary for its life, than was brought to his work by Judge Morgan.

Had all the judges been endowed as was he, the thought of judicial recall would never have developed. Were the purpose of these remarks the placing upon record the individual acts entitling the name of Judge Morgan to a place high upon the walls in the great Hall of Fame, the time allotted by the court in which to complete the record would be too brief to recount even the more prominent ones. I will, therefore, but mention the benefit of his influence upon the court, and upon the judicial history of the State at that most important time while the formative stage of judicial development was still on, when his moral courage, sound judgment, and profound legal knowledge, so generously applied, marked a proud period in the upbuilding of the commonwealth.

With all of his ability, with all of the successes that came to him through life, he never lost that modesty of spirit shown in an entry in his diary of November 8, 1870, which I have been privileged to see since he left us. It opens with these words: "To-day is an eventful day in my life's history. To-day I am twenty-one years of age. To-day I am supposed to be a man. To-day I step into a wide world, feel-

ing my own weakness and incapability of assuming the responsibilities of a man."

And, as one reads on through this entry, and notes his spirit of love and affection for his parents, his intention to comply at all times with their desires, and to do all things to administer to their happiness, as well as his determination "to accoutre himself for the conflict, and to meet the troubles of the world resolutely, and to battle the temptations of sin obstinately," it is apparent that in his case the boy was truly father to the man.

His modest and retiring disposition precluded the idea of self-advancement, and every honor conferred upon him was because of recognized merit.

It has been said: "Death opens the gate of fame, and shuts the gate of envy after it." In reality death shuts the gate of envy, and fame is seen with vision cleared of the shadows of petty jealousies. In his life, Judge Morgan enjoyed that transitory thing, called fame, with fewer of the shadows of envy than has fallen to the lot of any man within my ken. While the love that was given him by his fellow men was such as but few men may hope for, and while his labor as a man, a jurist, and a judge will make a lasting place for him in the annals of the State, yet the sweetest memory—the highest prized fame, and greatest comfort to friends who are left—is the knowledge that he himself, in the exercise of those wonderful traits of mind and heart that endeared him to all the world, erected a magnificent monument of love and honor that will endure forever, and stand as a rule of life for future generations.

The end has come. He has answered the summons. We who knew him best know that as he approached the hour of rest, looking with calm eyes into the Great Beyond, he could well say: "Yea, though I walk through the valley of the shadow of death I will fear no evil, for thou art with me. Thy rod and thy staff they comfort me."

For the life he lead, the friendships he displayed, the unfailing kindness, sympathy, and charity that he at all times bestowed, the bright flowers of earth's existence that were scattered by him along the way, must bring their own reward; and we know that he has received his. While he was not permitted to live out the allotted time, yet it was given

to him to do much more for mankind than is done by most men in the full measure of life.

He is gone. And as he marched down the western slope, the lengthening shadows cast behind, as he faced life's setting sun, showed none of the imperfections of unworthy thoughts or deeds, but wrote into the history of the world the record of a well-spent life.

Bravely he approached the ferry to which we all are driven, and as that mysterious bark, driven by the silent boatman, and guided by the hand of the Lord of Hosts, crossed the bar, and he went out to sea, we know that he met his Pilot face to face, and somewhere on the beautiful shore of that other world he awaits our coming. We must travel a little longer the shadowy paths of a darkened world, to him it is day-break everywhere. Yes, he has left us, and if tears could bring him back, how they would rain,—but we cry in vain. He has gone from this world forever, but we will not say, "Good-by," no, not "good-by." only "Goodnight," for in a little while—just a little while—we will meet him in Paradise.

HONORABLE N. C. YOUNG:

It was my good fortune to be a member of this Court when Judge Morgan came to it from the District Bench in 1901. In common with others, I had known of the great respect which his administration of the law had commanded and of the marked affection in which he was held by the members of the Bar and the people of his district. But I did not know him then as I came to know him during the succeeding six years of our association as members of this Court. That was the beginning of an official and personal companionship as intimate as men can enjoy, and of a friendship which continued to the end.

What we do or say now will have little or no weight in fixing the rank which he will finally hold in the judicial history of this State. The reputations of those who serve in legislative or executive offices depend largely upon what others say of them, but this is not true of those who serve as members of a court of last resort. Appellate judges make their own records, and their written opinions are their monuments. If their opinions are carefully considered, well grounded, and sound, they will stand the test of criticism and of time. If they are

not, time will disclose and correct their errors, and pass final and correct judgment upon those whose names they bear.

Judge Morgan has written his own record and has erected his own monument. While it is true that the decisions of this Court, like those of all orderly appellate courts, represent the combined opinions of the several members of the Court, as they are wrought out in conference and deliberations, still it is also true that the writer of the Court's opinion carries into it a measure of his own character and individuality which marks it as his own. I will not attempt comparisons. It is sufficient to say that of all the opinions written by Judge Morgan, and they run into the hundreds, not one, I believe, has been reversed, modified, or even seriously criticized. The statement of this simple fact expresses more than any words of praise which I might utter.

His excellence and power as a judge was due, I think, to his strong sense of justice and duty, coupled with untiring industry and an open mind. His mind was always receptive, and never combative, in his view, attorneys were the representatives of their clients and spoke for them, and it was his duty to hear them fully. For this reason he welcomed oral arguments and gave them his undivided attention. He made no interruptions, and did not lose their effect by engaging in mental excursions while they were being presented. In all cases assigned to him for an opinion, he studied the record carefully, even laboriously, until he had an accurate knowledge of every fact upon which the Court's decision might turn. He studied the briefs of counsel with the same painstaking care, mastering their contents, and carefully satisfying himself as to the propositions for which counsel contended, and in case of doubt he not infrequently called a council of his associates to the end that he might not misjudge a fact or err in stating counsel's position, and at all times he preserved an open mind.

This method involved much labor, but it resulted in producing opinions which were based upon the facts contained in the record, and in opinions fully and fairly deciding the questions which were presented for determination. It also resulted in a well-grounded confidence not only on his part, but also in his associates, in the conclusions which he had thus reached.

In framing his opinions no thought of winning popular favor or of avoiding popular criticism, entered his mind. Personal consequences

had no influence with him. He had a close, personal acquaintanceship with the members of the Bar and the citizens of the State, but this did not embarrass him. There was that about him which gently but firmly forbade all infringements upon judicial propriety even by those who were closest to him. In his judicial work he knew neither lawyers, litigants, nor friends. He knew only his duty, and that duty he kept constantly in view. He framed no apologies in his opinions for the conclusions he announced. It was enough for him to feel and know that they correctly interpreted and applied the law. His opinions will stand as monuments to his wisdom and worth as long as the State endures. His personal character and devotion to duty will be subjects of emulation for those who come after him. When shall we see his like again?

It is hard for those who were intimately associated with him to realize that he has gone. And yet we saw the shadows fall. We knew the night had come, and with unspoken grief we followed him to the river's brink. The silent Ferryman was there. Unseen, he took him from our sight—out into the darkness—toward the farther shore. And this is death! We shall not look upon his face again, neither shall we hear his voice. No! this is not death! This is the beginning of life,—eternal life. Such men do not die! He will live in our lives—in the lives of the generations to come—in the life of the State he loved so much and served so well—in the sweet memories of friendships and companionships, of those who knew him and loved him—his will be the immortality of the just.

HONORABLE EDWARD ENGERUD:

Judge Morgan was one of the most lovable characters I ever knew. That I had the privilege of close companionship with him for a considerable period of time I count one of my most pleasurable memories.

If I were to name his most prominent trait, I would say that it was *genuineness*. There was absolutely no veneer in Judge Morgan's make-up. He hated display and pretense. His modesty and simplicity were the genuine outward expression of his uncompromising honesty. He was as honest with himself as he was with others.

He could not dissemble, either in word or deed. He could not resort to sophistry or flattery himself, nor could he be deceived as to the real

merits of a controversy by sophistry or flattery or appeals to prejudice or sympathy.

Although he was well read in law and along general lines, and had a firm grasp of the principles of jurisprudence and was well informed in a broad way; yet he was not what one could justly term a learned man or a scholar. He took no interest in, but rather scorned, the subtle refinements in which the bookish lawyer finds delight in the study and practice of law. He looked upon the rules of law and legal procedure as means by which to administer justice amongst practical men in everyday life. He never lost sight of the end; and never subordinated the end to the means.

Consequently the substantial merits of a case were always uppermost in his mind, and he was not led astray by technical quibbles. His genuine honest mind repelled anything that savored of evasion or circumvention.

He was a most delightful companion. He was frank and candid in expressing his thoughts and views; but he was so kind and courteous; and was so charitable in his disposition, that he was never rude, however widely or strongly he might differ with you.

He had a keen sense of humor wholly free from coarseness; and though he was modest almost to the point of diffidence, and shunned formal functions, he loved the informal converse and companionship of those he knew.

I never heard him utter an unkind or intemperate word against another man, however much he might disapprove of his words or conduct. He was frank to express his disapproval if there was occasion for it; but he did it without apparent malice or bitterness. He did not reach conclusions hastily, but, having formed his conclusions, he was not easily shaken. He was a man of strong convictions and a high sense of duty; and there was no guile in him.

He was a genuine noble man.

Honorable Burleigh F. Spalding, Chief Justice:

The estimation in which the services of a public official are entitled to be held depends not more upon the ability displayed in his conduct of public affairs, than upon the honesty of his purpose, the integrity of

his character, and the faithful application of his powers to the performance of his duties.

The late Chief Justice Morgan met the highest expectations of his friends by the ability displayed in the opinions he wrote while a member of this body, and in his power of discrimination in the application of legal principles to the facts before the court.

His efforts were marked by the greatest industry and a keen sense of justice. While his opinions displayed a logical mind, he recognized the fact that justice is not always reached through the narrow channels of a syllogism or even by mathematical demonstration; that the safest guide in the search for justice by a normal mind is the exercise of an intuitive sense of the elements of justice, and that the surest way to its administration is by generally following courses which long-continued experience have shown to be reasonably certain of attaining the end, rather than by experimenting in untried fields or attempting it by following devious and unknown paths.

Judge Morgan was possessed of a keen apprehension of right and wrong, and was at all times impelled by the belief that justice must be administered in accordance with the principles of right and wrong. With him the determination of the law and the facts was an impersonal matter. Justice was blind to the parties to litigation. He sought diligently for the principles applicable in each case, and having found he applied them without fear or favor.

His opinions are models of simple English,—clear, concise, and not beyond the comprehension of the average person. On their perusal the reader may at once perceive what question was before the Court, and how it was decided.

No higher proof of his qualification for a judicial position could be suggested than these facts. They include all suggestions of his integrity and moral worth. Without these qualities, service like his could not have been rendered.

Members of the bar who have spoken have entered, in greater or less detail, upon the consideration of his traits and qualities of mind and character, alike as a citizen, as a trial judge, and a member of the court of last resort. I shall not dwell at length upon them.

There is, however, one quality of his character which should be emphasized, not only in justice to him, but as an inspiration to others, and

particularly to the youth of this State. I refer to two elements of courage which he possessed. Judge Morgan did not decide cases with any reference to the popularity or unpopularity of the decision. He never sought the acclaim of the populace. He possessed the courage necessary to administer justice regardless of numbers or majorities. I have heard him say that he enjoyed writing unpopular decisions. By this it must not be understood that he meant that he intended to have them unpopular, but that he felt an inspiration from the courage necessary to write such opinions, and that the fear of criticism did not swerve him from the paths of justice.

Judges are quite as subject as other people to the temptation to follow the lines of least resistance, and moral courage of a high degree is necessary to enable them, in cases on which public sentiment is strong, and perhaps excited, to ignore it, if need be, and adhere to unpopular duty. While sensitive to the opinions of others, and cherishing the approval of friends, Judge Morgan had the courage born of a mind which recognized that the approval of an enlightened conscience is the only earthly approval that is certain to withstand the assaults of enemies and the flattery of friends.

Ordinarily it would not be in good taste to refer on an occasion of this kind to one's physical infirmities; but I trust I may be excused for doing so in this instance. Without it the sterling qualities of mind and soul exhibited by Judge Morgan can never be appreciated by those to whom he was a stranger. As is known to most of you, he suffered I know not how long, but nearly his whole life, from great physical infirmity. I have often marvelled at the courage which he displayed in pursuing relentlessly and fearlessly the work before him in the face of such disability,—disability far exceeding that suffered by many meaner souls who stand on street corners soliciting public charity, or who acclaim that the public owes them a living without effort on their part.

I apprehend that for years, not a day, or an hour, passed that he did not suffer severe pain. It was only with the greatest difficulty that he walked a short distance, yet I never heard a complaint from his lips nor a reference to his infirmity or suffering. He seemed to shrink from making or hearing others make reference to it, and to appreciate that

a noble soul can only endure affliction patiently, and while enduring it, perform the best service that his faculties permit him to perform.

In spite of his affliction he did a man's work during his whole life. Without courage of the highest degree, without a fortitude born of noble aspirations and divinely inspired, he could not have done this.

He served on this Bench long after his associates felt that he was inflicting upon himself unnecessary pain, and perhaps shortening his life by doing so. He dreaded to lay down his duties and his work, and only did so when advised that it was imperatively necessary.

Many people seem to think that the occupant of a judicial position necessarily becomes so immersed in his books and absorbed in his search for truth that he must lose touch with the outside world.

It is to be regretted that the attitude of some judges appears to justify this belief. Like those in other positions, the heart of the judge who permits this to occur soon grows cold and at length freezes. It ceases to keep time to the pulse-beats of the world, and no longer exhales any of the fragrance of human emotion or sympathy.

Judge Morgan at no time permitted this condition to afflict him.

His was one of the most kindly natures,—neither suffering, nor official duty ever seemed to diminish his charity, his good will, or his kindly interest in all human kind. He was not prone to criticize, but to commend; he did not discourage, but always encouraged, worthy effort. The grip of his hand was one of cheer and encouragement.

He possessed no jealousies, and as far as intimate association with him could disclose, no heart burnings. He accepted life and duty as they confronted him, and at all times strove earnestly to make the most of his opportunities.

Others may serve the state who are quicker to perceive, but none will ever occupy his chair whose judgment in the performance of official duties will be more sure, and, when reached, more sane, than was the judgment of David E. Morgan. His resignation was a loss to the state which the members of the bar alone are competent to appreciate, but the loss by death of a high-minded, conscientious, faithful citizen, be his position high or low, can, in some sense, be understood and appreciated by the lowliest person.

His associates keenly regretted the loss of his sane counsel, his can-

did discussion of legal questions, his ever present smile, kindly word, and sympathy in all the duties devolving upon the Court.

The public, the bar, and the bench respected, esteemed, and loved David E. Morgan, not more for his faithful service than for the many and sterling virtues of heart, mind, and character which, alive, he possessed; and dying, the memory of such qualities should be cherished.

The resolutions which have been presented will be spread upon our records, and this Court will now stand adjourned until 10 o'clock tomorrow in honor of his memory.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

COTTON v. HORTON et al.

(132 N. W. 225.)

Mortgage — notice of sale — publication for number of weeks.

1. Under chapter 38, Sess. Laws (Dak.) 1889, publication of a notice of real estate mortgage foreclosure sale upon any day of the week was a sufficient publication for that calendar week, which commenced the previous Sunday morning, and a similar publication upon six such successive weeks next prior to the sale was sufficient notice of the sale, provided the several publications had been at least five days apart. The case of Finlayson v. Peterson, 5 N. D. 587, 33 L.R.A. 532, 57 Am. St. Rep. 584, 67 N. W. 953, is a construction of the law as it existed prior to March 8, 1889, the case at bar construes the law in force from March 8, 1889, to January 1, 1896, and the case of McDonald v. Nordyke Marmon Co. 9 N. D. 290, 83 N. W. 6, in an interpratation of the law as it has stood since January 1, 1896.

Champerty — deed by one out of possession.

2. Deed in this case was given by one out of possession, and who had not received the rents or profits from the premises for more than a year just previous to the execution of the deed. *Held* void, as against one in possession, under color of title of a foreclosure sale, and the possession of a tenant, or the possession of a tenant of a prior owner, *held* to be the possession of the defendant.

Mortgage — abandonment of premises to mortgagee — estoppel.

3. A mortgagor who for twenty years after a foreclosure sale has abandoned the premises to the mortgagee cannot assert title in a court of equity, and this estoppel applies to persons claiming under such mortgagor, through such abandoned title.

Mortgage — payment of, as condition of quieting title.

4. The doctrine that one who seeks equity must do equity will compel the payment of an outlawed mortgage as a condition precedent to the quieting title in the mortgagor.

Opinion filed May 27, 1911.

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

Action by Fred H. Cotton against J. E. Horton and Henry W. Stevens. Judgment for plaintiff, and defendants appeal.

Reversed, with directions to enter judgment for defendant Stevens.

Armstrong & Cameron (*John H. Perry* and *George R. Krause*, of counsel), for appellants.

George W. Lynn, C. C. Coventry, and *H. C. Lynn*, for respondent.

BURKE, J. This is an action in equity brought by the plaintiff to quiet title to a quarter section of land in Emmons county, North Dakota. The facts were stipulated in the court below, and from such stipulation it appears that in September, 1884, one Mary A. Packer, being then the owner, mortgaged the said premises to one Dudley. Default having occurred in the payments secured by the mortgage, foreclosure was made under power of sale in said mortgage contained, and upon the 10th day of August, 1891, the premises were sold and bid in by the mortgagee, who, in the year 1903, conveyed the same to the defendant Horton, for full value. Horton, later on, deeded to the defendant Stevens. Mrs. Packer paid nothing upon the mortgage debt after the year 1890, and the taxes have been paid by these defendants or their grantors since the year 1885. Mrs. Packer removed from the premises following the foreclosure, and has been a resident of the state of Montana since the year 1895. She had received no rents or profits from the premises for a year prior to the quitclaim deed given to the plaintiff in the year 1907. This plaintiff claims title under a quitclaim deed from Mrs. Packer, which recites a consideration of $1 and other valuable considerations. The mortgage debt and the taxes paid by the

defendants are still unpaid, and neither Mrs. Packer nor Mr. Cotton offers to pay them. The premises is untilled land, but the defendants and their grantors have had possession through their tenants, and have collected rent therefrom since the year 1900. The foreclosure sale is conceded to be valid in all things, excepting that the first publication of the notice of sale was made upon Friday, July 3, 1891, and the sale was made upon Monday, August 10, 1891, thirty-eight days later.

1. Plaintiff contends that such sale was absolutely void, because the notice of sale was not published "for six successive weeks" (forty-two days), and relies upon the holding of this court in the case of Finlayson v. Peterson, 5 N. D. 587, 33 L.R.A. 532, 57 Am. St. Rep. 584, 67 N. W. 953. There is this important difference between the Finlayson Case and the case at bar: The Finlayson sale was made in the year 1885, while this sale was made in the year 1891. In the interim, chapter 38 of the Laws 1889 was enacted, reading: "Whenever in any act or statute of the territory of Dakota providing for the publishing of notices, the phrase 'successive weeks' is used, the term 'weeks' shall be construed to mean calendar weeks, and the publication upon any day in such weeks shall be sufficient publication for that week, provided, that at least five days shall intervene between such publications, and all publications heretofore or hereafter made in accordance with the provisions of this act shall be deemed legal and valid."

We believe the plain reading of the first part of this chapter is that a publication upon any day of the first week of the "six successive weeks" should be sufficient publication for the entire calendar week, commencing Sunday morning. A similar publication for six successive weeks would satisfy the law. The sale might be held upon the first week day of the seventh week. In the case at bar, the publication upon Friday, July 3d, was publication for the entire calendar week beginning June 28th and ending July 4th; publication on July 10th would be sufficient publication for the week beginning Sunday, July 5th, and ending Saturday, July 11th, the second successive week. The sixth successive week began Sunday, August 2d, and ended Saturday, August 8th. The sale took place Monday of the following (seventh) week. Respondent argues that said chapter was enacted to settle a dispute that had arisen as to whether notices printed inadvertently upon different days of the several weeks were valid. We see no reason why

the legislature should not intend to settle both questions at the same time, and it is our conclusion that they did so intend.

The Finlayson sale, as we have said, was made in the year 1885, but was not presented to this court until about the year 1896. This court was therefore aware of the passage of chapter 38, Laws 1889, and discusses said chapter fully in the opinion. After setting out both sides of the controversy, the court contents itself with holding that said chapter was not retroactive, and could not apply to a sale made before its passage and approval. It is therefore apparent that the status of mortgage foreclosure sales made between the 8th day of March, 1889, and the 1st day of January, 1896, has not been heretofore passed upon by this court; the cases of McDonald v. Nordyke Marmon Co. 9 N. D. 290, 83 N. W. 6, and Grandin v. Emmons, 10 N. D. 223, 54 L.R.A. 610, 88 Am. St. Rep. 684, 86 N. W. 723, being an interpretation of the law as amended by the legislature of 1895, and as it stands to-day. Rev. Codes 1895, § 5848; Rev. Codes 1905, § 7459. We hold, therefore, that the sale in the case at bar was upon sufficient notice, and is valid, and that the defendant Stevens is entitled to a decree quieting title to the premises in himself.

2. Although not necessary for a decision of this case, we will pass upon three other points fairly arising upon the record of this case. We conclude that the plaintiff cannot recover in this action, for the reason that the quitclaim deed obtained by him from Mrs. Packer was champertous and void, as against these defendants. It is contended that the defendants are not shown to be in such possession of the premises as entitles them to invoke this rule, but it is stipulated that the defendants and their grantor have had tenants in possession of the premises since the year 1900, and have received the rents during those years. We hold this possession sufficient to render the quitclaim deed champertous. See Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77. Also see Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258, which has been followed generally by this court, and most recently in Burke v. Scharf, 19 N. D. 227, 124 N. W. 79.

3. Plaintiff's claim of title is also defeated by the clear acts of abandonment of his grantor, Mrs. Packer. Her failure to pay the mortgage debt, or any part thereof, for twenty years; her failure to pay the taxes for over twenty years; her removal from the state,—all

testify as to her intent. Having abandoned the land to the mortgagee for so long a time, she and her assigns are estopped to assert the abandoned title, especially against an innocent purchaser for value, who is in possession. See Higbee v. Daeley, 15 N. D. 339, 109 N. W. 318; Bausman v. Faue, 45 Minn. 418, 48 N. W. 13; Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722; Shelby v. Bowden, 16 S. D. 531, 94 N. W. 416; Farr v. Semmler, 24 S. D. 290, 123 N. W. 835; Ford v. Ford, 24 S. D. 644, 124 N. W. 1108; 16 Cyc. 718; 11 Am. & Eng. Enc. Law, 394; Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495; Pom. Eq. Jur. 802.

4. And lastly plaintiff cannot prevail in this action in equity, because he has not offered to do equity by paying the mortgage and the taxes. See Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68, a case very similar to the one at bar.

It follows from the foregoing conclusions that the order of the District Court should be reversed, and said court is directed to enter an order quieting title to the premises in the defendant Stevens.

MORGAN, Ch. J., not participating.

STATE v. KELLY.

(132 N. W. 223.)

Nuisance — variance between information and proof.

1. Under an information charging the keeping and maintaining of a common nuisance at a place described as within the city of Minot, in Ward County, North Dakota, proof of the maintenance of such nuisance at a place without the limits of said city gives rise to a fatal variance between the information and the proof.

Information — designation of place of nuisance.

2. It is unnecessary, in prosecutions for keeping and maintaining a common

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Note. —The authorities on the question of the power of the legislature to make possession of intoxicating liquor prima facie evidence of an attempt to violate the law against illegal sales are collated in notes in 1 L.R.A.(N.S.) 626, and 43 Am. Rep. 26.

nuisance, that the information particularly designate the place of the commission of the crime more than to charge that the same was committed within the county and state wherein the prosecution is had; but where the information designates the particular location of the place charged to be kept and maintained as a common nuisance, the state, to warrant conviction, must prove the crime to have been committed at the place so particularly described in the information, as proof of the commission of the crime of keeping and maintaining a common nuisance at a place other than that so designated with particularity in the information is proof of the commission of a separate independent crime, other than the one charged in the information.

Evidence — presumption from possession of intoxicating liquor.

3. The presumption declared by § 9383, Rev. Codes 1905, as arising from the finding of intoxicating liquor in the possession of a person charged with said crime, is to be considered by the jury as a circumstance or element of the case from which, considered with all the evidence in the case, the jury determine their verdict.

Trial — instruction as to presumption.

4. An instruction as to such presumption, giving the same in the words of the statute, and following with the instruction that "such presumptive evidence may be considered by you as competent and sufficient upon which to base a conviction, provided the jury is satisfied beyond a reasonable doubt from all the evidence in the case that the defendant is guilty as charged," properly defines the effect the jury should give such presumption, and is a correct instruction thereon.

Opinion filed June 1, 1911.

Appeal from the County Court of increased jurisdiction for Ward County; *N. Davis*, J.

William Kelly was convicted of maintaining a common nuisance for the sale of intoxicating liquors, and he appeals.

Reversed.

George A. McGee, for appellant.

D. L. Nash, State's Attorney, and *Andrew Miller*, Attorney General, for the state.

Goss, J. The defendant, William Kelly, was informed against and convicted of the crime of keeping and maintaining a common nuisance, and appeals. The principal reason urged for reversal is that of variance between the information charging the crime and the proof offered on the trial.

The information charged that "defendant herein wilfully and unlawfully kept and maintained a certain place, to wit, a saloon, in a building situated in the city of Minot, which building was a dirt dugout within what is commonly known as Wildwood Park, in the city of Minot, in the county of Ward and state of North Dakota, and in which place intoxicating liquors were then and there sold, bartered, and given away as a beverage" to certain named persons. All proof offered on the question of place shows the nuisance was maintained in a dugout 100 yards outside the corporate limits of the city of Minot. Objections were saved to the reception of evidence and to the instruction of the court in such particular. The court considered the allegation of the information charging the crime to have been committed within the city of Minot as surplusage; and the trial was had on the theory by the state and the court that, so far as the question of place of commission of the crime was concerned, proof that the same was committed at any place within the county of Ward was sufficient to warrant conviction.

While there is some question as to the sufficiency of the objections urged to the admission of testimony as to place on which to predicate error in this court upon the admission of such testimony, yet the place proven as the location of the nuisance the undisputed evidence shows was without the city of Minot. As to this the court gave the following instruction: "The proof in the case may be at variance with the information as to the exact location, as to the certain building or place where the offense is alleged to have been committed is located in this case. I charge you that it is immaterial as to the exact location, and if the state has proven to your satisfaction, beyond a reasonable doubt, that the offense was committed in a building or at a place within Wildwood Park, in this county and state, it is sufficient as to the place." And again: "It is not disputed that the location of the dugout where the offense is alleged to have been committed is on the south half of section 14, and the court instructs you that all of section 14 is in Ward county, North Dakota." To these instructions the defendant duly excepted, as also to the court's refusal to give the following requested instruction: "I charge you, gentlemen of the jury, that it is incumbent on the state to prove the crime, if any was committed, was committed within the city of Minot, Ward county, North Dakota, and if the state

has not so proven the place to your satisfaction, beyond a reasonable doubt, you should find the defendant not guilty."

The defense offered no evidence, and upon the state resting its case, motion was made by the defendant for an advised verdict of not guilty, on the grounds that under the evidence there was a variance between the proof and the allegations in the information as to place. On denial of such motion, defendant excepted.

Under this state of the record, we have no alternative, except to follow the case of State v. O'Neal, 19 N. D. 426, 124 N. W. 68, on all fours with the case under consideration. In the case cited, in which the writer of this opinion was trial judge, the information charged the commission of the crime as having occurred near the shore of Lake Metigoshe, in a certain section, township, and range of Bottineau county, North Dakota. On trial at the conclusion of the testimony, it developed that the range was erroneously described in the information, so that the particular description by section, township, and range located the crime as committed 6 miles west of the shore of the lake in question, the place of the actual occurrence. This court, however, there held a particular description to govern over a general one, notwithstanding that the court could by statute (Rev. Codes 1905, § 7319) take judicial notice of the location of the lake to be in a township other than that described in the information; and under the same instructions as in this case, under the same condition of the record, the judgment was reversed and the rule laid down that in a prosecution for the keeping and maintaining of a common nuisance, when the state elects to describe the place with certainty by particular description, such particular description must be proven as alleged. And this rule is in harmony with the weight of authority on the question.

It was not necessary, however, that the state, in a criminal prosecution for the keeping and maintaining of a common nuisance, charge the offense with more certainty as to description of place than to charge that the offense was committed within the county and state wherein the prosecution is had; in the case on trial, the county of Ward and state of North Dakota. State v. Empting, 21 N. D. 128, 128 N. W. 1119; State v. Ilvedsen, 20 N. D. 62, 126 N. W. 489; State v. Kruse, 19 N. D. 203, 124 N. W. 385; State v. Ball, 19 N. D. 782, 123 N. W. 826. Under such a general charge as to place, the state may prove

the commission of the crime of keeping and maintaining such nuisance at any certain place, within the said county and state, particularly described in the testimony. But, where the state unnecessarily charges a more particular description than an allegation of its commission within the county, the particular description must be proven as laid in the information or indictment charging the same. Every particular description to such extent narrows the scope of the proof accordingly. Therefore, the motion for an advised verdict should have been granted; likewise defendant's requested instruction was proper on the court's refusal to grant the motion for an advised verdict, and the court in its instructions, by ignoring the particular description charged in the information, which charged the offense to have been committed within the city of Minot, committed reversible error.

Defendant assigns error on a further instruction given by the court to the jury. While it is not necessary to consider this assignment, so far as the disposition of the case is concerned, yet, by reason of the state desiring a ruling on the question raised, we pass thereon. It concerns an instruction given under § 9383, Revised Codes 1905, and is relative to that statute, applicable when intoxicating liquor is, in an unusual quantity, found in a defendant's possession in certain designated places. The court charged the jury in the language of the statute, and as follows: "I charge you that the finding of intoxicating liquors in the possession of the accused in any place, except his dwelling house or its dependencies, or in such dwelling house, if the same is a tavern, store, public eating house, grocery, or other place of public resort, or in unusual quantities in the private dwelling house, or its dependencies, of a person keeping a tavern, store, public eating house, or grocery, or other public resort, shall be received and acted upon as presumptive evidence that such liquor was kept for sale contrary to law,"—adding thereto the following as to presumptive evidence: "And I charge you that presumptive evidence is competent and sufficient upon which to convict, provided the jury in fact believes beyond a reasonable doubt that the defendant is guilty." Appellant challenges the instruction, and urges that, while the statute makes the finding of the liquor in the possession of the accused presumptive evidence that he kept such liquors for unlawful sale, yet that, inasmuch as the selling of intoxi-

cating liquors is but evidence of the crime of maintaining the nuisance, and not the commission of the crime itself, the instruction is erroneous.

Under the statute, the finding of the intoxicating liquors, either in unusual quantities or in a place of public resort, is presumptive evidence that such liquors are kept for unlawful sale. Such is the statutory presumption arising from such finding of liquor. It is presumptive evidence, with the emphasis on the term "evidence;" it is a presumption having legal force, as evidence of the ultimate fact to be proven, that such liquors were kept for unlawful sale. Parsons v. State, 61 Neb. 244, 85 N. W. 65. It is but one circumstance or element of the whole case presented to the jury, from all of which the guilt of the defendant is determined; and the duty of the court is to declare such finding of intoxicating liquors to be presumptive evidence that the liquors were kept for unlawful sale, leaving to the jury the question of the weight and significance to be given to such presumption, considered in connection with all the other evidence in the case. So considered, it may to the jury be strong and convincing, or weak and unsatisfactory, conclusive or rebutted, according as they conclude from the whole case. See 6 Words & Phrases, 5541; 16 Cyc. 1050; State v. Barrett, 1 L.R.A.(N.S.) 626, and note (138 N. C. 630, 50 S. E. 506); Re Cowdry, 3 Ann. Cas. 70, and note (77 Vt. 359, 60 Atl. 141); State v. Sheppard, 64 Kan. 451, 67 Pac. 870; Board of Excise v. Merchant, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484; People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; Id., 139 N. Y. 645, 34 N. E. 1098. "Presumptions, like probabilities, are of different degrees of strength," Decker v. Somerset Mut. F. Ins. Co. 66 Me. 406.

An instruction that presumptive evidence is alone competent and sufficient upon which to convict might constitute prejudicial error. But the instruction given was qualified by the addition thereto, "provided the jury in fact believed beyond a reasonable doubt that the defendant was guilty." This instruction left the question of defendant's guilt for the determination of the jury under all the evidence, not limiting them to presumptive evidence alone. The instruction given by the same court, however, in State v. Otrey, post, 132 N. W. 367, referring to such presumptive evidence, that "such evidence may be considered by you as competent and sufficient upon which to base a con-

viction, providing the jury is satisfied beyond a reasonable doubt, from all the evidence in the case, that the defendant is guilty as charged," is a proper instruction on presumptive evidence, and one approved in the case cited, very recently decided by this court.

However, on the variance between the proof offered and the offense charged, it is necessary that the judgment be reversed, and the case is accordingly remanded for further proceedings. It is so ordered.

MORGAN, Ch. J., not participating. Honorable W. J. KNEESHAW, Judge of the Seventh Judicial District, sat by request.

BOOS v. ÆTNA INSURANCE COMPANY.

(132 N. W. 222.)

Insurance — parol contract of.

1. *Held*, following McCabe Bros. v. Ætna Ins. Co. 9 N. D. 19, 47 L.R.A. 641, 81 N. W. 426, that a recovery can be had in an action for a breach of a parol agreement to insure on a parol agreement, made with defendant's authorized agent, prior to the expiration of the policy.

Evidence — sufficiency of.

2. Evidence considered, and *held* sufficient to sustain the verdict.

Trial — charge to jury.

3. Court's charge to the jury examined, and *held* to state the law correctly.

New trial — affidavit of new evidence.

4. Affidavit presented on motion for new trial on the ground of newly discovered evidence considered, and *held* that said affidavit pertained to matters solely of a negative and cumulative nature, and that therefore there was no abuse of discretion on the part of the trial court in denying said motion.

Opinion filed June 5, 1911.

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

Action by John Boss against the Ætna Insurance Company. From a judgment in favor of plaintiff, and from an order denying a motion for judgment notwithstanding the verdict, or in the alternative for a new trial, and from an order denying a motion for a new trial, defendant appeals.

Affirmed.

Barnett & Richardson (*W. H. Boutelle* and *N. H. Chase,* of counsel), for appellant.

Pierce, Tenneson, & Cupler, for respondent.

KNEESHAW, Special Judge. This is an appeal from a judgment, and also from an order denying defendant's motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial. The litigation in this case arises out of a transaction in which the plaintiff alleges that the defendant, through its authorized agent, orally agreed to renew a certain policy of insurance on a certain frame building belonging to the plaintiff and situated in the village of Leonard, Cass county, North Dakota. It is conceded that on the 6th day of July, 1907, the defendant, through its agent, A. L. Porter, at Leonard, North Dakota, duly issued and delivered to the plaintiff its certain policy of insurance, whereby it insured said building against loss by fire in the sum of $1,000 for a period of one year from July 6, 1907, to July 6, 1908. It is also conceded that after the expiration of one year, to wit, on the 23d of July, 1908, that said frame building was totally destroyed by fire, and the plaintiff's loss thereby exceeded the said sum of $1,000. Plaintiff contends that prior to July 6, 1908, and before the expiration of said policy of insurance, that he entered into a parol agreement with the defendant, through its agent, whereby defendant promised and agreed to renew said policy of insurance at its expiration for the further period of one year or until July 6, 1909. The defendant failed to do so, and this action was brought to recover damages for the breach of said parol agreement. The defendant denies the existence of such an agreement.

Plaintiff bases his right to recover on two separate causes of action, —the first being on a breach of a parol agreement to insure made prior to the expiration of the policy; and the second, on a breach of parol agreement to insure made subsequent to the expiration of said policy.

The second cause of action has been totally eliminated from this case from the fact that the trial court in its instructions to the jury submitted the case to them solely upon the question of a parol agreement made prior to the expiration of the policy as set forth in the first cause of action. The law of this case on the question of the right of

a party to recover for the breach of a parol agreement to insure has been settled by this court in the case of McCabe Bros. v. Ætna Ins. Co. 9 N. D. 19, 47 L.R.A. 641, 81 N. W. 426, and is not, therefore, an open question.

The only question, therefore, to be considered outside of the other alleged errors is that as to the sufficiency of the evidence to sustain the verdict; and on that question the court, having carefully examined the evidence, is of the opinion that the evidence is sufficient to sustain the verdict.

The appellant also complains of the following instructions: "If you find that they did meet and a contract was made, then a verdict must be returned for the plaintiff in the sum of $1,000 and interest as alleged in the complaint." While it may be true that that portion of the charge taken alone and by itself, and without considering the instructions as a whole, might be considered misleading, yet, after carefully examining the instruction as a whole, we are of the opinion that the court instructed the jury correctly on the law of the case, and that the instructions as a whole correctly stated the law.

Appellant contends that the court erred in refusing to grant a new trial on the ground of newly discovered evidence. The affidavit used in support of said motion considered, and held that the facts therein set forth are merely of a negative and cumulative nature, and that, therefore, there was no abuse of discretion in denying the motion for a new trial on that ground.

All of the other alleged errors considered, and the court is unable to find any prejudicial error in the same.

Having decided each of appellant's assignments of error adversely to it, it follows that the order of the District Court denying a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, and the order denying defendant's motion for a new trial, should be affirmed.

MORGAN, Ch. J., not participating. W. J. KNEESHAW, Judge of the Seventh Judicial District, sat with the court in the hearing of the above-entitled action by request.

SELLAND v. NELSON.

(132 N. W. 220.)

Trial — misleading instructions.

1. Charge of the court on the question of damages for physical injuries and loss of time considered, and *held* that the same is misleading and prejudicial.

Pleading — complaint for assault and battery.

2. Complaint for damages for assault and battery considered, and *held* to have been drawn on the theory of compensatory damages only, and that malice could not necessarily be inferred or presumed from the acts therein charged.

Pleading — to authorize punitive damages.

3. Before a recovery of punitive or exemplary damages can be had in an action for damages for assault and battery, it is necessary that the complaint show on its face that the assault was a wilful and malicious act, so that, from the acts charged, malice must be necessarily presumed or inferred.

Evidence — inference or presumption of malice.

4. The mere doing of a wrongful or unlawful act will not of itself warrant or authorize the inference of malice, but malice may be inferred or presumed from the act itself if such act warrants such inference or presumption.

Damages — punitive — allegation to support.

5. Before punitive damages can be recovered, or before that question can rightfully be submitted to the jury, the complaint must be drawn on a theory that will necessarily include such damages by inference or presumption of law, unless actual malice is shown on the trial without objection.

Opinion filed June 5, 1911.

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

Action by Hilda Selland against Halvor Nelson. Judgment for plaintiff, and defendant appeals.

Reversed, and new trial ordered.

Albert E. Coger and *T. A. Toner*, for appellant.

L. N. Torson and *R. E. Wenzel*, for respondent.

KNEESHAW, Special Judge. This is an appeal from a judgment in favor of the plaintiff and respondent, in an action for damages for assault and battery, and from an order denying a motion for a new trial. In order to fully understand the errors assigned, it is necessary

to quote or set forth the complaint on which such action is based, which complaint is in substance as follows: "(1) That during the fall of 1905 she was in good health, mentally and physically. (2) That on or about the 1st day of October, 1905, the defendant violently assaulted the plaintiff, laid violent hands upon her, twisted and bruised her arm, and otherwise injured the plaintiff. (3) That the plaintiff was thereby disabled from attending to her business for three months thereafter; and was for a long time lamed and sick, and was compelled to pay $100 for medical attendance, to her damage in the sum of $100. (4) That the plaintiff was, owing to the wrongful acts of the defendant, unable to pursue her calling for a period of three months, to her damage of $100. (5) That owing to the injuries caused by the defendant, by the unlawful assault and battery heretofore mentioned, the plaintiff has suffered injuries to the amount of $500. Wherefore, the plaintiff demands judgment against the defendant for the sum of $500, and for the costs and disbursements of her action."

The answer of the defendant was a general denial. The jury brought in a verdict for $500, or the full amount claimed.

Defendant and appellant, in his specifications of error, sets up nine specifications or assignments of error, the first five specifications referring to the refusal to strike out certain evidence and the admission of evidence; and the sixth, seventh, and eighth, referring to alleged errors in the judge's charge, which were duly excepted to within the time provided by law; and the ninth being for an alleged error in the court's refusal to charge the jury as requested by the defendant in writing. For the reasons hereinafter stated the court deems it unnecessary to review or pass upon the first five assignments of error, and will therefore pass to the more important questions involved.

The court in its charge to the jury instructed them as follows: "In determining the amount which you will allow for physical suffering, you may take into consideration the fact that the doctor's bill amounted to over $200, if you find such to be the fact, for the purpose of determining the amount or degree of the injury, and in aiding you in arriving at the proper compensation. In other words, while the total amount of the doctor's bill might not be permissible because it has not been pleaded, but you may take it into consideration in aiding you in determining how much you will allow for physical suffering resulting

from such injury, if you find there was any, and also the loss of time that may have resulted, although there has been no proper measure of loss of time; yet at the same time if you find loss of time did result from the injury which she says she suffered from the defendant, you may take that into consideration, if you find that any injury did result."

There is no evidence in this case that the doctor's charge of $200 was a reasonable one, nor is there any allegation in the complaint that would authorize such proof, and it was clearly erroneous for the court to allow it and instruct the jury that they might take into consideration such charge of $200 for the purposes stated to the jury in the charge. In the second place, the latter portion of the charge indicates that the jury might take into consideration as an element of damages the loss of time suffered by the plaintiff by reason of the alleged injury, whereas it is conceded by the court in the charge itself that there was no proof in the case showing the value of such loss of time, and it is conceded in the case that there is no evidence showing the value of the alleged loss of time. The court in another portion of the charge told the jury that plaintiff could recover for such loss of time, and in another portion of the charge told them that plaintiff could not recover, and in the charge in question indicated to them that a recovery could be had. That portion of the charge as set forth in the sixth assignment of error was, therefore, clearly misleading, prejudicial, and erroneous.

The seventh assignment of error is that the court erred in charging the jury on the question of punitive or exemplary damages, and charging the jury that they could allow such damages. From a careful consideration of the complaint, it is evident that it was drawn on the theory of compensatory damages only. The only words used in charging the assault are that it was a "violent assault." While it is true that in the fourth and fifth paragraphs of the complaint the words "wrongful acts" and "unlawful assault and battery" are used, yet it is nowhere directly alleged in the complaint that the assault and battery was wrongful and unlawful.

But conceding that such allegations had been directly made or charged, it would not authorize a recovery for punitive damages. It nowhere appears in the complaint that the alleged assault and battery

was wilfully, wantonly, or maliciously done, and there is nothing in the allegations of the complaint from which malice could necessarily be inferred or presumed; and from a careful consideration of the evidence in the case there is no evidence in the record of actual malice or oppression.

The mere doing of a wrongful or unlawful act will not of itself warrant or authorize the inference of malice therefrom. Of course malice may be inferred or presumed from the act itself, if the act warrants such inference or presumption.

Before punitive damages can be recovered, or before that question can rightfully be submitted to the jury, the complaint must be drawn on a theory that will necessarily include such damages by inference or presumption of law, unless malice is shown on the trial without objection. And while it may not be necessary to use the word "malice" in the complaint before a recovery for punitive damages may be had, yet words of equal import must be used, and it must at least appear from the allegations of the complaint that the assault was a malicious one, and that from the acts charged it would necessarily follow that malice would be presumed or inferred.

Appellant in his brief has touched upon the alleged error of the court in refusing to allow an amendment to an affidavit to be made to be used on motion for a new trial on the ground of newly discovered evidence. On account of failure to set the same up in his specifications of error in his abstract, that question will not be considered by the court.

For the errors in instructions hereinbefore referred to and pointed out, the judgment and order appealed from are reversed and a new trial ordered.

MORGAN, Ch. J., not participating. W. J. KNEESHAW, Judge of the Seventh Judicial District, sat with the court by request upon the hearing of the above-entitled action.

STATE EX REL. TEMPLE et al. v. BARNES, Sheriff.

(— L.R.A.(N.S.) —, 132 N. W. 215.)

Habeas corpus — for irregularities at trial.

1. Irregularities occurring at the trial, and errors of the trial court in its procedure in a criminal action, are not reviewable on habeas corpus.

Habeas corpus — sufficiency of answer to petition.

2. The petition of the relators alleges as one ground for their release that they tendered the sheriff, who held them in custody under a commitment from the police court of the city of Bismarck, the sum of $50 in payment of the fine imposed by such court. The sheriff's return, containing commitment and judgment, discloses that the fine was $50 each, and that no tender was made other than $50 to release both defendant petitioners. *Held*, that the return of the sheriff was a complete answer to the petition on that point.

Sunday — constitutionality of statute — religious liberty.

3. Section 4 of the Constitution of this state provides that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this state." *Held*, that in general laws prohibiting the doing of certain acts and the performance of certain kinds of labor upon the first day of the week, commonly called "Sunday," are not in violation of this provision, as they in no way work an establishment of a religion, provide for compulsory support, by taxation or otherwise, of religious institutions, make attendance upon religious worship compulsory, work a restriction upon the exercise of religion according to the dictates of conscience, or impose restrictions upon the expressions of religious belief.

Statutes — as to Sunday theaters, etc. — special laws.

4. Chapter 285, Laws 12th Leg. Assem., making it unlawful to keep open or run or permit to be run any theater, show, moving-picture show, or theatrical performance, upon the first day of the week, commonly called the Sabbath,

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Note.—The question of the constitutionality of Sunday laws is treated in notes in 22 L.R.A. 721, 3 Am. Rep. 372, and 82 Am. Dec. 121.

As to validity of classification in Sunday law, see notes in 14 L.R.A.(N.S.) 1259, and 32 L.R.A.(N.S.) 1190.

Keeping theater open on Sunday as violation of Sunday laws, see note in 17 L.R.A.(N.S.) 1157.

and prescribing penalties for violation thereof, is not special legislation, as, if the legislative interpretation of the former law was correct, and it did not include theatrical performances in its provisions, chapter 285, supra, is in the nature of an addition to former prohibitions of the statute, making it more general and more universal in its application than it was previous to the enactment of said chapter; and in any event, if said chapter stood alone, it would constitute a valid enactment.

Opinion filed June 6, 1911.

Application by the State, on relation of C. W. Temple and Clara Wright, for writ of habeas corpus to Frank Barnes, Sheriff of Burleigh County.

Writ quashed, and petitioner remanded to custody of the sheriff.

Niles & Koffel, for relators.

W. L. Smith, State's Attorney, opposed.

SPALDING, J. Chapter 285 of the Laws of the Twelfth Legislative Assembly of the State of North Dakota, introduced as House Bill No. 328, omitting title, reads as follows:—

"Sec. 1. Theaters open on Sunday unlawful.—It shall be unlawful to keep open, or to run, or permit the running of, any theater, show, moving-picture show, or theatrical performance, upon the first day of the week, commonly called the Sabbath.

"Sec. 2. Penalty.—Any person, firm, or corporation violating any of the provisions of this act shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than $25 or more than $50.

"Sec. 3. Emergency.—Whereas, there is no express provision of law prohibiting the keeping open or running, or permitting the running of, any theater, show, moving-picture show, or theatrical performance, upon the first day of the week, commonly called the Sabbath, an emergency exists and this act shall take effect and be in force from and after its passage and approval."

It took effect March 3, 1911. On the 22d day of April, 1911, the relators were convicted in the police court of the city of Bismarck of violating the above law, and on the verdict rendered the police magistrate entered judgment against them, imposing a fine of $50 each,

and adjudging that, on failure to pay such fine, they each be imprisoned in the Burleigh county jail for a period of twenty-five days or until the fine be paid. Bail was fixed on appeal in the sum of $250. The specific charge was that of running a moving-picture show and theatrical performance upon Sunday, the 16th day of April, 1911, in said city of Bismarck. They refused to pay the fine imposed, and were duly committed to the county jail in accordance with the judgment. They subsequently applied to the judge of the sixth judicial district for a writ of habeas corpus, which was denied. The writ was issued by this court, and the sheriff directed to have the bodies of the said relators before this court on a date specified, "to do and receive what shall then and there be concerning the said C. W. Temple and Clara Wright." Upon the day specified the sheriff made return to the effect that he detained the petitioners in jail as sheriff and by virtue of a certain commitment issued to him out of the office of the police magistrate of the city, which commitment was set forth in his return and included a copy of the judgment. He also averred that neither of said petitioners had paid or offered to pay the fine of $50 so assessed against each of them, and that the period of twenty-five days, as commanded in the judgment and commitment, had not expired.

1. On the hearing a great number of reasons were assigned by the petitioners why they should be discharged from the custody of the sheriff. Most of such reasons relate solely to alleged irregularities occurring on the trial, or to errors of the trial court in its procedure, and are not reviewable on habeas corpus. State ex rel. Mears v. Barnes, 5 N. D. 350, 65 N. W. 688; State ex rel. Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541.

2. It is alleged as a ground for the discharge of the petitioners that they tendered to the respondent sheriff the sum of $50 in release of the restraint imposed, and that the same was refused. This allegation is supported by the affidavit of counsel, which is to the effect that on behalf of the relators he tendered the sum of $50 to the sheriff in satisfaction of the fine and in payment of the release of the petitioners named, and in accordance with the commitment under which said sheriff holds said petitioners, and that said tender was refused on the ground that it was insufficient. A sufficient answer to this objection is

that the commitment as set out in the petition of the relators does not conform to the commitment under which the sheriff returns he was restraining them; that such commitment, in fact, recited that each of the relators was sentenced to pay a fine of $50. No claim is presented that any tender was made except of the sum of $50 for the release of both defendants, and this was insufficient to satisfy the judgment.

3. It is urged that the law in question conflicts with the state Constitution, § 4 of which provides: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." Whatever the effect of the provisions of the Penal Code with reference to abstaining from labor on the Sabbath or first day of the week may be, we have little doubt that they, as well as all such statutes, were enacted with the purpose of protecting that part of the public which consists of a large majority, in the exercise of their varying and different methods of religious worship, and in recognition of the sacredness of the Christian Sabbath. A number of the courts of the different states have passed upon this question, and have held that this is a Christian nation, and that laws enacted to prevent the desecration of the Sabbath are valid for that reason, notwithstanding constitutional provisions similar to § 4, supra, and others peculiar to different states. The courts of practically all other states have sustained such statutes as a legitimate exercise of the police power, intended to promote the welfare, morals, and sanitary condition of the people. Many of these courts appear to have avoided determining its relation to the question of religion. We do not deem it necessary to pass upon that question; but, in view of this being the first time the law has been questioned in this court, a brief reference to the history of legislation on the subject may not be inappropriate, and a similar reference to a few of the decisions of other jurisdictions will throw some light upon the general subject.

The early Christians substituted the first day of the week, or Sun-

day, for the Jewish Sabbath, or seventh day of the week, and it has since been observed as a day of rest and worship in Christian lands, and, we think, generally by civilized peoples. Legislation on the subject was first had in Rome, about A. D. 321, when Constantine the Great commanded all judges and inhabitants of cities to rest on the venerable day of the Sun. Under Theodosius II., 425, games and theatrical exhibitions were prohibited, and about a century later all labor was prohibited on that day. In England laws of this kind were in force in the reign of Athelstan, 925 to 940 A. D. The statute of 29 Chas. II., passed in 1678, seems to have laid the foundation for laws on the subject in England and in many states of this country. It provided that no craftsman, artificer, workman, laborer, or other person whatsoever should do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity excepted), and placed prohibitions upon public sales on the Lord's Day. Fairs were prohibited in the reign of Henry VI. and amusements in the first year of Charles I. On the immigration from England to America the act of 1678 was taken as a model in most of the colonies, its terms, however, being varied somewhat; but a Sunday law was enacted in each of the colonies, and such a law is found in the statutes of every state in the Union. It has been attacked in very nearly every state, and almost as often sustained. Where not sustained, courts have based their decisions on some peculiar or special feature not applicable here. Without quoting at great length from authorities explaining and sustaining such statutes in some degree or wholly from a religious standpoint, we mention Charleston v. Benjamin, 2 Strobh. L. 508, 49 Am. Dec. 608; Lindenmuller v. People, 33 Barb. 548; Shover v. State, 10 Ark. 259; State v. Ambs, 20 Mo. 215; 2 Bl. Com. 63. Mr. Freeman, in his note, 49 Am. Dec. 617, says: "In the earliest contested cases, the constitutionality of acts for the observance of the Lord's Day was defended on the ground of the assumed right of a free Christian people, looking to the conservation of the public order, peace, and morality, and the promotion, within well-guarded limits, of the religious ideas immemorially pervading their history and indelibility stamped upon the character of their laws and institutions, to set apart the Lord's Day as a recurring period of ceremonial rest and voluntary worship. That ground seems to have been abandoned

in later times, to a great extent, but it has never yet been conclusively settled that it was not well taken." Judge Story asserts that the Christian religion is the religion of liberty, and may well be regarded as the true basis of our popular form of government, and that at the adoption of the Constitution, and the amendment to it which provides that Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof, it was probably the universal sentiment in America that Christianity should receive the support of the state, so far as was consistent with the general freedom of conscience and religious worship. The real object of the amendment respecting religion was to prevent the establishment of a hierarchy which would control the exclusive patronage of the government; and it may well be conceived that a proper recognition of the prevailing faith, supported by no compulsory acceptance of its doctrines or attendance upon its rites, would still be within constitutional limits, as the amendment to the Federal Constitution embodies the idea embraced in the Constitutions of the states. Story, Const. §§ 1873, 1874, 1877.

In New York and some other states it has been held that Christianity is a part of the common law of the state, and entitled to recognition and protection by the temporal courts. People v. Ruggles, 8 Johns. 291, 5 Am. Dec. 335; Vidal v. Philadelphia, 2 How. 198, 11 L. ed. 234; Shover v. State, 10 Ark. 259; Sedgw. Stat. & Const. Law, 14. Judge Cooley was of the opinion that, while the religious freedom of the people is protected and defended by the American Constitution, there is no prohibition against the solemn recognition by the authorities of a superintending Providence in public transactions and exercises; and no principle of constitutional law is violated when Thanksgiving Day or fast days are appointed, when chaplains are designated for the Army and Navy, and legislative sessions are opened with prayer, or by the general exemption of houses of religious worship from taxation. In State v. Ambs, 20 Mo. 215, the court said: "We must regard the character and condition of the people for whom our organic law was made. It appears to have been made by Christian men, and shows on its face that the Christian religion was the religion of its framers. The convention that adopted it sat under a Sunday law, adjourning in obedience to it, and in the conclusion of the instrument it is solemnly affirmed by its authors that their signatures were attached thereto

A. D. 1820, a form adopted by all Christian nations in solemn public acts." And Lindenmuller v. People, 33 Barb. 548, was a case sustaining a conviction for the violation of a city ordinance prohibiting theatrical performances on Sunday, and holding it valid on the ground that Christianity was the basis of our free institutions, the conservator of the peace, order, morality, and social welfare of the commonwealth, and that the compulsory observance of the Lord's Day was not only compatible with the constitutional provisions prohibiting the enactment of any law interfering with religion or restricting the free exercise thereof, but conducive to every need of good government; that the act was passed in deference to a prevailing sentiment that could not be ignored; and that, as no religious test was set up and no religious rite or ceremony exacted, it was well within the restrictions of the state Constitution. Lindenmuller v. People was approved in Neuendorff v. Duryea, 69 N. Y. 557, 25 Am. Rep. 235; People v. Moses, 140 N. Y. 214, 35 N. E. 499, and in People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, and perhaps in later cases, by the New York courts, and is a leading case on the subject.

It is in the light of these considerations that such laws must be construed. Chapter 4 of the Penal Code of this state (Rev. Codes 1905, §§ 8559–8584) is the first chapter of that Code in the order of chapters classifying crimes, and is entitled, "Crimes against Religion and Conscience," and includes definitions of the crimes of blasphemy, profane swearing, obscene language, and Sabbath breaking. If we may judge of the sentiments of the legislature enacting our Penal Code by the order of precedence given the different classes of offenses treated therein, it would seem that they considered this among the most important. They began with crimes against religion and conscience, and followed in the order named with crimes against the elective franchise, against the executive power of the state, against the legislative power, against public justice, etc. Our Penal Code was enacted by the territorial legislature on the 11th day of January, 1865, and the title of this chapter has remained unchanged and no material alterations have been made in its text. When our Constitution was adopted in 1889, article 4, supra, was taken literally from the Constitution of California of 1879, and Ex parte Burke, 59 Cal. 6, 43 Am. Rep. 231, shows the construction of the highest court of California of its provisions prior to its adoption in-

to our Constitution. It sustains the validity of a law of that state punishing the transaction of business upon Sunday. In the opinion in that case previous decisions of that court were reviewed and commented upon by the learned chief justice. He also reviewed, at considerable length, other authorities. See also Ex parte Koser, 60 Cal. 177. The first Constitution of the state of New York, adopted in 1777, contained the following provision: "38. And whereas, we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this state, ordain, determine, and declare that *the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind; provided that the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.*" And the Constitution of 1821 of New York (§ 3, art. 7) reads: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." This section was copied literally in § 3 of article 1 of the Constitution of 1846 of New York, except that there was interpolated the provision now found in the Constitution of this state, that no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief. It thus appears that in all material respects California adopted its provisions regarding religion from New York, in which state, by a long line of authorities, only a few of which are cited in this opinion, laws prohibiting labor, amusements, etc., have been sustained, both on religious grounds and as being within the police power of the state. While, as we have said, we have no doubt that the intent of the framers of the different Constitutions and laws was to protect Sunday as a sacred day, set apart for religious observance and rest, yet for the purposes of this case it is immaterial what their purpose was. If the provisions are clear, we need

not consider the motives which prompted the lawmakers, and they are clear. The law here in question in no manner interferes with the religious convictions or scruples of any inhabitant of the state. It neither prescribes for, nor compels, the petitioners or others to observe any form of religious worship. It creates no establishment of religion. The wills and consciences of all the people are left free in this respect. In the language of Chancellor Kent, "the constitutional provision is fully satisfied by a free and universal toleration." People are at liberty to attend the church of their choice or to continuously remain away from church. They are not required by it to contribute by taxation or otherwise to the maintenance of any form of religious practice or worship. They are at liberty to ignore, so far as their individual conduct is affected by the statute, the existence of churches and of religion. The legislative assembly has, however, said that in doing so they must not interfere with the purpose of the day, as viewed in the light of the history of the times, when out Constitution was framed, and the purpose of the founders. In fact, it may be maintained that the only effect of Sunday laws like our own is to secure peace and quiet in the observance of the religious ceremonies and worship of an overwhelming majority of our people. The fact that they happen to be adherents of the Christian faith may in no manner affect the principle. The legislature has reached the conclusion that the performance of ordinary labor and of certain other acts is an infringement upon the right of a great majority of the people to worship and to observe the day as set apart for that purpose, and as a day of rest. It is not for the courts to split hairs in an attempt to determine whether the judgment of the legislature has been exercised to the last degree of refinement so as to include nothing which may in any manner relate to such rights. In the exercise of the police power, the question as to what provisions are needful or appropriate is primarily for the legislature to determine, and, when it does not appear clearly that a statute thought to be within that power has no real or substantial relation thereto and to the rights of the citizen, the judgment of the legislative assembly is conclusive. The preamble to the Constitution recites that "the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this Constitution." Elsewhere, Sunday is expressly recognized by excluding it from the time required

for the return of bills by the governor during the sessions of the legislature. Const. § 79. Officers are required to take an oath on entering upon the performance of the duties of their office; the same requirement is made of witnesses before testifying, with certain exceptions. The Constitution is witnessed by the signature of the President and Secretary, as well as the members of the convention which framed it, "in the year of our Lord, 1889." All these things show that the character of our institutions was recognized by the delegates who framed the Constitution, and by the people who voted for its adoption, so when we find it provided, in the same section that guarantees the free exercise and enjoyment of religious profession and worship, that the legislature may enact laws to prevent practices inconsistent with the peace or safety of this state, we have a very strong intimation that the supreme authority regards laws of the nature of the one complained of as necessary to secure the peace and safety of the state, and, if so, unless clearly without relation to that subject, they are valid. It also seems almost incredible that the power of the legislature to enact such laws should be questioned at this day, when the tendency throughout the American nation is towards a more general observance of all laws protecting people in the observance of the first day of the week. It is plain to us that this statute, if invalid, must accomplish one of five things: First, it must work an establishment of a religion; second, provide for compulsory support, by taxation or otherwise, of religious instruction; third, make attendance upon religious worship compulsory; fourth, work a restriction upon the exercise of religion according to the dictates of conscience; or, fifth, impose restrictions upon the expression of religious belief. The statute complained of does neither of these things, and therefore, as against the objection which we have considered, it is valid. Such laws have been so universally sustained that we cite only a few of the authorities bearing on the subject in addition to those to which reference has already been made. Charleston v. Benjamin, 2 Strobh. L. 508, 49 Am. Dec. 608; Specht v. Com. 8 Pa. 312, 49 Am. Dec. 518; Allen v. Deming, 14 N. H. 133, 40 Am. Dec. 179; Shover v. State, 10 Ark. 259; Tucker v. West, 29 Ark. 386; Hennington v. State, 90 Ga. 396, 4 Inters. Com. Rep. 413, 17 S. E. 1009; Story v. Elliot, 8 Cow. 27, 18 Am. Dec. 423; People v. Moses, 140 N. Y. 214, 35 N. E. 499; Com. v. Dextra, 143 Mass. 28, 8 N. E. 756;

State v. Ambs, 20 Mo. 215; St. Joseph v. Elliott, 47 Mo. App. 418; Liberman v. State, 26 Neb. 464, 18 Am. St. Rep. 791, 42 N. W. 419; People v. Bellet, 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094; State v. Sopher, 25 Utah, 318, 60 L.R.A. 468, 95 Am. St. Rep. 845, 71 Pac. 482; note, in 12 Ann. Cas. 1096; State v. Dolan, 13 Idaho, 693, 14 L.R.A.(N.S.) 1259, 92 Pac. 995; State v. Petit, 74 Minn. 376, 77 N. W. 225; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; Topeka v. Crawford, 78 Kan. 583, 17 L.R.A.(N.S.) 1156, 96 Pac. 862, 16 Ann. Cas. 403.

4. It is urged that even though Sunday laws may, as a general proposition, be found unobnoxious to the provision of the Constitution to which reference has been made, and that if the act complained of were a part of the general Sunday law, and as such constitutional, that, having been passed as a separate and independent measure, it is in contravention of the terms of §§ 11 and 20 of the Constitution; in other words, that it is special legislation. We need not take the trouble to define special legislation, nor to determine whether this might not be such if it were the only law on the subject. The only answer necessary to be made to this contention is that, as evidenced by the terms of the emergency clause attached to this law, the legislative assembly considered the general Sunday law as not prohibiting the maintaining and running of theaters and similar shows on Sunday, and that until the enactment of this statute it was legal to maintain such shows upon that day. Without determining whether the legislative interpretation of the old law was correct, but assuming it to be so, it is quite evident that, instead of this being a special law, it is in the nature of an addition to the old statute on the subject, making it more general in its terms and more universal in its application than it was before the new enactment took effect. It enlarges the scope and application of the statute by enumerating theaters and shows among the prohibited avocations, and is not subject to the objection made. However, if it did stand alone, the books are replete with authorities passing upon the constitutionality of similar statutes, and almost without exception holding them valid as against these identical, and similar, objections. Ex parte Koser, 60 Cal. 177; Ex parte Donnellan, 49 Wash. 460, 95 Pac. 1085; State v. Dolan, 13 Idaho, 693, 14 L.R.A.(N.S.) 1259, 92 Pac. 995; State v. Sopher, 25 Utah, 318, 60 L.R.A. 468, 95 Am. St.

Rep. 845, 71 Pac. 482; Bohl v. State, 3 Tex. App. 683; St. Louis v. De Lassus, 205 Mo. 578, 104 S. W. 12; People ex rel. Woodin v. Hagan, 36 Misc. 349, 73 N. Y. Supp. 564; Liberman v. State, 26 Neb. 464, 18 Am. St. Rep. 791, 42 N. W. 419; People v. Bellet, 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; State v. Petit, 74 Minn. 376, 77 N. W. 225; State ex rel. Hoffman v. Justus, 91 Minn. 447, 64 L.R.A. 510, 103 Am. St. Rep. 521, 98 N. W. 325, and note to same case, 1 Ann. Cas. 93; State v. Weiss, 97 Minn. 127, 105 N. W. 1127, 7 Ann. Cas. 932; State v. Bergfeldt, 41 Wash. 234, 83 Pac. 177, 6 Ann. Cas. 979.

The statute in question is not vulnerable to the attacks made upon it, and we hold that its terms bring it within the proper exercise of the legislative power. The writ heretofore allowed is quashed. The petitioners are remanded to the custody of the sheriff, with directions that on payment of the fines imposed, or, in lieu thereof, imprisonment as adjudged, they be discharged.

MORGAN, Ch. J., not participating. Honorable W. J. KNEESHAW, Judge of the Seventh Judicial District, sat by request.

GEBUS v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

(132 N. W. 227.)

Evidence — order of proof — exclusion — harmless error.

1. In an action for damages alleged to have been caused by the negligence of defendant railroad company, in that its platform was overcrowded with baggage, express and freight; that said platform was insufficiently lighted, and that the deceased while moving along its platform tripped over some obstruction, and fell upon the track in front of a moving locomotive, *held* that evidence sought to be introduced showing the condition of the platform for a considerable length of time prior to the accident was properly excluded as not

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Note.—How near the main transaction declarations must be made in order to constitute part of the *res gestæ*, see note in 19 L.R.A. 733.

in the proper order of proof, where no proof had been made of the manner in which deceased met death, and no testimony introduced tending to prove that the accident was caused by reason of the condition of the platform. And, further, that where this testimony was subsequently admitted, if there was error in the prior ruling, it was cured by such admission.

Evidence — res gestæ — declarations — sufficiency to go to jury.

2. *Held*, that a statement made by deceased to a physician, between thirty minutes and one hour after an accident occurred, and made at a hospital some distance from the place of the accident, after deceased regained consciousness, was not a part of the *res gestæ*, where the physician stated that deceased might have given him his name at the platform before being removed to the hospital, and that he told where he was from and where he was going before making the statement in question. And where it does not appear that the statement was volunteered, but may have been in response to questions asked, and that it was not in the nature of an exclamation forced by shock or the injury, and that it does not appear to have been made even under stress or nervous excitement produced by the accident. *Held*, further, that such statement, even though admitted in evidence, was not sufficient proof as to the cause of the injury to make a question for the jury, there being no other evidence in the case tending to prove such fact, such statement being as follows: "I was going to Portal; I was going up the platform; it was dark and I either stumbled or was crowded off the platform."

Recalling witness — discretion as to excluding testimony.

3. Where a witness has been called twice, and each time examined under direct, cross, and redirect examination, *held*, that it was within the discretion of the court, and therefore was not error, to exclude his testimony upon being called back the day following and being asked questions which he had testified to fully theretofore, where it is not shown that his answers would have been different, or that he desired to change the same in any particular.

Opinion filed June 13, 1911.

Appeal from District court, Ward county; *E. B. Goss*, J.

Action by Mary A. Gebus against the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Chas. D. Kelso, L. J. Palda, Jr., C. D. Aaker, and *John E. Greene*, for appellant.

John L. Erdall (*Alfred H. Bright*, of counsel), for respondent.

FISK, Special Judge. This action was brought by Mary A. Gebus, the widow of J. A. Gebus, deceased, to recover damages for the death of said J. A. Gebus. The deceased was killed on the 15th day of August, 1906, at the passenger station by respondent in the city of Minot, North Dakota, by being struck by a passenger train of the respondent as it was about to stop at said station, at 9:10 o'clock P. M. It is claimed that the death of deceased was caused by the negligence of respondent, in that its platform was overcrowded with baggage, express and freight; that said platform was insufficiently lighted; and that the deceased while moving along this platform tripped over some obstruction and fell upon the track in front of the moving locomotive. At the close of plaintiff's case in the lower court, the court directed a verdict for defendant and respondent on its motion. Motion for a new trial was denied, and the appeal is from the judgment entered and from the order denying a new trial.

The appellant has set forth twelve assignments of error, the first ten of which relate to rulings of the court rejecting testimony offered by her, the eleventh to the directing of the verdict, and the twelfth to the denial of appellant's motion for a new trial.

These assignments can all be covered by four propositions, as follows:

(1) Was it error for the court to exclude the testimony of certain witnesses with respect to the condition of the platform at the passenger station of the defendant corporation at Minot, North Dakota, as to its being unduly encumbered with freight and baggage, and insufficiently lighted, for a considerable length of time prior to the accident?

(2) Was it error for the court to exclude the testimony sought to be introduced, and the proof offered by the plaintiff as to statements made by the deceased to the physician in charge, immediately after regaining consciousness and within a very few hours after the accident occurred?

(3) Was it error for the court to refuse the evidence sought to be introduced through the testimony of witness Ziegenbien, bearing upon the particular incidents surrounding the accident, upon a re-examination of the witness on the day following his first appearance on the witness stand?

(4) Was it error for the court to instruct a verdict for the defendant?

At the beginning of the trial, plaintiff attempted to prove by the witnesses Hyland and Ziegenbien what the usual condition of the said platform was prior to the day of the accident, and also by the last-named witness, that he had at one time prior to the accident made complaint to the agent of the defendant company about not having its lights lit at the station. This testimony was excluded by the court and assignments numbered 1, 2, 3, and 8 are based upon the court's rulings thereon. At the time this testimony was offered, there had been no proof made of the manner in which deceased met death, nor had any testimony been introduced tending to prove that the accident was caused by reason of the condition of the platform. This testimony was certainly not offered in the proper order of proof, and we cannot say that the court erred in rejecting it. Subsequently during the trial this evidence was admitted, and if there was any error in the court's prior ruling it was cured by such admission. Jonasen v. Kennedy, 39 Neb. 313, 58 N. W. 122; Young v. Otto, 57 Minn. 307, 59 N. W. 199.

The question asked by proposition No. 2 is, we think, the most important one in the case, although we do not deem the answer to it, even should it be in the affirmative, decisive of the case, as shall be seen hereafter.

The plaintiff sought to prove by the witness Dr. Windell that the deceased had made certain statements to such witness at the hospital some time after the accident occurred, relating to the manner in which it occurred. This testimony was excluded by the court, and assignments numbered 4, 5, and 6 are based thereon. Dr. Windell testified in part as follows: "I was summoned to the depot at that time, and when I got there, found the young man injured. There were other physicians attending to the young man. He was afterwards taken to the hospital and I went with him. I then made an examination, and I think Dr. Newlove was there. The young man was totally unconscious; he was delirious from the time we left the depot until we got to the hospital, and while attending him at the hospital he regained consciousness at times, and when he first regained consciousness said something to me about the accident. This was probably half an hour after I found him at the depot, I couldn't say definitely. I had given him two

hypodermics of morphine before being taken to the hospital. Prior to the time he became conscious he talked to me, he was muttering all the way up on account of the pain, and talked in a delirious way, and shortly after arrival at the hospital he made this statement. I remember him complaining when he was on the platform and in a delirious condition. From the time I got to the platform and the time he was removed to the hospital was five or ten minutes. I remember getting his name, but could not say whether it was there (meaning platform) or at the hospital. He might have given his name at the platform. I think he told me where he was from or where he was going, before he made the statement in regard to the accident. I couldn't say whether he volunteered the statement or whether it was in response to a question. I asked him questions. It might have been in response to questions. Considerable of what he said may have been in response to questions I put to him. He was quite rational when he made the statement."

Is a statement made under these conditions a part of the *res gestæ* and therefore admissible as such? If so, then the question propounded in proposition No. 2 must be answered in the affirmative. We think not, however. The statement was not made immediately after the accident nor at the place of the accident. It was made at the hospital about one half hour after deceased reached there. Dr. Windell testified that he might have learned the man's name, where he came from, and where he was going to at the depot. He also admitted that what deceased said may have been largely in response to questions addressed to him. It does not appear that the statement was volunteered by deceased, nor was it in the nature of an exclamation forced from him by shock or the injury. It does not appear to have been made even under stress or nervous excitement produced by the accident, and the statement was certainly not a spontaneous explanation of the real cause. These are some of the elements which must be present in order to make admissible as a part of the *res gestæ,* statements or declarations. Jones, Ev. 2d ed. §§ 344 et seq., and cases cited; 3 Wigmore, Ev. §§ 1747 et seq., and cases cited.

However, conceding for the purpose of argument that the statement was admissible as a part of the *res gestæ,* what would its effect be? Plaintiff offered to show by Dr. Windell that at the hospital, shortly after or immediately after the deceased regained consciousness, he

stated: "I was going to Portal. I was going up the platform; it was dark and *I either stumbled or was crowded off the platform.*" Such statement, even if received as evidence, was not sufficient proof as to the cause of the injury to make a question for the jury's consideration. Deceased by said statement admitted that he might have been crowded off the platform. He didn't know how the accident happened, and such statement was only in the nature of a guess or conjecture. He might have been walking in a crowd and accidentally have been shoved off the platform by some one unbeknown to him.

In the case of Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, this court used the following language in speaking of the proof necessary to sustain an allegation of negligence: "It is not asking too much of a plaintiff when he alleges negligence, that he be required to prove it. When he claims damages because of fire, which he avers was started through the neglect to observe due care and caution, his proofs must establish the charge. Mere speculation or possibility will not do."

Aside from this statement which plaintiff sought to prove by the witness Windell, there was no testimony introduced by her tending to prove the cause of the accident, and we therefore repeat that, even though proof of such statement had been admitted, still there was not sufficient evidence as to the cause of the injury to make a question for the jury's consideration.

Assignments of error numbered 7, 9, and 10 relate to rulings of the court in excluding evidence of the witness Zeigenbien, upon his being recalled the second day. These assignments are covered by proposition No. 3. It appears that the witness had previously been called to the witness box twice, and on both occasions had undergone a direct, cross, and redirect examination, and that he had testified fully as to what he saw of the accident during such examination. He testified in part as follows: "The train was pulling in when I was about 12 feet from the depot, and I heard an outcry which drew my attention, sounding like a party hollered for help. I heard an outcry and supposed it was the party that fell,—I don't know; it was dark, and I turned around to look. Just before hearing the outcry, I saw parties coming toward the depot, and just after I saw a party going over toward the track from the platform, and it looked to me as though he gathered himself to come back, at least to approach back towards the platform as the cowcatcher threw

him and the party behind grabbed him. . . . Just at the time I heard the outcry, I saw the man fall by the trunk; . . . The man went onto the tracks sideways, as I remember it, but could not say as to the exact motions he made, and I could not say I could see him when he struck the ground, there was a party right in back of him. . . . When I heard someone holler, I looked that way, and it appeared he was falling out on the track sideways. That is the first I saw of the accident. I saw the figures approaching, and the first I saw of the accident was when I heard the outcry, and it was one of the two figures I saw coming up the platform, and it was right there where the trunks were standing close to the edge of the platform."

After being recalled the second day, the following three questions were asked and objections thereto sustained by the court, to wit: "I wish you would tell the jury again just what you saw happen immediately before and at the time of the injury. . . . State to the jury just how it appeared to you when he fell off or started to fall off. . . . At the time you heard the outcry, tell the jury, or stand down and illustrate to the jury, just what position you saw this person in who was tumbling over onto the track."

Inasmuch as this witness had previously testified to the same matters covered by these questions, and his answers to the same would necessarily mean a repetition of his former evidence, we see no error, or prejudice to plaintiff, in the court's ruling. There was nothing to indicate that his answers would have been different, or that he desired to change the same in any particular. It was within the discretion of the court to exclude the same.

From what has heretofore been said, no comment is deemed necessary in answering proposition No. 4 in the negative.

The judgment and order are affirmed.

MORGAN, Ch. J., and GOSS, J., not participating. KNEESHAW and FISK, District Judges, sitting by request.

WOOLFOLK v. ALBRECHT.

(133 N. W. 310.)

Adverse possession — color of title — construction of statute.

1. Following Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, *held*, that chapter 158, Laws 1899, was constitutionally passed by the legislative assembly.

Statutes — evidence as to due passage.

2. Whether the enrolled bill, when signed by the president of the senate, the speaker of the house, and approved by the governor and filed in the office of the secretary of state, is conclusive evidence of the due passage of the law, or whether the legislative journals are controlling, not decided for reasons stated in the opinion.

Statutes — proper enactment — journal entries.

3. Conceding that the journal entries relating to the history of a bill may be considered and are controlling over the enrolled bill as authenticated by the president of the senate and speaker of the house and approved by the governor, they are entitled to no probative weight, and the enrolled bill will be alone controlling where such journal entries are conflicting, so that it is impossible to ascertain therefrom with certainty that the constitutional requirements were not complied with in the passage of such bill.

Statutes — presumption as to proper enactment.

4. The presumption that the enrolled bill was constitutionally passed is very strong, and, even conceding that such presumption is rebuttable by reference to the journals, the evidence must be very strong and clear in order to overcome such presumption.

Applying such test to the journal entries relative to the passage of said chapter 158 of Laws 1899, *held*, that the enrolled bill is controlling.

Adverse possession — color of title — tax deed.

5. Under Laws 1899, chap. 158, title to real property in this state may be acquired by the adverse, open, exclusive, and undisputed possession thereof

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Note. — The question whether a void tax deed is color of title is treated in an exhaustive note in 27 L.R.A.(N.S.) 340, and in note in 88 Am. St. Rep. 727. As to the effect of an invalid tax deed as color of title within general statutes of limitations, see extensive note in 11 L.R.A.(N.S.) 772.

The authorities on the question of legislative journals as evidence respecting passage of statute are collated in notes in 23 L.R.A. 340, 51 Am. Dec. 616, and 12 Am. St. Rep. 217. As to the conclusiveness of enrolment, see note in 85 Am. Dec. 357.

for a period of ten years under claim of title and by paying all taxes assessed against the land for such period.

Held, that a certain deed executed and delivered by the county auditor to defendant, describing the land and purporting for a consideration to transfer the same to defendant, although void upon its face, constitutes color of title sufficient upon which to base an adverse claim under said chapter.

Opinion filed June 7, 1911. On petition for rehearing, June 22, 1911.

Appeal from District Court, Morton county; *W. C. Crawford*, J.

Action by Eliza A. Woolfolk, for the use and benefit of John Bloodgood, against Sophie Albrecht. From a judgment for defendant, plaintiff appeals.

Affirmed.

Ball, Watson, Young, & Lawrence, for appellant.

F. H. Register, J. E. Campbell, and *W. H. Stutsman*, for respondent.

Fisk, J. Action to determine adverse claims to certain real property in Morton county. The complaint is in the statutory form. The sole defense relied upon is that one John Henry Albrecht, deceased, former husband of defendant, acquired title to the real property in question under the provisions of chapter 158, Laws of 1899, by the continuous, open, notorious, and exclusive adverse possession thereof under claim and color of title and payment of taxes thereon for more than ten consecutive years,—to wit, from 1895 to the time of his death, in 1907, —and that defendant acquired title there as devisee under the will of her said husband, and has at all times since continued to occupy and possess said real property, paying taxes thereon each year.

There are but two questions presented for determination: First, Did John Henry Albrecht, during the ten years he was in the actual adverse possession of this property, have title or color of title thereto within the meaning of the statute aforesaid? And, second, Was chapter 158 aforesaid constitutionally passed?

If either of these propositions requires a negative answer, a reversal must follow; otherwise the judgment appealed from must be affirmed.

Respondent does not contend that the tax proceedings were valid; her contention being merely that her husband acquired from the county auditor an alleged conveyance of the premises in the form of a deed,

which, it is contended, was sufficient to vest in him color of title, which instrument is as follows, omitting the acknowledgment:

Absolute Property Deed.

Know all men by these presents, that whereas John Foran, the then auditor of Morton county, state of North Dakota, in pursuance of the provisions of chapter 132, General Statutes of 1890, did offer for sale, prior notice having been given as required by law, on the 2d day of December, 1890, at the courthouse of Mandan, Morton county, North Dakota, duly and separately, all of the within-described tract or parcel of real estate for the several sums so declared to be due thereon, and returned delinquent by the county treasurer of said county, for the nonpayment of taxes for the year prior, 1889, theretofore duly levied on a valid assessment of said property for said year, amounting in the aggregate to the sum of $26.81, including interest and penalty thereon and the costs allowed by law, and no one bidding upon said offer an amount equal to that for which said tract or parcel was subject to be sold, the same was bid in for the state of North Dakota, and it appearing that three years or more have elapsed since the date of sale, and said property never having been redeemed nor assigned by the state in accordance with the provisions of § 86, chapter 132, Laws 1890, this property is now the absolute property of the state of North Dakota; and whereas, in accordance with § 10, chapter 100, Laws 1891, taxes for subsequent years have been levied upon each tract or parcel severally based upon due assessments thereof, amounting in the aggregate to the sum of $327.26, making the total amount due the state in taxes, penalties, interest, and costs, up to the present date, upon all of said tract or parcel, in the aggregate the sum of $354.07, and whereas the state auditor of said state has, in accordance with § 86, chapter 132, Laws 1890, directed the county auditor of said county to sell and dispose of said real estate at private sale: Now therefore, I, A. V. Schallern, auditor of said county of Morton, in consideration of the premises and the sum of $354.07, paid to the treasurer of said county on the 31st day of May, 1895, and by virtue of the statutes in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto John Henry Albrecht, his heirs and assigns, the following described piece or

parcel of land, situate in said county and state, to wit, all of section 19, township 138 north of range 82 west 5th p.m., containing 640 acres, more or less, in Morton county, North Dakota. To have and to hold unto him the said John Henry Albrecht, his heirs and assigns forever.

In witness whereof, I, A. V. Schallern, county auditor, as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed by name and affixed my seal this 17th day of July, A.D. 1895.

A. V. Schallern,
Auditor, Morton County.

The record discloses that such purported conveyance was duly filed for record in the office of the register of deeds of said county on July 18, 1895. Such purported conveyance was, no doubt, executed and delivered pursuant to §§ 86 and 87 of chapter 132, Laws of 1890. These sections are as follows:—

"86. Sale of property bid in for the state. All pieces or parcels of real property bid in for the state under the provisions of this act, and not redeemed or assigned within three years from the date of sale, shall become the *absolute property of the state,* and may be disposed of by the county auditor at public or private sale, as the state auditor may direct, subject to such rules and restrictions as he may prescribe. . . .

"87. *Deed to be given on sale of forfeited property.* Upon the sale of any tract or lot of forfeited real property the county auditor shall execute to the purchase thereof a *deed in fee simple* of the property so purchased, which shall pass to such purchaser absolute title to the property therein described, *without any other act or deed whatever.* . . . Such deed may be recorded as other deeds of real estate, and the record thereof shall have the same force and effect in all respects as the record of such deeds, and *shall be evidence in like manner.* Laws 1890, p. 376, chap. 132, §§ 86, 87."

It will be noticed that the statute aforesaid does not prescribe the form of the deed therein mentioned, and we think it entirely clear that, if the state had acquired title through the tax proceedings, such deed would have been sufficient to have transferred such title to the grantee therein named. It is, we think, equally clear under the rule announced in Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, that such purported deed operated to confer color of title upon the grantee therein

named. Appellant's attempt to differentiate on principle the case at bar from Power v. Kitching is, we think, without force. Such contention is based upon the unwarranted assumption of counsel that there was no statutory authority authorizing such a conveyance to be made. The fallacy of such argument lies in the erroneous conclusion that the only authority for the execution of a deed is that contained in § 7, chapter 100, Laws of 1891. The deeds prescribed by said section merely relate to conveyance in cases where the property was bid in at the tax sale by a person other than the state, or where the state has bid in the property and assigned the certificate of sale to another. In the case at bar the state bid in the property, but did not assign the certificate before it ripened into title by operation of law through lapse of time as provided in § 86, chapter 132, Laws of 1890, aforesaid. Had the tax proceedings been regular in all respects, the state would have become the absolute owner of this property at the expiration of three years, upon compliance with other requirements of law regarding notice of expiration of time for redemption. Darling v. Purcell, 13 N. D. 288, 100 N. W. 726. The only authority prescribed for transferring such title to another is that designated in §§ 86 and 87 aforesaid. We are entirely clear that the deed from the county auditor to John Henry Albrecht, even conceding the same to be void on its face, was sufficient to confer on such grantee color of title within the meaning of chapter 158, Laws of 1899, aforesaid. Power v. Kitching, supra; Stiles v. Granger, 17 N. D. 502, 117 N. W. 777; Murphy v. Dafoe, 18 S. D. 42, and cases cited at page 49, 99 N. W. 86; Treece v. American Asso. 58 C. C. A. 266, 122 Fed. 598; McMillan v. Wehle, 55 Wis. 685, 13 N. W. 694; Whittlesey v. Hoppenyan, 72 Wis. 140, 39 N. W. 355; Harrison v. Spencer, 90 Mich. 586, 51 N. W. 642; Brannan v. Henry, 142 Ala. 698, 110 Am. St. Rep. 55, 39 So. 92; Brown v. Hartford, 173 Mo. 183, 73 S. W. 140; Hughes v. Wyatt, 146 Iowa, 392, 125 N. W. 334; State v. Harman, 57 W. Va. 447, 50 S. E. 828; 27 Am. & Eng. Enc. Law, 973, and cases cited; 1 Cyc. 1095, and cases cited. See also 1911 Cyc. Ann. 97.

Having reached the above conclusion, it only remains for us to determine whether chapter 158, Laws 1899, being § 4928, Rev. Codes 1905, was constitutionally passed. The history of this section is as follows: The bill for its enactment originated in the senate, where it was duly

passed in the exact language of the enrolled bill. The house journal shows that it was materially amended in the house, and as thus amended that it was duly passed. The journal of the senate also shows that it was messaged back to the senate by the chief clerk, as having been passed without change. The journals of both houses disclose that such bill was duly authenticated by the signatures of the officers, as required by § 66 of the Constitution, and such enrolled bill, as filed in the office of the secretary of state, bears the signature of the governor, as required by § 79, Constitution. The precise question presented is what, under the facts, should be received by the courts as controlling evidence of the existence or nonexistence of this law. Should the house journal control over the enrolled bill as authenticated by the signatures of the sworn officers of both houses and that of the governor, as well as the message signed by the chief clerk, or should the latter control? Upon this very important question, there is an irreconcilable conflict in the authorities.

For reasons hereinafter stated, we deem it unnecessary to review at length the many adjudicated cases upon this question, or to announce what we deem the correct rule, as such decision is not necessary to a proper determination of this appeal. We shall therefore reserve such question for future determination, and shall content ourselves with a citation of a few authorities where the reader may find the cases collated both pro and con.

The most recent case dealing with this question which has come to our notice is that of DeLoach v. Newton, 134 Ga. 739, 68 S. E. 708, 20 Ann. Cas. 342, decided in July, 1910, wherein Mr. Chief Justice Fish, in a very able, elaborate, and instructive opinion, cites and reviews the authorities, and reaches the conclusion that the enrolled bill, when duly authenticated by the signatures of the president of the senate and speaker of the house, and approved by the governor, and deposited in the office of the secretary of state, cannot be impeached by the legislative journals. See also Palatine Ins. Co. v. Northern P. R. Co. 9 Ann. Cas. 582, and exhaustive note (34 Mont. 268, 85 Pac. 1032), 26 Am. & Eng. Enc. Law, 2d ed. 556; 36 Cyc. 971; 1911 Cyc. Ann. 3740; Yolo County v. Colgan, 84 Am. St. Rep. 41, and note (132 Cal. 265, 64 Pac. 403).

However the rule may be regarding the evidential force of the en-

rolled bill when properly authenticated as to its due passage by the legislature, the authorities are agreed that the presumption that the enrolled bill was constitutionally passed is very strong, and, even where such presumption is rebuttable by reference to the journals, the evidence must be very strong and clear in order to overthrow the same.

Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632. Applying this rule to the case at bar necessitates a holding that such presumption, even if rebuttable, is not overcome by the journal entries, and this is the effect of the decision of this court on this precise question in Power v. Kitching, supra, as may be seen by the language employed in the opinion. We quote: "The petitioner claims that the statute referred to in the original opinion, and relied upon by the defendant (chapter 158, Laws 1899), was never enacted or passed by both branches of the legislative assembly. It is conceded that a bill (No. 121) embracing the statute originated in the senate, and, after passing that body, that it was regularly transmitted to the house of representatives; and it is further conceded that the house journal shows that the bill was amended in the house, and after being amended was regularly passed by the house, and that upon the day of its passage in the house it was certified or messaged to the senate by the chief clerk of the house, and that such certificate of the clerk stated, in effect, that the bill was returned to the senate 'unchanged,' thereby declaring that the bill had not been amended in the house of representatives. . . . The petitioner reminds the court that the court is in duty bound to judicially notice the journals of both branches of the legislature; but the petition does not advise the court respecting any rule of law which is to govern courts in a case such as this, where the legislative journals are at loggerheads with each other, and where it will become necessary, in deciding a question of fact, to accept one part of the record evidence, and disregard another. That such a conflict of evidence exists in this case is manifest. The house journal shows affirmatively that the bill was amended in that body, and that it passed after such amendment. But the senate journal shows affirmatively that a sworn officer of the house—its chief clerk—certified that the bill was returned to the senate 'unchanged,' which means and must mean that the measure was not amended in the house. There is also strong negative evidence that the bill was not amended in the house. Had it been so amended, it would have been necessary to again pass

it in the senate before it could take effect as a law, or be officially signed and sent to the governor for approval. But the senate journal is silent as to any such action after the bill was returned to the senate. The senate journal only shows that the bill was signed officially in the senate after having been transmitted from the house. This silence of the senate journal, while negative in character, is nevertheless strong evidence that the bill never was amended in the house. We refer to these conflicts in the evidence, however, only to show that there is evidence to be found in the journals of the two houses bearing upon both sides of the question of fact to be determined, *viz.*, whether the published law was in fact ever enacted by both branches of the legislature. The evidence of the journals being conflicting, it will be necessary to consider the evidential effect of the enrolled bill properly authenticated and on file with the secretary of state. Which shall prevail? Which possesses the greater probative force,—the conflicting evidence of the journals, upon one side, or, on the other side, the positive evidence, consisting of the authenticated bill found in the hands of the official custodian of the laws?"

The chief clerk of the house, whose duty it was to make the journal entries, made two wholly irreconcilable entries, to wit: one, that the bill was amended and passed the house as amended; and the other, in effect, that the bill had passed the house without change. In the light of this conflict, the journals, even if otherwise competent to impeach the enrolled bill, were without probative force, and a resort to the latter was imperative. Where entries in a journal are ambiguous and conflicting, so that it is impossible to ascertain therefrom whether the bill was duly enacted, it will be assumed that the proper constitutional action was taken thereon. Homrighausen v. Knoche, 58 Kan. 646, 50 Pac. 879; State ex rel. Atty. Gen. v. Francis, 26 Kan. 724; Re Taylor, 60 Kan. 87, 55 Pac. 340; Chesney v. McClintock, 61 Kan. 94, 58 Pac. 993; State ex rel. Godard v. Andrews, 64 Kan. 474, 67 Pac. 870; Belleville v. Wells, 74 Kan. 823, 88 Pac. 47; Missouri, K. & T. R. Co. v. Simons, 75 Kan. 130, 88 Pac. 551.

We conclude, therefore, that the reasoning and conclusion reached by the court in Power v. Kitching on this question, in so far as it up-

held chapter 158 aforesaid, was entirely sound and is accordingly adhered to.

The judgment appealed from is affirmed.

MORGAN, Ch. J., not participating. Honorable FRANK E. FISK, Judge of the Eleventh Judicial District, at the request of the court sat in the hearing of the above case.

On Petition for Rehearing.

FISK, J. Counsel for plaintiff have filed a petition for rehearing, in which they earnestly contend that the court erred in deciding that absolute property deed issued by the auditor to John H. Albrecht, on July 17, 1895, was sufficient to constitute color of title. They attempt to distinguish this case from Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, on the alleged ground that the title to the property in the case at bar was in the United States government, and hence not subject to taxation. It is true that patent was not issued to the Northern Pacific Railway Company for these lands until January 17, 1896, while the so-called absolute property deed aforesaid is based on an alleged tax title acquired by the county for the taxes of 1889. Were the lands subject to taxation in 1889 and subsequent years? It is clear to us that they were. We must take judicial notice that these lands were included within the land grant made by the government to the Northern Pacific Railway Company in 1864, and also that such lands were surveyed long prior to 1889 and title thereto vested in such railway company. The date patent was issued is in no manner controlling as to the time title was acquired by the railway company under such grant. The record discloses that the company exercised ownership of such lands as early as January 16, 1883, on which date it executed and delivered to R. F. Woolfolk a warranty deed thereof. It is fair to assume, therefore, that the railway company had, at or prior to that date, done everything essential to complete its title under the grant. However this may be, and conceding that in 1889 the railway company had not paid to the government the expenses of making the survey, still these lands were not exempt from taxation, for Congress, after the decision of Northern P. R. Co. v. Traill (Northern P. R. Co.

v. Rockne), 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201, holding such lands exempt from taxation until the survey expenses were paid, expressly provided to the contrary. See chap. 764, 24 Stat. at L. p. 143, U. S. Comp. Stat. 1901, p. 1476. This act was approved July 10, 1886, three years prior to the initiation of the tax proceedings on which defendant's claim of title is based. Among other things, Congress there enacted "that no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by states, territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor."

In view of this statute we are unable to concur in the view of plaintiff's counsel that such lands were not subject to taxation. The title to these lands had passed from the government to the railway company and its vendees, and at most the government merely retained a lien as security for the payment of the survey fees and expenses, etc., which by the act of Congress aforesaid is merely paramount to the liens for taxes.

The contention, in effect, that the statute (§ 4928, Rev. Codes 1905) is merely a statute of limitations, and may not be used as a sword of attack, but only as a shield of defense, is without merit. By the express language of this section, as well as the preceding one, a compliance therewith operates to confer a good and valid title, and we know of no reason why a title thus acquired cannot be asserted by its owner in exactly the same manner as a title acquired in any other way.

For these reasons the petition for a rehearing is denied.

WANNEMACHER v. MERRILL et al.

(132 N. W. 412.)

Fraudulent conveyances — notice to grantee — duty to make inquiry.

1. Knowledge on the part of the grantee of land, of such suspicious facts and circumstances as would put a prudent man on inquiry as to the grantor's intention in making a conveyance, is equivalent to a knowledge of all the facts which would be developed by a reasonable pursuit of such inquiry, yet no duty of inquiry as to fraudulent intent of the grantor devolves upon the grantee, unless he has actual knowledge of some suspicious circumstance. Following Fluegel v. Henschel, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996.

Fraudulent conveyances — grantee's knowledge of fraud.

2. Evidence considered, and *held* that defendant Emma I. Merrill, the grantee in the mortgage sought by this action to be set aside as fraudulent, had no knowledge of any fraudulent intent on the part of her grantor or mortgagor, and had no actual knowledge of any suspicious fact or circumstance sufficient to put her on inquiry.

Fraudulent conveyances — right to prefer creditors.

3. In the absence of fraud, a debtor may pay or secure one creditor, to the exclusion of others, and may pay one or more creditors in preference to others, although all his property may be used in making such payment.

Fraudulent conveyances — mortgage to preferred creditors.

4. Evidence considered, and *held* that the defendants Walter W. Merrill and E. P. Merrill had the right to prefer their mother, Emma I. Merrill, by delivering and executing to her the mortgage in question to secure an antecedent debt due by them to her.

Fraudulent conveyances — preference to creditor — good faith of creditor.

5. Evidence considered, and *held*, that at the time of the execution and delivery of the mortgage in question the defendant Emma I. Merrill was a bona fide creditor of the defendants Walter W. and E. P. Merrill, and that at said time said Walter W. and E. P. Merrill were justly indebted to her in the sum of at least $3,000 for money and property advanced by her at their

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Note.—As to the grantee's knowledge of facts respecting fraudulent conveyance sufficient to put him on inquiry, see note in 34 Am. St. Rep. 399. For authorities on the question, What participation by creditor in fraudulent intent of debtor will make a transfer to pay or secure his debt invalid as to other creditors, see note in 31 L.R.A. 609.

As to the right of an insolvent to make a preference, see note in 41 Am. Dec. 531.

request for their benefit, and which was used and applied as part of the purchase price of the land on which said mortgage was given.

Held, further, that defendant Emma I. Merrill took said mortgage in good faith and without any intent to defraud, hinder, or delay this plaintiff or any other creditor of the defendant Walter W. Merrill in the collection of their debts.

Opinion filed August 4, 1911.

Appeal from District Court, Stark county; *E. B. Goss*, J.

Action by George R. Wannemacher against Emma I. Merrill and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

M. A. Hildreth, for plaintiff.

H. C. Berry, for defendants.

KNEESHAW, Special Judge. This is an action in equity brought by the plaintiff, Wannemacher, as a creditor of one Walter W. Merrill, to set aside and have declared fraudulent and void a certain real-estate mortgage made by Walter W. Merrill and E. P. Merrill to their mother, Emma I. Merrill, for $3,000 on certain real estate owned by them jointly in Sargent county, North Dakota. Said action was tried in Stark county, North Dakota, and on the trial of said action the court found all the issues in favor of the defendants and dismissed the action on the merits, and this appeal is taken from said judgment of dismissal, and the plaintiff demands a retrial of all the issues of fact and of law in the supreme court.

The defendants Walter W. and E. P. Merrill are brothers, and the defendant Emma I. Merrill is the mother of Walter W. and E. P. Merrill. On or about the 1st day of January, 1907, the defendant Walter W. Merrill made, executed, and delivered to the plaintiff his promissory note in writing, whereby he promised to pay to said plaintiff the sum of $4,000, with interest at 10 per cent payable January 1, 1909, and it is by reason of said note that plaintiff claims to be a creditor of the defendant Walter W. Merrill. At the time of the commencement of this action no judgment had been recovered on said note, but on or about the month of May, 1910, plaintiff recovered a verdict in his favor, and against the defendant, in the district court of Stark county,

on said note, for the sum of $2,663.60, and on the 15th day of August, 1910, a judgment was duly entered on said verdict. The defendant E. P. Merrill was never at any time indebted to the plaintiff.

The undisputed evidence in this case shows that in the month of July, 1902, all of the defendants were residents of the state of Iowa, and that on or about that time defendants Walter W. and E. P. Merrill purchased from Mathews & Hynes about half a section of land in Sargent county, North Dakota, for something over $5,000; and, as part of the purchase price of said land, they turned in on said purchase price a certain house and lot in Iowa, owned by the defendant Emma I. Merrill, at the agreed price of $1,300, and assumed certain mortgages then against the land, and, in addition thereto, were to pay Mathews & Hynes the sum of $2,000, including the house and lot. The undisputed evidence further shows that some time later some of the proceeds of the crops raised on said lands were turned in to apply on said balance, and defendant Emma I. Merrill furnished defendants Walter W. and E. P. Merrill about $400 to apply on said indebtedness to Mathews & Hynes as part of said purchase price. Some time later all of the defendants moved to North Dakota, and the defendant Emma I. Merrill and her husband sold out in Iowa and came to North Dakota. At the time Emma I. Merrill deeded her house and lot to Mathews & Hynes to apply on the purchase price of said land, and at the other times, when advancements or loans were made by Emma I. Merrill to Walter W. and E. P. Merrill, no written obligation of any kind was given by them to her, but there was an oral understanding between the parties that later, or when the land was disposed of, that she would be reimbursed for the value of the house and lot and the other advancements. The matter ran along until about the month of January or February, 1907. It became necessary, for the purpose of raising money to assist her two sons, for her to borrow some money, and at that time the question of interest was talked over, and it was suggested by E. P. Merrill that he and Walter W. Merrill would give her a mortgage on their Sargent county land for $3,000 to cover the advances made by her to her sons. At that time Walter W. Merrill was not present, but was out on the ranch, but it was agreed by E. P. Merrill that he would get Walter to sign the mortgage. In pursuance of said agreement on the 6th day of February, 1907, a real-estate mortgage on the land in ques-

tion was prepared and dated on that day from Walter W. Merrill and E. P. Merrill to Emma I. Merrill, to secure said sum of $3,000, according to the conditions of a certain promissory note, dated on said date and payable three years after date, with interest at 6 per cent per annum; and on the 5th day of March, 1907, after the same had been duly signed, it was acknowledged before a notary public, which mortgage was subsequently, on the 20th day of March, 1907, duly filed for record in the office of the register of deeds of Sargent county, and duly recorded in book 26, p. 392, of mortgages, and the mortgage so executed and delivered is the one which this plaintiff by this action seeks to have declared fraudulent and void.

After a careful consideration of the evidence in the case, we are of the opinion that the undisputed evidence shows that at the time of the execution and delivery of said mortgage the defendants Walter W. Merrill and E. P. Merrill were justly indebted to Emma I. Merrill in a sum exceeding $3,000 for the house and lot deeded by her to Mathews & Hynes and turned in on the purchase price of said land, and for money loaned and advanced to her said two sons; that at said time she was a bona fide creditor of the said Walter W. and E. P. Merrill; and that the said Emma I. Merrill gave a valuable and sufficient consideration for said mortgage.

It is contended by the plaintiff: First, that, at the time of the execution of the alleged fraudulent mortgage, the defendant Walter W. Merrill was insolvent; second, that the said mortgage was executed and delivered by him for the purpose of hindering and delaying plaintiff in the collection of his claim, and with the fraudulent intent on his part of hindering and delaying his creditors in the collection of their claim; and, third, that the defendant Emma I. Merrill participated in such fraudulent intent. Under all well-settled principles of law, it devolved upon the plaintiff to establish by competent evidence said three essential elements. The vital question in this case is, therefore, to determine the fact as to whether or not the plaintiff has satisfactorily shown said three essential elements.

After a careful examination of the evidence introduced for the purpose of showing the insolvency of the defendant Walter W. Merrill at the time of the execution of the alleged fraudulent mortgage, we have come to the conclusion that such evidence was of a very unsatisfactory

nature, and fails to show such insolvency. We are further of the opinion from an examination of the record that the evidence fails to show that such mortgage was given with the intent on the part of the defendant Walter W. Merrill to defraud the plaintiff or his creditors, or with the intent to hinder and delay plaintiff in the collection of his claim; and we are further of the opinion, from an examination of the record, that the evidence fails to show that the defendant Emma I. Merrill participated in such fraudulent intent.

The next question that we will consider is as to the right of a debtor to prefer one creditor in the preference to another. It is well settled that a debtor has the right to make such preference, in the absence of fraud. It was held in the case of Jewett v. Downs, 6 S. D. 319, 60 N. W. 76, that a debtor in failing circumstances may pay or secure one creditor to the exclusion of others, which was approved in Smith v. Baker, 5 Okla. 339, 49 Pac. 65. In the case of Cutter v. Pollock, 4 N. D. 205, 25 L.R.A. 377, 50 Am. St. Rep. 644, 59 N. W. 1062, it was held that an insolvent debtor may pay one or more creditors in preference to others, although all of his property is used in making such payment. In the case of Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60, it was held that, in the absence of statute, a debtor has the right to prefer one creditor as against another, and a conveyance received by the creditor in good faith for that purpose is valid. Creditors of a husband cannot complain of a payment made by him, in good faith, of an honest debt due his wife. Kolbe v. Harrington, 15 S. D. 263, 88 N. W. 572. A conveyance of property by a husband to his wife, to secure a bona fide debt due to her from him, is not void as to creditors, although the husband had a fraudulent intent, unless the wife had notice of such intent. Williams v. Harris, 4 S. D. 22, 46 Am. St. Rep. 753, 54 N. W. 926. A transfer of land from a husband to his wife will not be defeated on the ground that it was fraudulent as to creditors, even though the husband had a fraudulent intent, if the wife had no knowledge of it. First State Bank v. O'Leary, 13 S. D. 204, 83 N. W. 45. Our Code specifically provides that a debtor may pay one creditor in preference to another, and may give one creditor security for the payment of his demand in preference to another. Rev. Codes 1905, § 6635.

While it is true that knowledge on the part of the grantee of land, of such suspicious facts and circumstances as would put a prudent man

on inquiry as to the grantor's intention in making the conveyance, is equivalent to a knowledge of all the facts which would be developed by a reasonable pursuit of such inquiry, yet no duty of inquiry as to the fraudulent intent of the grantor devolves upon the grantee unless he has actual knowledge of some suspicious fact or circumstance. Fluegel v. Henschel, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996.

The evidence does not disclose the fact that the defendant Emma I. Merrill had any actual knowledge of any fraudulent intent on the part of the grantor, nor are there any suspicious facts or circumstances in the case sufficient to put the defendant Emma I. Merrill on inquiry. The record discloses the fact that the defendant Emma I. Merrill had advanced to her two sons money and property which had been applied on the purchase price of the Sargent county land, and in purchasing the same land on which the mortgage in question was given; and in all good conscience, honest, fair, and just dealings between one another, we can see no good reason why defendants Walter W. and E. P. Merrill should not give a preference to their mother, as against plaintiff or any other creditor, by giving her a mortgage on the land on which she had advanced money for its purchase price, and we see no good reason why the defendant Emma I. Merrill should not be allowed to accept such mortgage and hold the same as against the claim of this plaintiff.

It therefore appears to the court, from the evidence in this case, that at the time of the execution and delivery of the mortgage in question, the defendant Emma I. Merrill was a bona fide creditor of the defendants Walter W. and E. P. Merrill, and that she gave a good and valuable consideration for the mortgage by reason of such antecedent indebtedness; and it further appearing to the court that said Emma I. Merrill took said mortgage without any intent on her part to hinder, delay, or defraud plaintiff, and being of the opinion that the findings of fact of the trial court are amply and fully supported by the evidence, the judgment of the lower court is affirmed.

Morgan, Ch. J., not participating. By request, Honorable W. J. Kneeshaw, Judge of the Seventh Judicial District, and Honorable S. L. Nuchols, Judge of the Twelfth Judicial District, the latter in place of Mr. Justice Goss, disqualified, sat with the court on the hearing of the above-entitled action.

FISK, J. (concurring specially). I concur in the conclusion that the judgment should be affirmed, but express no opinion upon the merits, for the reasons which I will briefly give.

The complaint wholly fails to allege facts sufficient to constitute a cause of action, and the learned trial court should have sustained defendants' objection, made at the commencement of the trial, to the introduction of any testimony under such complaint. As stated in the foregoing opinion, the action is one in equity, the object of which is to set aside an alleged fraudulent mortgage executed and delivered by defendants Walter and E. P. Merrill to the defendant Emma I. Merrill on certain real property in Sargent county, to secure the payment of the sum of $3,000. The action, therefore, is in the nature of a creditors' bill, and yet the complaint affirmatively discloses that the plaintiff is a mere general creditor, whose claim is represented by promissory notes. It is true the complaint alleges "that an action is now pending in said district court, wherein this plaintiff is plaintiff and said Walter W. Merrill is defendant, said action being based on said promissory note," but it nowhere appears in the complaint that the plaintiff is a judgment creditor, or has any lien whatsoever upon the real property described in the alleged fraudulent mortgage. I take it to be elementary that a plaintiff has no standing in a court of equity to challenge the validity of an alleged fraudulent conveyance or mortgage, without laying a proper foundation by alleging that he is a judgment creditor, or at least has some lien, and that his rights and remedies will be obstructed or interfered with if the alleged fraudulent conveyance is not set aside. There is no such showing in the complaint.

Hence the same fails to state facts sufficient to constitute a cause of action, and the plaintiff is entitled to no relief thereunder.

SPALDING, J., concurs in the opinion of FISK, J.

BEDDOW v. FLAGE.

(132 N. W. 637.)

Action — uniting legal and equitable causes.

1. Under the Code, several causes of action, whether such as have been heretofore denominated legal or equitable, or both, if they all arise out of the same transaction, or transactions connected with the same subject of action, may be united. *Held*, that plaintiff may, in the same action, seek a decree of specific performance for the conveyance of land, and damages for failure to convey in accordance with a written contract.

Specific performance — contract running to person as "cashier" — who may enforce.

2. Plaintiff took an option contract for the purchase of land, running to "W. E. Beddow, Cashier of the C. Bank of Waukon, Iowa." He complied with its terms, and, on the refusal of the vendor to convey, brought suit in his own name. *Held*, that among the different rules applicable to contracts so made, that most favorable to the appellant is that prima facie the words, "Cashier, etc.," are descriptive of the person, and do not constitute a representation of the capacity in which the plaintiff acted in making the contract, and that a demurrer to a complaint on such a contract, upon the ground that the action is not brought in the name of the bank, was properly overruled.

Complaint in action for specific performance — demurrer.

3. An allegation in the complaint of a vendee in an action for specific performance, that he has been ready, willing, and able at all times to comply with his part of a contract for the purchase of land, and has tendered payment, but that the vendor has refused to convey, is sufficient on demurrer.

Specific performance — contract signed only by vendor.

4. An action for specific performance may be maintained upon a contract for the conveyance of land signed only by the vendor.

Option contract for purchase of land — definiteness.

5. An option contract for the purchase and sale of land, certain as to the minimum amount of cash to be paid, and giving an option to pay all cash, becomes definite and certain upon the vendee accepting the option and offering to pay all cash. Hence other conditions in the contract as to security in case

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Note.—Tender or payment of consideration as a condition precedent to a suit for the specific performance of a contract to convey realty consummated by the vendee's exercise of an option, see note in 24 L.R.A.(N.S.) 91.

Right to specific performance of option to purchase as affected by lack of mutuality of obligation, see note in 6 L.R.A.(N.S.) 403.

part cash only is paid are rendered immaterial, although set out in the complaint.

Option contract — mutuality — specific performance.

6. An option contract accepted in accordance with its terms is mutual, and can be enforced against the vendee if he fails to perform; and hence a complaint setting out these facts is not open to demurrer on the ground of want of mutuality in the contract.

Specific performance — damages for delay.

7. The vendee in a proper case of specific performance may recover damages against the vendor for withholding possession, and delay in conveying, in an action in which specific performance is decreed.

Opinion filed September 30, 1911.

Appeal from District Court, La Moure county; Winchester, Special Judge.

Action by W. E. Beddow against Fred C. Flage. From an order overruling a demurrer to a complaint, plaintiff appeals.

Affirmed.

See also 20 N. D. 66, 126 N. W. 97.

Knauf & Knauf, for appellant.

Davis & Warren, for respondent.

SPALDING, J. The relief prayed for in the complaint in this action is that the defendant be required to specifically perform his part of an agreement to sell and convey certain land described, and, in case of his failure, that the title be transferred by a decree of the court, and that the plaintiff have and recover $2,900 as damages sustained by reason of the defendant's refusal to convey the land pursuant to the terms of an agreement set out. The complaint alleges that on or about the 26th of September, 1905, the defendant in consideration of $1 paid to him, and by an instrument in writing, called an option contract, sold and granted to the plaintiff an option for the period of ninety four days from the said date to purchase the E. ½ of section 11, township 135, range 64 W., La Moure county, for the sum of $4,800, and a copy of the option contract is attached; that at the time said contract was executed and delivered it was understood and agreed that if the plaintiff should elect to purchase said land within said period, he should pay to

the defendant, on delivery to him of the proper conveyance, at least one third of such agreed purchase price, and as much more as he might then elect to pay in money; that, if he should elect not to pay all of the purchase price in money, he should liquidate the balance by either giving defendant a promissory note and mortgage securing the same, or five promissory notes secured by a mortgage; that defendant agreed to convey said lands free and clear of all encumbrances, by deed, with full covenants of warranty, and furnish plaintiff with an abstract of title thereof, showing it free and clear of all encumbrances; that in compliance with the terms of such contract, and on the 27th of December, 1905, plaintiff notified in writing the defendant that he would take said land, and tendered in full consideration the purchase price therefor, $4,800, and demanded a deed and an abstract of title thereof. It is then alleged that defendant refused, and ever since has refused, to convey or to furnish the abstract of title; that at all times referred to the defendant was, and is now, the owner of said premises, and fully competent and able to convey the same in accordance with the terms of such agreement; and that at all times the plaintiff has been fully prepared to pay the purchase price in full in money, and brings the same into court for payment to the defendant.

A second cause of action is then set out which, in all respects, is identical with the first cause of action, except that in it it is alleged that the plaintiff purchased such option contract for speculative purposes, and that while it was in full force and effect, and relying upon the defendant to convey pursuant to such contract, plaintiff negotiated and sold the said land at a profit of $2,400, and obligated himself to convey the same to the purchaser on or before the 1st day of January, 1906, and that, because of the refusal and failure of the defendant to convey as agreed, plaintiff was unable to convey to his purchaser, and was compelled to effect a settlement with him by reason of such failure; and that he necessarily paid and expended, to effect such settlement, the sum of $500. The option contract made a part of the complaint is as follows:

Option Contract.

For and in consideration of the sum of $1 to me in hand paid, the receipt whereof is hereby acknowledged, I hereby grant unto W. E.

Beddow, Cashier of the Citizens' State Bank of Waukon, Iowa, an option for ninety four days from the 26th day of September, 1905, to purchase for the sum of $4,800.00 the following described land, situated in the county of La Moure and state of North Dakota: The east half of section 11, 135–64. One third or more cash, balance on time at 6 per cent interest, upon the following terms and conditions, to wit: Said W. E. Beddow to signify his intention to take or reject the same by due notice in writing within the time above specified, and a failure to serve such notice within the time specified shall terminate this option without further action, time being the essence of this agreement. In case said notice shall be served in due time, then thirty days shall be given in which to examine abstract, make deeds, and close sale.

Fred C. Flage. [Seal]

Witnesses: N. W. Niehaus.

To this complaint the defendant demurred; First, because several causes of action have been improperly united; second, because the complaint does not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer; and from the order overruling it this appeal is taken.

1. Does this complaint improperly unite two causes of action? We are not concerned with the sufficiency of the allegations of the complaint under either cause of action in the consideration of this question. If the two causes of action attempted to be stated are such as can properly be united in one complaint, the question must be answered in the negative. Under the Code several causes of action, whether they are such as have been heretofore denominated legal or equitable or both, where they all arise out of the same transaction or transactions connected with the same subject of action, may be united. Rev. Codes 1905, § 6877. The first cause of action which respondent attempts to state is for specific performance of the contract to convey land. The second is for damages for failure to convey in accordance with the contract. It is true that, standing alone, one would involve a suit in equity and the other an action at law, but the multiplicity of suits necessary under the old system was one of the things sought to be avoided by the adoption of the Code provision to which reference has been made. There can be no question that both these causes of action arise out of the same trans-

action, and it would seem under the plain terms of the section referred to that they may be united in the same complaint. Sheets v. Prosser, 16 N. D. 180, 112 N. W. 72; Tripp v. Yankton, 10 S. D. 516, 74 N. W. 447; Aultman Co. v. Ferguson, 8 S. D. 458, 66 N. W. 1081; Wiles v. Suydam, 64 N. Y. 177; Bliss, Code Pl. §§ 166, 167. We need not determine whether it was necessary for the plaintiff to treat the breach of this contract as two causes of action, or whether only one cause of action is shown. Appellant's authorities are not in point.

2. Does the fact that the contract was made between the defendant and "W. E. Beddow, Cashier of the Citizens' State Bank of Waukon, Iowa," and that the suit is brought by W. E. Beddow, disclose no cause of action in Beddow? This contract was, upon its face, made by the defendant with Beddow, the plaintiff, personally. The rule is adopted in some states that in contracts the words "cashier," etc., are prima facie descriptive of the person, and do not constitute a representation of the capacity in which the plaintiff was acting in making the contract. Brunswick-Balke-Collender Co. v. Boutell, 45 Minn. 21, 47 N. W. 261. And this is the most favorable to appellant of any rule on the subject called to our attention. The allegations of the complaint are that the contract was with Beddow personally, and it discloses nothing on its face to the contrary.

3. It is contended that the complaint does not disclose any proper tender of performance within the time specified in the contract by the plaintiff. Sufficient answer to this contention is that the complaint alleges a tender of the full amount of the purchase price, and that he has been ready, able, and willing to comply with his part of the contract. But no tender was necessary. The contract discloses that it was incumbent on the plaintiff to signify his intention to take or reject the land by due notice in writing within ninety-four days, and that in case such notice would be served within such time, the plaintiff was to have thirty days within which to examine an abstract of the title thereto, and the defendant, within which to make deeds and close the sale; but the complaint alleges not only the service of the notice within the time, the demand for a deed, and that the plaintiff was then and ever since has been fully prepared to pay the purchase price in full in money, and tendered the same to the defendant, but that the defendant refused and ever since has refused to convey. It is elementary that an offer to per-

form is rendered unnecessary when the party to whom the act is due first makes known his refusal to accept performance. Where a party resists the performance of a contract and insists he is not bound by the contract to convey, no tender is necessary before suit is brought. Rev. Codes 1905, § 6679; Wright v. Young, 6 Wis. 127, 70 Am. Dec. 453; Gill v. Newell, 13 Minn. 462, Gil. 430; Gray v. Dougherty, 25 Cal. 266; Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938.

4. As near as can be gathered from the brief of appellant, the principal ground of appeal rests upon the theory that the contract of sale pleaded is insufficient to entitle respondent to a decree for specific performance thereof; in other words, that it does not state a cause of action on which specific performance may rest. In support of this it is said that the contract is one-sided, uncertain, and ambiguous, because it does not determine the amount to be paid down, when or where the balance is to be paid, whether it is to run for a long or short term of years, whether the balance is to be secured by a mortgage or otherwise, and thereby furnishes a wide ground for dispute of the parties as to its terms.

(a) Section 6612, Rev. Codes 1905, provides that a party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance. See also Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881, 48 S. E. 891, 1 Ann. Cas. 986; McPherson v. Fargo, 10 S. D. 611, 66 Am. St. Rep. 723, 74 N. W. 1057; Gira v. Harris, 14 S. D. 537, 86 N. W. 624. Hence the objection that the contract is one-sided or unilateral is not well taken. Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; Frank v. Stratford-Handcock, 13 Wyo. 37, 67 L.R.A. 571, 110 Am. St. Rep. 963, 77 Pac. 134; Cheney v. Cook, 7 Wis. 413.

(b) The option contract, standing alone, may be somewhat uncertain as to the amount to be paid in cash, and the terms and conditions of the security to be given if only a partial payment is made, but it provides that the vendee may pay all cash, and by his election to pay all cash he made what was in the option contract uncertain, certain. The combination of the option contract and the acceptance by the vendee constitutes the contract under which respondent is seeking to recover. Until

he elected, which he did, within the time permitted, *viz.*, ninety four days, to accept the option given him, it was a one-sided contract, but immediately on his making the acceptance in writing it became a bilateral contract; the terms, which theretofore had been uncertain and were left to be adjusted or to be determined upon by the vendee within certain limits, became definite. The permission given him by the option to pay all cash was accepted, and this renders the allegations of the complaint with reference to oral agreements regarding terms if only part cash should be paid surplusage. Such allegations are wholly unnecessary and irrelevant to the facts disclosed by the complaint, and made so by the cash offer. De Rutte v. Muldrow, 16 Cal. 505; Wardell v. Williams, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796; South & North Ala. R. Co. v. Highland Ave. & Belt. R. Co. 98 Ala. 400, 39 Am. St. Rep. 74, 13 So. 682; Brown v. Munger, 42 Minn. 482, 44 N. W. 519; Rude v. Levy, 43 Colo. 482, 24 L.R.A.(N.S.) 91, 127 Am. St. Rep. 123, 96 Pac. 560; Ross v. Parks, 93 Ala. 153, 11 L.R.A. 148, 30 Am. St. Rep. 47, 8 So. 368; Watkins v. Robertson, 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33.

(c) It is further objected under this head that there is a lack of mutuality, and that the contract comes within the terms of § 6610, Rev. Codes 1905, reading as follows: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compelled 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." There is no merit in this proposition. What we have said under "b" is here applicable. Had the respondent not accepted the offer of the appellant, there might be some merit in this contention, but the instant that the offer was accepted, within the definite term of the contract, it became a mutual contract, and could have been enforced against the respondent had he thereafter failed to perform. Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526. Many authorities hold that an option to buy or sell real estate, more than any other form of contract, contemplates a specific performance of its terms, and we find no authorities that sustain appellant's contention that the contract is not mutual after it has been accepted by the vendee. See Watts v. Kellar, 5 C. C. A. 394, 12 U. S. App. 274, 56 Fed. 1, 36 Cyc. 626; Frank v. Stratford-

Hancock, 13 Wyo. 37, 67 L.R.A. 571, 110 Am. St. Rep. 963, 77 Pac. 134; Warren v. Castello, 109 Mo. 338, 32 Am. St. Rep. 669, 19 S. W. 29; Vassault v. Edwards, 43 Cal. 458; Hall v. Center, 40 Cal. 63.

5. The vendee plaintiff in an action for specific performance may recover damages for withholding possession, and delay in conveying when performance is decreed. 36 Cyc. 753; Pillsbury v. J. B. Streeter, Jr. Co. 15 N. D. 174, 107 N. W. 40.

The complaint in this case is not open to any of the objections made by the appellant. The order of the District Court overruling appellant's demurrer is affirmed. Mier v. Hadden, 148 Mich. 488, 118 Am. St. Rep. 586, 111 N. W. 1040, 12 Ann. Cas. 88.

A. G. BURR, Judge of the Ninth Judicial District, sat in place of MORGAN, Ch. J., not participating.

GESSNER v. HORNE.

(132 N. W. 431.)

Joinder of causes in complaint — motion to require separation.

1. Complaint construed, and *held*, that its allegations are sufficiently broad to embrace not only a cause of action for alienation of affections, but also one for criminal conversation; and the fact that such causes of action are intermingled, instead of separately pleaded, cannot avail defendant. His remedy was by motion to require a separation of such causes of action.

Criminal conversation — relief under pleadings.

2. Conceding, as contended by respondent, that plaintiff's counsel in drafting such pleading did not intend to allege a cause of action for criminal conversation, such fact does not preclude plaintiff from recovery thereunder. The fact that a party proceeds to trial upon a mistaken idea as to the nature of an action and the scope of the issues framed by the pleadings does not deprive him of the right to such relief as is consistent with the real issues and the proof in the case, where he has not expressly or impliedly waived such right.

Opinion filed September 6, 1911.

Appeal from District Court, Ramsey county; *John F. Cowan*, J.

Action by Charles C. Gessner against Arthur Horne. Judgment for defendant, and plaintiff appeals.

Reversed.

Anderson & Traynor and *Guy C. H. Croliss,* for appellant.

P. J. McClory and *F. T. Cuthbert,* for respondent.

FISK, J. This is an appeal from a final judgment in defendant's favor based on the verdict of a jury. Counsel disagree as to the nature of the action; appellant's counsel contending that it is an action for criminal conversation, while respondent's counsel, on the other hand, insist that it is an action merely for alienation of affections. The trial court took the latter view, and instructed the jury accordingly. Proper exceptions to the rulings of the court were preserved, and such rulings clearly constitute reversible error if, as contended by appellant, the allegations of the complaint are broad enough to include a cause of action for crim. con. Whether, as argued by appellant's counsel, it is proper to speak of alienation of affections and crim. con. as separate and independent causes of action, we need not determine.

Conceding the correctness of the contention of respondent's counsel on this phase of the case, it by no means follows that the ruling complained of was correct, for it is not questioned that both of such causes of action may properly be united in one complaint; and the fact that they are not separately stated is not fatal. The remedy in such case would be by motion to require a separation of such causes of action. The pivotal question is, Can the complaint, when properly construed, be held to state a cause of action for crim. con.? Are its allegations broad enough to cover such cause of action, as well as a cause of action for alienation of affections? Respondent's counsel assert that the intention of the pleader was merely to allege alienation of affections, and in proof of this they point to the evident fact that the pleader took for his model the complaint in King v. Hanson, 13 N. D. 85, 99 N. W. 1085, wherein Judge Young, in writing the opinion, characterized the action as one for alienation of affections. Such argument is entitled to but little weight, for in King v. Hanson no question was raised or considered involving the nature of the cause or causes of action, and the expression of Judge Young, as aforesaid, does not rise even to the dignity of *obiter dictum.* Nor are we favorably impressed with respondent's argument

that the King-Hanson complaint must have been merely for alienation of affections, for the alleged reason that the wife could not maintain an action for crim. con.? Counsel say: "No one would claim that a wife can recover in a crim. con. action against one having adultery with her husband,"—citing 8 Am. & Eng. Enc. Law, 261, and Doe v. Roe, 82 Me. 503, 8 L.R.A. 833, 17 Am. St. Rep. 499, 20 Atl. 83. While not very material and in no manner controlling, we suggest that a careful reading of the citation to the Encyclopedia of Law and the following page will show that the rule in those states where the rights of married women have been enlarged is the reverse of what counsel contend for; the rule of the common law having been abrogated in this respect. The case of Doe v. Roe, supra, merely voices the rule of the common law.

The complaint in the case at bar, so far as material to the present inquiry, is as follows:—

"(3) That during the fall of 1905, or about said time, the defendant seduced the plaintiff's said wife, and that from that time and at various times up to and until about the 1st day of October, 1907, at Penn, North Dakota, Devils Lake, North Dakota, and St. Paul, Minnesota, and elsewhere, the defendant, knowing the said Annie Gessner was plaintiff's wife, wrongfully, wickedly, and maliciously contriving and intending to injure plaintiff, and to deprive him of the comfort and society, aid, and affection of his said wife, maliciously, by means of presents of a diamond ring, jewelry, money, buggy rides, trips, and other means, enticed plaintiff's wife away from plaintiff and her said children at Penn, aforesaid, and wrongfully, maliciously, and wickedly induced, caused, persuaded by the means aforesaid and at said times, plaintiff's wife to commit adultery with him, the said defendant, and live in adultery at said places.

"(4) That in consequence thereof and by means of the arts, wiles, and inducements of the said defendant, and caused solely thereby, the said Annie Gessner, plaintiff's wife, did during the month of July, 1907, at Penn, North Dakota, desert and abandon the said plaintiff, their said home, and their children, which desertion and abandonment of said plaintiff and children has ever since continued, and the plaintiff's said wife and the defendant since said desertion, as plaintiff is informed and verily believes, resided together at St. Paul, Minnesota, a

short period during the month of September, 1907, and while so residing there lived together in adultery.

"(5) That plaintiff's said wife has wholly abandoned the plaintiff and his children by reason of the arts, wiles, and inducements of said defendant, whereby the affection of said wife has been wholly alienated and destroyed, and the plaintiff has ever since been and is now deprived of the comfort and society, assistance, love, and affection which he otherwise would have had, and by reason of the wrongful acts of the defendant aforesaid has suffered great distress of body and mind, and his domestic peace and happiness have been forever destroyed, and is damaged in the sum of $25,000."

Notwithstanding the ingenious argument of respondent's counsel, which we have carefully considered, we are impelled to the conclusion that the complaint is broad enough to charge defendant with criminal conversation with plaintiff's wife. Paragraph 3 alleges, in effect, that defendant in the fall of 1905 seduced plaintiff's said wife, and at various other times therein mentioned he maliciously enticed her away from plaintiff, and wrongfully and maliciously induced, caused, and persuaded her to commit adultery with him, the defendant, and live in adultery with him at various designed places. If this is not a sufficient charge of crim. con., we are at a loss to understand why. Counsel for respondent contends that the word "seduced," as used in said paragraph, does not mean that defendant had sexual intercourse with plaintiff's wife. Such argument is based on the fact that later in the paragraph it is alleged that by means of presents, etc., defendant enticed plaintiff's wife away from plaintiff, and persuaded her to commit adultery and live in adultery with him. Does the fact that defendant, in the fall of 1905, succeeded in debauching this female, foreclose the idea that at subsequent dates he may have, through the means and inducement mentioned, procured her to commit like acts and also to live with him in adultery? But counsel are clearly in error in the construction which should be given to the word "seduced," as used in said paragraph. See State v. Bierce, 27 Conn. 319, and Hart v. Knapp, 76 Conn. 135, 100 Am. St. Rep. 989, 55 Atl. 1021.

We quote from the opinion in the first case: "The word 'seduce,' . . . when it is used with reference to the conduct of a man towards a female . . . is universally understood to mean an enticement

of her on his part to the surrender of her chastity, by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him. . . . The word 'seduction,' used in reference to a man's conduct towards a female, *ex vi termini* implies sexual intercourse between them. Everyone understands, when it is said of a man that he has 'seduced' a particular female, that he has had such intercourse with her." We deem it too clear for serious doubt that, standing alone, paragraph 3 charges both an enticement away of plaintiff's wife and a defilement of the marriage bed. The fact that defendant committed these wrongs with the double intent, as alleged, of injuring plaintiff, and of depriving him of the comfort and society, aid, and affection of his said wife, does not lessen or tend to restrict the wrongs thus alleged to that of mere alienation of affections. Respondent's counsel did not seriously contend in oral argument that the above construction is not justified when paragraph 3 is alone considered; but they contend that paragraph 4 is and should be a part of paragraph 3, and that, when construed together, a clear intent is manifested to allege merely alienation of affections. We are unable to see how paragraph 4 tends in the least to modify or restrict the charges contained in paragraph 3. It is, in substance, therein alleged that, in consequence of the wrongful acts in paragraph 3 set forth, plaintiff's wife deserted and abandoned plaintiff and her home. Paragraph 5 realleges such abandonment, and also the alienation of her affections, and concludes by alleging that by reason of such wrongful acts of defendant (enticement, alienation of affections, and adultery) plaintiff has suffered great distress of mind, to his damage, etc. Surely the complaint in the case at bar is sufficient to charge criminal conversation, if, as was held in Hollister v. Valentine, 69 App. Div. 582, 75 N. Y. Supp. 115, the complaint in that case was sufficient. There plaintiff was held to have waived the right to recover on such ground, but in the case at bar no such waiver was made.

Our conclusion is that the complaint not only charges enticement of plaintiff's wife and alienation of her affections, but it also charges, and it was the intention to charge, criminal conversation between defendant and this woman. But even conceding, as contended by appellant's counsel, that it was not the intention of the pleader to charge defendant with criminal conversation with plaintiff's wife, still plain-

tiff would have the right to rely thereon as a ground of recovery. "The fact that a party proceeds to trial upon a mistaken idea as to the nature of an action and the scope of the issues framed by the pleadings does not deprive him of the right to such relief as is consistent with the real issues and the proof in the case." Logan v. Freerks, 14 N. D. 127, 103 N. W. 426. The necessary facts to constitute each of these infringements of plaintiff's marital rights having been pleaded in the complaint, we feel required to hold that plaintiff had the right to rely on any of such causes of action, which the evidence tended to establish, and that on the issue of crim. con. there was evidence sufficient to require its submission to the jury.

Judgment reversed, and new trial ordered.

MORGAN, Ch. J., took no part in the decision; Honorable A. G. BURR, of the Ninth Judicial District, sitting by request.

STATE EX REL. HAGEN v. ANDERSON, County Auditor.

(132 N. W. 433.)

Statutes — uniformity — special privileges — payment for bridge.

Section 3013, Rev. Codes 1905, which provides that "the county treasurer of each county wherein any city or municipal corporation shall have constructed a bridge, or shall hereafter construct a bridge, over any navigable stream, shall pay to the city treasurer of such city or municipality whereby such bridge has been constructed, or is about to be constructed, all money in the county treasury or which may come into the county treasury, in the bridge fund of such county, which may have been or shall be levied, assessed, and collected from persons and property, or either, in said city or municipality," construed, and *held* to be a valid enactment.

Opinion filed September 6, 1911.

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

Application by the State, on the relation of T. J. Hagen, for writ of

mandamus against Hans Anderson, auditor of Grand Forks county. From a judgment awarding the writ, defendant appeals.

Affirmed.

O. B. Bertness and *B. G. Skulason,* for appellant.

J. B. Wineman, for respondent.

FISK, J. A peremptory writ of mandamus was awarded to the relator by the district court, commanding defendant to issue and deliver to relator warrants upon the county treasurer for certain moneys collected and held by Grand Forks county for road and bridge taxes on persons and property within the city of Grand Forks. The appeal is from the judgment awarding such writ. The facts are stipulated, and the sole defense urged is the alleged unconstitutionality of § 3013, Rev. Codes 1905, under the provision of which relator bases his claim to a portion of such moneys. This section is as follows: "The county treasurer of each county wherein any city or municipal corporation shall have constructed a bridge, or shall hereafter construct a bridge, over any navigable stream, shall pay to the city treasurer of such city or municipality whereby such bridge has been constructed or is about to be constructed, all money in the county treasury, or which may come into the county treasury, in the bridge fund of such county, which may have been or shall be levied, assessed, and collected from persons and property, or either, in said city or municipality."

It is the appellant's contention that this statute contravenes the following sections of the state Constitution: Section 11 providing that "all laws of a general nature shall have a uniform operation;" section 20 providing, among other things, "nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens;" § 69 providing that "the legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say. . . . 23. For the assessment or collection of taxes." Such contention cannot be sustained. Said statutory provision is not vulnerable to attack on any of the enumerated grounds. The facts bring the case within the rules enunciated in the following, among many like, decisions: People ex rel. Springfield v. Power, 25 Ill. 189; Seabold v. Northumberland County, 187 Pa. 318, 41 Atl. 22; Lewis v. Board of Education, 66 N.

J. L. 582, 50 Atl. 346; Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; Condon v. Maloney, 108 Tenn. 82, 65 S. W. 871; Codlin v. Kohlhousen, 9 N. M. 565, 58 Pac. 499; Re Connolly, 17 N. D. 546, 117 N. W. 946, and cases cited; Wheeler v. Philadelphia, 77 Pa. 338; Louisville School Board v. Superintendent of Public Instruction, 102 Ky. 394, 43 S. W. 718; Fellows v. Walker (C. C.) 39 Fed. 651; Schintgen v. La Crosse, 117 Wis. 158, 94 N. W. 84; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; Gilson v. Rush County, 128 Ind. 65, 11 L.R.A. 835, 27 N. E. 235; Johnson County v. Johnson, 173 Ind. 76, 89 N. E. 590; State ex rel. Terre Haute v. Kolsem, 130 Ind. 434, 14 L.R.A. 566, 29 N. E. 596.

We are in full accord with the reasoning and conclusions of these courts, and applying the principles thus firmly established to the facts in the case at bar necessitates an affirmance of the judgment appealed from.

Affirmed.

HALVERSON v. BENNETT et al.

(132 N. W. 434.)

Justice's judgment — relief from — meritorious defense.

Equitable relief will not be granted against a justice's judgment, regular on its face, although void for failure to enter the same at the close of the trial, without some showing in the complaint and proofs of the existence of a meritorious defense against the cause of action forming the basis of the judgment.

Opinion filed September 7, 1911.

Appealed from District Court, La Moure county; *E. B. Goss,* Special Judge.

Action by Ebert Halverson against E. A. Bennett and E. G. Houston to set aside an alleged void justice's judgment. Judgment for defendants, and plaintiff appeals.

Affirmed.

M. C. Lasell, for appellant.

Davis & Warren, for respondents.

FISK, J. Action in equity to set aside a justice's court judgment upon the ground that such justice lost jurisdiction to render any judgment; he having failed to enter same in his docket at the close of the trial. His jurisdiction, both of the subject-matter and of the person of the defendant, down to the close of the trial, is not questioned; nor is the fact questioned that at the conclusion of the trial the justice orally announced his decision. The lower court denied the relief prayed for, and the case is here for trial *de novo*.

We have no difficulty in arriving at the conclusion reached by the trial court, but we arrive at such conclusion on an entirely different ground. We deem it unnecessary to a proper disposition of this appeal to notice the various contentions of counsel, or to consider the correctness of the findings or conclusions of the court below, for it is apparent that appellant has no standing in a court of equity, under either his pleading or proof. Neither the complaint nor the proof contains a word or syllable tending to show that such judgment is unjust or inequitable in any respect, or that plaintiff pretends to have any defense to the cause of action sued on. The judgment is regular on its face, and presumably plaintiff (defendant in the action in justice's court) had a full and fair hearing.

Under these facts, it is well settled that courts of equity will not interfere with such judgments, even though void. A mere statement of the rule ought to suffice to satisfy anyone that it is founded on reason and common sense, and should, at least, be applied to cases like the one at bar. Such rule is well stated by the supreme court of California, in Burbridge v. Rauer, 146 Cal. 21, 79 Pac. 526, as follows: "It would be inequitable to set aside the judgment without an affirmative showing in the complaint that there was a good defense to the justice court judgment." The same court, in Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888, said: "Equity will not overturn a judgment valid on its face, unless it is an unjust judgment. It must be against conscience, and it must appear that a like judgment would not follow in the same action or upon the same cause of action." This rule is supported by ample authority. Among the numerous authorities, we cite: True v. Mendenhall, 67 Kan. 497, 73 Pac. 67; Strowbridge v. Miller, 4 Neb. (Unof.) 449, 94 N. W. 825; Foust v. Warren, — Tex. Civ. App. —, 72 S. W. 404; Tootle v. Ellis, 63 Kan. 422, 88 Am. St. Rep. 246, 65

Pac. 675; Knox County v. Harshman, 133 U. S. 152, 33 L. ed. 586, 10 Sup. Ct. Rep. 257, 16 Am. & Eng. Enc. Law, 386, 387, and cases cited.

A few courts have held that where the judgment is void on its face, no such showing is required as a condition to equitable relief. While the courts differ on this question, we find no case wherein the court has refused to apply the above rule to a state of facts such as are presented in this record.

Applying such rule to the case at bar necessarily leads to an affirmance of the judgment. It is so ordered.

Goss, J., having presided at the trial in the lower court, took no part in the above decision.

SPALDING, Ch. J. I concur in affirming the judgment of the trial court, but prefer to do so upon the ground argued in respondent's brief, that the party aggrieved by a judgment cannot resort to a court of equity for relief when he has an adequate remedy at law. The defendant had a remedy by motion to vacate the judgment, of which he did not avail himself. See Kitzman v. Minnesota Thresher Mfg. Co. 10 N. D. 26, 84 N. W. 585; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Kerr v. Murphy, 19 S. D. 184, 69 L.R.A. 499, 102 N. W. 687, 8 Ann. Cas. 1138; Freeman, Judgm. § 486.

KENNEDY v. STATE BANK OF BOWBELLS.

(132 N. W. 657.)

Principal and agent — disobedience of orders — wrongful surrender of draft by bank.

1. In an action to recover as for money had and received by defendant to plaintiff's use, the proof disclosed that plaintiff, a resident of Wisconsin, sent to defendant bank at Bowbells, this state, a draft for $1,700, payable to the order of one K., accompanied by specific written instructions to deliver same to such payee only on receipt by it of a warranty deed conveying to plaintiff, free and clear of encumbrance, a fee-simple title to certain real property, together with an abstract showing such title in plaintiff; such abstract and title to be approved by plaintiff in the event of any doubt arising regarding the title as disclosed by such abstract. Thereafter defendant forwarded to plain-

tiff a warranty deed of such property, together with an abstract of title thereto, which plaintiff refused to accept or approve, for the reason that such abstract disclosed that title to such property had not passed from the government to the grantor in such deed; and such disapproval was communicated, by letter, to defendant. Subsequently, certain correspondence was had between the parties relative to the transaction, but the original instructions were in no manner changed or modified. Notwithstanding this, defendant thereafter procured the payee of such draft to indorse same, and it passed such draft to its credit in a Minneapolis bank. It was stipulated, in effect, that the grantor, in such deed, never acquired title under her homestead entry and final receiver's receipt, and that she relinquished to the government all claims thereto.

At the close of the testimony, a verdict was directed in plaintiff's favor. *Held* not error.

Assignment of error not argued in brief.

2. An assignment of error, not argued in the brief, will be deemed abandoned.

Motion for directed verdict — time for.

3. An assignment of error cannot be predicated on a ruling denying a motion for a directed verdict made at the close of the plaintiff's case, which such motion is not renewed at the close of all the testimony.

Record on appeal — failure to disclose motion for new trial.

4. Where the record fails to disclose that a motion for a new trial was made and denied, error cannot be predicated on such alleged ruling.

Opinion filed September 8, 1911.

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

Action by W. T. Kennedy against the State Bank of Bowbells. From a judgment for plaintiff based on a verdict directed by the court, defendant appeals.

Affirmed.

Palda, Aaker, Greene, & Kelso, for appellant.

D. C. Greenleaf and *W. F. Doherty,* for respondent.

Fisk, J. Action to recover as for money had and received to plaintiff's use. Plaintiff was successful in the court below, and the notice of appeal recites that it is both from the judgment and from an order denying defendant's motion for a new trial, but no such motion or order is disclosed in the record.

The facts are not seriously disputed. The following is appellant's version of such facts, slightly modified by us to conform to what we deem the true situation: On January 28, 1906, plaintiff sent to the de-

fendant from Amery, Wisconsin, a draft, on the Northwestern National Bank of Minneapolis for $1,700, indorsed by the plaintiff, payable to the order of one D. W. Kelly. Such draft was sent with instructions that the same was to be held in escrow, subject to the following conditions: The draft to be delivered to Kelly when the latter should deposit with the defendant a warranty deed conveying the S. E. ¼ of section 24, in township 163 N., of range 95 W., in Williams county, North Dakota, and also furnish an abstract of title showing the record of such deed and perfect title in fee simple in the plaintiff; the draft to be held subject to the approval of the abstract by the plaintiff. Defendant received such letter and draft and held the same until the 28th day of February, when it passed the draft for deposit to its credit in the National Bank of Commerce in Minneapolis, and on March 1, 1906, it sent the warranty deed, Exhibit 6, and the abstract of title, Exhibit 5, to plaintiff at Amery, Wisconsin. The money was not paid to Kelly on the draft until March 19, 1906. On March 3d the plaintiff wrote and forwarded to the defendant Exhibit 4, in which he objected to the title and the abstract on account of its failure to show patent from the United States and on account of some personal-property taxes. On March 7, 1906, defendant wrote plaintiff the letter, Exhibit 7, in which attention was called to the fact that the personal-property tax had, at the time of writing the letter, been paid, and made some explanation as to the patent. In answer, plaintiff wrote the letter, Exhibit 8, wherein he expressed his willingness to rely upon the defendant to forward the patent as soon as it should be received from the government. Replying thereto, defendant wrote Exhibit 9, in which it disclaimed any intention to guarantee the title or the issuance of patent, and notified plaintiff that, unless he decided to accept the deed and title, the grantors in the deed desired the land reconveyed. This last letter was dated and forwarded on March 12, 1906. Defendant's assistant cashier, D. E. McLellan, testifies, that no subsequent communication was received, to his knowledge, from plaintiff concerning the transaction, and on the 19th of March, 1906, the proceeds of the draft were credited to Tessie C. Black on defendant's books. Plaintiff claims to have forwarded under date of March 17, 1906, a letter of which Exhibit 10 is a carbon copy, in which plaintiff expressed his willingness to wait a reasonable time for the patent, but closed his letter with the following language:

"You will, however, hold the money until the patent is forthcoming." The assistant cashier, McLellan, claims that such letter was never received to his knowledge, and after waiting from March 12th, the date of the bank's last letter to the plaintiff, the defendant bank paid the money as above mentioned. The matter stood in this situation until November, 1906, when plaintiff called upon defendant bank, and was informed that the draft had been cashed and paid in money to Kelly long prior thereto, and plaintiff demanded back the $1,700 from the defendant, and offered to the defendant the deed. The demand was refused, and thereupon the plaintiff brought this action to recover from the defendant the $1,700, alleging that the same was received by the defendant to the use of the plaintiff, and was the property of plaintiff. The parties, through their respective counsel, entered into a stipulation which was offered and received in evidence, wherein it was in substance stipulated as a fact that Tessie C. Black, the grantor in the deed, Exhibit 6, made H. E. No. 28,177 for said land in May, 1904, and submitted final proof for such entry in October, 1905; that in March, 1906, the Commissioner of the General Land Office rejected such proof, giving to such entryman the right to submit new proof; and that, although she received due notice of such action, she failed to comply therewith, and in September, 1906, her final proof and final receiver's receipt were canceled by such Commissioner, and in October of said year she relinquished to the government all claims to such tract, and thereafter one McGee made H. E. entry thereon.

Appellant assigns errors as follows: (1) The court erred in overruling the defendant's objection to the introduction of Exhibit 10. (2) The count erred in overruling the defendant's motion, made at the close of plaintiff's case, to direct a verdict in favor of the defendant upon the grounds, stated in said motion. (3) The court erred in granting the plaintiff's motion and instructing the jury to find a verdict for the plaintiff at the close of the evidence. (4) The court erred in overruling the defendant's motion for a new trial upon the grounds set forth in said motion.

The first assignment, even if meritorious, is not available to appellant, as the same is not argued in the brief and must be deemed abandoned.

The second assignment is of no avail, as it is well settled that error

cannot be assigned on a ruling denying defendant's motion for a directed verdict made at the close of the plaintiff's case, where such motion is not renewed at the close of all the testimony. Landis Mach. Co. v. Konantz Saddlery Co. 17 N. D. 310, 116 N. W. 333.

The fourth assignment has not foundation in the record. The record is wholly silent as to any motion for a new trial having been made or denied, and any reference in the printed abstract to such a motion or ruling having been made is unwarranted, according to the original record certified to this court.

The sole question therefore for consideration is the correctness of the ruling of the court below in directing a verdict for the plaintiff. As proof stood at the close of the trial, was it error, as a matter of law, to direct such verdict?

Appellant's contention, in brief, is that defendant was merely a gratuitous depositary of such draft, and hence bound only to use such care as a person would exercise in his own ordinary business affairs, and that the only ground on which the plaintiff could rightfully recover was by way of damages for any detriment suffered by him by reason of a lack of due care on the bank's part, and that plaintiff failed to prove either a lack of such care by defendant, or that plaintiff had suffered any detriment. We quote from appellant's brief: "If we take the entire record in this case and search it diligently, we shall be unable to find any evidence sufficient to establish the fact that the deed and the abstract, which were actually furnished to the plaintiff, did not meet with all the requirements of the plaintiff's letter, Exhibit 1. It is quite apparent that there was some dissatisfaction on the part of the plaintiff with regard to the title of the land in question; but there is not a syllable of evidence to show that the title conveyed by deed did not result in the transfer of absolutely perfect title to the plaintiff. If an inference could be indulged that the title which the plaintiff assumed thereby had failed in some particular, there is still a total lack of evidence of any kind to show that the plaintiff does not now own and hold good and sufficient legal title to the land in question. If such be the case, then the plaintiff has sustained no damage through any act of the defendant. In order to recover, the plaintiff must show by clear and unequivocal evidence that he has sustained a loss. No such evidence is found in this record. The plaintiff himself testifies to the fact that he

has made no effort to recover any damages or any money from the grantor in the deed, or from Mr. Kelly, to whom the money in question was paid by the defendant. There was offered and received in evidence a stipulation of certain facts, which is marked Exhibit 3 and found on pages 40–42 of the abstract; but we submit there is nothing in such stipulation of facts, either separately or considered in connection with the other evidence in the case, that shows that the plaintiff has not received, and does not now own and hold, a legal title to the land in question. He may not have received it through the original conveyance of Tessie C. Black, the grantor in the deed, Exhibit 6; but there is nothing to show that he did not ultimately receive it and does not now hold it. The jury could not find a verdict upon mere suspicion or inferences, and much less would the trial court be justified in directing a verdict under such conditions." With due deference to the argument of appellant's counsel, we are unable to uphold their contention. To our minds, it is not a case of mere negligence on defendant's part in turning over the draft or its proceeds; but it is a clear case, under the facts, of a wilful violation by the agent of his principal's instructions. Such instructions were in writing, and were clear and unambiguous. Defendant was instructed to hold the draft until such time as it received for plaintiff a deed conveying a fee-simple title to certain real property, together with an abstract showing such title in plaintiff, free from encumbrance. It saw fit to assume the performance of the duties of such agency. These instructions were in no way modified or changed, and defendant's wilful violation thereof, whether it was a gratuitous depositary or one for hire, constituted a conversion of such draft to its own use, and it became liable to plaintiff at his election either in conversion, or as for money had and received to plaintiff's use. Appellant's contention, therefore, that there is no proof of negligence on defendant's part, is beside the question. Nor is there any merit in its contention that the proof wholly fails to show that plaintiff was damaged. Aside from the positive proof in the case, it will be presumed that the draft was worth its face value, and that by its conversion plaintiff's detriment caused thereby was the value of such draft. But, aside from such presumption, the proof is clear to the effect that the warranty deed from Tessie C. Black conveyed no title, as she had none to convey. The title had not passed from the government, and it is stipulated that

Tessie Black's final proof was rejected by the Commissioner of the General Land Office, and her homestead entry on such land canceled. Also, that she subsequently relinquished all her claims in such land to the government, and thereafter one McGee was permitted to file a homestead entry thereon. It seems to us that there is abundant proof of plaintiff's damage as a result of defendant's unauthorized acts, and that defendant's contention to the contrary has no support in the record. This conclusion renders further discussion unnecessary.

The judgment is accordingly affirmed.

MORGAN, Ch. J., and GOSS, J., took no part in the above decision; Honorable FRANK E. FISK, Judge of the Eleventh Judicial District, sitting in place of the latter by request.

ZILKE v. JOHNSON.

(132 N. W. 640.)

Trial — order of proof — harmless error — discretion.

1. In an action against a physician and surgeon to recover damages for alleged malpractice, in which the negligent act alleged consists in the defendant leaving some gauze in plaintiff's abdomen at an operation performed on November 13, 1906, plaintiff before establishing the alleged act of negligence, and over defendant's objection, was permitted to testify to the pain and suffering endured by her.

Held, that such objection merely goes to the order of proof, and the ruling complained of was nonprejudicial.

Action for malpractice — evidence.

2. It was not error to permit plaintiff, a married woman, to testify to her inability, after such operation, to perform her usual household work; it appearing that such testimony was offered merely to show the extent and character of plaintiff's injuries, and not for the purpose of augmenting the damages on account of loss of services.

Action for malpractice — evidence as to damages.

3. It was proper to permit plaintiff to show that she had unconditionally obligated herself to pay another physician and surgeon for performing an operation for the purpose of removing such gauze.

Admission of evidence — harmless error.

4. The erroneous admission of certain immaterial testimony *held* not prejudicial.

Order of proof — harmless error.

5. Certain other objections, merely going to the order of proof, *held* not prejudicial.

Action for malpractice — question for jury.

6. Evidence examined, and *held* sufficient to require its submission to the jury.

Harmless error in instructions.

7. In charging the jury the trial court made certain inaccurate statements regarding the allegations in the pleadings, but, being of a trivial nature, it is *held* that they were not prejudicial. The issue was clearly stated, and could not have been misunderstood by the jury.

Appeal — error in instructions — waiver.

8. The objection that the instruction as to the burden of proof was too general is unavailing to appellant. He made no request for a more specific instruction, and, furthermore, the one given was more favorable to appellant than he had a right to ask.

Instructions — definition of terms.

9. The instruction defining the terms "negligence," and "negligently," was given in the exact language of the Code. *Held* sufficient, especially in view of the fact that no more specific instruction was asked.

Malpractice — instructions as to negligence.

10. Among other things, the court, in effect, instructed the jury that the defendant was guilty of negligence if he left the gauze in the wound, as alleged. *Held* correct for the reason that the case was apparently tried by both parties upon the theory that defendant was liable, if he left the gauze in the wound, as alleged; the sole issue tried being whether such fact occurred.

Instructions — construing as a whole.

11. Certain other instructions relative to the rule to be followed in assessing damages, and in determining whether defendant was negligent as charged, considered, and *held* not prejudicial, when read in connection with the other instructions in the case.

Instructions — as to disregarding statements by counsel in argument — reversible error.

12. The court charged the jury, among other things, as follows: "If, during the heat of the argument, any of the counsel have made any statement to you of what they consider to be the testimony and the evidence in this case, it should be eliminated from your minds, and you should disregard such statements of counsel, and you are the sole judges of the testimony yourselves.

The counsel on both sides have been permitted to assist in presenting the facts and circumstances of the case to you, but any statement or opinion advanced by them should be disregarded entirely, and you are to try this matter herein from the evidence introduced and from the instructions of the court."

Held, **following State v. Gutterman, 20 N. D. 432, 128 N. W. 307, that the giving of such instruction constitutes reversible error; the effect of such instruction being to advise the jury to disregard entirely all statements made by counsel in argument.**

Opinion filed September 9, 1911.

Appeal from District court, Bottineau county; *A. G. Burr,* J.

Action by Amelia Zilke against J. A. Johnson. From a judgment for plaintiff and from an order denying a new trial, defendant appeals.

Reversed, and new trial ordered.

Noble, Blood, & Adamson, for appellant.

Bowen & Adams, for respondent.

Fisk, J. Plaintiff recovered judgment in the court below, and defendant appeals therefrom, and also from the orders denying his motions for judgment notwithstanding the verdict and for a new trial.

The defendant is a physician and surgeon, and on November 13, 1906, was employed to and did perform a serious surgical operation upon the person of plaintiff. The action is to recover damages for alleged malpractice on defendant's part in connection with such operation; it being alleged that he negligently failed and refused to procure necessary professional assistance in performing such operation, and that he unskilfully, negligently, and carelessly left and permitted to remain in the wound in plaintiff's abdomen a large amount of cloth and gauze, and that the same remained therein until on or about October 26, 1908, at which time plaintiff was obliged to employ other physicians and surgeons to remove such cloth and gauze, and, to accomplish such end, she was again compelled to submit to and suffer another painful and serious operation to her great damage, etc. Defendant, by his answer, put in issue the alleged acts of unskilfulness and negligence, and the issue thus framed is the sole issue tried in the district court.

Appellant's counsel have assigned a great number of alleged errors,

which are argued in the brief, but they are grouped and treated under various heads. We will consider them in the order presented.

Assignments numbered 1 to 8, inclusive, relative to certain rulings on the admission of testimony. Counsel complain because the court permitted plaintiff to show pain suffered by her, before establishing the acts of negligence charged. There is no merit in these assignments. Such rulings merely go to the order of proof, and it is firmly settled that the order of proof is committed to the discretion of the trial court, and it is seldom, if ever, that reversible error can be predicated on the exercise of such discretion.

Assignments 9 and 30 to 34 are based on certain rulings in the admission of testimony relative to plaintiff's ability to do work of any kind after the 1906 operation and prior to the time such gauze was removed in 1908. We discover no error in such rulings. It is apparent from the record that such testimony was offered merely to show the extent and character of plaintiff's injuries, and not, as appellant's counsel assume, for the purpose of augmenting the damages on account of loss of services. That the testimony was admissible for the purpose for which it was offered is, we think, clear. See Stutz v. Chicago & N. W. R. Co. 73 Wis. 147, 9 Am. St. Rep. 769, 40 N. W. 653; Bliss v. Beck, 80 Neb. 290, 114 N. W. 162, 16 Ann. Cas. 366; Consolidated Kansas City Smelting & Ref. Co. v. Tinchert, 5 Kan. App. 130, 48 Pac. 889; Wade v. Leroy, 20 How. 34, 15 L. ed. 813; 7 Enc. Ev. 384, note 27; 13 Cyc. 188, and cases cited in note 2; Dahlberg v. Minneapolis Street R. Co. 32 Minn. 404, 50 Am. Rep. 585, 21 N. W. 545.

Assignments 35 to 41, inclusive, involve the admissibility of certain testimony as to the expense of the 1908 operation. No exception was saved to the ruling forming the basis of assignment 35. Hence such assignment must be overruled. The rulings on the questions asked by defendant's counsel on cross-examination, and on which assignments 36, 37, and 38 are predicated, were correct. Such questions were clearly immaterial, and the last one was also improper cross-examination.

The next three assignments are likewise devoid of merit. It was perfectly proper for plaintiff to show that she had unconditionally obligated herself to pay Dr. Halldorson for the 1908 operation. In-

dianapolis Traction & Terminal Co. v. Kidd, 167 Ind. 402, 7 L.R.A. (N.S.) 143, 79 N. E. 347, 10 Ann. Cas. 942; Wilson v. Southern P. Co. 13 Utah, 352, 57 Am. St. Rep. 766, 44 Pac. 1040.

Assignments 11, 44, and 47 are based on rulings in sustaining objections to certain questions asked plaintiff on cross-examination, and in overruling objections to certain questions asked defendant on cross-examination. These assignments relate to testimony as to the reason the 1906 operation was performed at plaintiff's home, instead of elsewhere, and the doctor's knowledge that the surrounding conditions at that place were not the most favorable. This testimony was immaterial. It had no tendency to throw any light upon the issue of defendant's alleged negligence in leaving the gauze in plaintiff's abdomen, nor upon his alleged negligence in performing such operation without proper assistance. Even if erroneous, such rulings were nonprejudicial. Assignment 12 is not argued, and will therefore be deemed abandoned.

We perceive no merit in assignments 13, 14, 15, 26, and 27. If the testimony as to the conversation between plaintiff and defendant regarding the necessity of employing other medical assistance at the operation, and also the testimony of the witness, Dr. Halldorson, as to the custom in having such assistance at an operation of this character, was immaterial, as urged by appellant's counsel, we are unable to discover how it could have been prejudicial. While the complaint charges, as one of the acts of negligence, that defendant performed such operation without proper assistance, there is nothing to show that such alleged negligence in any manner directly contributed to the injury complained of. It might be proper, however, to show such fact as a circustance of some evidentiary weight bearing upon the particular negligent act relied on. However this may be, we are agreed that the rulings do not in any event constitute prejudicial error.

Assignments 16, 17, and 18 require but brief notice. They relate to rulings in permitting plaintiff to testify to the fact that the nurse, M. P. Barnes, left, and why she left after four or five days. Such testimony was wholly immaterial, but its admission could not possibly have influenced the jury, and such rulings, were harmless to appellant. The same is true of assignments 19 and 20.

Assignments numbered 21, 22, 23, 24, 25, and 28 merely go to the

order of proof; and hence, for reasons heretofore stated, the rulings on which such assignments are based do not constitute reversible error, and these assignments cannot avail appellant.

The remaining assignments call in question the correctness of the trial court's actions in overruling defendant's motion for a directed verdict, denying his motion for judgment *non obstante veredicto,* and in denying his motion for a new trial. These assignments require more extended consideration, as they involve the sufficiency of the evidence to sustain the recovery, and also numerous exceptions to the instructions. The question of the alleged insufficiency of the evidence will be first disposed of. As before stated, the precise act of negligence claimed is the leaving of the gauze in the wound at the 1906 operation. Is there any substantial testimony in the record to support a finding by the jury of such alleged neglect on defendant's part? Appellant contends that there is no direct testimony of such fact, and that if gauze was found in plaintiff's abdomen, as testified to by Drs. Halldorson and Durnin, that it must have been placed there at a prior operation, which was made, as the testimony disclosed, in 1905. Defendant positively swears that at the 1906 operation he did not make an incision entirely through the abdominal wall, but merely penetrated what is known in surgery as "the eponerosis of the recti muscles," and that the operation was outside of the peritoneal cavity. In this he appears to be corroborated, at least to some extent, by the nurse, M. P. Barnes. Defendant also swears that at neither the 1906 nor 1905 operations did he use any packing, but he did use a dressing and sponging. Respondent concedes that there is no direct testimony showing that appellant left gauze in her abdomen at the 1906 operation, but contends that the circumstantial evidence is well-nigh conclusive that such is a fact, and at least it was amply sufficient to require a submission of such question to the jury. She calls attention to the fact that in the nature of the case direct proof could not be furnished. She was under the influence of an anesthetic at the time of such operation, and the only other persons present were defendant, his wife, and the nurse. It is an undisputed fact in the case that on October 26, 1908, Drs. Halldorson, Durnin, and Jensen removed from plaintiff's abdomen the gauze (Exhibit 2), and the crucial question is, When was such gauze placed therein?

The undisputed evidence shows that three operations were performed on plaintiff's abdomen by this defendant,—the first in 1905, the second on November 13, 1906, and the third on September 18, 1908. These were the only operations performed on plaintiff between the operation in 1905 and the date Drs. Halldorson, Durnin, and Jensen removed the gauze on October 26, 1908. The nurse positively testified that there were no sponges left in the abdomen of the plaintiff at the 1905 operation. She says: "I prepared the sponges; they were counted out, and after the operation they were counted again." She was also present as nurse at the 1906 operation, and testified that she counted the sponges before the operation, but did not count them afterwards. The September, 1908, operation, according to the testimony of the defendant, was a slight external operation for the purpose of opening an abscess. He says he packed some gauze into the opening of the abscess at that time, but states that he did not put such gauze in deep. In this connection he testified: "The opening that I made was about 2 inches, and I could see into the abscess; I cleaned it out thoroughly . . . and packed it full of gauze. What I put in was packing. The incision was left open, and a part of the gauze allowed to remain in the opening through the skin, and with a probe I kept pushing it in, so as to cover the whole abscess inside." It is defendant's theory that this is the gauze which was removed, in October, 1908, by Drs. Halldorson and Durnin. At another place he testified: "I did not put this gauze as deep or below the muscles; . . . it was exterior of the muscles, and nature would have a tendency to expel the gauze that I put in. A part of it was sticking out,—enough to take hold of it handily."

The plaintiff, however, positively testified that shortly after defendant placed this gauze in such abscess it pained and hurt her, and she removed it herself. Consequently, if her testimony is entitled to credence, this is not the gauze which was subsequently removed by Drs. Halldorson and Durnin. Her testimony is corroborated by that of Drs. Halldorson and Durnin, who swore that the gauze which they removed was in the inside of the abdominal wall. Among other things, Dr. Halldorson testified: "The gauze was inside of the peritoneum, but walled from the rest of the cavity by a wall nature had built. . . . There was a membrane that separated this gauze from the

abdominal cavity,—an artificial substance that nature had drawn around it. I am sure that the gauze was within the peritoneum. From the examination that I made, I would say that the gauze had been left in the abdominal cavity." He is corroborated by the testimony of Dr. Durnin, and their testimony tends strongly to negative the defendant's theory that the gauze which they removed was that left by him in September, 1908. Dr. Windell, a witness for the defense, gave it as his opinion that the gauze must have been imbedded at the place where it was found, and this same witness also stated that it is possible for gauze left between the peritoneum and the muscles to remain not only three, but fifteen years, but it could not remain if in a bad condition.

After a careful consideration of all the evidence in the record, we have no hesitancy in concluding that there was sufficient testimony to require a submission to the jury of the issue as to whether the gauze which was removed by Drs. Halldorson and Durnin, in October, 1908, was placed and left in plaintiff's abdomen by the defendant at the operation on November 13, 1906, as alleged in the complaint.

This brings us to a consideration of the exceptions to the instructions. Exceptions 1 to 10 are aimed at those portions wherein the court merely, in a general way, outlined to the jury the issue as framed by the pleadings. It is contended that the learned trial judge did not accurately narrate to the jury the allegations in the pleadings. For instance, among other things, it is said that the jury was told that the plaintiff alleges that defendant entered upon a *cure;* whereas the allegation is that he entered upon said *employment,* and this is claimed to be prejudicial. Also, in stating defendant's claims, as alleged in the answer, the court stated: "And he further alleges that any injury or damage was not due to any act or omission on the part of defendant, but alleges that it was due to contributory negligence on the part of the plaintiff;" while the allegation in the answer is: "And he further alleges that any injury or damage was not due to any act or neglect or omission on the part of the defendant, but alleges that any injury, *if such injury occurred,* was due to contributory negligence on the part of the plaintiff." These exceptions are hypercritical and wholly devoid of merit. Such slight deviations from the allegations in the pleadings could not possibly have misled or prejudiced the jury in the least. The issue was clear, and could not have been misunderstood. It was

nowhere contended that defendant agreed to effect a cure of the plaintiff, and he was bound only to use reasonable skill and care in treating the plaintiff. That the gauze (Exhibit 2) was removed from the plaintiff's abdomen in October, 1908, is uncontroverted, and the sole question was whether the same was carelessly left in the wound by defendant at the 1906 operation.

Exception No. 11 is levied at that portion of the instructions relative to the burden of proof. It is contended that this instruction is too general, and did not restrict the jury to the precise act of negligence complained of. We see no merit in such contention. If appellant desired a more specific instruction, he should have asked for the same.

Exception 12 challenges that portion of the instructions wherein the jury were told that the fact that defendant was, at the time mentioned in the complaint, a physician and surgeon, and that he performed an operation on the plaintiff in the year 1906, and also that there was a certain piece of gauze taken from the body of the plaintiff in October, 1908, were either admitted or proven beyond dispute. Such instruction was clearly correct and in strict accordance with the allegations and proof in the case, as we have heretofore stated.

By exception 13 appellant complains of the following definition of negligence, as given by the trial court to the jury: "The terms 'negligence,' 'negligent,' and 'negligently,' when so employed, import a want of such attention to the natural or probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." Appellant's criticism of this instruction is that such definition fails to convey the idea of ordinary conduct of the ordinary prudent person *under the same or similar circumstances;* citing in support of his contention Boelter v. Ross Lumber Co. 103 Wis. 324, 79 N. W. 243. While such an instruction would have been eminently proper, the same was not requested, and in the absence of such a request appellant will not be heard to complain, especially in view of the fact that the instruction given is in the identical language of our Code (Rev. Codes 1905, § 9522). See Landis v. Fyles, 18 N. D. 587, 120 N. W. 566; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972.

What we have just said regarding exception 13 applies with equal

force to exception 14. The instruction complained of was in the language of the statute, as follows: "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." Rev. Codes 1905, § 6556.

Among other things, the court charged as follows: "If the preponderance of the evidence shows it [meaning the gauze] to have been left in the body during the 1906 operation, and that plaintiff suffered damages therefrom, then you should find the defendant guilty of negligence, for which damages are recoverable." Exception No. 16 challenges the accuracy of this instruction. It is said that the court, by giving such instruction, invaded the province of the jury by in effect instructing them that, as a matter of law, defendant was guilty of negligence, if they found that he left the gauze in the wound, as alleged. No authorities are cited by appellant's counsel in support of their contention. The rule is well settled that, where the facts are undisputed, and but one inference can be drawn from them, it is the duty of the court to decide, as a matter of law, whether there was negligence; but where, under the facts, different minds might come to different conclusions upon the question of the care used, the question is one for the jury. 29 Cyc. 629; Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427. We think there was no prejudicial error in giving such instruction. The case was tried by both parties upon the theory, apparently, that defendant was liable, if he left the gauze in the wound at the 1906 operation. Defendant's sole defense was that he did not do so. He nowhere sought to justify his conduct on the assumption that the gauze was left in the wound by him on such occasion.

Among other things, the court charged as follows: "And in determining the amount of damage, you may consider the fact that the defendant refused to have a competent physician or other person to assist him, if that has been proven." This instruction, standing alone, may appear to be erroneous and prejudicial; but, when considered in the light of the entire instructions, we are not willing to say that the giving of the same requires a reversal, although its omission would have been preferable. The learned trial court, in other portions of the instructions, very carefully and accurately stated the rule for measuring the damages, in the event the jury found for the plaintiff.

We have carefully considered appellant's contentions relative to the instructions covered by exceptions 18 to 25, inclusive, and find no prejudicial error in such instructions, when considered in the light of all the instructions given, and it would serve no useful purpose to enter into a detailed discussion of appellant's various contentions under these exceptions; nor do we feel justified in taking the time necessary to do so.

Exception 26 challenges the correctness of the following portions of the instructions: "If, during the heat of the argument, any of the counsel have made any statements to you of what they consider to be the testimony and the evidence in this case, it should be eliminated from your minds, and you should disregard such statements of counsel, and you are the sole judges of the testimony yourselves. The counsel on both sides have been permitted to assist in presenting the facts and circumstances of the case to you, but any statement or opinion advanced by them should be disregarded entirely, and you are to try this matter herein from the evidence introduced and from the instructions of the court." We are constrained to hold that the giving of the foregoing instruction constitutes reversible error. The jury was, in effect, told to disregard entirely any statements made by counsel in argument. Such an instruction is everywhere condemned, so far as we have been able to discover; and this court, in the recent case of State v. Gutterman, 20 N. D. 432, 128 N. W. 307, held it reversible error to give an instruction which in all essential particulars was the same as that above quoted. The reasoning there advanced applies with equal force in the case at bar. The learned trial judge, no doubt, intended to caution the jury to disregard such statements, in so far only as they were unsupported by the testimony in the case; but the language employed might, and probably did, convey a different meaning to the jury, and we are unable to say that such instruction did not operate to the prejudice of the defendant. We regret the necessity of remanding the cause for a new trial, but our duty is plain under the authorities. That the rule announced by this court, in State v. Gutterman, supra, applies equally to instructions in civil actions is clear. 5 Enc. L. & P. 290, and cases cited; 11 Enc. Pl. & Pr. 367, and cases cited; Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341.

We have examined the instructions upon which are based exceptions

28 and 29, and while such instructions are subject to criticism, and ought not to have been given in the form in which they were given, we are unable to say that they constitute reversible error. On the next trial the criticisms directed against these instructions will, no doubt, be obviated by giving such instructions in proper form. The remaining assignments are already covered.

For the error above pointed out a new trial is ordered.

MORGAN, Ch. J., not participating.

STATE EX REL. STANDARD OIL CO. v. BLAISDELL, Secretary of State.

(132 N. W. 769.)

Constitutional law — separation of powers.

1. The people, through the Constitution of this state, have created three departments of government, each supreme in its own sphere.

Constitutional law — judicial power.

2. Section 85, N. D. Const. vested the judicial power of the state in a supreme court, district courts, county courts, justices of the peace, and in such other courts as may be created by law for cities, incorporated towns, and villages.

Constitutional law — vesting judicial power in secretary of state.

3. The secretary of state is not a judicial officer, under the Constitution, and judicial power cannot be vested in him.

Constitutional law — separation of powers — definition of judicial power.

4. While it is extremely difficult to formulate any definition of judicial power which will be applicable to all cases, it may be said in general that it is authority vested in some court, officer, or person to hear and determine when the rights of persons or property, or the propriety of doing an act, are the subject-matter of adjudication.

Constitutional law — separation of powers — judicial power.

5. Official action, the result of judgment or discretion, in such cases is a judicial act.

Constitutional law — conferring judicial power on secretary of state.

6. Section 2 of chapter 258 of the Laws of 1907 provides that, when complaint shall be made to the secretary of state that a corporation chartered in this state, or authorized to do business therein, has been guilty of unfair discrimination,

he shall issue a notice fixing a date for hearing on such charge; and that, if in the opinion of the secretary of state such corporation has been intentionally or wilfully guilty of unfair discrimination for the purpose of destroying or preventing competition, or for such purpose shall wilfully refuse to sell the commodities in which it deals, he shall so find, and make a record of such finding upon the records of his office, and shall at once forfeit the charter of the corporation, if domestic, or revoke and forfeit its permit to do business in the state, if a foreign corporation. *Held*, that these provisions require the secretary of the state to hear evidence for and against, determine the relative weight thereof, the intent of the corporation charged, to find the facts, and to apply the law thereto, and, if he finds such acts are not innocently done, to impose a penalty, and that such provisions require, on the part of the secretary of state, the exercise of judgment or discretion upon the evidence admitted, as to intent and purpose, and it amounts to a notice and trial, and a judgment of acquittal or conviction, as, in the opinion of the secretary of state, the facts and law require. *Held* further, that the duties above referred to are clearly judicial in their nature; and that so much of said chapter as relates to the duties of the secretary of state in determining whether to cancel charters of domestic corporations or revoke permits of foreign corporations is obnoxious to § 85 of the Constitution of this state, and therefore void.

Constitutional law — due process — forfeiture of charter of corporation.

7. The provisions of chapter 258, Laws 1907, supra, above referred to, are void for the further reason that the proceedings contemplated do not constitute due process of law.

Opinion filed September 20, 1911.

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

Application by the Standard Oil Company for a writ of certiorari to Alfred Blaisdell, as Secretary of State. From a judgment for defendant, relator appeals.

Reversed.

Alfred D. Eddy, *Robert W. Stewart*, and *Ball, Watson, Young, & Lawrence*, for appellant.

Andrew Miller, Attorney General, and *C. L. Young*, Assistant Attorney General, for respondent.

SPALDING, J. This appeal involves proceedings taken under chapter 258 of the Laws of 1907. The act in question reads as follows:

"Sec. 1. Any person, firm, or corporation, foreign or domestic, doing business in the state of North Dakota and engaged in the production,

manufacture, or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying or preventing competition, discriminate between different sections, communities, or cities of this state, by selling any such commodity at a lower rate or price in one section, community, or city, or any portion thereof, than is charged for such commodity in any other section, community, or city, after equalizing the distance from the point of manufacture, production, or distribution and freight rates therefrom, or who shall wilfully, for the purpose of such discrimination and unfair competition, refuse to sell any commodity in general use, and in the manufacture, production, or distribution of which such person, firm, or corporation may be engaged, to any other person, firm, or corporation which may desire to purchase the same, and who shall comply with all reasonable regulations of such person, firm, or corporation, and who shall tender payment therefor,— shall be deemed guilty of a misdemeanor.

"Sec. 2. If any complaint is made to the secretary of state that any corporation chartered in this state, or authorized to do business therein, is or has been guilty of unfair discrimination within the terms of this act, it shall be the duty of such secretary to at once institute an inquiry as to such discrimination, giving the corporation complained of notice of such complaint and an opportunity to be heard, and if, in the opinion of such secretary of state, any corporation, foreign or domestic, shall have been guilty of any such unfair discrimination under the terms of this act, the said secretary shall so find, and shall make a record of such finding upon the records in his office, and shall at once forfeit the charter of such corporation, if it be a domestic corporation, or, if it be a foreign corporation, he shall immediately revoke and forfeit its permit to do business in this state.

"Sec. 3. If, after the revocation of such charter in the case of a domestic corporation, or of its permit if it be a foreign corporation, any such corporation shall continue or attempt to do business within this state, it shall be the duty of the attorney general of this state, by a proper action commenced in the name of the state, to oust such corporation from any and all business of any kind or character within the state of North Dakota.

"Sec. 4. Any firm, person, or corporation violating any of the provisions of this act, shall upon conviction thereof forfeit to the state of

North Dakota a sum not less than $200 nor more than $500 for each and every violation of this act, said sum to be recovered by action commenced by the attorney general in the name of the state of North Dakota in any court of competent jurisdiction. All sums so collected shall be credited to the general school fund of this state.

"Sec. 5. Nothing in this act contained shall in any manner be construed as repealing, or in any manner altering, any other act or part of act heretofore adopted by the legislature of this state, but the remedies herein provided shall be cumulative to all other remedies now existing."

On the 15th day of April, 1908, the attorney general of the state filed with the secretary of state an unverified document, called "a complaint," wherein, among other things, it was stated that complaint had been made and evidence furnished him showing that the Standard Oil Company, a corporation of the state of Indiana, had violated the provisions of said chapter by discriminating between different sections of this state in the prices of commodities sold by it, and that he, as attorney general, charged the Standard Oil Company with having violated said chapter by such discrimination, "in this, that said Standard Oil Company aforesaid has on divers and different dates during the year 1908 charged dealers and consumers in this state for commodities sold by the said company, to wit, oil and gasolene, different prices for the same quality of such oil and gasolene; that said company charged higher prices per gallon for the same grade of oil and gasolene in one locality of this state than it did for the same quality of oil and gasolene in another locality of this state, at equal distances from the place of shipment, and in which the freight rates for shipping there were the same," and asking the secretary of state to serve notice on said Standard Oil Company of Indiana, "apprising them of such charges herein, and setting a time and place at which they may appear and show cause, if any they have, why the certificate of authority issued to said company on the 23d day of December, 1895, authorizing them to do business in the State of North Dakota, as a foreign corporation, should not be revoked and forfeited." Upon the same day the secretary of state issued and mailed to the said Standard Oil Company notice of such complaint, and that he was about to institute an inquiry as to such alleged discrimination, and ordering it to appear before him at his office in the city of

Bismarck on the 1st day of June, 1908, at 10 o'clock in the afternoon, and show cause, if any there be, why the benefits, privileges, and permission to do business in this state, as given by law to foreign corporations, should not be immediately revoked and forfeited. On the 26th day of May, 1908, Honorable W. H. Winchester, Judge of the Sixth Judicial District, granted an order to show cause, returnable on the 1st day of June, 1908, why a writ of certiorari should not issue commanding said secretary of state to certify fully to that court, and to annex to such writ of certiorari a transcript of the record and proceedings had before such secretary of state in the matter referred to, that his proceedings thereon might be reviewed by such court. Such order to show cause was based upon the affidavit of W. P. Cowan, a vice president of the Standard Oil Company, a corporation, wherein he alleged the incorporation thereof, the granting to it of permission to do business in the state of North Dakota according to the laws thereof in 1895, and its compliance in all respects with such laws. He then sets out in his affidavit the proceedings pending in the office of the secretary of state to which reference has been made, and that, upon calling upon that official for a certified copy of all documents or writings filed in his office in connection with the charges referred to as a basis therefor, he was informed by said secretary of state that no other papers or documents than the complaint of the attorney general were on file therein. He also alleges that the complaint filed with the secretary of state by the attorney general does not state any violation of said chapter 258 by or on the part of said Standard Oil Company, in that it does not set forth or state any specific instance or cause of violation, or aver any facts upon which a conclusion could be found that said law had been violated, and does not attempt to set forth or charge that any alleged violation of the terms of said act was done intentionally for the purpose of destroying or preventing competition, to discriminate between different sections, communities, or cities of North Dakota, and that the secretary of state was exceeding his jurisdiction in issuing and serving the order to show cause referred to, in that his acts were without authority of law, and that he was exercising powers and authority not conferred upon him and wholly judicial in their nature; that, unless prevented by an order of the court, such secretary would proceed to a so-called inquiry or investigation, and in deponent's belief would pretend to revoke or

cancel said corporation's authority to do business in this state. He shows the great extent of the business of the Standard Oil Company in this state, the nature and value of its property therein, and asserts other grounds for claiming the proceedings taken and the law invalid, none of which is it necessary to detail here. On the return day of the order to show cause, the Honorable T. F. McCue, Attorney General, appeared for the secretary of state, and moved to quash the application for the writ of certiorari on each of several grounds, denying the correctness of the contention of the relator. He also made return, setting forth the proceedings had, and alleging that he had in all things complied with the provisions of the statute referred to. Upon argument based upon the files in the case, the affidavit of said Cowan, and the return of the secretary of state, the writ was denied and the order to show cause quashed, and the proceedings had at the instigation of the relator dismissed. Judgment was entered accordingly. From this judgment the relator is here on appeal.

The appellant filed an elaborate brief in this court more than two years ago. No brief was ever filed on the part of the secretary of state, and much delay was occasioned in the hearing and consideration of the matter by this failure. Before argument a new attorney general and a new secretary of state had assumed the duties of the offices. The assistant attorney general appeared on the argument before this court, and stated that the office of attorney general did not desire to argue the case; that they deemed it due the court and themselves and the office of the secretary of state that explanation be made regarding the state's position; that when the change occurred in the office of the attorney general no brief had been filed or prepared, and that the new officers spent some time in attempting to find authorities sustaining the action of the secretary of state and the district court, but that they were unable to find any cases, which had not been overruled, that would sustain the position of the state; that thereupon the matter was submitted to former Secretary of State Blaisdell, who spent considerable time, with the aid of outside counsel, in investigation, and at length informed the attorney general that he would be unable to prepare a brief defining his position in the matter; that the attorney general's office felt, under the circumstances, it would be folly to try to make out a case. However, the attorney general declined to consent to a reversal of the judgment.

Our view of the law renders it unnecessary to pass upon several of the grounds relied on by appellant for a reversal. It will be observed that the statute does not expressly require the complaint to be verified. The complaint of the attorney general was unverified. No provision is made in the law for administering oaths to the witnesses who might testify before the secretary of state on the hearing, or for securing or compelling the attendance of witnesses, either on the part of the state or of the party accused. The complaint may as well be made by an irresponsible individual as by the attorney general, and the party complained of might readily find itself in the position of being cited to appear and show cause why its authority to do business should not be revoked, or why its charter, if a domestic corporation, should not be forfeited, on mere unverified allegations of some irresponsible or vindictive person, and, on appearing, find itself wholly powerless to present any defense by reason of the inability to compel the attendance or secure the testimony of witnesses. All these things might enter into the consideration of some of the questions presented by this appeal, as reasons why on demurrer the statute should be construed with strictness.

A great part of the argument of the appellant is in support of its contention that the act in question violates § 85 of the Constitution of this state, in that it attempts to confer upon an administrative officer judicial power. Section 85, supra, reads: "The judicial power of the state of North Dakota shall be vested in a supreme court, district courts, county courts, justices of the peace, and in such other courts as may be created by law for cities, incorporated towns, and villages." A similar statute, but requiring action by the court, was passed upon and sustained in State v. Drayton, 82 Neb. 254, 23 L.R.A.(N.S.) 1287, 130 Am. St. Rep. 671, 117 N. W. 768, that, like this, applying only to discriminations for the purpose of destroying business of a competitor.

The question of the distribution of the powers of government to the legislative, executive, and judicial departments under the Constitution has been passed upon many times and by nearly every court of this country, and there can no longer be any doubt that each department is supreme within its own sphere, or that the judicial power of this state has been exclusively vested, under § 85, supra, in the courts. Without any extended citation of authorities, we may call attention to the exhaustive opinion of Judge Hook of the Federal court in Western U.

Teleg. Co. v. Myatt (C. C.) 98 Fed. 335, and to State ex rel. Hovey v. Noble, 118 Ind. 350, 4 L.R.A. 101, 10 Am. St. Rep. 143, 21 N. E. 244, for extended citation of authorities on this subject and quotations therefrom. An eminent author says: "In further consideration of this work of constitution making, it is the ultimate requirement of all political systems in modern times, and in a large sense in all eras, that the organic social force we call government must be vested with three classes of powers in order to make its organization efficient for the social state. The first of these is the ordainment of rules for the civil conduct of men in their relation to each other, and of each to the state. These rules, which should be made to protect each in his liberty against all others, must prescribe what is right and forbid what is wrong, and are generically called laws. Law is the expression of the will of the organic social force (government) in order to conserve the peace of society and protect the liberty of its members. This is the supreme power in the state,—the body politic, acting through the legislative department of the government. The second of these is that which applies the law so made to special cases, which arise from the interrelations of men by contact and contract. It does not make law, but declares the law as applicable to each of such cases. This is the supreme power of the body politic, acting through the judicial department of government. The third of these is that which brings before the judicial department the persons and things as to which contention has arisen for the maintenance of right against wrong; and which executes the mandate of the law as adjudged by the judicial department. These two functions are the supreme power of the body politic exercised through the executive department of government." Tucker, Const. § 59. The same author, after discussing the different departments, continues [§ 66]: "How majestic is this essential unity of the people's will and purpose through diverse and independent agencies for their expression! How true a unity is obtained by not taking the will of the whole without reference to the parts, but the will of each distinct part in order to attain the will of the whole! How superior this to a government based on the majority of numbers! The government of the numerical majority is the mechanism of brute force. Ours is the resultant of the moral forces of intelligent, popular will over brutal selfishness. It will be perceived that this is the security by dividing power and distributing it between agencies independent

in will and action. So that no one person is permitted to wield power in more than one of the three great departments of government, or in more than one of the bodies constituting such department. This maxim for the division of the department of government into three departments, whose functions are to be performed by distinct and independent agents, no one of whom shall be allowed to act in any other, is fatal to the designs of any one department against right and liberty, because such department is powerless unless it can combine all the others in its purpose of usurpation. When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty, because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." And Baron de Montesquieu, in the Spirit of Laws, at chapter 6 of Bk. 2, thus states some of the reasons for maintaining the departments of government separate and independent each of the other: "The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals."

No difficulty is presented in the determination that under our system

the legislative assembly cannot delegate duties belonging to one department to another, nor that the secretary of state is not an officer in whom judicial power can be vested. Grant v. Raymond, 6 Pet. 242, 8 L. ed. 384. Great difficulty, however, is often encountered in deciding what acts are executive or administrative and what judicial. Therein lies the difficulty in the case at bar. That the secretary of state is an executive or administrative officer cannot be questioned. The legislative assembly has granted foreign corporations of the character of the relator, in fact, all foreign corporations except insurance companies and certain religious and charitable corporations, the right to do business in this state on filing in the office of the secretary of state duly certified copies of their charters or articles of incorporation, and appointing the secretary of state as attorney to accept service of process. The secretary is required to make a record of such articles of incorporation in a book kept for that purpose. Rev. Codes 1905, chap. 24. He collects a fee for filing and recording such articles, and for filing and recording his certificate of appointment as attorney, but is not required to issue any certificate showing the authority of a foreign corporation to do business within this state. No specific limit is placed upon the time during which a foreign corporation is permitted by such action to do business within this state. It is clear that all the acts and duties of the secretary of state, in the first instance, are purely ministerial. Of what nature are the duties imposed upon him by chapter 258, Laws 1907? If they are executive or administrative, the law is not subject to the objection under consideration. On the contrary, if the duties imposed upon the secretary of state by chapter 258, supra, are judicial in their nature, the law conflicts with the Constitution, and the acts of the secretary in undertaking to enforce the provisions of chapter 258, supra, are in excess of his powers, he is without jurisdiction in the premises, and they are wholly illegal and void.

It may aid in determining these questions to consider briefly what constitutes judicial power. It will be unnecessary to formulate a definition which includes everything which may come under the appropriate title of judicial powers, but only to determine those things or acts which appropriately belong thereunder as applicable to the instant case. Judge Cooley says: "On general principles, those inquiries, deliberations, orders, and decrees which are peculiar to such a depart-

ment must in their nature be judicial acts." Cooley, Const. Lim. 111. And the same author on the same subject says that the judicial department of government is that department which it was intended should interpret and administer the laws. And a definition which we consider appropriate and fully sustained is that judicial power is authority vested in some court, officer, or person to hear and determine when the rights of persons or property, or the propriety of doing an act, are the subject-matter of adjudication.

Official action, the result of judgment or discretion, in such case is a judicial act. 23 Cyc. 1620, and citations; Territory ex rel. French v. Cox (Dist. Ct.) 6 Dak. 501; State v. Le Clair, 86 Me. 522, 30 Atl. 7; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Owners of Lands v. People, 113 Ill. 309. In United States v. Rider (D. C.) 50 Fed. 406, the court construed an act of Congress providing that, when the Secretary of War shall have reason to believe that any bridge is an obstruction to free navigation, he shall give notice requiring the bridge to be so altered as to render navigation through or under it easy and unobstructed, and imposing a penalty on the controllers of the bridge for failing to make such provisions; and it was held that as power of the Secretary depended upon his having adjudged that the bridge was an obstruction, and that under the terms of the law his adjudication was made final and conclusive, this was judicial power, and that Congress could not delegate such power to the Secretary of War. In Church v. South Kingstown, 22 R. I. 381, 53 L.R.A. 739, 48 Atl. 3, the question before the court related to the liability of a town for the care of a pauper, and three questions were presented for determination: (1) Was the person a pauper? (2) Had he a legal settlement in the town sought to be charged? (3) Had the defendant town failed in the discharge of its duty to suitably care for him? The legislature of Rhode Island had enacted a law providing that when it was claimed a pauper was not suitably cared for by the town to which he was chargeable, upon five days' notice to the commissioners or overseers of the poor of such town, and on continued neglect of the town, complaint might be made in writing to the appellate division of the supreme court or any justice thereof, setting forth the nature of the grievance complained of; and that such division or justice, after ordering notice to the town of the pendency of such complaint, might, in its discretion, appoint a com-

mission who should visit the pauper, and, on hearing evidence and allegations of the parties, report to the court or justice whether the complaint was well-founded. If it appeared from the report of the commissioners that the pauper was not suitably provided and cared for, such court or justice should pass an order requiring the town authorities to provide suitable accommodations and care, etc. And it was held that the statute conferred upon the commission appointed by the court judicial powers, in that it was required to find the facts and apply the law, and that the court or justice was bound by the report of the commission, leaving the court or justice only ministerial duties to perform in the premises, without any power of review. The court held that for determination in that case involved a trial before some tribunal possessing ordinary judicial attributes, and that because a town neglecting or refusing to comply with the order made should be fined rendered it liable to indictment, branding it as criminal, and taking its property without its ever having been legally adjudged to have committed any offense. We may add that it was also held that such proceedings constitute the taking of property without due process of law. In Payton v. McQuown, 97 Ky. 757, 31 L.R.A. 33, 53 Am. St. Rep. 437, 31 S. W. 874, the Kentucky court adopts the definition found in Com. v. Jones, 10 Bush, 749, wherein it is said: "We regard it as an indisputable proposition that where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial." The court in the Payton Case was considering the power attempted to be given by the legislature to a deputy clerk of court to issue injunctions, and held that it was conferring upon a ministerial officer's judicial powers, and that the law was invalid for that reason. The act there under consideration provided that an injunction might be granted without notice when the officer "to whom application is made shall be satisfied, by the affidavit of the applicant, or by other evidence, that irreparable injury will result to the applicant if the injunction be not immediately granted." And the court observes that this requirement clearly demands investigation and consideration judicial in its character.

In State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551, the supreme court of Ohio had un-

der consideration the validity of the Torrens law, which conferred upon the recorder, as held, judicial powers in passing upon the rights of individuals in land, and held that as a ministerial officer he was incompetent to receive a grant of judicial power from the legislature, and that his acts and attempted exercise of such powers were necessarily nullities. To the same effect was People ex rel. Kern v. Chase, 165 Ill. 527, 36 L.R.A. 105, 46 N. E. 454.

The supreme court of Massachusetts, speaking through Chief Justice Bigelow, in Denny v. Mattoon, 2 Allen, 361, 79 Am. Dec. 784, regarding the determination of the solvency or insolvency of a party under the insolvency law, said: "He must be found to be insolvent within the legal signification of that word in order that his property may be taken, the title thereto vested in the assignees, and its proceeds distributed among his creditors. Especially is this true where, as in the case at bar, the proceedings are *in invitum,* and no assent of the debtor, either express or implied, can be had or inferred to aid the course of legal proceedings by which his right to the property is devested and appropriated to the payment of his debts. The determination of the question whether a debtor is so situated in relation to his creditors as to be subject in his person and estate to the provisions of the insolvent laws is, in its nature, the exercise of a judicial power. It is not to be settled arbitrarily or capriciously, but by the application of fixed rules and established principles to facts which may be proved. . . . It must be the result of due inquiry sufficient to satisfy the discretion and convince the judgment of the officer of the law." That case involved the validity of a law reviving a certain invalid judgment, and the principle, being considered, was the usurpation of judicial powers by the legislature.

In Re Sims, 54 Kan. 1, 25 L.R.A. 110, 45 Am. St. Rep. 261, 37 Pac. 135, it was held that power given by statute to the prosecuting attorney to punish for contempt any witnesses disobeying process, or refusing to answer questions when commanded by subpœna issued by such attorney to appear before him, was invalid. In that case it was also held that executive and judicial powers could not be mingled and combined in the same person, at the same time, in the same proceeding. "Judicial tribunals decide upon the legality of claims and conduct. They determine controversies and interpret laws." 6 Am.

& Eng. Enc. Law, 1053, and note. Whether a citizen has been guilty of an offense involving a forfeiture of his right to vote is necessarily a judicial question, which can be constitutionally decided by the judiciary on a full and fair trial, on an indictment or presentment, but cannot be adjudged collaterally or incidentally by the officers of election. Burkett v. McCarty, 10 Bush, 758.

In People ex rel. Martin v. Mallary, 195 Ill. 582, 88 Am. St. Rep. 212, 63 N. E. 508, an act which authorized the managers of the state reformatory to transfer temporarily to the penitentiary certain persons shown to have been previously convicted of crime, or those deemed incorrigible, was held unconstitutional. To the same effect is Re Dumford, 7 Kan. App. 89, 53 Pac. 92. "The secretary of state is a ministerial officer, authorized by law to perform different duties, upon different contingencies. If he makes mistakes of facts in the performance of his functions, his action may be void or voidable only in different circumstances. But he cannot judicially determine the facts on which he acts or refuses to act. This can only be done by the courts." State ex rel. Drake v. Doyle, 40 Wis. 188, 22 Am. Rep. 692.

We will not consider whether the duties imposed upon the secretary of state by the statute in question are judicial rather than administrative. We need not consider the provisions of § 1 further than to call attention to the fact that it makes the doing of any of the acts referred therein a misdemeanor, and the gist of the offense under its terms is the intent and wilfulness of the acts. Section 2 attempts to add a separate and different penalty for such acts, to be imposed by the secretary of state. The requirements are that a complaint shall be made that a corporation chartered in this state, or authorized to do business therein, is or has been guilty of unfair discrimination. After issuing notice fixing a date for hearing, it is provided that, if in the opinion of the secretary of state such corporation has been guilty of such unfair discrimination, the secretary shall so find and shall make a record of such finding upon the records of his office. The penalty provided is that the secretary shall at once forfeit the charter of the corporation, if a domestic one, or immediately revoke and forfeit the permit to do business in the state, if a foreign corporation. It will be seen that his finding, if against the corporation, is the unfair discrimination within the terms of his act. The terms of the act are disclosed by referring back

to section 1; that is to say, that the corporation intentionally, for the purpose of destroying or preventing competition, shall discriminate, or wilfully, for the purpose of such discrimination or unfair competition, refuse to sell, etc. The finding of the secretary must be as to the intent or the wilfulness of the corporation, and the record which he makes is based upon his opinion of the intent or wilfulness. His opinion must be reached as the result of hearing evidence pro and con offered as to the facts of discrimination, and gathering from such evidence and facts the intent or purpose of the corporation complained against, and determining the legal effect of such acts. He must decide whether they conflict with the duties of the corporation under the statute, or are innocently done. It is true that administrative officers must exercise their judgment and discretion on innumerable occasions when called upon to perform official duties. It is true that they must also pass upon or find facts upon which to base their actions, but these acts are done only in the necessary routine of their business or official duties, and are such as people in all occupations must perform in the ordinary exercise of their callings. The province of courts is not only to find the facts from evidence submitted in the proper case, but to apply the law and render judgment; that is to say, determine by the exercise of their judgment and discretion, taking into consideration the facts and the law, what judgment must be imposed. The secretary of state is required, in this instance, to make and record in his official records the finding he makes, and to at once forfeit the charter of each offending domestic corporation, or, if a foreign corporation, cancel its permit to do business in this state. The result is that the corporation is punished by what is in effect a judgment entered by the secretary of state. We fail to distinguish between it and a provision requiring him, in case of such finding, to imprison a private party. The difference in the penalties applicable to a misdemeanor, which the acts are made by the first section of the law, and the penalty authorized under the other sections, is only in kind, and not in principle. If the secretary can punish a domestic corporation, by forfeiting its charter to do business, he destroys a franchise, which is property; he destroys valuable rights, taking thereby from the corporation the right to do business, the very object of its existence, and ofttimes destroying, in a large measure, the value of its property. The same is true as to a foreign corporation. While

its right to do business in the state may not be equal to that of a domestic corporation, and it may not be entitled to the same degree of protection, it is of some value. In the case of the relator it is shown to be of great value. It also appears that the property possessed by it within this state is of a peculiar character, valuable only in the carrying on of the business in which the relator is engaged, and that it will be greatly depreciated, if not totally destroyed, if the relator is driven from the state.

We are not attempting to say what the effect of the law would be if the decision of the secretary was not required to be based upon his opinion as to the intent or wilfulness of the relator. An entirely different question would be presented on such a statute. We repeat, the act of the secretary provided for by this statute rests not on the act of discrimination or unfair competition, but on his opinion as to intent and purpose of such acts, and his opinion is the result of the exercse of his judgment or discretion upon the evidence submitted, and is far more potent than would be his finding of the simple fact that a greater price is charged at one place than at another, under similar circumstances. He hears evidence, decides upon its weight, he finds some true and some false. He passes upon the intent of the offender, and, if found guilty, affixes the penalty, and the whole proceeding is made a record which excludes the relator from the state. In other words, he notifies, tries, acquits, or convicts, as in his opinion or judgment the facts and the law require. This is the function of courts under the Constitution. It is authority attempted to be vested in an officer to hear and determine when the rights of persons and property, and the propriety of doing an act, are the subject-matter of his adjudication.

We are of the opinion that the legislature by this act attempted to confer upon the secretary of state powers which are clearly judicial in their nature, and that the act is to that extent invalid. We may add that it is difficult, if not impossible, to define judicial powers, and to discriminate between judicial and administrative functions in a given case in a way which will be applicable to every case. It may also be added that the legislature at the same session enacted other statutes, apparently having the same object as the one complained of, but containing provisions which appear to obviate many of the objections found in the act which we are considering. If those statutes are valid, the state

is not left without means of compelling the relator to comply with the requirements of law applicable to it and its business.

It is further urged by the relator that this law does not provide due process. It necessarily follows, from our conclusions as to the delegation of judicial powers to the secretary of state, that this point is well taken.

The judgment of the District Court is reversed.

FISK, BURKE, and GOSS, JJ., concur. MORGAN, Ch. J., did not participate.

MURPHY v. TEUTSCH et al.

(35 L.R.A.(N.S.) 1139, 132 N. W. 435.)

Execution sale — redemption — waiver of purchaser's rights.

1. The acceptance of a partial payment by the purchaser at an execution sale prior to the expiration of the statutory period of redemption operates as a waiver to the right to sheriff's deed, and the execution debtor will be allowed to redeem after the expiration of such statutory period.

Execution — joint purchasers.

2. Where execution creditors purchase property at an execution sale, and agree that their respective interests in the certificate of sale be in proportion to the relative amount of their debts at the time of sale, their interest in such certificate is a joint one, and each is bound by the acts of the joint owner.

Execution — joint purchasers.

3. An oral agreement by one of the joint owners of a sheriff's certificate of sale to extend the period of redemption is binding upon all the joint owners of such certificate.

Opinion filed June 5, 1911. Rehearing denied September 23, 1911.

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

Action by Anna D. Murphy against Eugene Teutsch and others. From an order overruling demurrer, defendant Teutsch appeals.

Affirmed.

F. B. Lambert, for appellant.

Thompson & Schull, for respondent.

CRAWFORD, Special Judge. The complaint in this case in substance alleges: That at all times mentioned therein plaintiff was the owner in fee of certain lots in the city of Minot of the value of $16,000. That defendants Teutsch and Swenson held mechanics' liens against said premises, and an action was brought by Teutsch to foreclose the same on or about April 16, 1908. Thereafter, and on the 27th day of August, 1908, judgment was entered in favor of Teutsch for $190.10, and in favor of Swenson in the sum of $838.38; and said defendants were adjudged to have a lien on the lots described, and a direction that said premises be sold to satisfy said liens. That thereafter the sheriff levied upon said property under special execution, and advertised the same for sale, and sold the same on October 24, 1908, to Teutsch and Swenson for the sum of $1,067.08, and, on the 9th day of November following, the sheriff executed and delivered a certificate of sale to Teutsch and Swenson jointly, with the usual recitations. That plaintiff had, at various times prior to the expiration of the period of redemption, paid to Swenson several sums of money, amounting in the aggregate to $350, and subsequent to the payment of the said money, and on the 20th day of October, 1909, the plaintiff, through her agent, interviewed said Swenson relative to effecting a redemption of the said premises from said foreclosure sale, and stated to said Swenson that said plaintiff would pay the full amount necessary to redeem said premises on the 30th day of October, 1909, to which Swenson agreed, and further informed the plaintiff that, if said sum was paid on said date, it would be satisfactory, and at the same time stating that the period of redemption did not expire until the 9th day of November, 1909, all of which was communicated to the plaintiff by her agent, and the plaintiff relied upon the statements, and believed that she had full legal right to redeem said premises any time prior to November 9, 1909, further alleging that, during all the times mentioned, Swenson had the custody of the certificate of sale, and was at all times fully authorized by the said defendant Teutsch to accept and receive money paid by the plaintiff for the purpose of redeeming the premises from the foreclosure sale. That on the 30th day of October, 1909, the plaintiff, through her agent, tendered to the sheriff of Ward county the full amount necessary to redeem said premises, which tender was refused, and thereafter, on the same day, deposited the amount necessary to

redeem in a bank in Minot to the credit of said sheriff, and gave notice to the sheriff of the deposit of the money to his credit for the purpose of redeeming the premises from said sale. Two days later the defendant paid defendant Swenson $579, the balance due him, and he executed a certificate of redemption as to his interest in said foreclosure sale.

To this statement of facts the plaintiff adds, among other things, her prayer for relief that she be adjudged and decreed to be entitled to redeem said premises from said foreclosure sale within such time as may be fixed by the court. The complaint shows upon its face that the proceedings were regular for the foreclosure of the mechanics' liens up to and including the issuance of the sheriff's certificate; that plaintiff had a legal right to redeem from that foreclosure up to October 24, 1909. That right she failed to exercise. For the loss of the right which followed as a consequence of her failure to do so, she seeks redress in this action, and asks the court to permit her to redeem after the year of redemption has expired.

The power of courts of equity give relief in certain class of cases, and permit a redemption of real estate sold under execution after the statutory period of redemption has expired, has been generally recognized, and such power has been exercised when a proper state of facts required it. See Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 738; Wilson v. Eggleston, 27 Mich. 257; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686; Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512; Hart v. Seymour, 147 Ill. 598, 35 N. E. 246. Such power has been exercised by courts of equity most frequently upon a sufficient showing of either fraud, accident, or justifiable mistake.

The defendant Teutsch relies mainly upon two propositions: (1) That the plaintiff allowed the statutory period of redemption to expire, and has not brought herself within any of the rules in which courts of equity will afford relief. (2) If the acts of Swenson were sufficient, such acts are not chargeable to nor binding upon him.

All the transactions had concerning the redemption from said sale prior to the expiration of the period of redemption were with Swenson, who accepted $350 prior to the expiration of the period and the bal-

ance due him on October 30, 1910, in accordance with his agreement to extend the time for redemption to that date.

The acceptance of a part payment by the purchaser at an execution sale during the statutory period of redemption operates as a waiver to the right to a sheriff's deed, and such purchaser can only look to the land as security for the payment of the balance. Neither equity nor good conscience would permit such purchaser to accept payments during the period of redemption, and then exact a full forfeiture upon a failure to pay the balance within said period. Southard v. Pope, 9 B. Mon. 261; Ott v. Rape, 24 Wis. 336, 1 Am. Rep. 186; Whiting v. Butler, 29 Mich. 133; Spath v. Hankins, 55 Ind. 155; Felton v. Smith, 84 Ind. 485. Southard v. Pope, supra, holds that a "redemption, having been commenced, must progress until it be complete. The purchaser is under no obligation to return the money which he has received. . . . Inasmuch as he cannot retain both the land and the money, his reception of the latter operates as a legal waiver of his right to enforce a forfeiture and make his purchase absolute under the statute, and gives to the owner of the land a right to redeem after the expiration of the year. The purchaser is under no obligations to receive less than the whole amount of the purchase money. But, if he receive a part, he thereby changes the character of his title, surrenders his right to enforce a forfeiture under the statute, and, by enabling the owner to redeem after the year, converts his purchase into a mere lien to secure the payment of the balance of the purchase money. It is necessary to give this effect to the act of the parties to do justice between them." In addition to receiving a portion of the money prior to the expiration of the statutory period of redemption, Swenson agreed orally with plaintiff to extend the time for redemption to the 30th of October, 1910, on which date the plaintiff made a tender of the full amount necessary to redeem from such sale. On such an oral agreement the plaintiff had a right to rely, and violation of such agreement would amount to a fraud upon the plaintiff. This court has held in the case of Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012, that where a purchaser at an execution sale, during the period of redemption, makes an oral promise to the owner to extend the period of redemption, and the same is relied upon, such promise is binding, and for violation of such oral agreement a court of equity will afford re-

lief. See also Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512.

It is very strenuously contended by defendant Teutsch that the acts of Swenson were not binding upon him, and he is entitled to a deed for his proportional interest in the lots in question. By an agreement between Teutsch and Swenson their respective interests in the land purchased were to be in proportion to the relative amount of their debts at the time of sale. Such a purchase is essentially a joint one in its character and effect, and combined the sums due on both executions into one consolidated debt. Swenson had the custody of the sheriff's certificate of sale, and the plaintiff had a right to redeem by the payment of the whole purchase money to him, and had a right to rely on the oral agreement of one of the joint owners of the sheriff's certificate of sale to extend the time for redemption, and the other joint owner cannot take advantage of the fact that he was not personally consulted concerning such extension of time, and cannot claim a forfeiture as to his interest in the sheriff's certificate of sale. He is bound by the acts and agreement of the joint owner of the certificate of sale. Southard v. Pope, 9 B. Mon. 261.

When Teutsch and Swenson made a joint bid at the sale, they became joint creditors during the year of redemption, having a lien upon the premises, by virtue of the judgment, as security for their joint claim, and, this being true, the debtor could pay either one. The case is analogous to that of joint mortgagees, and it is well settled in such a case that the mortgagor may pay either one of the joint mortgagees. 20 Am. & Eng. Enc. Law, 2d ed. 1059, and numerous cases cited. Also 1 Jones, Mortg. 6th ed. § 958, and cases cited. The fact that Teutsch and Swenson each held a mechanics' lien for different amounts cuts no figure. Their rights are exactly the same under the purchase at the sale as though they were total strangers who purchased at the sale, and from the time of their purchase, as before stated, they were joint creditors, having a joint lien upon the premises as security during the year of redemption. In Donnelly v. Simonton, 7 Minn. 167, Gil. 118, it was held that the same relation exists between the purchasers at a sale and the party having the right to redeem, as existed between joint mortgagees and the mortgagor before the sale, and that payment to one discharges the lien. The case of Maddox v. Bram-

lett, 84 Ga. 84, 11 S. E. 128, is not in point. In that case the two brothers held the title to the land jointly, with an outstanding right of redemption from both; but in the case at bar Teutsch and Swenson had no interest in the land, but were merely joint creditors.

The order overruling the demurrer is affirmed. Plaintiff and respondent will recover costs upon this appeal.

Goss, J., being disqualified, CRAWFORD, District Judge, acted in his place by request. MORGAN, Ch. J., did not participate.

LAMBERT v. BROWN et al.

(132 N. W. 781.)

Dismissal of action for failure to prosecute.

1. Under § 6999 of the Code of 1905, failure for five years after the commencement of an action to bring the same to trial creates a presumption of unreasonable neglect on the part of the plaintiff, entitling defendants to a dismissal of the action, unless good cause for the delay be shown.

Dismissal of action for failure to prosecute — discretion.

2. On an application for dismissal because of such failure to prosecute, the determination thereof is a matter in the sound discretion of the court.

Dismissal of action for failure to prosecute.

3. The order dismissing the action because of plaintiff's failure to prosecute the same to trial during a period of nearly six years from its commencement *held* proper, under the facts shown on the application to dismiss.

Opinion filed September 25, 1911.

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

Action by Jules Lambert, Jr., against William H. Brown and others. From an order dismissing the action, plaintiff appeals.

Affirmed.

Goss, J. This is an appeal from the decision of the district court of Ramsey county, dismissing this action for want of prosecution on an application therefor made by the defendant, under the provisions of § 6999, Revised Codes of 1905. Said statutory provision reads:

"All actions which have been commenced or hereafter may be commenced in any of the courts of record in this state, wherein the plaintiff or his successor in interest shall have neglected or shall neglect for a period of five years after the commencement of said action to bring the same to trial, and to take proceedings for the final determination thereof, are hereby deemed dismissed and abandoned by the plaintiff; and the defendant or his successor in interest, or any other person having an interest in said action or in the subject-matter thereof, may apply to the court for a formal order dismissing said action. If upon such application to the court facts shall be presented thereto showing that said action is one covered by the provisions of this section, the court shall make an order formally dismissing said action, which order shall be entered of record in the office of the clerk of the court of the county where said action is pending, and shall have the effect of a final judgment of dismissal."

It is the duty of the court to enforce this statute upon an application made by the party entitled to apply for dismissal. In so doing the court is vested with authority to determine on the record, or on such additional evidence as it may desire and as shall be presented, whether the case is one coming within the five-year provision mentioned in the first paragraph of the statute, and whether a failure by plaintiff to have the matter brought to trial, or in course of proceedings for final determination, within such five-year period, is occasioned by plaintiff's neglect, or is excusable under all the circumstances.

In this determination, a court is clothed with judicial discretion akin to that in passing upon an application to vacate a judgment under § 6884, Revised Codes of 1905, wherein, except in cases of manifest abuse, the holding of the trial court will not be disturbed. See Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228, wherein all previous holdings of this court on said subject are collected. We apply such rule to the case at bar, and briefly recite the record facts to determine whether the trial court abused its discretion in applying the statute and deciding that the case be thereunder "deemed dismissed and abandoned by the plaintiff," and making the formal order dismissing it accordingly.

The facts are not controverted. The summons and complaint were filed July 6, 1903, and issue joined thereon by answer served Novem-

ber 17, 1903. Note of issue was thereafter filed by the defendants December 3, 1905, noticing the case for trial for the term of court convening January 2, 1906. For want of appearance on the part of plaintiff, on the January 9th following, the action was dismissed for want of prosecution. Plaintiff appeared in person on the same day, but after the order for dismissal was made, an oral agreement between counsel in the case was then entered into that the order dismissing the action should be vacated and the case be tried. This oral agreement was, on April 4, 1908, reduced to writing; the parties stipulating "that said cause is hereby reinstated as though it had not been dismissed, and the said case is hereby to be placed on the next June, 1908, general term calendar of this court for trial on its merits." On July 15, 1908, plaintiff's attorney filed a note of issue, noticing the cause for trial for the July 21, 1908, term of said court. The case passed over the term, however, without further action on the part of plaintiff toward bringing it to trial. Defendants served an amended answer on opposing counsel on August 1, 1908. On October 21, 1908, defendants filed certain depositions taken during the preceding August. On March 9, 1909, defendants served motion for dismissal, returnable the following March 18th, the hearing upon which motion was deferred until April 20, 1909, when the plaintiff appeared in person, and testified to facts relative to the first dismissal, tending to show the reason for his non-appearance to have been because of his sickness, and that proceedings herein had been deferred awaiting determination of another case pending in the supreme court of this state between different parties, entitled Brown v. Commonow, 17 N. D. 84, 114 N. W. 728, a decision of which might have an important bearing upon or virtually decide the law propositions involved in the case at bar, which cause, however, had been decided by the supreme court in the January, 1908, term thereof. He further testified that "always since this action has been on the calendar, he has been ready and anxious to have it tried and disposed of," and that the reason it had not been tried was because the attorneys in the case had, by mutual consent, postponed the trial to abide the decision of the case mentioned, previously pending before the supreme court. Plaintiff on said hearing also offered in evidence a letter, dated February 3, 1909, of counsel for the defendants mentioning the action, and stating that the same "will probably not be reached until some

little time yet. The court is still busy with jury cases, and it will probably be some time before they are over yet." That term of court mentioned in said letter passed over without further proceedings having been taken. Upon the filing of the original complaint, a *lis pendens* had been filed against the land involved. The court deferred ruling on the motion heard April 20, 1909, until June 7th following, when an order of dismissal of the action was made, and judgment thereon was entered June 8, 1909.

The action is one in equity, triable to the court. This court will take judicial notice that the county seat of Ramsey county at all times has been the place wherein the district court chambers of that district are located, and that four terms of court each year since the commencement of this action have been fixed by statute to be held, at any of which plaintiff, in the absence of good cause shown to the contrary, could have forced the trial of this case. Instead of so doing, it has been permitted to encumber the court calendars of more than twenty terms of court, as fixed by statute to be held. Granting that both counsel have during a considerable portion of this time acquiesced, that does not excuse plaintiff's neglect in commencing an action and permitting it to slumber without trial being had for five and one half years after joinder of issue, and for nearly six years from its commencement, during which time, and some two years after the case had been at issue after defendants had filed note of issue, bringing it on the calendar, a dismissal for want of prosecution had been had, which dismissal was set aside, however, by stipulation, without apparent inconvenience to plaintiff, demonstrating no desire on the part of defendants' counsel to take any advantage of plaintiff or plaintiff's counsel in the case. The statute was enacted to apply to cases of this kind.

The effect of the statute is to declare that a plaintiff permitting a case to drag along without trial for five years after its commencement is prima facie guilty of such unreasonable neglect as, in the absence of proof sufficient to satisfy the court to the contrary, entitles the opposing party to take a dismissal thereof. The statute in effect declares a presumption of negligence on the part of the plaintiff, and throws upon him the burden of exonerating himself therefrom, or suffer dismissal of his action. The statute in question does not extend the limit

to five years within which a dismissal for want of prosecution may be taken, nor affect the usual rules of court procedure regarding disposition of causes. Our statute as to when actions shall be deemed dismissed is more liberal as to time than those of most states. For statutes similar, see § 822 of Bliss's New York Annotated Codes of 1903, vol. 1, p. 1430, and § 583 and subd. 7 of § 581 of Kerr's Code of Civil procedure of California; and for the California holdings thereon, see ¶¶ 160–168, inclusive, of vol. 3, Kerr's Codes, supra.

This case is analogous to the leading New York case of Seymour v. Lake Shore & M. S. R. Co. 12 App. Div. 300, 42 N. Y. Supp. 92, and the following from the opinion in that case is applicable: "The defendant made out a prima facie case of unreasonable neglect to prosecute. The action remained at issue for nearly six years without any step having been taken by the plaintiff to bring it to trial. Unreasonable neglect having thus been shown, the burden of excusing the neglect was thrown upon the plaintiff. . . . The defendant, moving to dismiss, may rest upon proof of neglect thus defined. The rule then throws upon the plaintiff the burden of making it appear to the court that such neglect was not unreasonable. The plaintiff in the present case has failed to make this appear. The only excuse he gives is contained in the vague statement that the action would have been tried long since, but for the ill health of his attorney 'for several years.' . . . Such a statement furnishes no basis for the exercise of judicial discretion. . . . His condition is not bettered by the filing of a note of issue and the service of a notice of trial shortly before the defendant made its motion to dismiss. These acts simply evince present readiness to proceed. They have no bearing upon the past neglect, and they certainly do not tend to excuse it. The defendant says that it has lost its witnesses by the delay. This may or may not be so. It was to prevent the possibility of such instances, and to compel diligence in legal procedure, that the practice was instituted. We deem it our duty to apply the statute and the rule of practice with reasonable fairness. Looseness in their enforcement would inevitably lead to an increase of the mischief which the legislature and the judges in convention aimed to lessen. The order should be reversed." And the action of the lower court denying a motion to dismiss was set aside, and the action dismissed. For other similar holdings, see Israel v.

Voight, 12 Misc. 206, 34 N. Y. Supp. 28; Silverman v. Baruth, 42 App. Div. 21, 58 N. Y. Supp. 663; Paulson v. New Jersey & N. Y. R. Co. 54 App. Div. 189, 66 N. Y. Supp. 364. See cases cited in 17 Century Dig. cols. 136 et seq. See also 14 Cyc. p. 443: "An action may be dismissed or a nonsuit granted for the failure of plaintiff to prosecute it with due diligence, unless he presents sufficient excuse for failure to prosecute. This power exists independently of statute or rule of court." Then, again (p. 445, same authority): "An action is properly dismissed for want of prosecution where there is no appearance by plaintiff or his counsel when his case is called in its order for trial [or] where plaintiff fails to take any steps in the action for several years, especially where younger issues have been tried in order during that time; . . . and leave to plaintiff to amend is no bar to granting defendant's motion to dismiss for lack of prosecution made shortly thereafter." Then, again (p. 446, same authority): "It is no excuse for delay in bringing on the trial of a cause at issue that another cause is pending in which the same principles are involved, and the decision of which might aid in the determination of the case at issue." Then, again (p. 448, same authority): "The fact that defendant notices the cause for trial, the same not having been placed on the calendar, does not waive his right to move for a dismissal. Where this rule [referring to a rule of court as to speeding trial of causes] does not prevail, the proper mode of proceeding on defendant's part, if he would expedite the determination of the cause, is to set it down for trial on his own notice. Then if plaintiff does not choose to try it, defendant may move for a dismissal."

The foregoing authority is here applicable. The facts in the case at bar are more extreme than in Seymour v. Lake Shore & M. S. R. Co. supra. Whatever the intentions of plaintiff may have been, the facts remain that from July 6, 1903, the date of the commencement of this action, a period of more than five years elapsed until July 15, 1908, date of service of note of issue by plaintiff, without any steps being taken by him toward final determination of the cause. In the meantime, defendants had brought the case on the calendar, and once, in January, 1906, procured its dismissal for want of prosecution; and even then plaintiff waited two years before procuring a written stipulation setting aside the dismissal and reinstating the cause on the

calendar, during which time no attempt whatever was made to bring the action on for trial. At the first sign of activity by plaintiff, in July, 1908, defendants served an amended answer, August 1, 1908, and, taking it for granted from the note of issue filed the previous month that plaintiff meant to try the case, defendants prepared for trial by taking and filing depositions after service of such amended answer. This was over six months after the decision in the case of Brown v. Commonow (decided January 9, 1908; reported in 17 N. D. 84, 114 N. W. 728), which case plaintiff urges as a reason for previous delay. Then plaintiff goes to sleep upon whatever rights he may have had after the expiration of the five years from date of commencement of the action, and does nothing during succeeding terms of court until the following spring, when he suddenly becomes active upon the service of the notice to dismiss, and proceeds to try the issue of his own negligence, but urges nothing tending to justify the delay from January, 1908, to March, 1909, granting that the pendency of Brown v. Commonow was sufficient excuse for all delay previous to its decision. Under this showing of fact, we are convinced that the dismissal was properly granted. Plaintiff has not only failed to rebut the presumption of negligence arising from his failure to prosecute the action to trial within five years from its commencement, but has actually established the fact of his own negligence.

The order appealed from is affirmed, with costs.

FREEL v. PIETZSCH.

(132 N. W. 779.)

Notice of appeal and undertaking on appeal — mistake in title.

1. Where a notice of appeal and undertaking on appeal otherwise clearly identify the order and judgment appealed from, and are properly served on the attorney for respondent, who admitted service thereof, and are filed in the action to which they were intended to apply, a mistake in their title is not ground for dismissal of the appeal; it appearing that the notice and undertaking are entitled in the same manner as the action was originally instituted.

Judgment non obstante veredicto — reversal.

2. In an action against husband and wife for the wrongful conversion of promissory notes, where the evidence shows that defendant husband had nothing whatever to do with the alleged wrongful conversion of the same, and neither aided, abetted, counseled, nor advised therein, motion for judgment *non obstante veredicto* was improperly denied, and this court will reverse the judgment and enter such order where it appears probable from the record that a different showing cannot be made on another trial.

New trial — for disregard of erroneous instructions.

3. Instructions of the court, though erroneous, being the law of the case, should be followed by the jury, and a verdict rendered in disregard to them should be set aside on motion for new trial, as against law, even though such verdict may be supported by the evidence under proper instructions.

Opinion filed September 29, 1911.

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

Action by Bertha Freel against Fred Pietzsch and wife. From a judgment for plaintiff, defendants appeal.

Reversed and judgment ordered for defendant Fred Pietzsch, and new trial granted defendant Anna Pietzsch.

Maddux & Rinker and *Ball, Watson, Young, & Lawrence,* for appellants.

J. A. Manly and *John Knauf,* for respondent.

Fisk, Frank, Special Judge. Action in conversion for the recovery of the sum of $5,000, the face value of three promissory notes alleged to have been executed by defendants to plaintiff on or about April 8, 1908, and thereafter and on May 4, 1908, wrongfully converted by defendants to their own use. Judgment was had in plaintiff's favor and against the defendants for the sum of $5,000, and they have appealed separately from such judgment, and also from an order denying their motion for judgment notwithstanding the verdict or for a new trial.

Respondent moved to dismiss the appeals on the ground that no notice of appeal from any order denying appellants' motions for judgment notwithstanding the verdict, or for a new trial, was ever served in said action, and no undertaking on appeal made or served; and, further, that no notice of intention to move for a new trial, and no

notice of motion for a new trial or for judgment notwithstanding the verdict, was ever served in said action. The action was originally commenced in the name of Frederick Freel, as guardian *ad litem* of Bertha Freel, plaintiff. From the record it appears that on May 26, 1909, a notice of motion for leave to file a supplemental complaint was served upon the attorneys for appellants, the object of the same being to have the title of the action changed to Bertha Freel, as plaintiff, by reason of her having reached the age of majority. There appears to have been no order made changing the title upon such application, although the action was tried upon the supplemental complaint, which is entitled "Bertha Freel, plaintiff." The answer to the original complaint was allowed to stand as the answer to the supplemental complaint, and is entitled, "Frederick Freel, as Guardian *ad litem* of Bertha Freel, Plaintiff." The instructions to the jury are also so entitled. The verdict and judgment are in the name of Bertha Freel as plaintiff. The notices of appeal and undertakings on appeal are entitled in the same manner in which the action was originally instituted. Respondent contends that by reason of the same not being entitled in the name of Bertha Freel, plaintiff, the appeal is ineffectual, and should be dismissed. We are unable to agree with such contention. The notices of appeal from the orders denying appellant's motion for judgment notwithstanding the verdict, and for a new trial, as well as the notice of appeal from the judgment, describe particularly from what the appeal is taken. They were served upon one of the attorneys for respondent, who instituted the action originally, and who has been connected with the same ever since, and he admitted service on each of said documents as the attorney for plaintiff. This is equally true as to the undertakings and the notice of intention to move for judgment notwithstanding the verdict, or for a new trial. The same attorneys on each side have appeared in the case since its inception.

The authorities cited by respondent are not in point. In Dorsey v. Raleigh & G. R. Co. 91 N. C. 201, the undertaking on appeal given as security for costs was made payable to the state, instead of to respondent, and the court says: "Had no person been named in the undertaking to whom it was payable, and the instrument been without seal, it would have been sufficient under the ruling in the case of the Clerk's Office v. Huffsteller, 67 N. C. 449,—a conclusion arrived at not with-

out much hesitancy, as shown in the opinion of the court." In Herrlich v. McDonald, 72 Cal. 579, 14 Pac. 357, the court says: "The certificate of the clerk, presented on hearing of the motion to dismiss, shows that the notice of appeal filed below was entitled 'Julia Herrlich v. H. M. McDonald.' But the notice was signed by the 'attorney for the defendant,' the subscriber being the attorney for the defendant in the action Julia Herrlich v. Maggie McDonald. It was filed in the court in which that action had been pending, and was served on the attorney for the plaintiff therein, who acknowledged service, 'reserving all objections.' The notice refers to an order made February 18, 1887, refusing to recall an execution, etc. . . . We cannot say, however, but that the notice described the order in such manner as clearly to identify it, and so to inform the respondent of the particular order appealed from." There appears to have been no objection made to the party plaintiff at the hearing of the motion for judgment *non obstante veredicto* or for a new trial, and the case appears to have proceeded until it reached this court, in the name of Frederick Freel as guardian a portion of the time, and in the name of Bertha Freel, plaintiff, the balance of the time. The action, while entitled in the name of Frederick Freel as guardian of Bertha Freel, was in substance the action of Bertha Freel, and the fact that the verdict and judgment were entitled in her name alone as plaintiff, without any order apparently having been made for such change, would not, in our opinion, be grounds for dismissing the appeals in said action, because the same are entitled as the action was originally commenced, and especially so in view of the fact that the orders and judgment are particularly described. Finding no merit in respondent's motion to dismiss the appeals, we will pass to the merits of the case.

The appellants (defendants in the lower court) are husband and wife, and the respondent is a sister of appellant Anna Pietzsch. Respondent claims that, when she was about twelve years old, appellant Fred Pietzsch took improper liberties with her, and had sexual intercourse with her on numerous occasions; that nothing was said about the matter until she was sixteen years old, and had been delivered of a bastard child begotten by her present husband, Freel; that while confined to her bed by reason of such childbirth she informed her mother of what had taken place between Pietzsch and herself, which information

was communicated to appellant Anna Pietzsch, and by her to her husband; that appellants then executed and delivered the notes in question in settlement for the wrong Fred Peitzsch had done respondent, and to have the matter kept quiet, as she puts it; that three or four weeks thereafter and shortly before the first note became due, Anna Pietzsch went to the home of respondent, who was living with her mother, ostensibly to pay the note falling due, but, instead of paying the same, forcibly took all three notes from respondent, and refused to deliver them back. Appellants deny the execution and delivery of the notes, and deny that Fred Pietzsch ever had improper relations with respondent. Appellants made both joint and several motions for directed verdicts at the close of respondent's case and at the close of the entire case, and also for judgment *non obstante veredicto* or for new trials, and they specify the rulings on these motions as error, setting up eleven separate assignments of error. It would serve no useful purpose to set forth at length the testimony. Suffice it to say that there is not a scintilla of evidence in the record tending in any way to connect Fred Pietzsch with the alleged wrongful conversion set forth in the complaint, and it was therefore manifest error to deny his motion for a directed verdict, conceding for the purposes of the case, that there was sufficient evidence to warrant a finding that the notes were executed and delivered for a good and valid consideration. There is no intimation or suggestion in the testimony that defendant Fred Pietzsch either advised, counseled, aided, or abetted his said wife in such wrongful conversion, and we are at a loss to understand on what possible theory he can be held responsible for her said acts. We are agreed that as to him the judgment and order appealed from must be reversed, and judgment entered in his favor as prayed for, the record disclosing that no different showing can likely be made on another trial. Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436.

The following instruction was given by the trial court: "Sexual intercourse between other than husband and wife is unlawful, and a contract having such an unlawful intercourse as its basis and consideration is absolutely void. If, therefore, you find that the notes in suit were actually executed and delivered, and later appropriated by the defendants, but that they were based upon sexual intercourse of the plaintiff and defendant Fred Pietzsch, then said notes are void and

unenforceable, and your verdict must be for the defendant." All of the evidence in the case goes to show that, if the notes in question were executed and delivered as claimed by plaintiff, the consideration therefor was sexual intercourse between appellant Fred Pietzsch and respondent some years prior to the giving of said notes. The instruction thus given amounted practically to a directed verdict in appellant's favor, and, whether right or wrong, was the law of the case, and it was the duty of the jury to obey it. It is manifest that the verdict was rendered in disregard of the above-quoted instruction, and is, for that reason, contrary to law, and a new trial should have been granted appellant Anna Pietzsch upon her motion setting forth that ground. Neither appellants nor respondent have questioned the correctness of such instruction, and it does not become necessary for us to pass upon the same. However, for the guidance of the trial court upon a retrial of the case, as to appellant Anna Pietzsch, we will state that in our opinion there is ample evidence in the record to justify its submission to the jury on the questions of the execution of the notes, the consideration therefor, and the alleged wrongful conversion thereof; that these notes were executed as alleged, and that there was in law a valid consideration therefor. So far as Fred Pietzsch is concerned, there is ample evidence to justify a finding in respondent's favor. If the plaintiff's testimony be true, he committed a gross outrage on this young girl, subjecting himself to liability, both criminally and civilly. His wife and codefendant, for the purpose of avoiding a public scandal and protecting him from a civil damage suit, saw fit to personally obligate herself for the payment of such notes by joining with her husband in executing and delivering the same, and we have no doubt that she thus became primarily liable thereon with her said husband. The contention of appellant's counsel that such promissory notes are without consideration finds no support in the evidence, there being no testimony whatever showing, or tending to show, that any portion of the consideration for such notes was for the purpose of stifling criminal proceedings. Furthermore, defendants are not in a very good position to urge such defense, as they flatly deny the execution of such notes at all. In a few jurisdictions it has been held that where the court erroneously instructed the jury as to the law, and they disregarded such instructions, and brought in a verdict supported by the evi-

dence in the case and the law applicable thereto, such verdict will not be set aside and a new trial granted on the ground that justice has been done between the litigants. But the great weight of authority supports the other view of the matter, and we believe correctly so, and holds that even though the instruction given is erroneous, and that the evidence is amply sufficient to sustain the verdict under a proper instruction, still, where the jury disregard the erroneous instruction and bring in a verdict which is clearly repugnant thereto, a new trial should be granted. As sustaining this view, see the following cases: Standiford v. Green, 54 Neb. 10, 74 N. W. 263; Mast v. Pearce, 58 Iowa, 579, 43 Am. Rep. 125, 8 N. W. 632, 12 N. W. 597; Battin v. Marshalltown, — Iowa —, 77 N. W. 493; King v. Lincoln, 26 Mont. 157, 66 Pac. 836; Darlington Oil Co. v. Pee Dee Oil & Ice Co. 68 S. C. 46, 46 S. E. 720; Aguirre v. Alexander, 58 Cal. 30; Emerson v. Santa Clara County, 40 Cal. 543; Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; Lynch v. Snead Architectural Iron Works, 132 Ky. 241, 21 L.R.A.(N.S.) 852, 116 S. W. 693; Rogers v. Murray, 3 Bosw. 357. By reason of what has heretofore been said, it is unnecessary to pass upon the other assignments.

The judgment is reversed as to both appellants, and it is ordered, that judgment be entered in favor of the appellant Fred Pietzsch for a dismissal of said action, and that a new trial be granted the appellant Anna Pietzsch.

MORGAN, Ch. J., and BURKE, J., not participating. W. J. KNEESHAW and F. E. FISK, District Judges, sitting by request.

CLAIR v. NORTHERN PACIFIC RAILWAY COMPANY.

(132 N. W. 776.)

Railroads — trespassing animals.

1. Where animals are trespassers on the tracks or right of way of a railroad company, the duty of the company is only to exercise ordinary care to avoid injury to them after they are discovered.

Motion for directed verdict — denial.

2. It is not error to deny a motion for a directed verdict where the evidence, though undisputed, is such that different impartial men might fairly and reasonably differ in the conclusions to be drawn from such evidence.

Instructions — correctness.

3. Certain instructions considered, and *held* not erroneous.

Opinion filed September 30, 1911.

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

Action by James Clair against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ball, Watson, Young, & Lawrence, for appellant.

Feetham & Elton, for respondent.

MORGAN, Ch. J. This is an action to recover damages against the defendant for the killing of plaintiff's horse, through the alleged negligence of the defendant's employees, in operating a train on January 4, 1905. The horse was killed at about 1:30 A. M. of said day, while it was on the defendant's track, some considerable distance from a crossing. The train was running between 20 and 25 miles an hour, and consisted of an engine with eight freight cars. The engine and

Note.—The question of the duty of railroad employees to keep a lookout for live stock on track is treated in notes in 24 L.R.A.(N.S.) 858; 96 Am. Dec. 681; and 20 Am. St. Rep. 161.

For authorities on the power of the legislature to make the killing of stock prima facie evidence of negligence, see note in 32 L.R.A.(N.S.) 227. See also notes in 15 L.R.A. 39 and 58 Am. Rep. 703.

braking appliances were in good working order. The engineer first distinctly saw the horse when it was 5 car lengths ahead of the engine. As soon as he distinctly saw the horse on the track, be set the emergency brake and sounded the whistle, but the engine was not reversed. At the place where the animal was killed, there was a curve in the track, which is shown to have been about a 4-degree curve. The headlight, therefore, did not directly fall upon the animal as soon as it would have done on a straight track, and the engineer did not distinctly see it before it was shown by the headlight, and it was then about 5-car lengths ahead. Before the headlight fell on the horse, the engineer had noticed an object on the track which showed up like a shadow, but he did nothing to stop the train until he actually discovered it to be a horse, which was a very few seconds after he first saw the object. The engineer did not sand the rails, but he testifies that he could not possibly have stopped the train at that distance, in time to save the animal, without danger of an accident, and that there would have been danger of an accident and damage to the equipment if the engine had been reversed; but no danger of injury or accident would have followed sanding the rail.

At the close of the plaintiff's testimony the defendant moved for a directed verdict, on the ground that the evidence was insufficient to justify a verdict, and that no negligence on the part of the defendant had been shown. The trial court denied the motion, and submitted the question to the jury, who found a general verdict in favor of the plaintiff, and assessed his damages at the sum of $150, together with interest, amounting in all to the sum of $181.06. Two special questions were also submitted to the jury, and in their answers to the same the jury found that the defendant was guilty of negligence, and that such negligence consisted in the failure of the engineer to use all means at his command to stop the engine. The defendant moved for a new trial, and also for judgment notwithstanding the verdict, and the court denied both motions. The defendant perfected an appeal from the order denying judgment notwithstanding the verdict, or a new trial, and also appealed from the judgment.

When the engineer first saw the horse on the track, it was about 200 feet ahead. He testifies that he could have stopped the train within 300 feet that night. He also testifies that he did nothing to stop it

until he was enabled by the light to see that the object or shadow was a horse. Owing to the curve in the track, he says that he was unable to distinguished what the object was as soon as he could have done so, if the track had been straight; and he further says that he set the emergency brake, although he knew that the train could not be stopped in time to save the horse, and that he did so as it would give the horse longer time to jump from the track. He also says that it would have stopped the train very much more quickly with the emergency brake and the rails sanded, but that it could not have stopped in time to avoid killing the animal, if it did not jump from the track, as stock sometime does. He also says that if he had gotten the train under control, or stated to do so immediately, he would not have struck the horse nearly so quickly. The horse was running away from the train when the engineer first saw it, and when it was struck by the engine.

In view of these undisputed facts, it remains for us to determine whether a verdict should have been directed for the defendant. It has been held in this state, in several cases, that when animals are on the railway tracks between crossings they are trespassers, and that railway companies owe no duty to watch for them, but that they are bound to use only ordinary and reasonable means to save the trespassing animals, after they are seen, consistent with the safety of the train, its crew, and passengers. Cumming v. Great Northern R. Co. 15 N. D. 611, 108 N. W. 798; Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 159, 96 N. W. 324.

It is admitted that the engineer did not sand the rails, and that doing this would have materially reduced the speed at once, in connection with the use of the emergency brake. The animal was running away from the train during all the time, which is a fact to be considered. In view of the entire record, we think it was a question for the jury to say whether all reasonable precautions were taken by the engineer, and whether the animal was killed by reason of not using ordinary and reasonable means to avoid the killing of it.

It is true that the evidence is undisputed in this case; but that does not necessarily make it a question of law for the court to say whether there was negligence or not. If, on consideration of the undisputed facts of the case, impartial minds may fairly draw different conclusions, it becomes a question for the jury, and the court shall pass upon the undisputed facts only when but one conclusion can fairly

be deduced therefrom. This principle has been announced in many cases in this court. In Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972, the court said: "Contributory negligence, as well as negligence of the defendant, are questions for the jury in a case at law, unless the conceded facts from which the inference must be drawn admit of only one conclusion. If the facts . . . are such that different impartial minds might fairly draw different conclusions from them, they should be submitted to the jury, and are only for the court when such that fair-minded men might draw only one conclusion from them." See also Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224; 15 Current Law, 1380, and cases cited. Whether the defendant had overcome the statutory presumption of negligence where animals are killed by locomotives along a railroad, as declared under § 4297, Rev. Codes 1905, is not shown to the extent that but one conclusion can be reached from the evidence. The rails were not sanded, and if this had been done the speed of the train would have been materially reduced at once. That the engineer should have endeavored to stop the train when he first discovered an object on the track is also a question concerning which the jurors and other impartial minds might disagree. Under the evidence, it is shown that the animal was running, and that it would have had more time to escape if all precautions had been taken by the engineer. In view of these facts, we are satisfied that there was no error in submitting the issues to the jury, notwithstanding the conclusion of the engineer that no precautions on his part would have avoided the injury.

It is claimed that this case is controlled by Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054, and Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co. 3 N. D. 382, 56 N. W. 139, but we think the facts of these cases are clearly distinguishable from the present case. In the Corbett Case, the evidence of the engineer was unequivocal that he did everything in his power to stop the train, and we held that no question presented itself to throw any doubt upon the evidence of the train employees as to the exercise of the diligence required to protect the trespassing animals. The same is true of the Hodgins Case. It was therefore held in these cases, and properly, that the statutory presumption of the negligence was completely overthrown, and that

there was no question in the case for the jury. In this case, the admitted omission of the engineer to take the precautions that have been mentioned leaves the question doubtful, as a legal conclusion, whether the stock would have been saved if these precautions had been taken, and the question was therefore properly left with the jury.

Several exceptions were taken to the charge of the court in reference to the negligence of the defendant. These exceptions are based upon the claim that the evidence was undisputed, and that it was therefore the court's duty to decide the question. What we have said on the denial of the motion for a directed verdict disposes of these assignments.

Error is also specified on that portion of the charge wherein the court stated that the question of the credibility of the witnesses was for the jury to determine. It is claimed that these instructions, in effect, stated that the engineer's testimony might not be worthy of belief, inasmuch as he was the only witness on the question of the operation of the train. There were other witnesses that testified in the case, and the engineer's testimony was not particularly referred to, nor was there any particular reference to witnesses' testifying on the question of defendant's negligence. We therefore conclude that the instruction was without prejudice, and the specification without merit.

It is claimed, also, that the trial court misdirected the jury in its instructions on the question of the statutory presumption of negligence. The claim is that the charge stated that when animals killed by the locomotive or cars are found along a railroad a presumption of fact is raised that they were killed through the negligence of the defendant. We think a reading of the instruction makes it clear that the court stated that such presumption is only a rebuttable presumption; in other words, that it was only a legal presumption, existing only until overcome by evidence. What we have said disposes of all the questions arising on the record including those arising on the motion for a new trial.

For the reasons given, we conclude that the judgment should be affirmed, and it is so ordered. All concur.

Goss, J., being disqualified, W. C. Crawford, Judge of the Tenth Judicial District, sat in his place by request.

STATE v. HERMANSON.

(132 N. W. 415.)

Prosecution for keeping liquor nuisance — evidence of former convictions — admissions.

1. Defendant entered pleas of guilty to the maintaining of nuisances under the city ordinances of Minot, which ordinances provided that the seller of intoxicating liquor as a beverage, or the keeper of a resort wherein people were allowed to drink intoxicating liquors, was maintaining a nuisance and prescribing a penalty therefor. *Held*, on proper foundation laid, such convictions could be shown and were admissible as admissions of guilt in this action prosecuted for maintaining a common nuisance under the statute, and covering the entire time in which the transactions under the ordinances were charged to have occurred.

Evidence of pleas in former prosecutions — oral testimony as to — docket entries.

2. Such admissions by pleas of guilty may be shown by oral testimony of the magistrates or other persons present, and also, on proper foundation laid therefor, by the docket entries made in the course of official duty by the magistrates.

Opinion filed June 1, 1911. Rehearing denied September 13, 1911.

Appeal from the County Court of increased jurisdiction for Ward County; *N. Davis*, J.

Amos Hermanson convicted of maintaining a common nuisance, and appeals.

Affirmed.

Palda, Aaker, & Greene, for appellant.

D. L. Nash, State's Attorney, and *Andrew Miller*, Attorney General, for the State.

Goss, J. The defendant, Amos Hermanson, appeals to this court from a judgment entered in the county court of increased jurisdiction for Ward county on November 22, 1909, imposing six months' imprisonment with a fine of $800 and costs, and further imprisonment in default of payment of fine. The information charged the defendant with keeping and maintaining a common nuisance, a saloon, at a place particularly described.

Many errors are assigned, but the ones chiefly relied upon are those relating to the admission of evidence of judgments of conviction entered in the magistrate courts in the city of Minot, which magistrate proceedings were had under ordinances of said city, identical in provisions and language with the statutes of this state under which this prosecution is had. The ordinances provided, following approximately the language of the statutes, that premises within said city wherein intoxicating liquors were kept for sale, sold, or given away as a beverage, or wherein persons were permitted to resort for the purpose of drinking any intoxicating liquors as a beverage, were declared nuisances, and provided a penalty for the keeping and maintaining of the same. Such ordinances were received in evidence. During the period of time described in the information, two complaints were laid against the defendant in the magistrate courts and warrants of arrest issued; the defendant being twice arrested thereon. He, acting in person, pleaded guilty under the city ordinance charges, on which judgments were entered adjudging him guilty and fining him; he promptly paying both fines. The record of said proceedings, consisting of complaints, warrants, pleas, and sentences under said ordinances, was received in evidence over the objection that no foundation was laid therefor, and that the same was incompetent, irrelevant, and immaterial. The foundation for the admission of such documentary evidence consisted of testimony identifying defendant with the place alleged to be the nuisance, his sales of beer therein, a description of the premises corroborative of the nature of said illegal business there maintained, the congregation at that place of persons to buy beer and their purchase of it, their intoxication and the presence of intoxicated persons in numbers congregating there, the arrest of the defendant at such place by the chief of police on the warrants on two different occasions under such prosecutions based on violations of said city ordinances, and defendant's statements at the times of his arrest to the chief of police, that he was the person running the place, and the statements in the magistrate courts to the same effect, and that he handled beer there, and that he pleaded guilty to the charges laid against him. All these proceedings were had during the month of August, 1909, for offenses under the ordinances alleged as occurring in said month, all being within the period of time charged

in the information as the time during which the defendant is alleged to have maintained said nuisance.

The defendant is identified with the entire transaction in all details, and the foundation as to proof of facts is sufficient to entitle the magistrate's judgment to be admitted as evidence in the nature of admissions of guilt, made by the defendant, of acts necessarily admitted in his pleas of guilty, tending to prove him guilty of the crime charged under the statutes. Both magistrates testified to his statements made in connection with his pleas of guilty in their courts, and their docket entries made in due course of their official duties were also admissible as evidence thereof. The crime charged under the city ordinances was identical in nature, time, and place with that laid in the information. That the docket entries of the justices of the peace in the prosecutions under the ordinances were admissible under the foundation laid in the trial of this action, see 5 Ann. Cas. 716, collected under State v. Bringgold, 40 Wash. 12, 82 Pac. 132, and note immediately following; 12 Cyc. 418, 460, 474, and cases cited. See also 14 Am. Dig. cols. 1906 et seq., and 6 Decen. Dig. §§ 406–517 et seq. A plea of guilty, to be admissible in evidence, need not have been made in the prosecution in which it is offered. In addition to above authorities, see Beason v. State, 43 Tex. Crim. Rep. 442, 69 L.R.A. 193, 67 S. W. 96. Where a defendant's plea of guilty of the theft of the articles taken in the commission of a burglary was admitted against him in a prosecution thereafter on the same facts for the burglary, defendant was convicted of the offense of theft, petit larceny, by his plea of guilty, and thereafter indicted and convicted for burglary in the taking burglariously of the same goods the subject of the petit larceny. Murmutt v. State, — Tex. Crim. Rep. —, 67 S. W. 508, also s. c. on former appeal in 63 S. W. 634; Beason v. State, 43 Tex. Crim. Rep. 442, 69 L.R.A. 193, 67 S. W. 96, s. c. on former appeal in 63 S. W. 633.

Such testimony being admissible as evidence in the nature of admissions of defendant, the charge of the court to that effect was proper. The charge excepted to and assigned as error is the following: "The testimony introduced in this case, showing that defendant has entered two pleas of guilty under the city ordinances of the city of Minot, may be used and considered by you as admissions of the defendant, and you

may give to such admissions such credit or weight as you may find it is entitled to in connection with all the other evidence in the case."

The instructions are challenged on the ground of being erroneous because said pleas of guilty are not to be considered as admissions of guilt in the case on trial. The foregoing authorities are conclusive against defendant's position, and dispose of the error assigned to instructions, as well as to the question of admissibility of the pleas of guilty. Had the defendant, in some place other than a court, made the same statements as he did by his plea of guilty, declaring his guilt of selling intoxicating liquor within the city of Minot on August 24, 1909, and August 28, 1909, no one would seriously question its admissibility on this trial, on the information charging him with there maintaining this common nuisance during the month of August, 1909.

The judgment appealed from should be affirmed, and it is so ordered.

MORGAN, Ch. J., not participating. W. J. KNEESHAW, District Judge of the Seventh Judicial District, sat by request.

STATE v. OTREY.

(132 N. W. 367.)

Violation of liquor laws — sufficiency of evidence to convict.

1. Evidence examined, and *held* sufficient to warrant the conviction of the defendant for keeping intoxicating liquor for sale as a beverage.

Criminal prosecution — instructions.

2. An instruction to the jury, when applicable to the fact and in the words of the statute declaring the law, is proper.

Opinion filed June 1, 1911. Rehearing denied, September 12, 1911.

Appeal from the County Court of increased jurisdiction for Ward County; *N. Davis,* J.

J. B. Otrey was convicted of keeping intoxicating liquor for sale as a beverage, and appeals.

Affirmed.

Palda, Aaker, & Greene, for appellant.

Dudley L. Nash, State's Attorney, and *C. L. Young,* Assistant Attorney General, for the State.

Goss, J. This is an appeal from a conviction for keeping intoxicating liquors for sale as a beverage. Defendant challenges the sufficiency of the evidence to warrant conviction as his principal assignment of error. This necessitates a review of the testimony. The following is a *résumé* of the evidence:

Defendant was with "a tall, dark complected fellow, dressed in a dark suit," on the evening of July 4, 1909, in the city of Minot, while said "fellow" made arrangements with a drayman to have twelve cases of beer hauled 7 miles to a celebration to be had the next day in the woods near the town of Logan. By 7 o'clock the day of the celebration, defendant is at the Soo Line depot in company with this "dark complected fellow" of indefinite description, assisting in placing the beer cases on the wagon. Defendant then finds a friend named Nelson, and they remain away from the wagon until it arrives at an icehouse a considerable distance from the depot, at which a sufficient cargo of ice is taken aboard to keep the wet goods cool for the day. The wagon waits the arrival of the defendant, who from five to fifteen minutes thereafter appears, and, pursuant to instructions from the "tall, dark complected fellow" previously given to the drayman, the defendant pays for the ice. He and his companion mount the wagon. The beer and ice in the meantime had been covered with enough hay to conceal the contraband on board. Defendant, with Nelson and the drayman, drives to the woods aforesaid, adjacent to the picnic grounds at Logan, and had just unhitched the horses at evidently the proper place to do the business of the day, having just opened up one of the twelve cases, when the sheriff, who had passed them *en route* a couple of times, interfered with plans and arrested defendant, the drayman, and Nelson. Of course, the usual explanations were made, and the "tall, dark complected" stranger was named as the real party in interest, for whom the three had, with no intention of ever assuming control of the beer and without any intent to violate even the spirit of the prohibition law, unwittingly compromised themselves by being found in such close proximity to the twelve cases aforesaid. On the trial the drayman,

Salter, defendant's companion, Nelson, and the defendant, all testified, as did the sheriff and deputy. The testimony of the first three men must have impressed the jury with their desire to shoulder the responsibility on some person other than themselves, and particularly place it upon the "tall, dark complected fellow" of name and antecedents unknown, who mysteriously appeared in their lives as an employer the night before, and forever after disappeared from the load of responsibility from the circumstances above related resulting in the apprehension of the three. The jury, however, may have considered the situation in another light. It is possible that they thought about the $8 in wages Salter was to get for hauling this beer 7 miles. And, again, defendant's omnipresence throughout the transaction may have been considered as singular. Perhaps they considered the act of the defendant in spending his money for ice to keep the cargo in condition as a circumstance slightly inconsistent with innocence. Of course, the innocent disguise of the whole transaction by the hay covering was only a circumstance, considered perhaps with the final location of the "blind pig" on wheels in the woods in readiness to do business. It was, of course, only an accident that the place chosen from which to make final distribution of this inheritance of grief from this mysterious "dark complected" stranger was in such close proximity to the place where our national holiday was being celebrated. Another unfortunate circumstance for the defendant was that the goods were labeled as Blatz beer, so that the same was presumed in law to be intoxicating, which presumption naturally prevented the question of the intoxicating nature of the beverage being as indefinite as the description of the real villian, the "dark complected" individual described in their testimony. We might here observe that every trial judge sees this "dark complected" or variously and always indefinitely described guilty third person in a great percentage of criminal cases where ordinarily guilt is conclusively proven against defendant's plea that such "court ghost," and not defendant, was the real guilty party. Courts are familiar with this peculiar form of *alibi,* and we shall presume the jury properly and fully considered all the testimony tending to convict the "specter" in this trial, but this did not cause them to overlook existing facts altogether. Possibly, also, the jury may have considered the previous occupation of the defendant as a vender of malt at the town of Sawyer, a few miles

beyond Logan, as having something to do with defendant's familiarity with the field of operations on the particular day. Possibly, too, they considered as an element the government license issued him by the Federal government, undisputable evidence of the fact that it had collected from him a license, possibly construed by defendant as a permit to violate our state laws in such respect. In any event, notwithstanding the fact that the defendant testified "mechanical work" was his business, the jury concluded he was mistaken as to July 5, 1909, and evidently followed the presumption at law arising from a statute generally in force in this state, providing that the finding of intoxicating liquors in such unusual quantities in the possession of the defendant at such place might be considered as sufficient evidence that the same was kept for sale contrary to law, in the absence of a satisfactory explanation thereof. Evidently defendant's explanation was not satisfactory to his peers of the realm, as they concluded the case against him by a verdict of guilty. The trial judge was of the same opinion as is apparent from his denial of defendant's motion for new trial. Precedent leads us to leave the verdict undisturbed under these circumstances.

Another error complained of is a part of the court's instructions wherein the court gave a portion of § 9383, Rev. Codes 1905, relating to the finding of intoxicating liquor in unusual quantities in the possession of the defendant, and instructed them in the words of the statute that such evidence "shall be received and acted upon as presumptive evidence that such liquors were kept for sale contrary to law." The instruction given was in the words of the statute, the court, however, further instructing the jury immediately following that "such evidence may be considered by you as competent and sufficient upon which to base a conviction, providing the jury is satisfied beyond a reasonable doubt, from all the evidence in the case, that the defendant is guilty as charged." The court also instructed fully upon all phases of the case, so the jury understood the application of the law to the facts. The instruction in the words of the statute was certainly a correct instruction as to the law.

Error is also urged in the court sustaining an objection to a question as to the defendant not employing the drayman to haul the beer in question. The testimony was excluded on the grounds that it was

already fully testified to and merely repetition, and an inspection of the record shows the ruling of the court was proper in such respect, the witnesses having been examined and re-examined at length on the same matter. The ruling was one under the circumstances discretionary with the court.

Our conclusion is against appellant's contention on all assignments urged, and accordingly judgment is ordered affirmed.

MORGAN, Ch. J., not participating. W. J. KNEESHAW, District Judge of the Seventh Judicial District, sat by request.

POLLOCK v. JORDON et al.

(132 N. W. 1000.)

Amendment of complaint — new cause of action.

1. *Held,* that the amendment to plaintiff's complaint did not change the cause of action from a suit to recover damages for a preference granted by the insolvent prior to bankruptcy to his creditor to an action against said creditor for conversion.

Continuance — surprise — amendment of pleadings.

2. That such amendment during trial did not give defendant the right to a continuance on the ground of surprise occasioned by amendment of pleadings. in the absence of a showing of actual surprise and need of time for preparation to meet it. Where the pleading gives sufficient information of the evidence to be adduced, the allowance of an amendment to cure a defect which had been relied upon by the opposite party to defeat the pleading does not create "surprise," within the meaning of the rule as to continuances on the allow ance of amendments to pleadings.

Continuance — sufficiency of application for.

3. A mere request or statement of inability to meet the issues presented by an amended complaint is not usually of itself sufficient application for continuance.

Appeal — refusal of continuance — discretion.

4. The granting or refusal of an application for a continuance, like a motion for leave to amend, is largely within the discretion of the trial court, and an order denying the same will not be reversed, unless it clearly appears there has been an abuse of such discretion.

Opinion evidence as to value — competency of witness.

5. Allowance of testimony touching value *held* proper, as upon sufficient foundation laid, and exceptions as to instructions of the court reviewed.

(Spalding, J., dissenting in part.)

Opinion filed October 2, 1911.

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

Action by Robert M. Pollock, trustee in bankruptcy of Mossing Brothers & Company, against Walter B. Jordon and others, doing business under the firm name of W. B. & W. G. Jordon. From a judgment for plaintiff, defendants appeal.

Affirmed.

Stambaugh & Fowler, for appellants.

Roberts M. Pollock and *Geo. S. Grimes,* for respondent.

Goss, J. This is an action brought by the plaintiff as trustee in bankruptcy of Mossing Brothers & Company, to recover of the defendants the value of certain property transferred to them by said bankrupts when insolvent, and within the four-month period before the filing of the petition in bankruptcy by such insolvents. Plaintiff brings this action under § 60 of the Federal bankruptcy act of 1898 (act July 1, 1898, chap. 541, 30 Stat. at L. 562, U. S. Comp. Stat. 1901, p. 3445), as amended by the act of 1903 (act Feb. 5, 1903, chap. 487, § 13, 32 Stat. at L. 799, U. S. Comp. Stat. Supp. 1909, p. 1314), to recover the value of the goods given as a preference by the bankrupt to defendants, his creditors.

The original complaint was to recover the proceeds of the goods and book accounts assigned by the insolvents to the defendants, and received by them. On written notice and application for leave to amend the complaint, the plaintiff was permitted to amend the same so as to charge defendants with receiving and disposing of the goods and certain book accounts, upon which judgment was asked for damages for the value of such property. This amendment was made on two days' written notice, and allowed on the eve of trial (February 9, 1910), over defendants' objection "that it was an application to entirely change the nature of the plaintiff's cause of action from an action to recover a

preference to an action in conversion." This amendment was after an answer—a general denial—had been interposed. Upon the allowance of the amendment, counsel for the defendant requested a continuance of the case, stating that "we cannot prove the value of these goods, and are unprepared to try the new issue." This was denied, and the same is urged as error.

In reviewing these two rulings of the trial court, it is well to consider the previous progress of the case from its commencement. The action was placed upon the November, 1909, court calendar, with issue joined on the previous September 22d. On the call of the calendar for the November term, it was agreed that if the cause was triable to a jury, it should be passed to the next term, but if it was held to be a court case it was for trial in December following. Hearing was afforded counsel on December 23, 1909, on the question of whether the issue was one at law or in equity. Plaintiff had previously assumed that the action was for an accounting and an action in equity, while defendants contended for a trial by jury; the court holding with the defendants, and assigning it for jury trial. The case passed upon the calendar of jury causes of the January, 1910, term. Thereafter written notice of the proposed amendment was served by plaintiff on February 7th, and allowed on hearing February 9th, after the impaneling of a jury to try the case; all parties litigant being personally present. On notice two weeks prior, plaintiff had taken depositions of several witnesses on the value of the property. The authority of the court to allow the amendment is unquestioned. The classifying of the action as triable to a jury for damages caused plaintiff to amend, that he might "recover the property or its value" from the transferees. The preference was the gist of the action. The amendment only changed the measure of damages claimed as resulting therefrom. There was in reality no change in the matter to be litigated; the action had been begun to recover a preference, and after amendment remained an action for such recovery, and not an action in conversion, as contended by defendant in his objection.

In requesting a continuance, defendant does not urge a surprise by amendment; nor could he, in the face of the record, successfully so contend. The application to amend had been served, and he had permitted, without objection, the jury to be impaneled and sworn to try

the case. The amendment really raised no entirely new issue, nor one other than that for the trial of which he was before the court, supposedly prepared to try on the merits the issue of preference presented. The request was not a regular application for continuance.

The mere fact that defendants were unprepared to try the case was no ground for continuance, in the absence of a proper application therefor on showing made. Possibly defendants might never be in position to try this issue; but that would constitute no reason for indefinitely delaying its trial. And the record discloses that, after the overruling of the request, the parties actually tried the issue to the jury; defendant offering testimony from various witnesses on all questions involved, and resting his cause without further application for a continuance, having presumably offered all testimony ever obtainable, or that he desired to present for the jury's consideration. It does not appear, therefore, how the ruling complained of resulted to the prejudice of defendants, or that defendants were unduly precluded in their defense. This cannot constitute grounds for new trial because of surprise, as ordinary prudence could in any event have guarded against such ruling of the court operating to defendants' injury. See third subdivision of § 7063, Revised Codes 1905. It does not appear that the ruling of the court affected any of the substantial rights of the defendants, within the meaning of such section.

The following from 9 Cyc. p. 128, applies to the situation before us: "The keynote of the courts' decisions in this class of cases [referring to refusal to grant continuance on allowance of amendments] is the surprise occasioned the adverse party by the amendment as allowed; and, *in the absence of any showing to that effect, the application will be invariably denied.* And so, where the original pleadings are full enough to give reasonable premonition that the matter embraced in the amendment *exists as a fact, and is likely to be used on the trial,* a want of preparation by adverse counsel on the points of law applicable to it is no cause for a continuance on the ground of surprise." And, again, on page 129, same authority: "Surprise at the trial may and frequently does operate as a ground for continuance, unless the surprise is such as might have been obviated by the exercise of ordinary care and due diligence on the part of the party asking the continuance." And again, on page 134, same authority: "A continuance will ordinarily be de-

nied when the application is made after the trial has begun, especially where the applicant could have, by the exercise of reasonable diligence, prepared himself for its earlier presentation." The rule is also concisely stated as follows, in 4 Enc. Pl. & Pr. 837–839: "the modern rule . . . requires a showing of actual surprise on account of the amendment, and need of time for preparation to meet it, in order to entitle the opposite party to a continuance. Where a pleading gives sufficient information of the evidence to be adduced, the allowance of an amendment to cure a defect which had been relied upon by the opposite party to defeat the pleading does not create the kind of surprise contemplated by the statute."

The application in this instance is merely the statement of counsel, and is wholly unsupported by affidavit or any corroborative showing whatever. An application for continuance, made a day before trial and based on affidavits, should be disregarded, when the same recites on information and belief what an absent witness could testify to, where the grounds for such belief are not themselves disclosed; and a denial of an application for continuance based on such affidavits was proper. State v. Carroll, 13 N. D. 383, 101 N. W. 317, a prosecution under the bastardy statute. Even in a criminal action, the showing must be made by affidavit to permit a defendant to obtain a continuance. State v. Murphy, 9 N. D. 175, 82 N. W. 738.

An application for a continuance, like a motion for leave to amend, is largely within the discretion of the trial court, and an order denying the same will not be reversed, unless it clearly appears there has been an abuse of such discretion. 4 Enc. Pl. & Pr. 828–835; J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82; Gaines v. White, 1 S. D. 434, 47 N. W. 524; and numerous cases cited in 10 Century Dig. cols. 2673 et seq. The application, if treated as such, is deficient in all requisites, including necessity therefor, previous diligence to obtain material testimony, existence of evidence desired and possibility of its procurement, or surprise by amendment of the adversary's pleading.

Defendant urges as error the admission of the testimony of several witnesses touching the value of the stock of goods sold to liquidate their demand against the insolvents. We conclude the testimony objected to was properly admitted. One of the witnesses had been a sales clerk

in the store in question for six months before defendants took possession. He testifies he was familiar with the stock, knew the quality and amount of such merchandise, knew the cost of the goods, and was able to compare the same with the prices obtained by the defendants while disposing of them, and that he remained in the store at times after defendants' agent took possession. The other witness, whose testimony is objected to on the grounds of his alleged disqualification to testify, examined the stock of merchandise at the request of Anderson, sales agent of the defendants, and says he looked it over carefully, and had a talk with one of the partners about it, and was acquainted with the value of the merchandise; that he had been clerking in that kind of business for a year; that he assisted defendants' agent on two or three evenings in selling these goods, and was in the store from time to time while they were being disposed of, and received instructions as to their disposal from the defendants' agent in charge; that he was familiar with the stock of goods when such agent took the same, and knew the quantity and character of the goods left unsold. We think sufficient foundation was laid upon which to receive the testimony offered as to value.

The last assignments relative to the charge of the jury eliminate from their consideration all matters excepting the value of the goods and accounts disposed of at the time by the defendants. Counsel contend that the court should have submitted to the jury the question of whether the defendants received goods, or whether they received money. To this we cannot agree. The undisputed testimony establishes that the defendants, and not the insolvents, disposed of the goods. The defendants employed their agent (Smedburg) in Minneapolis to come to North Dakota and take charge of the stock; they having another agent (Anderson, their traveling salesman) already in North Dakota, and familiar with the stock and the financial status of the then insolvent merchants. They furnished such agent expense money to come out, and he remained in defendants' employ, reporting sales to them. Their traveling salesman (Anderson) paid off the former employee, and procured from him the keys of the establishment, turning them over to Smedburg, whom both the company and Anderson had instructed to take charge and make the sales. Such agent remained in the conduct of the business until relieved by his employers, when he received the

balance due him for salary and expenses. Anderson, besides paying off the former employee, said the business had changed hands, and cautioned the employee not to tell anyone around town about it. W. B. Jordon, one of the defendants, testifies to the employment of his traveling man, Anderson; also his employment of Smedburg, and the advancing of expense money to him, and directing him to get his instructions from Anderson, their traveling man. Smedburg's testimony is to the same effect; and it is stipulated that Smedburg received from the sales of goods made by him, and his collection of book accounts during the employment, the total sum of $1,332, for which he regularly bought exchange of the local bank, and forwarded to his employers. Prior to defendants placing Smedburg in charge, their agent, Anderson, had attempted to sell the stock, and when asked about the title, said the Jordons would guarantee the title. The insolvents had ceased to exercise control over the stock. One of them went to Canada on the 14th of October previous to the bankruptcy proceedings November 14th following, and prior to the time of Smedburg's taking possession of the stock on or about October 28th. The reason defendants took control was to collect an indebtedness owing them by the insolvents, amounting to $3,500, of which $1,450 was unsecured. Under the evidence we conclude that the question submitted to the jury as to the value of the goods disposed of by defendants was proper, as a finding that the insolvents, and not the defendants, had disposed of the goods, could not be sustained, being contrary to the evidence in the case.

The judgment of the trial court is accordingly affirmed.

SPALDING, J. (specially concurring.) I concur in affirming the Judgment in this case, but I do so solely upon the ground that no sufficient showing was made by the defendants on their application for a continuance. They failed to show that they were surprised by the application, or that a continuance was necessary to enable them to procure evidence to meet the new issues raised by the amended complaint, or that witnesses on the subject could be procured. I cannot concur, however, in any statements in the opinion of my associate indicating that there was no material change in the issues made by the amended pleading. The original complaint had asked as damages the amount received by the defendants for the stock of goods sold; the amended complaint

asked for the value of such goods. The amendment required a wider range of evidence than the original complaint; in fact, the recovery on the amended complaint was nearly $1,000 more than the original complaint would have supported. The defendants might have been fully prepared to defend as to the amount received, yet wholly unprepared to show the value. The quotation from 4 Enc. Pl. & Pr. 837–839, is unquestionably law; but it has no bearing upon this case. The defect referred to in that quotation is not a defect in substance, or a defect arising from an omission to allege any of the facts necessary to support the recovery. It only applies to an imperfect or incomplete statement of facts.

In the case at bar, had the plaintiff attempted to plead the facts relating to the value, and had done so imperfectly, unquestionably he would have been entitled to amend by perfecting his statement of such facts; but the defect in this case consists in an entire omission to state any legal subject for recovery. There was nothing to amend by, and, as I have said, the amendment allowed was one which might have required a much broader line of proof. This would have entitled the defendant to a continuance to meet the new allegations, had be made a proper showing of surprise and unpreparedness by reason of the change. This showing he failed to make.

BRADLEY v. EARLE.

(— L.R.A.(N.S.) —, 132 N. W. 660.)

Exemptions — liberal construction of statute.

1. Exemption privileges allowed by statute are to be liberally construed, and a debtor should not be deprived thereof through a technical following of statutes pertaining to pleading.

Note.—For notes on the liberal construction of statutes allowing exemptions, see 45 Am. Dec. 252; 76 Am. Dec. 224.

As to set-off against claim for exemption, see notes in 19 L.R.A. 33, and 66 Am. St. Rep. 385.

Action for exempt wages — counterclaim.

2. Where a plaintiff brings an action for wages due from the defendant, and such wages are exempt to the plaintiff, the defendant cannot counterclaim a debt due from the plaintiff to him, although the counterclaim comes within the letter of the statute.

Opinion filed September 13, 1911. Rehearing denied October 10, 1911.

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

Action by John Bradley against D. Earle. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

John E. Middaugh, Jr., and *Burke, Middaugh, & Cuthbert*, for appellant.

F. E. Harris, for respondent.

MORGAN, Ch. J. The plaintiff brought an action in the justice court to recover the sum of $117.17 for labor performed at defendant's request. The defendant in his answer admits that such labor was performed, and that the same is not paid for, but pleads a counterclaim in his favor arising out of the purchase by him, before the commencement of this action, of a promissory note made and executed by plaintiff to one McIlrath for the sum of $194, on which there is now due more than sufficient to satisfy the plaintiff's claim. Demand is made for judgment against the plaintiff for the sum of $6, besides the costs of this action.

Plaintiff filed a reply, in which he sets forth that the McIlrath note was purchased after its maturity, and that McIlrath was indebted to him in a sum far in excess of the amount of the note. In his reply, he further alleges that the debt due him for labor and the debt due from McIlrath are exempt by law from seizure or sale on execution or attachment; and in the reply he further sets forth a schedule of all his property, which shows that the debt due from the defendant is exempt from seizure or sale under process.

The district court, on motion, struck out the allegations of the reply, setting forth the schedule of plaintiff's property, and the claim of exemption, and rendered judgment in defendant's favor for the sum of $4. The appeal is from the judgment. Plaintiff insists that it was error to strike out these allegations from the reply, and this is the only specification of error necessary to consider.

The appeal presents a question of the construction to be given the statute allowing counterclaims to be pleaded, and the statute allowing exemptions to debtors. The counterclaim statute is as follows:

Section 6859, Rev. Codes 1905:

"The answer of the defendant must contain: . . .

"2. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition."

Section 6860:

"The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: . . .

"2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they are such as have been heretofore denominated legal or equitable or both."

The exemption statute is as follows: Section 7115: "Except as hereinafter provided, the property mentioned in this chapter is exempt to the head of a family, as defined by chapter 41 of the Civil Code, from attachment or mesne process, and from levy and sale upon execution, and from any other final process issued from any court."

Section 7116 specifies what the absolute exemptions shall be.

Section 7117 is as folows: "In addition to the property mentioned in the preceding section, the head of the family may, by himself or his agent, select from all other of his personal property not absolutely exempt, goods, chattels, merchandise, money, or other personal property not to exceed in the aggregate $1,000 in value, which is also exempt and must be chosen and appraised as hereinafter provided."

The respondent contends that the counterclaim statute should be literally construed, and full effect be given to its terms without regard to its effect upon the right to exemptions. The appellant contends for a liberal construction of the counterclaim statute, and that it should not be construed so as to deprive a debtor of his exempt property.

It is beyond dispute that if the counterclaim statute be given full effect, the plaintiff would be deprived of his exempt property as effectually as though taken by execution or attachment. In view of the well-

established principle in this and other states that exemption privileges allowed by the statute are to be literally construed, we are satisfied that the contention of the appellant should be sustained. To permit the plaintiff's exemptions to be wrested from him by giving a technical construction to the counterclaim statute, in disregard of the exemption statute, would render its declarations wholly without effect, which we do not think was the legislative intent. Such a construction would result in wholly depriving a debtor of the benefit of the exemption statutes in many cases. If so construed, the principle of liberal construction would be set at naught.

Many courts, under similar enactments, have given effect to exemption statutes, regardless of the fact that the counterclaim and set-off statutes contain no exceptions or qualifying words. In Cleveland v. McCanna, 7 N. D. 455, 41 L.R.A. 852, 66 Am. St. Rep. 670, 75 N. W. 908, this court sustained a claim for exemptions, although contrary to the strict letter of the set-off statute, and said: "It is true that the procedure under our exemption statute refers more particularly to seizures under attachments and executions, but that is because it is by means of those writs that property is usually seized. But it would be an exceedingly narrow view of the law that would deny exemptions, where it was sought to take property by other means. This court is unqualifiedly committed to a liberal construction of exemption statutes."

In Collier v. Murphy, 90 Tenn. 300, 25 Am. St. Rep. 698, 16 S. W. 465, an action for wages, where the defendant purchased a judgment against the plaintiff and pleaded it as a set-off against the plaintiff's claim, the court said: "While the language used in the act of 1871 [Milligen & V. Code, § 2931], strictly construed, would protect such wages only from 'execution, attachment, or garnishment,' yet the whole spirit of the act is such that we think this claim was not subject to any manner of legal seizure. . . . To subject this claim for wages to a set-off of the kind here offered was to subject exempted wages to a species of legal seizure not admissible."

In Millington v. Laurer, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533, an action for the value of services in painting two pictures of the defendant by one Merrill, the claim therefor having been assigned to the plaintiff, defendant pleading a judgment which had been assigned

to him, the court said: "It will be noticed that the interpretation given to the statute is not in all cases the one which a literal following of its provisions would seem to require, but force and effect are sought to be given to the obvious legislative intent. It is clear that the money due to Merrill could not have been appropriated under an execution or attachment issued against his property. This is conceded, and is according to the letter of the statute. But the primary object of the statute is not merely to protect the earnings of the debtor from seizure by means of the processes technically known as 'attachment' and 'execution,' but to preserve them, for the benefit of his family, against any appropriation for the payment of his debts not authorized by law, to which he does not consent. It was said, in Banks v. Rodenbach, 54 Iowa, 695, 7 N. W. 152, that an employer cannot purchase claims against a laborer and set them off against his earnings." See also Wm. Deering & Co. v. Ruffner, 32 Neb. 845, 29 Am. St. Rep. 473, 49 N. W. 771; Below v. Robbins, 76 Wis. 600, 8 L.R.A. 467, 20 Am. St. Rep. 89, 45 N. W. 416; Wilson v. McElroy, 32 Pa. 82; Thompson, Homestead & Exemption, § 5, chap. 26; 18 Cyc. p. 1463, and cases cited.

We have carefully considered the opinions in Caldwell v. Ryan, 210 Mo. 17, 16 L.R.A.(N.S.) 494, 124 Am. St. Rep. 717, 108 S. W. 533, 14 Ann. Cas. 314, and Lynn v. Cotton Mills, 130 N. C. 621, 41 S. E. 877, holding contrary to our decision herein, but we are satisfied that they are not in accord with the weight of authority or the better reason.

The judgment is reversed, and the cause is remanded for further proceedings. **All concur.**

OLSON v. RIDDLE.

(132 N. W. 655.)

New trial — discretion — review.

1. Although trial courts are vested with a large discretion in granting or refusing new trials, such discretion is a legal discretion, and appellate courts will not hesitate to interfere for the protection of litigants in a clear case of abuse of such discretion.

New trial — abuse of discretion.

2. Record examined, and *held*, that none of the grounds assigned as reasons for granting a new trial are tenable, and in making the order granting such new trial the lower court clearly abused its discretion.

Opinion filed September 6, 1911. Rehearing denied October 10, 1911.

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

Action by Sigrid Olson against Coleman Riddle. Verdict for plaintiff, and from an order granting a new trial plaintiff appeals.

Reversed.

R. S. Frazer, J. J. Coyle, and *O. B. Herigstad,* for appellant.

McCulloch & Gibson, for respondent.

FISK, J. Plaintiff recovered a verdict in the court below for the sum of $700 as damages for the destruction, by fire, of her barn and its contents through defendant's alleged wrongful or negligent acts. In due time defendant made a motion for a new trial upon the following statutory grounds: (1) Insufficiency of the evidence to justify the verdict; (2) the verdict is against law; (3) errors in law occurring at the trial and excepted to by the defendant; and (4) newly discovered evidence. Such motion was based on a statement of case duly settled and on certain affidavits. From an order granting such motion, this appeal is prosecuted.

Note.—For the authorities on the question of liability for setting, upon one's own premises, a fire which spreads to the property of others, see note in 36 L.R.A. (N.S.) 194.

As to the duty of one not responsible for kindling of fire to prevent its spread from his premises, see note in 6 L.R.A. (N.S.) 882.

It is well settled that such an order will not be disturbed in the appellate court, unless it is clearly apparent that in making the same the trial court abused its discretion. It is likewise well settled that such order will not be disturbed if any of the grounds urged for a new trial are tenable.

We will notice each of the grounds of such motion in the order above enumerated.

1. Was the evidence insufficient to justify the verdict? Briefly stated, the record discloses that defendant and one Dwyer called at plaintiff's home about noon of July 5, 1907, with a team of horses and buggy, and after hitching the team to the corner of plaintiff's barn, or near there, they entered plaintiff's house and requested, or ordered, her to prepare dinner for them, which she did. After dinner defendant went out to his buggy, lit a cigar, throwing the lighted match into a cotton quilt which he had for a lap robe, which quilt caught fire, and, after making some effort to extinguish the fire, defendant hung the quilt on the corner of the barn and drove away, leaving it there. Shortly afterwards plaintiff discovered her barn on fire, and she testified that such fire started at the place where the quilt was discovered. It is an undisputed fact that the barn was completely destroyed by fire, and that two horses were killed and certain harness and other personal property destroyed. It is also undisputed that plaintiff was the owner of such property. Defendant admits that the quilt was discovered on fire by him, and that he took it out of the buggy and left it at plaintiff's place, and he does not dispute plaintiff's testimony that he stated to her subsequent to the fire that he would pay her for the damage if he had the money. In fact, defendant nowhere seriously disputes the fact that such fire was caused by him. The proof discloses that there was a high wind blowing on the day of the fire, and while it is disclosed that defendant, on discovering the fire in the quilt, immersed the same in the water trough, and all concerned supposed the fire was thereby completely extinguished, subsequent events inevitably lead to the conclusion that they must have been mistaken, and that, after defendant left such quilt on the barn, the wind fanned the smouldering sparks into a flame. Dwyer testified positively that he did not go into the barn, nor did he smoke on the place except in the house, and the testimony discloses that no one but defendant and Dwyer were in

the immediate vicinity of the barn just preceding the fire. While respondent's counsel urge that the proof discloses that the fire in the quilt was completely extinguished, and that there is no proof tending to show the origin of the fire, we think it reasonably certain from all the facts and circumstances disclosed by the proof that defendant caused such fire; at least it was clearly a question of fact within the province of the jury to decide, and its finding in plaintiff's favor could not rightly be disturbed by the trial court.

Respondent's contention that there is no competent evidence of the value of the property destroyed is clearly devoid of merit. The plaintiff testified that she bought the material and built the barn and well house and paid the expense of the labor, and knows what they cost. She also swore that she knew what said buildings were worth, and fixed their value at $300. Such testimony is undisputed. She also swore that one of the horses which was destroyed was worth $250 and the other $130, and that the harness and other personal property was worth, in the aggregate, $88.90. That she was a competent witness as to such values is clearly apparent. We therefore have no hesitancy in concluding that the evidence is amply sufficient to sustain the verdict, and the order complained of cannot be sustained on such ground.

2. Is the verdict against law? In support of an affirmative answer to this question, respondent's counsel advance the novel doctrine that, although defendant did set the fire in the quilt, he was bound to exercise only ordinary diligence to prevent it from spreading, and they cite in support thereof Baird Bros. v. Chambers, 15 N. D. 618, 6 L.R.A. (N.S.) 882, 125 Am. St. Rep. 620, 109 N. W. 61. We are unable to concur in this view. Nor does the case cited support such contention. It was there merely held that defendant, who "did not kindle the fire and was in no manner responsible for the kindling thereof," could not be held liable for damages caused by the fire, unless his failure to extinguish it after discovering it was due to some omission of duty on his part. It is true that in the opinion it is, among other things, stated that "even if the defendant had himself set the fire, he was bound to exercise only ordinary care and diligence to prevent it from spreading." But such language must be construed in the light of the facts in the case, which were that such fire was started on defendant's premises, and not on the premises of another. It may be true that, when a

person rightfully sets a fire on his own premises, he should be held to the exercise of but ordinary care and diligence in preventing it from spreading. We think the trial court correctly instructed the jury under the evidence that, if they should find that the property in question was destroyed by and on acount of the defendant setting the fire, they should find for the plaintiff. Such instruction is not challenged on the ground that it states an incorrect rule, but merely on the ground that there was no testimony to sustain a verdict for plaintiff. Even if erroneous, the giving of such instruction could not be urged in support of the contention that the verdict is against law. We must therefore conclude that such verdict is not vulnerable to attack on the above ground.

3. Does the record disclose any errors of law occurring at the trial sufficient to warrant a new trial? We feel obliged to answer this question in the negative. Some of the alleged errors relied on are already sufficiently disposed of by what we have heretofore held. The others have been carefully considered and are without substantial merit.

4. Counsel for respondent do not attempt to support the order granting such new trial upon the ground of newly discovered evidence. They merely state that the trial court had a right to take into consideration the affidavits of Montz and Stophlet as bearing on the credibility of plaintiff and the reliability of her testimony. Conceding this, there is no material discrepancy between such affidavits and plaintiff's testimony, with the possible exception of the portions thereof regarding the place where the fire first broke out. It is stated in the Montz affidavit that in a conversation with plaintiff about ten days after the fire, the latter said to affiant that the fire first broke out at the northeast corner of the barn. But such affidavits were clearly improper to be considered. They fall far short of showing newly discovered evidence, and the question of the credibility of plaintiff's testimony was for the jury, not the court, and in any event such question could not be determined except from the evidence in the record.

It necessarily follows from what we have above held that there exists no proper or tenable ground upon which the trial court could legally have exercised any discretion in disposing of defendant's said motion, and consequently it was an abuse of discretion to make the order appealed from.

Reversed.

LOWE et al. v. JENSEN.

(132 N. W. 661.)

Action on express contract — recovery on implied contract or quantum meruit.

Where plaintiffs allege an express contract as a basis for a recovery, they will not be permitted to recover on an implied contract or *quantum meruit*.

Opinion filed September 8, 1911. Rehearing denied October 10, 1911.

Appeal from the County Court of increased jurisdiction for Ward County; *N. Davis*, J.

Action by S. H. Lowe and J. H. Hayes, doing business as S. H. Lowe & Company, against Martin L. Jensen. Judgment for plaintiffs, and defendant appeals.

Reversed.

Palda, Aaker, Greene, & Kelso, for appellant.

Murphy & Wooledge, for respondents.

FISK, J. Plaintiffs had judgment in the court below pursuant to a verdict directed by the court, and, from such judgment and from an order denying defendant's motion for a new trial, this appeal is prosecuted.

Plaintiffs' cause of action, as stated in the complaint, is upon an express contract to recover for certain labor and services in threshing grain for defendant at the alleged special instance and request of such defendant. The answer consists of a general denial and other defensive matters unnecessary to state. At the trial plaintiffs were permitted, over defendant's objections, to prove facts showing merely an implied contract between the parties; there being no proof offered showing an express contract as alleged in the complaint, and plaintiffs in effect admitting at the trial that no such express contract was made.

A large number of alleged errors are assigned in appellant's brief, challenging the correctness of the trial court's rulings in admitting and excluding testimony offered at the trial, and in denying defendant's motion made at the close of the testimony for a directed verdict in his favor, and in granting plaintiffs' motion directing such verdict. We find

it unnecessary to notice any of such assignments other than those relating to the action of the trial court in permitting plaintiffs to prove, over defendant's objection, facts establishing a cause of action differing from that alleged by them, and in directing such verdict. It is entirely clear to our minds that these rulings constituted prejudicial error necessitating a reversal of the judgment and order appealed from. Under the showing made by plaintiffs, they could only recover on a *quantum meruit*. It is well established that under an allegation of an express contract no recovery can be had on a *quantum meruit*. It is not a cause of a material variance alone, but it is a failure of proof. The following are some of the more recent authorities in support of this view: Hunt v. Tuttle, 125 Iowa, 676, 101 N. W. 509; Ecker v. Isaacs, 98 Minn. 146, 107 N. W. 1053; Wade v. Nelson, 119 Mo. App. 278, 95 S. W. 956; Fordtran v. Stowers, 52 Tex. Civ. App. 226, 113 S. W. 631; Pettibone v. Lake View Town Co. 134 Cal. 227, 66 Pac. 218; Doyle v. Edwards, 15 S. D. 648, 91 N. W. 322; Manning v. School Dist. No. 6, 124 Wis. 84, 102 N. W. 356; Davis v. Chase, 159 Ind. 242, 95 Am. St. Rep. 294, 64 N. E. 88, 853; Dorrington v. Powell, 52 Neb. 440, 72 N. W. 587; 9 Cyc. 749.

The record discloses that defendant in no manner waived his right to restrict plaintiffs to the issues framed by the pleadings. On the contrary, his attorneys strenuously objected throughout the trial to the offered proof of an implied contract. Plaintiffs did not ask to amend the complaint, and, having failed to prove the contract as alleged, their recovery cannot stand. The above conclusion renders it unnecessary to notice the other assignments of error.

The judgment and order appealed from are reversed, and the cause remanded for further proceedings according to law.

STEWART v. LYNESS.

(132 N. W. 768.)

Appeal — undertaking — sufficiency of affidavit.

1. Section 7208, Rev. Codes 1905, provides that, to render an appeal from the district court to the supreme court effectual for any purpose, an undertak-

ing must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding $250. Section 7221 provides that an undertaking upon appeal shall be of no effect, unless accompanied by the affidavit of the sureties, in which each surety shall state that he is worth the sum mentioned in such affidavit over and above all his debts and liabilities in property within this state, not by law exempt from execution, and the sum so sworn to by such sureties shall in the aggregate be double the sum specified in such undertaking. *Held*, that an appeal to this court in which the undertaking referred to in said section is supported by an affidavit which fails to state that the property of the sureties is within this state in the amount specified is ineffectual for any purpose, and that such undertaking must be stricken out on motion, and the appeal dismissed.

Appeal — undertaking — sufficiency — right to benefits of statute not asked for.

2. No intimation is made as to any rights of the appellant under the provisions of § 7224, Rev. Codes 1905, for the reason that he stood upon the undertaking and affidavits furnished.

Opinion filed September 20, 1911. Rehearing denied October 13, 1911.

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

Application by James R. Stewart for mandamus to Hampton Lyness. From an order overruling and denying a motion for a peremptory writ, and granting a motion to quash an alternative writ issued in the cause, an appeal is taken.

Appeal dismissed.

Herman Winterer and *D. S. Ritchie*, for appellant.

John A. Layne and *Maddux & Rinker*, for respondent.

SPALDING, J. This is an appeal from an order of the district court of Wells county overruling and denying appellant's motion for a peremptory writ of mandamus, and granting the motion of respondent to quash an alternative writ issued in the cause, and dismissing the same.

The respondent submitted a motion to dismiss the appeal upon each of several grounds stated in the motion papers, and a motion, among others, to strike out appellant's undertaking for costs and damages on the appeal. This last motion must be granted and the appeal dismissed. Sec. 7205, Rev. Codes 1905, provides, among other things, that an

appeal shall be deemed taken by the service of a notice of appeal, and perfected on service of an undertaking for costs or the deposit of money instead, or the waiver thereof. Section 7208 provides that, "to render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding $250." Section 7221 provides that an undertaking upon an appeal shall be of no effect unless accompanied by the affidavit of the sureties, in which each surety shall state that he is worth a sum mentioned in such affidavit over and above all his debts and liabilities in property within this state, not by law exempt from execution, and which sum so sworn to by such sureties shall, in the aggregate, be double the amount specified in such undertaking. The motion relied upon was based upon the ground that the affidavit attached to the undertaking for costs and damages utterly fails to state that the sureties are worth the sum named, above their debts and liabilities and exclusive of property exempt from execution, in property within this state. The legislature has seen fit to require the sureties to make affidavit that the required amount of property is located within the state of North Dakota, to render the undertaking on appeal effectual for any purpose. This court cannot question the wisdom of the action of the legislature in making this requirement of sureties. It would appear to the court to be a most reasonable thing to require. If an appellant desires to pursue his remedies in the highest court, he must insure the respondent at least as to costs and damages occasioned by the appeal; and it would be an unwarranted hardship to require the respondent, in case he should be compelled to resort to an action upon the undertaking to collect costs and damages, to follow the property of sureties out of the state, and to enforce his rights in a foreign jurisdiction. While in some cases it might occasion but little inconvenience, in others it would work a greater hardship than would the loss of the amount involved. So far as the affidavits of the sureties in the case at bar are concerned, and for all that is disclosed in the record, the property which they aver they possess in excess of their debts, liabilities, and exemptions, may be in China or Australia; and it is quite clear that the legislature did not intend to impose upon the respondent, if success-

ful upon the appeal, the burden of enforcing his rights as against the sureties in any foreign jurisdiction, near or remote.

We are of the opinion that this defect is fatal to appellant's cause in this court. It is unnecessary for us to consider what his rights might be under the terms of § 7224, Rev. Codes 1905, which provides that when a party shall in good faith give notice of appeal, and shall omit, through mistake or accident, to do any other act necessary to perfect the appeal, to make it effectual or to stay proceedings, the court from which the appeal is taken, or the presiding judge thereof, or the supreme court, or any one of the justices thereof, may permit an amendment or the proper act to be done on such terms as appear to be just, for the reason that, although this question was fully discussed by counsel on argument, the appellant saw fit to stand upon the undertaking and affidavit furnished in support of the appeal already taken, and gave no intimation of any desire to amend or to furnish new affidavits or undertaking. The courts are disposed to construe the last-mentioned section of the Code liberally, but they cannot force its benefits upon litigants who do not seek them, even if the omission is not jurisdictional, which we do not determine.

The motion to strike out the undertaking is granted, and the dismissal of the appeal necessarily follows.

POLLOCK, Judge of the Third Judicial District, sat in place of BURKE, J., disqualified. MORGAN, Ch. J., did not participate.

DAVENPORT TOWNSHIP v. LEONARD TOWNSHIP et al.

(133 N. W. 56.)

Surface waters — what are.

1. The waters of a water course emptying into a swale, and there spreading

Note.—In addition to the L.R.A. notes referred to in the opinion, see note in 65 L.R.A. 250, on the question of the rights and duties of municipalities as to sur-

over considerable areas and losing identity as a stream, and commingled with surface water from other sources, become surface water.

Surface waters — disposal of.

2. The disposal of such surface water is governed by the law applying to drainage of surface waters, and no question of riparian rights in running streams is involved.

Surface waters — diversion by highway ditches — liability.

3. The diversion of surface water by highway ditches necessarily excavated in building a public highway, although it occasioned damage, is, under the facts of this case, *held* not to be actionable.

Opinion filed October 16, 1911.

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

Action by the Township of Davenport against the Township of Leonard and others. From a decision in favor of defendants, plaintiff appeals.

Affirmed.

Engerud, Holt, & Frame, for appellant.

V. R. Lovell, for respondents.

Goss, J. This action arises from the inundation of certain lands on and in the near vicinity of the township line between Leonard and Davenport townships, in Cass county, causing damage to highway grades on such township line. The plaintiff asks injunctional relief to prevent defendants from obstructing the natural waterflow by the maintenance of certain highway grades and highway ditches on either side of the same, as heretofore constructed by them, and now maintained on the section line between sections 24 and 25, in Leonard township, and which grade ditches convey water to the township line grade and grade ditches between said townships. The other parties defendants are sought to be enjoined from preventing natural flow water across section 24, owned by them.

face water. See also notes in 5 L.R.A.(N.S.) 831, on the liability of a municipality for changing course of surface drainage, and in 30 Am. St. Rep. 390, on interference with surface waters by grading streets.

The water, the cause of the trouble, comes from two sources, melting snow and rainfall, directed by the watershed toward and upon the northern portion of section 25 and the southerly part of section 24, in Leonard township, and also a stream of water starting from springs on section 35, in Leonard township, thus having a living, constant source, and flowing in a well-defined channel for some 2 miles, emptying its waters into a bog or marsh varying in extent according to seasons. The water thus discharged between 200 and 300 feet south of the south line of section 24 forms a pond or marsh from 15 to 30 rods in width. Though the brook runs constantly, it has no well-defined channel northward and across section 24, but instead, at all seasons, except during high water, its waters are either lost, or end in the lowland adjacent to the creek's mouth. Plaintiff claims there exists a natural outlet from this bog in a northerly direction across section 24, and charges defendants with the diversion of the waters by means of certain artificially created ditches on either side of the highway between sections 24 and 25, extending eastward and joining with similar highway ditches extending north and south on the town-line grade between the two townships. From these township-line ditches, carrying water most of the season, the township highway between the townships is injured by the unusual and increased flow thus produced. These ditches were caused by the excavation necessary to build the road grade, and are shallow, of uniform depth, and such only as necessarily resulted in the use of the ordinary road-grading machinery. They are sufficient, however, to increase the flow of surface water from near the place where discharged from the creek, and to collect additional surface water from the lowlands crossed by such ditches. There are two culverts across the road north of where the spring brook discharges its water. These culverts permit the flow of water to the north side of the east and west grade between sections 24 and 25, and the trial court found that at the end of the larger culvert "an embankment had been constructed and been extended along the south side of the southeast quarter of said section 24, commencing at about the southeast corner of section 24, about a rod north of the south line of said southeast quarter, and run-

ning due west to a point about a rod east of the west line of said southeast quarter section. And that since the purchase of the said southeast quarter section by the defendants Van Arnum and Fritzinger, the said embankment has been permitted by said last-named defendants to remain on said tract as originally constructed. The court also found the discharge of the spring into the portion of section 25 heretofore mentioned, and that the spring "had ceased, and ever since has ceased, to follow a definite channel, but has spread out upon and flowed over the northern half of said section 25 *as surface water, and that a portion of such surface water,* since the construction of the highway road and grade aforesaid, has, during a part of such years [since 1900], *found its way to and accumulated in a road ditch along the south side of the highway road and grade aforesaid,* and has thence flowed north along the west side of the highway road and grade constructed and mantained during said years between section 24, Leonard township, and section 18 in Davenport township."

The plaintiffs admit: That a culvert between sections 24 and 19 of the respective townships, soon after it was made, was partially filled up to prevent the flow of the water through it, and thereafter raised for the same purpose. That the road grades and ditches in question were built in 1900. That the embankment above mentioned along the south line of section 24, and on the north side of the highway grade, was either artificially constructed to prevent the water flowing northward as it emerged from the culvert, or that natural causes created it about 1900. In any event, such embankment obstructed the flow of water across section 24. The owner of the southwest quarter of section 19, in Davenport township (a township supervisor), at one time opened this embankment, permitting the water to flow northerly toward and into a natural depression extending upon or across the section, which act resulted in one of the owners of that portion of section 24 affected (one of the defendants) immediately closing the break through the embankment, turning the waters eastward again toward the township line, and also brought forth a warning from the owner as to dire results that would follow further meddling with his premises.

Witnesses disagree on the flowage of water prior to 1900, but there is practical unanimity in their testimony that in excessive high water the drainage was partially or entirely across section 24, either northward or cornerwise in a northeasterly direction through natural depressions, not amounting to well-defined channels; the channel ceasing where the creek discharged its waters, two or three hundred feet south of section 24. It is also a circumstance mentioned in the testimony, and one of which the court will take judicial notice that the cultivation of the soil and changing of the prairie to cultivated fields, together with droughts prior to 1900, would have had a tendency to diminish the extent of the area naturally covered by such surface water; and, again, that the period from 1900 to the time of the trial of this action, in 1909, was one of excessive moisture from natural causes, which would, no doubt, in the opposite way affect the lands in question. These are urged by defendants as causes for changed conditions now existing from those prior to 1900.

Certain record evidence is before us, among which are exhibits of the original field notes of the survey of the land in question, containing thereon the course of the spring brook mapped to the middle of section 24; evidence of the opinion had by the surveyors on the matter before us at the time of their survey from August 10 to 17, 1870, and June 29, 1874, and August 5 to 10, 1874; one of said plats being from the state engineer's office of this state, and the other from the files of the surveyor general's office of the then territory of Dakota. We also have the plats of two surveyors, testifying on opposite sides of this lawsuit, which plats agree substantially in all important particulars, among which may be noted the schedules as to elevations, showing the surface depressions, and establishing that a natural depression of varying width exists from the mouth of the culvert near the southeasterly corner of the southwest quarter of section 24, and touching the corner of section 13 near or at the southeast corner of said section, showing a gradual but continuous decline, amounting to about 27 inches in traversing the mile, as appears from the plat offered by defendants' surveyor witness, as opposed to a decline of not quite 9 inches in the ditch along the half mile on the south line of the southeast quarter of section 24, from which located point a fall of 11 inches occurs in the ditch running 1 mile north to a point at or near the northeast

corner of section 24. It is true the testimony given by the various witnesses is somewhat conflicting, as it naturally would be, in their descriptions of the lay of the ground and the natural course of drainage in the vicinity in question; but no very substantial conflict occurs, and the surveyors' plats of measurements actually taken we deem conclusive as to elevations. These establish a natural depression, continuing from the culvert near the southwest corner of the southeast quarter of section 24, opposite which culvert, two or three hundred feet distant, the creek discharges into a low or level intervening space, extending from said culvert northeasterly across section 24, and constituting the natural drainageway of excessive water discharged by the spring in the place above described. There is, however, through said depression no channel, and the testimony is insufficient to establish that any well-defined channel ever existed across said section 24. The water in draining across said section has spread out, diffusing itself over considerable areas, varying in width according to natural depressions.

We are satisfied the facts make the decision of this case controlled by Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894, wherein the rule was laid down that "a township is not liable for the loss suffered by a landowner by the increased flow of surface water upon his land, resulting solely from the improvement of the highway in the ordinary manner, without negligence." While this is not an action for damages, yet the principle applies to the right of the plaintiff township to restrain damage occasioned by the surface water, as aptly as it does to collect damages so caused, where the flow complained of in either case is augmented and increased beyond its natural state by the ordinary grade ditches necessarily dug in the erection of grades in improvement of township highways.

Counsel seek to discriminate the case cited from the one before us, urging that the water discharged by the brook should not be found to be surface water, but instead should be treated as still within a water course. Under normal conditions, under the facts in this case, the stream disappears, loses its identity and characteristics as such, as much so as though it had emptied into a lake or large body of water, instead of losing its waters, as it does, by spreading them over a considerable surface, enabling them to be absorbed by the ground and perculated through quicksand, or other kind of subsoil, impregnating with moisture

a large area. Under different soil conditions, the accumulations of water at this place might have resulted in a lake or lesser body of water, instead of a slough of stagnant water, largely absorbed by the soil, to the injury of the land and highways in the vicinity. Under these facts, our conclusions from the evidence (found also by the trial court) are the waters discharged from the brook, commingled with surface waters from the other sources mentioned in this opinion, are surface water.

The rights of the parties relative thereto are to be governed by the rules of law applicable to drainage of surface water, instead of by the law as to riparian rights in water courses or streams having definite channels. If we were passing on the rights of riparian owners to the spring brook in question above the place where it discharged its waters, an entirely different holding would result, as we would be dealing with a natural running stream, instead of drainage of surface water. No question of riparian rights is involved herein. The law applicable to water courses is inapplicable under the finding that the water of the brook on its diffusion heretofore described becomes surface water. Thereafter the law as to drainage of surface water governs. This also is to be considered with the fact that its drainage complained of has been occasioned by ditches maintained as improvements made in the performance of official duty by the township officers, defendants, or their predecessors in office. Farnham, Waters, pp. 1553–1578, and chap. 29, same authority. See citations in exhaustive notes to following cases, *viz.*: Wharton v. Stevens (Iowa) 15 L.R.A. 630; Gray v. McWilliams (Cal.) 21 L.R.A. 593; Cairo, V. & C. R. Co. v. Brevoort, 25 L.R.A. 527; Southern P. R. Co. v. Dufour (Cal.) 19 L.R.A. 92; 64 L.R.A. 236; and 26 L.R.A. 632. Also see Gould, Waters, §§ 263, 264, et seq.; 48 Century Dig., under Waters and Water Courses, and subd. 5 thereof, on Surface Waters.

The action against the township board of Leonard township will not lie. As to the other defendants (landowners across whose lands it is contended the natural waterflow would be), so far as said highway ditches are concerned, it does not appear that either of them has ever done more than to permit the township officers to keep and maintain the grade, resulting incidentally in the digging of the highway ditches beside the grade; all of which have remained as at present for the past ten years. Consequently, it does not appear how any rights of the town-

ship board of Davenport township (the plaintiff) have been interfered with to its injury by the two defendant landowners. As is well said in Carroll v. Rye Twp.: "Whatever damage plaintiff suffered from surface water diverted by these highways is not traceable to any misconduct on defendant's part." It is uncertain whether the damage to the grade results from the embankment maintained, or whether it results from the act of the member of the board of Davenport township, who, for reasons of his own, rendered drainage of the township line grade impossible by filling in a culvert designed to carry off the water, occasioning this injury. Also it appears that facts exist tending to leave in doubt the question of whether the town-line grade has been properly maintained for highway purposes, leaving out of consideration the drainage of waters.

Under all the facts, we affirm the decision of the trial court.

J. L. OWENS COMPANY v. BEMIS et al.

(— L.R.A.(N.S.) —, 133 N. W. 59.)

Secondary evidence of contents of document — notice to produce original

1. There is a well-recognized exception to the general rule that notice to produce must be given before secondary evidence will be received as to the contents of a letter or other written document in the possession of the adverse party. Where the pleadings clearly disclose that proof of such document will be necessary at the trial, notice to produce it is unnecessary.

Countermanding order.

2. Until there has been an acceptance of a written order for machinery to be shipped to the purchaser at a future date, the latter is at liberty to countermand such order, as the same, until acceptance, does not constitute a contract, but merely an offer or proposal to purchase.

Sale — cancelation of order.

3. Defendants' letter to plaintiff, countermanding such order, was as follows: "Cummings, N. Dak. 1/4, 1908. J. L. Owens Co., Mpls. Minn. — Gentlemen: Please cancel our order of Aug. 10–07. Resp. yours, Bemis &

Note.—The authorities on the right to withdraw order given agent before acceptance by principal are collated in a note 10 L.R.A.(N.S.) 1138.

Wilsie." *Held*, a sufficient cancelation of such order, and withdrawal of the offer or proposal to purchase therein contained.

Opinion filed October 26, 1911.

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

Action by J. L. Owens Company against Vera C. Bemis and another, doing business as Bemis & Wilsie. From a judgment for defendants, and from orders denying motions for judgment *non obstante veredicto* and for a new trial, plaintiff appeals.

Affirmed.

Turner & Murphy, for appellant.

P. G. Swenson, for respondents.

FISK, J. Action to recover the purchase price of certain grain-cleaning machinery claimed by plaintiff to have been sold by it to defendants in the fall of 1907. Such sale is expressly denied in the answer, and defendants' contention is that they merely gave to plaintiff's agent an order for such machinery amounting to a proposal to purchase, and before the same was accepted by plaintiff they countermanded such order.

At the conclusion of all the testimony, both parties moved for a directed verdict, whereupon the trial court granted defendant's motion, and judgment was entered pursuant to the verdict directed by the court. In due time plaintiff caused a statement of the case to be settled, embracing proper specifications, and thereafter moved for judgment notwithstanding the verdict, or for a new trial, which motions were denied, and this appeal is from the judgment and also from the orders denying such motions.

Appellant's assignments of error all relate to the correctness of the rulings aforesaid, and the pivotal question in the case is as to whether the order for such machinery constituted a completed contract of sale and purchase, or merely, as claimed by defendants, an offer on their part to purchase the same upon the terms therein stated. Appellant also claims that there was a prejudicial error committed by the trial court in the admission in evidence, over its objection, of Exhibit 1, being a copy of a purported letter claimed to have been sent by defendants to plaintiff on January 4, 1908, countermanding the order for such machinery.

Before noticing appellant's contentions, a brief statement of the facts will be made. In the fall of 1907, defendants, dealers in hardware, etc., at Cummings, gave to one Kuhnley, plaintiff's traveling salesman, the following order:

Order No..... Date, Aug. 10, '07.

J. L. Owens Co., Mpls. Minn.

Ship to Bemis & Wilsie.

At Cummings, N. D.

How ship: Freight. When: Feb. 1, 1908.

Terms: 60 days from invoice 3 per cent 10 days.

3 No. 1 Men. Sup.	$14.50 each		43.50
3 No. 2 Men. Sup.	18.50		55.50
1 No. 2 Bagger	4.00		4.00
Complete with			
1 No. 1 Macaroni			2.00
1 No. 2 Macaroni			3.00

Wheat, oats, barley, flax, timothy, clover attachments.

Screen, sieves, 8x8,—9x9,—2x11.

Total $108.00

By S. M. Kuhnley.

Bemis & Wilsie, per V. C. B.

Such order was solicited from defendants by the said Kuhnley, and the same was signed by him and by defendants at the time the order was given. Thereafter, and until January 4, 1908, no communications took place between the parties regarding such order, but on the latter date defendants claim that they mailed to plaintiff a letter as follows:

Cummings, N. Dak. 1/4, 1908.

J. L. Owens Co., Mpls., Minn.

Gentlemen:—Please cancel our order of Aug. 10—07.

Resp. yours,

Bemis & Wilsie, R. M. W.

It is conceded that on January 8th plaintiff wrote defendants as follows:

Minneapolis, Minn., Jan. 8, 1908.

Messrs. Bemis & Wilsie,
Cummings, N. D.

Gentlemen:—

We have yours of the 4th, desiring us to cancel your order of Aug. 10th, 1907, and will say, gentlemen, in answer that we have investigated this order and find that the order is a signed order, without any provision or condition under which you could cancel same, and we fail to see in what light we would be justified in doing so. Of course, we wish it understood that we desire to do all that is proper and right, and meet our customers in their demands where we can possibly do so, but in this case we think it would be detrimental to yourselves as well as to us, for we surely can prove to you that we have the goods that will do what we claim for them, and will get the business in spite of any competition that you might have. We know that we have a machine that can be sold at the right price, and that no machine, no matter what it is, can compete with it when it comes to doing the work in all kinds of grain and seed. And under the circumstances we cannot consent to cancel the order, but will consent to give you such help, with one of our travelers, as you desire in starting the machines and the trade in your territory, and proving to you what we claim above, which we believe you yourselves will agree is entirely fair, and that our stand in consequence of same is not more than what you could ask or would do were you in our position.

We beg to remain,

Yours truly,
J. L. Owens Company.

Notwithstanding defendants' attempt to countermand such order, plaintiff shipped such machinery to defendants from Minneapolis, on January 24, 1908, but, defendants refusing to receive the same, it was later sold by the common carrier to satisfy its lien for freight and storage charges.

In the light of the above facts, we are required to determine the correctness of the trial court's rulings complained of.

Appellant's first contention is that it was error to admit in evidence the copy of the letter claimed to have been written by defendants to plaintiff on January 4th, countermanding the order; the point being that no proper foundation was laid for the introduction of such secondary evidence. A notice to produce the original of such letter was not served on plaintiff's counsel until the afternoon of the day preceding the trial, and appellant's counsel contend that this was insufficient notice. We are agreed that there was no error in the ruling of the trial court. A notice to produce such letter was unnecessary. Defendants had a right to assume that plaintiff would have such letter at the trial. The answer furnished plaintiff with sufficient notice that the same would or might be required at the trial. Nichols v. Charlebois, 10 N. D. 446, 88 N. W. 80. In disposing of a similar question, this court there said: "The general rule is that notice to produce must be given before secondary evidence can be received as to the contents of a written document in the possession of the adverse party, but there is a well-settled exception to this rule. Where the issues framed by the pleadings necessarily disclose to the adverse party that proof of the document will be necessary at the trial, it is well settled that notice to produce the document is not necessary in order to admit secondary evidence of the contents of such document, in case the original is not produced. The adverse party is bound to take notice from the pleadings that the production of the document at the trial is required, and in case it is not produced secondary evidence must be resorted to. The answer in this case necessarily informed the plaintiff that the defense relied upon was a breach of the warranty, and therefore the plaintiff was bound to know that, in proving such defense, the defendant would necessarily be required to prove the contents of the notice sent in this registered letter. The reason for the rule requiring a notice to produce the original, therefore, did not apply. See 1 Jones, Ev. ¶ 24; Kellar v. Savage, 20 Me. 199." See 2 Wigmore, Ev. § 1205.

Appellant's next contention is that the order for this machinery constituted a contract of sale between the parties, but we think such contention unsound. The fact that plaintiff's soliciting agent, as well as defendants, signed their names at the bottom of the order, in no manner tends to lend support to appellant's theory. It is, we think, entirely clear that such instrument constituted a mere offer or proposal on de-

fendants' part to purchase such machinery, and that, until accepted by plaintiff, the same would not become a binding contract. The plaintiff was in no manner obligated to accept such order, and until it did so in fact, and notified defendants thereof, the latter were at liberty to countermand the same. It is not contended that plaintiff, prior to January 8, 1908, notified defendants of its acceptance of such order, and it is conceded that such machinery was not delivered to the common carrier for shipment until long after defendants' letter had been received by plaintiff, countermanding the order. That defendants had the right to cancel or countermand such order at any time prior to its acceptance by plaintiff is abundantly supported by authority. See 1 Mechem, Sales, 252; McCormick Harvesting Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682; Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241; Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614; Hallwood Cash Register Co. v. Finnegan, 84 N. Y. Supp. 154; P. J. Bowlin Liquor Co. v. Beaudoin, 15 N. D. 557, 108 N. W. 545; McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485; Merchants' Exch. Co. v. Sanders, 74 Ark. 16, 84 S. W. 786, 4 Ann. Cas. 955; Bauman v. McManus, 75 Kan. 106, 10 L.R.A.(N.S.) 1138, 89 Pac. 15; John Mathews' Apparatus Co. v. Renz, 22 Ky. L. Rep. 1528, 61 S. W. 9.

In McCormick Harvesting Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682, action was brought upon a written order for twine given to plaintiff's agent. The court says: "It does not purport to be a contract between the parties. By it the plaintiff was not obligated to do anything on its part. The plaintiff does not undertake, by the terms of the writing, to ship the twine on the proposed conditions. It is merely a request or a proposition from the defendant to the plaintiff that, if the latter will ship certain goods, he will pay a certain sum therefor at a fixed time. It may be said to be an order, but it lacks an essential element of a contract,—mutual assent. Being only a request or order, which required acceptance by the plaintiff to give it the force of a contract, it follows that it might be withdrawn or countermanded at any time prior to its being so accepted."

In McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485, the court said: "But the agent did not sell the goods, nor even contract to sell them. When the defendant had completed his transaction with Kilbourn, there had been no binding contract made, or any

sale, absolute or conditional. The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiffs could have refused to accept the order. Neither party had become bound by anything then done. The order of the defendant was a mere proposal, to be accepted or not as the plaintiffs might see fit, and he could have withdrawn it before its acceptance."

In speaking of the character of such an order as established, by custom, the Kentucky supreme court, in John Mathews' Apparatus Co. v. Renz, 22 Ky. L. Rep. 1528, 61 S. W. 9, used the following language: "The custom of so doing business is of such long standing, so extensive, and so important in the commercial world, especially in the United States, that the courts will take notice of it. They have done so, and this court has. In the Charles Brown Grocery Co. v. Becket, 22 Ky. L. Rep. 394, 57 S. W. 458, we recognized in this state what appears to be the general rule in most or all of the states, quoting it in this language: 'In the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become completed until the order is accepted by his principal.' Any other construction of these transactions would tend to so materially hamper and cripple this important means of conducting mercantile business as to well-nigh destroy its effectiveness, now so generally understood, employed, and recognized."

We are entirely satisfied with the reasoning and conclusions announced in the foregoing authorities, and applying such rules to the case at bar required us to overrule appellant's contention to the contrary.

But one other point remains to be considered. Appellant's last contention is, in effect, that defendants' letter of January 4th "does not show a distinct, unequivocal, and unconditional withdrawal of the offer." It is true, no doubt, that such letter must meet these requirements, but we are entirely clear that it does; and plaintiff's letter in reply thereto clearly discloses that its officers thus interpreted it.

Finding no error in the record, the judgment and orders appealed from are affirmed.

AMERICAN CASE & REGISTER CO. v. BOYD et al.

(133 N. W. 65.)

Appeal — trial de novo — action for recovery of money.

1. Under § 7229, Rev. Codes, 1905, an action at law for the recovery of money only, and therefore properly triable to a jury, whether thus tried or not, is not triable *de novo* in this court on appeal.

Waiver of jury — effect on mode of reviewing decision.

2. The implied waiver of the jury at the close of the testimony, by both parties moving for a directed verdict, did not have the effect of changing the case from an action at law to a suit in equity, so as to change the method of reviewing the decision in the supreme court.

Appeal — failure to specify errors in statement of case.

3. In a case not triable *de novo* on appeal, errors of law occurring at the trial, when not specified in the settled statement of case, as required by law, cannot be considered by the supreme court.

Opinion filed October 26, 1911.

Appeal from Stutsman County Court; *Marion Conklin,* J.

Action by the American Case & Register Company against Oscar Boyd and another, doing business under the firm name of Boyd & Mares. From a judgment for plaintiff, defendants appeal.

Affirmed.

John Knauf and *C. S. Buck,* for appellants.

Oscar J. Seiler and *A. W. Aylmer,* for respondent.

FISK, J. This appeal is from a judgment of the county court of Stutsman county. The cause of action is founded on a promissory note executed and delivered by defendants to plaintiff on May 27, 1908, and given for the purchase price of a certain account register sold by the latter to the former. The defense is that such contract of purchase was canceled by defendants before the property was shipped.

The issues were tried to a jury, and at the conclusion of the testimony both sides moved for a directed verdict, whereupon the lower court discharged the jury, and subsequently made findings of fact and con-

clusions of law favorable to plaintiff, and entered judgment accordingly. Thereafter defendants procured a settlement of a statement of the case, but no specifications of error are included therein. Their counsel are evidently laboring under the erroneous belief that the case is triable *de novo* in this court, for they caused such statement to be settled in accordance with the practice under the so-called Newman law, and such statement, instead of having incorporated therein the necessary specifications of error, embraces the statement that the defendant demands a trial *de novo* in the supreme court. Appellant's brief is also prepared on such erroneous theory. The action is one at law, and not in equity, and was properly triable to, and was in fact tried to, a jury.

The mere fact that both parties moved for a directed verdict at the close of the testimony did not operate to change the action from one at law to a suit in equity. By making these motions for the direction of a verdict, the attitude of each party was that there was no issue of fact to be submitted to the jury, and that the court should dispose of the case as a matter of law. By such motions they are deemed to have impliedly consented to a disposition of the case without the aid of a jury, by the submission of all questions to the court, and if, in disposing of the case, it should become necessary for the court to determine issues of fact, such parties will not thereafter be permitted to urge that such issues should have been submitted to the jury. Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390. The act of discharging the jury by the implied consent of the parties did not operate to change the action from a jury case to one triable under the so-called Newman law. If the parties, instead of thus impliedly waiving the jury at the close of the testimony, had at the beginning of the trial expressly waived such jury, the case could not have been tried *de novo* in this court under the statute (§ 7229, Rev. Codes 1905), for, since the amendment by chapter 201, Session Laws of 1903, cases properly triable to a jury, whether thus tried or not, have not been triable *de novo* on appeal. Barnum v. Gorham Land Co. 13 N. D. 359, 100 N. W. 1079. Decisions by this court under the former statute, in so far as they uphold a contrary practice, are not in point under the present statute. The statute in force at the time they were decided expressly authorized trials *de novo* in this court in all cases tried to the court without a jury, whether they were actions at law or suits in equity.

Manifestly, therefore, we are powerless to review any of the alleged errors in this record, as none are specified in the statement of the case, and there is no contention that any errors appear on the case of the judgment roll proper.

It follows that the judgment appealed from must be affirmed; and it is so ordered.

PFEIFFER v. NORMAN.

(— L.R.A.(N.S.) —, 133 N. W. 97.)

Pleading — construing as a whole.

1. The effect of a pleading is not necessarily determined by the technical definition of a single word. Words used in a pleading must be construed with reference to the context, and, when it is apparent that a word is not used in the statutory sense, courts will interpret it in the light of its relation to and as explained by the pleadings as a whole. *Held*, in the case at bar, that the words "rescind and cancel," employed in the pleadings, and particularly in the answer of the defendant, are modified by other language of the pleadings, and that they are not used to indicate a statutory rescission of a contract.

Conditional sale — passing of title — retaking of property.

2. A conditional-sale contract does not convey title, and if its terms provide therefor it entitles the vendor to retake possession of the property described therein, on default by vendee, if it has previously been delivered to him; and the rights of the vendee are terminated when this is done.

Conditional sale — retention of title — retaking possession.

3. Under the contract considered in this case, the title remained in the vendor until all the conditions of the contract should be performed by the vendee, and under its terms, the facts showing that the vendor retook possession of the property on consent of all interested parties, no demand or notice was necessary, and the contract relations of the parties were terminated when the vendor retook the property.

Conditional sale — retaking possession — recovery of partial payments.

4. In the absence of any statutory provision on the subject, it is held that when a conditional-sale contract permits the termination thereof on default of the vendee, and the vendor retakes possession of the property involved, as he

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Note.—As to vendor's rights on default of vendee in conditional sale, see note in 89 Am. Dec. 128.

had a right to do, the vendee cannot recover, in an action at law, partial payments made on such contract; and to hold otherwise would be to offer a bounty for the violation of contracts.

Conditional sale — retaking possession — recovery of partial payments — new contract.

5. If the parties to such a contract enter into a new contract at the request of the vendee, after the vendor has resumed possession, and their former contract relations have ceased, this does not entitle the vendee to recover payments made under the original contract.

Conditional sale — retaking possession — notice or demand — waiver.

6. Any rights which may have accrued to the vendee to notice or demand, although time was made of the essence of the contract involved in this suit, were waived.

Opinion filed October 26, 1911.

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

Action by William Pfeiffer against M. Norman. From a judgment on motion for judgment notwithstanding the verdict, or for a new trial, plaintiff appeals.

Affirmed.

W. J. Mayer, for appellant.

Murphy & Duggan, for respondent.

SPALDING, J. The material facts in this case are as follows: On the 22d day of October, 1906, respondent delivered to one Downey certain furniture, rugs, window shades, etc.; the value and price of each article being agreed upon in the contract entered into. Such contract provided that Downey had purchased of respondent the temporary right to the furniture and property therein named, and that by prompt payment of certain sums monthly to respondent, amounting in the aggregate to the price placed upon the property, the respondent should execute to him a bill of sale. The last payment became due Feburary 2, 1907. The agreement contained certain provisions regarding the care and use of the chattels, and the further provision that, if he should make default in any of the payments agreed to be made or in any of the conditions of the contract, the respondent was authorized and empowered at his election at once, without notice, to resume possession of said property and to take the same wherever situated, but in such case all pay-

ments theretofore made should be forfeited to the use of the respondent; and that if the same should deteriorate or be damaged more than by ordinary wear and tear, he should be entitled to resume possession at once, and without notice, and in the same manner as if default had been made in any of the other conditions. Time was made of the essence of the contract.

The evidence shows that payments were made by the purchase of feed from a firm of which Downey was a member, on the agreement that the purchase price should be applied on this contract. A balance still remained due when this action was brought and tried, and Downey misused the furniture and other materials, and abandoned it. Thereupon, and with the consent of Downey and appellant, respondent took possession thereof. Downey subsequently requested that he be allowed to complete payment therefor, but no payment was made after May 11, 1907, and after storing it for two years respondent sold the goods at private sale. In the meantime Downey's firm dissolved partnership, and he assigned all his claims to a repayment of the payments made on such chattels to the appellant, his former partner, and in September, 1909, appellant brought this action to recover the whole amount paid.

It is only necessary to give a brief abstract of the complaint. It alleges the purchase of the chattels by Downey; the price to be paid therefor; that by the terms of their agreement respondent was empowered to rescind the same for failure to perform on the part of Downey; the payments made; and that respondent, having elected to rescind said contract, seized and repossessed himself of the goods and disposed of the same to his own use; the assignment of Downey's claim to appellant; and a demand for a return of all the money paid on the contract to the respondent, and the refusal of such demand. The answer contains the usual qualified general denials; admits the execution of the contract, and a difference in the articles in price, which difference is sustained by the evidence without conflict; an allegation that Downey failed to pay any part of the price of such property, and delivered all of the same to the defendant for storage at the rate of $2 per month; that it was stored by him for two years; that he repeatedly requested Downey to pay for the same, but that he failed to do so; that no notice of any transfer of any obligation to the appellant was ever given respondent; and an admission of partial payment, through the purchase of feed of

appellant's and Downey's firm, and that it was credited to the account of said Downey. The answer contains a further allegation that in "the month of January, 1909, respondent elected to rescind and cancel said contract for the reason that no other settlement of said contract seemed probable, and the goods were constantly deteriorating in value; that it had been used and marred and injured, and was of the value of $35 and no more." It also sets up a counterclaim against the appellant for goods sold him, which it is unnecessary to further notice, as the amount involved is not in controversy, neither is the validity of the counterclaim. No demurrer or motions were interposed to the answer, and the case was duly tried to a jury. After both parties had rested, respondent moved for a directed verdict, on the ground that the facts proved were insufficient to constitute a cause of action in any sum, and that upon the pleadings and proof it conclusively appeared that Downey was indebted to the respondent in the sum of $19.50, and that if the plaintiff was the owner of the rights and burdens of Downey he was indebted to the respondent in the sum of $31.15, and upon other grounds which are immaterial. The motion was denied, and the jury returned a verdict in favor of appellant for $40.75 damages, whereupon respondent submitted a motion for judgment *non obstante veredicto* or for a new trial, in brief upon the grounds stated in his motion for a directed verdict. This motion was granted and judgment entered for the respondent for $12, a portion of the counterclaim. From this judgment an appeal was duly perfected.

After considering the record, we are satisfied that only two questions are presented: (1) What was the effect of the pleadings upon the issue; and (2) the nature of the contract between respondent and Downey, and the rights of the parties under it.

1. The appellant's case is built up on the theory that, because he pleads a rescission of the contract by the respondent, and that in his answer the respondent admits a rescission, appellant is entitled to a return of all sums paid. It is contended by the respondent that the word "rescission" was "artlessly" used in his answer, and that it is not to be taken in the sense or meaning that the respondent had elected to rescind in such a sense that he must return everything of value received from appellant or Downey.

We find several authorities which use the word "rescind" or "rescis-

sion" to designate the act of taking possession of property sold on a conditional-sale contract, wherein such taking possession is not construed as a technical, legal rescission, entitling the vendee to recover payments made. Patterson v. Murphy, 41 Neb. 818, 60 N. W. 1; Bryson v. Crawford, 68 Ill. 362. But it is elementary that the words of a pleading must be construed with reference to the context. When the answer of the respondent is read as a whole, and particularly the allegation in which the word "rescission" is used, we are satisfied that a fair construction of its terms does not lead to the conclusion that he was pleading a rescission in the statutory sense. The answer must also be read in the light of the allegations of the complaint. Appellant set out in effect the terms of the agreement by which Downey received possession of the furniture, and then in construing the terms of such agreement, which was received in evidence, he alleges that under its terms the respondent is authorized and empowered to rescind the same, etc.; and that, having elected to rescind said contract, he seized and repossessed himself of the goods.

The respondent in his answer, after setting out the terms of the contract and other items of defense, alleges that the defendant did elect to rescind and cancel said contract for the reason that no other settlement of said contract seemed probable, and the goods were constantly deteriorating in value, and under the terms of said agreement said defendant, as authorized by said contract of sale, possessed himself of the said furniture.

We think that the meaning of the words "rescind" and "cancel" is modified by the later allegation explaining how he rescinded and canceled said contract,—namely, by retaking possession thereof, which he was authorized to do by the contract,—and that the only interpretation which can properly be placed upon the allegation of the respondent's answer is that he repossessed himself of the goods described, as he was permitted to do by the terms of the contract.

2. We have no doubt that the contract in question in this case, although drawn in the form of a lease, was in law a conditional-sale contract; but, be that as it may, it must be so treated for the reason that it is so considered and discussed by both appellant and respondent, and unquestionably it was so treated by them in the trial court. This being true, we will determine what the rights of the appellant were under that contract.

That a conditional-sale contract does not convey title, and entitles the vendor to retake possession thereof, when it has been delivered to the vendee, on default in the terms of the contract, and that the rights of the vendee are terminated when this is done, has been held several times by this court. Hawk v. Konouzki, 10 N. D. 37, 84 N. W. 563; Bidgood v. Monarch Elevator Co. 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561, and authorities cited.

Neither the appellant nor Downey, his assignor, acquired any title to the goods. Their title was conditioned upon the performance of all the requirements found in the contract to be by the vendee performed. Until they were performed, the title would be and remain in the respondent. That either Downey or the appellant completed payment as required by the terms of the contract is not claimed. Neither is it shown that they ever offered to complete payment, or demanded a return of the goods in case they should comply with the contract. It is, however, shown that respondent was justified by their failure to pay, and by their neglect and misuse of the goods, in retaking possession. Not only that, but it is shown that he did so with the knowledge and consent of both Downey and appellant. We must therefore assume that at the date of his retaking possession the contract relations of the parties were terminated.

The question then arises whether, on the termination of such contract, caused by the default of the vendee, the vendee may recover the partial payments made thereon. A few states seem to hold that he can do so, but it is not clear as to what extent their decisions are governed by statute. In this state there is no statute specifically covering such cases. In any event, we are satisfied that the great weight of authority, as well as of reason, is to the effect that in an action at law the vendee cannot recover such payments where he is the party in default. To hold that he might do so would lead to startling results.

This may be illustrated by the effect on the parties to a conditional contract for the purchase and sale of land on instalments. The vendee might make such a purchase for speculative purposes, and on a failure to make a profitable sale, or on the property depreciating or failing to increase in value, he might default and recover all sums paid, at most only deducting the rental value of the premises. This would result in the contract not serving the purpose for which it was intended, but, on the

contrary, becoming a shield for the vendee by means of which he could take contracts for land, hold them for a rise, and, on failure to realize a profit, surrender them and recover all sums paid, thus making the vendor take all the chances; the vendee being bound by nothing. As is said by one authority, it would be offering a bounty for the violation of contracts.

In Glock v. Howard & W. Colony Co. infra, the California court says: "It would be to the last degree unjust and inequitable to allow a vendee, after his default under such contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee without risk could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence, and stipulate under condition precedent, as in this case, to make payment at a certain time. Failing to make payment, he would three months, six months, one year, or, as in this case, over three years, after the date of the failure, make an offer to perform, and if the land had risen in value, according to the theory of respondents here, could compel performance; but in every case he could recover the moneys paid."

Lord Loughborough, Lloyd v. Collett, 4 Bro. Ch. 469, note says: "There is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should be certainly known when a man is bound and when not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say the time is not so essential that in no case in which the day has by any means been suffered to elapse the court would relieve against it and decree performance. The conduct of the parties, inevitable accident, etc., might induce the court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that if the agreement is not executed at a particular time the parties shall be at liberty to rescind it. . . . I want a case to prove that where nothing has been done by the parties this court will hold in a contract of buying and selling a rule . . . that the time is not an essential part of the contract. Here no step has been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time

will do? . . . An equity out of his own neglect! It is a singular head of equity."

Such contracts are intended to make possible and secure the sale of property on small payments, either at the time of sale or subsequently, and a large percentage of the transactions, both in real estate and personal property, in this state, is conducted in this manner. To hold that by reason of his own default the vendee can recover all his payments would work a revolution of business methods long established, and in the end result in untold hardships to vendors. Notwithstanding the fact that in same instances the vendee may be exposed to hardship by a denial of his right to recover all the payments made, we see no sound reason based on logic or authority warranting us in holding that he may do so. Hansbrough v. Peck, 5 Wall. 497, 18 L. ed. 520; Satterlee v. Cronkhite, 114 Mich. 634, 72 N. W. 616; Patterson v. Murphy, 41 Neb. 818, 60 N. W. 1; Bryson v. Crawford, 68 Ill. 362; White v. Oakes, 88 Me. 367, 32 L.R.A. 592, 34 Atl. 175; Glock v. Howard & W. Colony Co. 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; Neis v. O'Brien, 12 Wash. 358, 50 Am. St. Rep. 894, 41 Pac. 59; McAlpine v. Reicheneker, 56 Kan. 100, 42 Pac. 339; Hanschka v. Vodopich, 20 S. D. 551, 108 N. W. 28; Way v. Johnson, 5 S. D. 237, 58 N. W. 552; Walter v. Reed, 34 Neb. 544, 52 N. W. 682; Downey v. Riggs, 102 Iowa, 88, 70 N. W. 1091; Eames v. Germania Turn Verein, 8 Ill. App. 663; Rayfield v. Van Meter, 120 Cal. 416, 52 Pac. 666; Bradford v. Parkhurst, 96 Cal. 102, 31 Am. St. Rep. 189, 30 Pac. 1106; Tufts v. D'Aroambal, 85 Mich. 185, 12 L.R.A. 446, 24 Am. St. Rep. 79, 48 N. W. 497.

For a construction of various sections of our statute, to some of which reference is made in appellant's brief, and the reasons why they are inapplicable in this case, see Glock v. Howard & W. Colony Co. 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 19, 55 Pac. 713.

In Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558, we held that the vendor under a contract of conditional sale may elect whether he will recover possession of the property sold in which he still retains title, or waive this title and sue for the value or selling price, but that he cannot do both. In the case at bar the vendor elected to stand on his contract and retake possession of the property. Such contract gave him the right to do so without notice. As we have shown, such possession

was retaken with the knowledge of all the parties interested, and with either their tacit or express consent. We are satisfied that, under the pleadings and evidence, the contractual relations of the parties ceased when the defendant retook possession of the property; that is to say, the relations under the contract in question.

If, as may be admitted, they thereafter entered into a new contract, express or implied by respondent, assenting to the suggestion of Downey that he wanted the privilege of paying the remainder, that, on his failure to do so, does not entitle him to recover what he had paid under the original contract. Whether he would be entitled to recover what he paid after such new arrangement need not be considered, because the evidence fails to disclose what part of the payments through the purchase of feed were made subsequent to the retaking of possession.

Many authorities hold that, where a vendee makes a deposit or payment on the purchase price, without taking possession of the chattels, and thereafter fails to complete the payments, he forfeits the deposit. The question of time being of the essence of the contract is, under the pleadings and evidence, not in the case. The contract permitted respondent to retake possession without notice, and both nctice and demand were waived by the consent of the interested parties that he retake the property.

Some authorities make a distinction between those conditional-sale contracts wherein the condition is that the plaintiff pay instalments when they become payable, and those in which the condition is that the property is to remain the property of the vendor until such payments are made, and hold that in the one case the omission of the purchaser to pay at maturity does not operate as a forfeiture of his rights under the contract, in the absence of a demand on the party of the seller for payment or for the property, and that on such demand, even if payment was overdue, the purchaser would have a right to pay and retain the property; but that, under a contract with the other wording, demand would not be necessary. Taylor v. Finley, 48 Vt. 78.

We may add that the pleadings and the record in this case are in a somewhat hazy condition. Neither the appellant nor the respondent appears to have known on just what theory to proceed with the action or defense. If the correct procedure was in equity for an accounting of all their differences relating to the property in question, on the evidence

included in the record, the respondent would have been entitled to a judgment in a larger sum than he obtained.

The judgment of the District Court is affirmed.

MORGAN, Ch. J., not participating.

POWER v. HAMILTON.

(132 N. W. 664.)

Statutes — construction.

1. In construing a statute, the courts will give effect to the spirit, rather than the mere letter, of the same, with a view of effectuating the evident intention of the legislature, and to this end the courts, where necessary to carry out the evident legislative intent, will limit general language of an act to the cases contemplated by it. In other words, where the enforcement of general statutory provisions to particular facts clearly not in the contemplation of the legislature would lead to unjust and absurd results, the court is justified and required to limit the application of such general provisions so as not to thwart the legislative will.

Elections — construction of statute as to vote of nonregistered person.

2. Applying the above rule of statutory construction, *held*, construing § 738, Rev. Codes 1905, that the provision therein providing that a vote of a nonregistered person shall not be received or counted unless such voter furnishes an oath of a householder and registered voter has no application, where, as in the case at bar, the officers, through an oversight, omit and neglect to meet as a registration board; and when, as in the case at bar, the nonregistered voters, who admittedly are qualified electors, furnish their affidavits, as required by said statute, their votes must be received and counted.

Opinion filed September 8, 1911.

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

Action by Joseph Power against J. K. Hamilton. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. A. McIntyre and *G. M. Price*, for appellant.

W. B. Dickson and *Joseph Cleary*, for respondent.

FISK, J. This in an election contest, in which the appellant contests the right of respondent to the office of county auditor of Cavalier county for the term which began April 3, 1911. The facts are not in dispute, and, briefly stated, are as follows: At the general election held in said county on November 8, 1910, the parties were opposing candidates for the office aforesaid, and the returns of the canvassing board show that appellant received 1,305 votes and the contestee 1,342 votes for said office. In the first and second wards of the city of Langdon respondent received a plurality of forty-one votes. Notwithstanding the fact that such city possessed the requisite population to require the registration of voters prior to the election, no attempt was made, through an oversight of the proper officers, to comply with the registration laws in such wards prior to such election. There was no meeting or assembly of the registration boards therein for such election, and no lists of the voters were prepared, posted, or certified as required by law. Each of the voters voting therein did, however, prior to casting his vote, furnish to the election officers an affidavit in compliance with § 738 of the Revised Codes; this section being that portion of the registration law giving the right to a nonregistered voter to vote by furnishing a certain affidavit, etc. It was expressly stipulated that each person who voted in such wards at said election was a duly qualified elector therein.

The above facts, with others not deemed necessary to mention, were embraced in stipulations or admitted by the pleadings, but each party reserved the right to object to any of the stipulated facts on the ground of irrelevancy and immateriality, and appellant's counsel interposed certain objections accordingly. Much space is devoted to such objections by counsel, and they disagree as to the issues framed by the pleadings, but we find it unnecessary to consider these questions; for, conceding for the purposes of this case the correctness of the various contentions of the appellant's counsel with reference to these preliminary questions of pleading and evidence, we have no difficulty in reaching the main conclusion arrived at by the learned trial court, *viz.*, that the contest is without merit, and should be dismissed. Appellant's contention on the merits, in effect, is that as a necessary result of the omission of the election officers to meet as a registration board no valid election could be held in said wards; the precise point being, as we understand counsel, that, because of the omission of the registry board to meet,

the section of the statute aforesaid, which, in effect, prescribes that a nonregistered person's vote cannot be received or counted unless such person shall furnish his affidavit stating certain facts, and also prove, by the oath of a householder and registered voter of the precinct, that he knows such person to be a resident therein, etc., could not be complied with, and hence none of such votes could legally be received or counted. In other words, that, inasmuch as the strict letter of such statute could not be complied with by furnishing the oath of a registered voter (as there were none), the entire electorate of such wards must be disfranchised, even in the face of the admitted fact that every person who voted was a duly qualified elector. We cannot yield our assent to such a contention.

The strict letter of the statute will not be permitted to control over its true spirit and the evident legislative intent, especially where such liberal construction would lead to such absurd results. This statute is, no doubt, mandatory, as was held in Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 95; but it does not follow from this that a good-faith compliance with its provisions to the utmost extent of the voter's ability will not suffice. In the Fitzmaurice Case no attempt was made to furnish the statutory proof required of nonregistered voters; and, while it was not necessary to the decision, we there stated in effect that, had the voters furnished the statutory affidavit, their votes would and properly should have been counted. As before stated, such affidavit was furnished by each voter in the case at bar, and not only this, but an oath, in corroboration thereof, was also furnished by a householder. This was a sufficient compliance with such law under the circumstances, and, in fact, the only compliance possible. The law does not exact the impossible, and any attempt by the legislature to do so would be both unreasonable and absurd. But the legislature, by the enactment of said statute, attempted no such thing. It is evident that in enacting such statute the legislature did not contemplate a situation where it would be impossible, on account of nonregistration, for the voter to furnish the corroborative oath therein prescribed. The exact reverse is true. It was clearly contemplated that it would always be possible to furnish required proof, in lieu of the registration, of eligibility to vote of all qualified electors. Any other construction would convict the legislators of gross incompetency, if not utter imbecility. The views above expressed find ample

support in the authorities. 25 Am. & Eng. Enc. Law, 608–648, and cases cited. We quote from the text at page 608 as follows: "Language, though apparently general, may be limited in its operation and effect, where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions." In State v. Smiley, 65 Kan. 240, 67 L.R.A. 903, 69 Pac. 199, it was held to be a universal rule of construction that the general words of statutes will be restricted in their application to cases presumptively within the legislative intent. A very good statement of this rule of construction is the following from the supreme court of Illinois: "It is true the 126th section of the statute of wills [Rev. Stat. 1845, chap. 109] requires a demand to be made before the administrator is chargeable with a devastavit, but that statute must not receive a construction the effect of which would be to discharge the securities of a delinquent administrator merely as a consequence of his death. Such certainly could never have been the intention of the legislature. The statutes must receive a sensible construction, even though such construction qualifies the universality of its language. When it directs that a demand shall be made upon an administrator by a person entitled, under the order of the court, to money in his hands, it must be considered as having reference to cases where there is an administrator in being upon whom the demand can be made. . . . The law is not so unreasonable as to require the performance of impossibilities as a condition to the assertion of acknowledged rights, and, when legislatures use language so broad as apparently to lead to such results, the courts must say, as they have always said, that the legislature cannot have intended to include those cases in which by the act of God a literal obedience to their mandate has become impossible. . . . The law in its most positive and peremptory injunctions is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases." People v. Admire, 39 Ill. 251. In Potter's Dwarr. Stat. p. 138, the same rule is enunciated. We quote: "It happens in two sorts of cases that it is necessary to interpret the laws. One is when we find in a law some obscurity, ambiguity, or other defect of expression; for in this case it is necessary to interpret the law in order to discover its true meaning. And

this kind of interpretation is limited to the expression that it may be known what the law says. The other is when it happens that the sense of a law, how clear, however, it may appear in the words, would lead us to false consequences, and to decisions that would be unjust if the laws were indifferently applied to everything that is contained within the expression. For, in this case, the palpable injustice that would follow from this apparent sense obliges us to discover by some kind of interpretation, not what the law says, but what it means; and to judge by its meaning how far it ought to be extended, and what are the bounds that ought to be set to its sense. . . . If an arbitrary or positive rule is applied to a case which it apparently embraces, and the result is contrary to the intent of the legislator, the rule should not be applied to the case."

But we need not rely on the above authorities, for this court in at least two instances has unqualifiedly given its approval to the same rules of statutory construction. Vermont Loan & T. Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; State ex rel. Flaherty v. Hanson, 16 N. D. 347, 113 N. W. 371. In the first case, Bartholomew, J., in speaking of the power of courts to place a limitation upon the language of the legislature, quoted approvingly from the decisions of other courts as follows: "In the case of State ex rel. Jackson v. Emerson, 39 Mo. 87, the court said: 'In construing an instrument, the true intention of the framers must be arrived at, if possible, and, when necessary, the strict letter of the act, instrument, or law must yield to the manifest intent.' In Whitney v. Whitney, 14 Mass. 92, this language is used: 'Therefore many cases not expressly named may be comprehended within the equity of a statute, the letter of which may be enlarged or restrained according to the true intent of the maker of the law.' The supreme court of Vermont has said: 'Effects and consequences of a construction are to be considered, and, when from a literal interpretation an effect would follow contrary to the whole intent and spirit of the statute, the intent, and not the literal meaning, must be regarded.' Ryegate v. Wardsboro, 30 Vt. 746. In People ex rel. Atty. Gen. v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243, it is said: 'Whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute. . . . A thing which is within the intention of the maker of the statute, is as much within the statute as if it were within the letter, and

a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers, and such consruction ought to be put upon it as does not suffer it to be eluded.' . . . 'The spirit as well as the letter of a statute must be respected, and, when the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid the intent.' Durousseau v. United States, 6 Cranch, 307, 3 L. ed. 232. 'It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words would import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it.' Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408. 'If it is true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words when it is found necessary to do so in order to carry out the legislative intent.' Reiche v. Smythe, 13 Wall. 162, 20 L. ed. 566. 'A thing may be within the letter of a statute, and not within its meaning, or within the meaning, though not within the letter.' Atkins v. Fibre Disintegrating Co. 18 Wall. 302, 21 L. ed. 841." See also 36 Cyc. 1109, and cases cited.

Applying these elementary and well-settled rules to the case at bar, we deem it clear that, while the statute aforesaid is mandatory so far as applicable, the portion thereof requiring the furnishing of an oath of a registered voter has no application to a state of facts like those presented in this record, nor was it the legislative intent that it should thus apply.

This conclusion requires an affirmance of the judgment appealed from.

MORGAN, Ch. J., took no part in the above decision; Hon. CHARLES F. TEMPLETON, Judge of the First Judicial District, sitting by request.

STATE v. FLOYD.

(132 N. W. 662.)

Habeas corpus — right to.

1. The writ of habeas corpus can be properly used only where the petitioner is confined without jurisdiction.

Habeas corpus — right to.

2. It cannot be invoked as a means of correcting mere errors or irregularities, or as a substitute for an appeal or writ of error.

Habeas corpus — former jeopardy — wrongful discharge of jury.

3. Where a defendant was regularly informed against and on trial, and the jury came into court after the issues were submitted to them, and announced that they could not agree upon a verdict, and were discharged, as alleged, in the defendant's enforced absence in jail, and without his consent or the presence or consent of his counsel, *held:*

(1) Conceding, without deciding, that the discharge of the jury was erroneous, the court was not thereby dispossessed of jurisdiction.

(2) That the action of the court in discharging the jury was, at most, an error, which cannot be reviewed, except in the usual manner, and not by habeas corpus.

(3) If the action of the district court was erroneous, its action can only be reviewed on another trial by pleading former jeopardy in the manner provided by statute.

Opinion filed September 30, 1911.

Application by M. E. Floyd for a writ of habeas corpus.

Writ quashed.

T. F. McCue, for petitioner.

The Attorney General, for the State.

Note.—The strict rule which formerly prevailed in England as to the effect of the discharge of the jury in a criminal case has been greatly relaxed, and there are now many causes for which the jury may be discharged without entitling defendant to his discharge, as shown by a review of the authorities in 14 L.R.A.(N.S.) 548. And the holding in the case of STATE v. FLOYD that the question of former jeopardy cannot be determined in a habeas corpus proceeding is in entire accord with the other authorities on the subject, which are reviewed in a note in 15 L.R.A.(N.S.) 227, appended to the case of Hovey v. Sheffner, holding that the wrongful discharge of the jury does not devest the trial court, where the question of former jeopardy must be determined, of jurisdiction and entitle the accused to discharge on habeas corpus.

MORGAN, Ch. J. Petition for a writ of habeas corpus based upon the following facts, as shown by the petition and the sheriff's return to the writ: Petitioner was regularly informed against for the crime of robbery, and placed on trial before the district court of Foster county. The issue of guilt was submitted to the jury, and after considering the evidence they came into court and announced that they were unable to agree upon a verdict. Thereupon the court discharged the jury from further consideration of the case. The petitioner was not present in court at the time of the discharge of the jury. His absence was an enforced one; he being at the time confined in the county jail. His counsel was not present in court at the time, and neither the petitioner nor his counsel in any way consented to the discharge of the jury. It is also set forth in the petition that an application was made for a writ of habeas corpus to the district court, and denied. These are the facts set forth and relied on by the petitioner in his application for the writ in this court. The sheriff of Foster county, having custody of the petitioner, files a return, wherein he denies that the jury was wrongfully discharged, and denies that the petitioner's confinement is unlawful, or without legal authority. In disposing of the writ, we will deem it shown, for the purposes of this proceeding only, that the jury was wrongfully discharged in the petitioner's enforced absence, although the sheriff denies that such discharge was irregular and erroneous.

It is elementary law that in habeas corpus proceedings jurisdictional questions only are reviewable or to be considered. The writ cannot be invoked for the purpose of reviewing the acts of courts or officers, where they acted within their jurisdiction, nor for the purpose of correcting irregularities or errors, or as a substitute for an appeal or writ of error. Before the writ is available as a means of release from confinement, it must appear that the court issuing the process, or the officer or person who keeps the applicant in confinement, has acted entirely without jurisdiction. Our statute particularly lays down the grounds on which the writ will issue, and the substance of the statute is embodied in the statement given above. Rev. Codes 1905, § 10,482.

It appears from the record before us that the petitioner was before the district court on trial under an information charging him with the crime of robbery, and that said court had jurisdiction of that offense,

and of the person of the petitioner. The trial had not been concluded when the jury was discharged, and no final judgment or order had been entered in the case. The order under which he was committed to jail after his arraignment under the information was still in force. That order will continue in force until the district court orders his release from custody after verdict, or dismissal of the case, or other causes, unless the petitioner becomes entitled to release by virtue of failure to bring him to trial regularly, as provided by law, or for some other cause happening after his commitment, rendering his detention unlawful.

In this case it is not contended by the petitioner that the jury was wrongfully discharged by reason of the fact that the jury was discharged before sufficient time had elapsed for a due consideration of the verdict. The sole contention is that the jury was discharged without his knowledge or consent, while he was in jail. We do not decide, in this case, whether the discharge of the jury under the circumstances are erroneous or not. It is not necessary to say more than that the order discharging the jury was not made without jurisdiction. If merely made erroneously, it cannot be attacked collaterally by habeas corpus. The error, if any, must be reviewed in the regular way of reviewing errors occurring at the trial; that is, by motion or appeal. There was no loss of jurisdiction, so that another trial cannot be proceeded with. If the petitioner has been once in jeopardy, the statute provides the procedure, if he wishes to raise that question. If a plea of prior jeopardy should be presented and sustained, it must be based on error by the trial court, which cannot be reviewed by habeas corpus. That fact, however, must be shown, if it exists, in the same way as any other defense must be shown on the trial.

Church on Habeas Corpus discusses this question, and in § 255 says: "And conceding that the court erred in discharging the jury, . . . it could not be reviewed without the record in the cause was properly before the court of review in such a way as to give it a revisory power under its appellate jurisdiction. But such an error is a mere irregularity, and should not be reviewed under this writ. It does not effect the question of jurisdiction, and where a court has jurisdiction it is within its power and authority, and is clearly its duty, to entertain, hear, and determine every question that may possi-

bly or legitimately arise during the progress of the trial, to final judgment of conviction or acquittal. The fact, therefore, if it be one, that the court has improperly discharged the jury, in the enforced absence of the prisoner, does not dispossess the court of its jurisdiction over the cause. If so, any further step or procedure in the action is wholly nugatory, and the only judgment that can be rendered is one of dismissal for want of jurisdiction, instead of a judgment upon the merits, which alone can furnish any protection to the defendant against another prosecution for the same offense."

In Gillespie v. Rump, 163 Ind. 457, 72 N. E. 138, the question of presenting a plea of former jeopardy under habeas corpus proceedings was under consideration, and the court said: "The jurisdiction of the Ohio circuit court over the subject of the action and the person of the petitioner at the time he was brought into court to answer the indictment, and a jury was first impaneled to try him and his codefendants upon it, is not questioned. That indictment is still pending against the petitioner, and no final judgment has been rendered in the cause. If it should be conceded that the appellant is correct in his contention that he has been once in jeopardy upon the charge contained in the indictment, and that the setting aside of the submission after the jury had been sworn to try the cause, the discharge of one of the jurors upon a peremptory challenge by the state, and the impaneling of a second jury—all without his consent and over his objections, duly presented—was equivalent to an acquittal, still the facts of such jeopardy and acquittal would, at most, constitute a defense in bar of the action, and would require proof upon a second trial, as any other fact or facts which might entitle the defendant to a verdict of 'not guilty.' Even if the proceedings of the court in setting aside the submission and discharging the juror were unauthorized and illegal, they were errors only, which, if proved upon subsequent trial of the cause, might or might not amount to a defense to the action. But these supposed errors did not deprive the court of its jurisdiction over the subject of the action, or the person of the defendant. Certainly they were not such as to render all further proceedings in the cause void."

The following are a few of the authorities that sustain the foregoing principles, where the facts were like these, or arose under similar circumstances: State ex rel. Styles v. Beaverstad, 12 N. D. 527, 97 N.

W. 548; Ex parte Maxwell, 11 Nev. 428; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; Ex parte Nesson, 25 S. D. 330, 126 N. W. 594; Steiner v. Nerton, 6 Wash. 23, 32 Pac. 1063; State ex rel. Noonan v. Hennepin County, 24 Minn. 87; Re Terrill, 58 Kan. 815, 49 Pac. 158; Hovey v. Sheffner, 16 Wyo. 254, 15 L.R.A.(N.S.) 227, 125 Am. St. Rep. 1037, 93 Pac. 305, 15 Ann. Cas. 318; Ex parte Bigelow, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; Hurd, Habeas Corpus, p. 333; Ex parte Ruthven, 17 Mo. 541; State v. Orton, 67 Iowa, 554, 25 N. W. 775; Bishop, Crim. Proc. § 821; 9 Enc. Pl. & Pr. p. 1046; Ex parte McLaughlin, 41 Cal. 211, 10 Am. Rep. 272.

Our conclusion, therefore, is that the District Court did not lose jurisdiction, and that the writ must be quashed.

All concur.

AMERICAN CASE & REGISTER COMPANY v. WALTON & DAVIS COMPANY.

(133 N. W. 309.)

Prejudicial error in exclusion of evidence.

1. Defendant was permitted, over plaintiff's objection, to prove a conversation in which plaintiff's sales agent made certain representations regarding the quality of a certain account register ordered by defendant from plaintiff through such agent. Plaintiff asked and was granted permission to cross-examine defendant's witness for the purpose of showing that the contract was in writing, and after proving such fact offered the written contract in evidence as a part of such cross-examination, which contract contains a stipulation that "no agreement or promise, written or verbal, not appearing in the original, will be binding upon the American Case & Register Company." *Held*, that the exclusion of such offer constitutes prejudicial error.

Sales — exclusion of written contract because not completed.

2. Such offered proof was rejected because of the fact that the existence of such written contract had not been pleaded by way of a reply to the answer. *Held*, that such ground is untenable.

Sale — evidence of offer by vendee to return property — laying foundation for.

3. Before evidence is admissible of an offer by a vendee to return to the

vendor the personal property purchased, a foundation must be laid by proving a right to rescind the sale.

Direction of verdict.

4. In a suit on a promissory note, the defense urged in the answer was an alleged failure of consideration. At the conclusion of the trial a verdict in defendant's favor was directed by the court. *Held*, error; there being no evidence to establish such defense.

Opinion filed October 28, 1911.

Appeal from District Court, Stark county; E. B. Goss, *Special Judge*.

Action by the American Case & Register Company against Walton and Davis Company. From a judgment for defendant on a verdict directed by the court, plaintiff appeals.

Reversed, and new trial ordered.

Thomas H. Pugh and *Field & Pugh*, for appellant.

T. F. Murtha, for respondent.

FISK, J. Action to recover on a promissory note for $216 executed and delivered by defendant to plaintiff on August 22, 1908. The execution and delivery of such note and its nonpayment is expressly admitted by the answer. Defendant relies for a defense thereto wholly upon an alleged total failure of consideration. The answer, in paragraph 4, alleges, it is true, that defendant, by means of certain false representations of plaintiff's agent, was induced to purchase from plaintiff a certain account register for a portion of the purchase price of which the note in suit was given, and that such account register was not as represented and was "worthless and of no value for any purpose to the defendant or others;" but there is no allegation therein of a tender or offer to return such register to plaintiff, or that a rescission of the sale contract was ever made or attempted, and the concluding portion of such paragraph is as follows: "That by reason of the facts herein set forth the defendant has received no consideration for said note whatever." Upon the issue thus framed testimony was introduced, and at the close of the trial both parties moved for a directed verdict, whereupon defendant's motion was granted over plaintiff's objection and exception, and a verdict was directed accordingly. From the judgment entered pursuant thereto, plaintiff has appealed, assigning numerous

alleged errors of a prejudicial nature. No motion for a new trial was made in the court below, consequently we are not called upon to review the sufficiency of the evidence, and, if there is any competent testimony in support of the verdict, it will not be disturbed in the absence of some prejudicial error in the record.

Appellant has assigned twelve alleged errors on which it relies for a reversal; but it will not be necessary to notice these only in a general way.

At the commencement of the trial, plaintiff offered in evidence the note in suit, which was received without objection, and rested. Thereupon defendant called as a witness one Davis, its president, who was permitted, over plaintiff's objection, to narrate a conversation had with one Gouth, plaintiff's traveling salesman, at the time the register was ordered, and this, in the face of the fact developed on cross-examination of such witness that the contract was in writing and contained a stipulation that "no agreement or promise, written or verbal, not appearing in the original will be binding upon the American Case & Register Company." Such written order and contract was offered in evidence as a part of such cross-examination and for the purpose of laying a foundation for an objection to a question calling for such conversation; but, strange as it may seem, the same was excluded upon the ground that it was not within the issues, not having been set forth in a reply to the answer. It is entirely clear that such ruling was error. The parties having reduced the contract to writing, it was manifestly proper for plaintiff to show such fact when defendant offered to prove oral negotiations and representations relating thereto. And it is equally apparent that such fact could properly be shown without first pleading it in a reply. Moreover, under our system of Code pleading a reply is never necessary or proper except for the purpose of putting in issue facts alleged in the answer by way of a counterclaim, unless the court, in its discretion and on defendant's motion, requires a reply to new matter constituting a defense by way of avoidance. Rev. Code 1905, § 6863. If any authority is required upon the proposition that the above-quoted stipulation in such written order excludes oral representations or warranties as to the quality of this account register, see Hooven & A. Co. v. Wirtz, 15 N. D. 477, 107 N. W. 1078.

The error above pointed out is alone sufficient to require a reversal;

but, in view of another trial, we will briefly notice some of the other rulings complained of. Defendant, over plaintiff's objection, was permitted to introduce in evidence a letter dated November 28, 1908, written by defendant to plaintiff for the purpose, as stated by defendant's counsel, of showing that defendant offered to return the property. Conceding, without deciding, that the offer to return such property, as disclosed by the letter, was a sufficient offer or tender of the property to plaintiff, we fail to see how such proof was admissible without first showing a *right* to rescind and also laying a foundation in the pleadings for such a defense. As we have above stated, no such defense is alleged in the answer, and the record falls far short of showing a right of rescission, especially when the testimony, which was erroneously admitted, as to the oral statements of plaintiff's traveling salesman, is eliminated as it should be. Whether, if such testimony was properly in the record, there would be sufficient evidence as a matter of law to warrant a rescission, it is unnecessary to decide.

The defense of a failure of consideration for the note in suit is clearly not established by the evidence. At most, defendant merely proved that the device was not adapted or adaptable to its business. For all that appears in the record the register was in fact worth the full purchase price.

In the light of this record we are agreed for the reasons above stated, that it was reversible error to direct a verdict in defendant's favor. For this, as well as the other errors pointed out in this opinion, the judgment is reversed, and a new trial ordered.

Goss, J., being disqualified, took no part in the decision; Honorable W. C. Crawford, of the Tenth Judicial District, sitting by request.

TRUMBO v. VERNON.

(133 N. W. 296.)

Public lands — leaving certificate of purchase in agent's keeping — blank assigment — sale by agent to third party.

1. Where the plaintiff left a certificate of purchase of land from the board of university and school lands, of which he was the owner, with his agent for safe-keeping, and the assignment thereof was not filled in, and such agent sold it for a valuable consideration to the defendant and delivered the certificate to him after inserting defendant's name in the blank assignment, but defendant had knowledge of the facts, in reference to the ownership of the land by the plaintiff which would cause an ordinarily prudent person to make inquiry, and no such inquiry was made, the defendant is estopped to claim the land against the plaintiff.

Public lands — assignment of certificate of sale.

2. A person obtains no better title to land by virtue of the assignment only of a certificate of sale from the board of university and school lands than the assignor had.

Bona fide purchaser of land — notice of facts putting on inquiry.

3. If a person buys land from one not the owner, with knowledge of material facts concerning the title, without making inquiry as to such ownership, he is not deemed in law a purchaser without notice as against the true owner.

Public lands — wrongful transfer of certificate by agent — bona fide purchaser.

4. The evidence is reviewed in the opinion, and *held*, that the defendant is not a purchaser in good faith without notice.

Opinion filed October 31, 1911.

Appeal from District Court, La Moure county; *Burke*, J.

Note.—The question raised, but not decided, in this case, as to whether the plaintiff was guilty of such negligence in placing the blank assignment in his agent's hands as to estop him from claiming the title to the land as against a bona fide purchaser from the agent, is treated in a note in 29 L.R.A.(N.S.) 252, and the authorities there reviewed show that one who puts papers or securities indorsed or assigned in blank into another's possession is estopped, as against a purchaser in good faith, to claim title thereto.

Action by Moab P. Trumbo against Edward J. Vernon. From a judgment for defendant, plaintiff appeals.

Reversed and remanded.

David, Warren, & Hutchinson (*R. A. Green,* of counsel), for appellant.

Curtis & Curtis, for respondent.

MORGAN, Ch. J. This is an action to quiet the title to 160 acres of land in La Moure county. The facts may be summarized as the following: Each of the parties claims under a certificate of sale issued and delivered to Donaher and Maben by the board of university and school lands of this state on the 7th day of November, 1902. The price agreed to be paid for the land was the sum of $10 per acre, and they paid to the state at the time of the sale $2 per acre. Subsequently these parties assigned the contract to one Andrew Pfau, who assumed the indebtedness to the state, and on December 15, 1904, Pfau assigned the contract to the plaintiff, who assumed the indebtedness to the state on the contract, and agreed to pay in addition thereto the sum of $1,400 for the 160 acres involved in this suit, and said sum has now been paid to Pfau. The sale to the plaintiff from Pfau was made partly through the agency of one Riale, after Pfau had himself talked with the plaintiff concerning the sale. The assignment was prepared by Riale, and was signed by Pfau and his wife in Riale's office in Ottawa, Illinois, and, after it was signed, the plaintiff told Riale to put the assignment in his safe, to be kept there for him. At this time the assignment was in blank; that is, the name of the plaintiff as assignee was not inserted therein. Later, and in the winter of 1904, and 1905, the plaintiff authorized Riale to find a renter for 320 acres of land owned by him in La Moure county, which included the 160 acres involved in this suit, and he entered into negotiations with the defendant, Vernon, for renting this land, and rented the land for the year 1905, and, under another contract, for the year 1906. Vernon paid the rent under these contracts for these years to the plaintiff. In September, 1906, Vernon wrote the plaintiff, and in the letter asked him what his price was for the land, and plaintiff answered, saying that the price was $24 per acre. This letter was not answered.

This action involves 160 acres only, although the assignments of the original contracts between Donaher and Maben and the state involved 320 acres. There were two contracts, each representing 160 acres.

Pfau had assigned both of these contracts to the plaintiff, although but one of them is involved in this litigation. In the winter of 1906–07 plaintiff learned that he held tax receipts for only 160 acres of this land, and that he had no tax receipts for the 160 acres involved in this suit. He wrote to Riale for an explanation of this fact. Riale answered, saying that he had sold this land to Vernon. The plaintiff made proposition for a settlement with Riale, but nothing was accomplished, and this action was begun against Vernon and Riale to quiet the title to the 160 acres. The defendant Vernon answers by way of counterclaim, and asks that the title be quieted in him; he claiming to be the owner of the land by reason of a purchase of the same in good faith from Pfau. The defendant Riale did not answer.

The assignment to the defendant Vernon was made under the following circumstances: On October 24, 1906, Riale visited Vernon's place near Edgeley, North Dakota, and asked him to purchase the S. W. ¼ of section 36, being the 160 acres involved in this suit. Riale had in his possession at that time the contract between the board of university and school lands and Donaher and Maben, and the assignment thereof by Pfau and wife executed at Ottawa, Illinois, on December 15, 1904, which was delivered to this plaintiff and by him left with Riale for safekeeping. Riale showed these papers—that is, the contract and the assignment—to Vernon. Vernon then told Riale that he would not purchase until he went to Edgeley and saw a banker there. He went to Edgeley on the following morning and saw one Martin, a banker, and asked him "if it was all right to take an assignment in blank" of a school-land contract. The banker telegraphed to the land department at Bismarck, and was informed that the land was in the name of Andrew Pfau. After the receipt of such information from the land department, the banker informed Vernon that the title to this land was in Pfau, and that it was all right. Vernon then bought the land from Riale, and gave him $10 an acre for said 160 acres, and assumed the deferred payments of $8 per acre due the state. Vernon's name was then and there inserted in the blank assignment from Pfau and wife which had been previously delivered to the plaintiff and left with Riale by him for safe-keeping.

From these and other facts to be mentioned, we are to determine which of these claimants is entitled to relief in this action. There is

no question involved as to notice by virtue of the recording acts. It is not claimed that Riale had authority from the plaintiff to sell this land. He did not pay or offer to pay the plaintiff the consideration received by him for this land. He sold it as his own property, and denies that the plaintiff is entitled to any of the consideration. By reason of a delay of a few months in bringing this action, plaintiff did not assent to the sale, and he did nothing to ratify it.

Vernon's main contention is that he was an innocent purchaser of the land; that plaintiff was guilty of such negligence in placing the blank assignment in Riale's hands as to estop him from now claiming the title to the land as against him. It may be that this would be true if Vernon was not in possession of other material facts in regard to the ownership of the land. It is not necessary, therefore, to determine what Vernon's rights would be had he acted solely on the possession of the title papers by Riale, and what the banker told him. The other pertinent facts that Vernon had knowledge of are the following: He knew that the plaintiff was recently the owner of the land, and had asked him what his selling price was. This was in September, 1906. In October following he purchased the land from Riale. He had known that Riale was acting as plaintiff's agent in renting the land. Vernon admits that he knew that the plaintiff had some interest in the land when he bought it, although he denies that he knew that he owned it at that time. He did not inform Martin, the banker, that he knew that the plaintiff had some interest in the land. About March 15, 1905, Riale wrote Vernon that he was representing the plaintiff in regard to that land. Vernon also knew that the plaintiff was paying for breaking this land. Vernon raised a crop on this land in 1906, and in September of that year—a few weeks before he bought the land of Riale—he wrote the plaintiff as follows: "The wheat on your land is all cut, and shall thresh it as soon as I can get a machine to do it, and I would like to know if you want me to pay the taxes before I send you your share of the money."

Under these facts we think a finding that Vernon had actual knowledge that Trumbo, the plaintiff, was the owner of the land, is shown by the evidence, although he attempts to deny such knowledge. His own letters and admissions completely refute his denial. But there are other facts equally decisive against defendant's contentions. He

admits in his letters that he knew that Trumbo was interested in the land; and this fact, together with the other facts growing out of his renting this land that have been mentioned, are sufficient to have made it incumbent upon him to make inquiries as to the ownership of the land. He had no right to wholly disregard his knowledge of such facts and buy the land without inquiry.

The principle relied on by the respondent is that, "when one of two innocent parties must suffer by the act of a third, he by whose negligence it happened must be the sufferer." But that principle has no application under these facts. The defendant, having purchased with knowledge of the facts mentioned, without inquiry, cannot be deemed an innocent purchaser. The fact that plaintiff left the blank assignment in Riale's hands did not and could not have misled defendant if he had made the investigation suggested by these known facts and easily within his power to investigate. The mere possession of the papers without the name of any assignee in them did not show that Riale had any title to the land. We think the following a correct statement of the law applicable to the facts of this case, as stated in Doyle v. Teas, 5 Ill. 202: "Where the court is satisfied that the subsequent purchaser acted in bad faith, and that he either had actual notice or might have had that notice had he not wilfully or negligently shut his eyes against those lights, which, with proper observation, would have led him to acknowledge, he must suffer the consequences of his ignorance and be held to have had notice, so as to taint this purchase with fraud in law. It is sufficient if the channels which would have led him to the truth were open before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution if he was liable to suffer the consequences of his ignorance. The law will not allow him to shut his eyes when his ignorance is to benefit himself, at the expense of another, when he would have had them open and inquiring had the consequences of his ignorance been detrimental to himself, and advantageous to the other." The defendant does not claim that the papers misled him. His claim is that he relied on Riale's statement as to ownership, and the opinion of the banker that the title was all right. The record shows in the cross-examination of the plaintiff that Vernon paid taxes on this land, and paid part of the unpaid purchase price due the state, but it cannot be determined from the evidence

with definiteness the amount of such payments. The plaintiff offered to pay the state, but the money was returned for the reason that Vernon had paid what was due. We deem it to be equitable and just that Vernon should be reimbursed by the plaintiff so far as the money actually paid by him for taxes, and such sum as he paid on the deferred purchase price. The district court will determine on a hearing for that purpose the sums so paid by the defendant, and, on payment of such sum with 7 per cent interest, the district court will order judgment for the plaintiff, quieting the title in him.

The judgment is reversed, and the cause is remanded for such further proceedings, plaintiff to recover his costs and disbursements.

BURKE, J., being disqualified, took no part in the above case.

MILLER et al. v. NORTON et al.

(132 N. W. 1080.)

Removal of county seat — finality of decision of county commissioners.

1. *Held*, following State ex rel. Little v. Langlie, 5 N. D. 595, 32 L.R.A. 723, 67 N. W. 958, involving county-seat removal from Caledonia to Hillsboro, Traill county, that the decision of the board of county commissioners on the sufficiency of the petition for removal is final, in the absence of a showing of fraud sufficient to vitiate such petition, and that in this case the board did not lose jurisdiction to make a valid order submitting the county-seat removal question to an election.

Removal of county seat — immediate action on petition for removal.

2. No sufficient reason for deferring action by said board in ordering an election on said petition was made to appear, and its immediate action on such petition was not an abuse of discretion under the facts in this case.

Removal of county seat — construction of statute providing for.

3. Our county-seat removal statute construed, and *held:*

(a) That it is a departure from relocation statutes in force in this state prior to 1895.

(b) That the ballot requirements are mandatory, and the entire enactment, when construed therewith, necessitates its construction as a removal statute.

(c) That the procedure on county-seat removal contemplates a petition

asking removal from the established to a proposed county seat, designated in such petition, to be followed by an election in which the question submitted is in accord with the petition on a ballot containing only the old and proposed new locations as the places from which the voter must select.

(d) That such a construction does not render our statute unconstitutional.

Removal as distinguished from relocation of county seat.

4. Removal as distinguished from relocation statutes as to county-seat legislation, and the various county-seat statutes in force in Dakota territory and since statehood, are discussed so far as they relate to uor present statute on this subject.

Removal of county seat—petition for prohibition against.

5. Petition for writ of prohibition denied, and application dismissed, and the county-seat removal election accordingly declared valid.

Opinion filed July 20, 1911. On rehearing October 31, 1911.

Appeal from District Court, Pembina county; *Pollock,* Special Judge.

Petition by M. H. Miller and others. From an order denying the petition and dismissing the application, the petitioners appeal.

Affirmed.

H. B. Spiller, E. W. Conmy, and *Ball, Watson, Young, & Lawrence,* for appellants.

George A. Bangs, Geo. R. Robbins, D. J. Laxdal, and *Wm. McMurchie,* for respondents.

Goss, J. This is an appeal from an order of the district court of Pembina county, denying the petition of the appellants, residents, electors, and taxpayers of the city of Pembina, for a writ of prohibition, and dismissing such application.

At the general election of 1910, there was submitted to the voters of Pembina county the question of county-seat removal ordered July 13, 1910, on a petition for removal from Pembina city to the city of Cavalier. Further facts are recited in the opinion in connection with the points raised. To avoid repetition, they are omitted in this introductory statement.

Appellants urge that the county commissioners acted without and in excess of their jurisdiction when they ordered an election without according to the petitioners and other electors of Pembina county, an

opportunity to examine the petition, time to investigate its sufficiency, and, if they should desire the same, further opportunity for hearing as to the validity of the petition for removal. Counsel for appellant appeared before the board of county commissioners for Pembina county in behalf of Pembina city, and hearing was granted him, whereupon an adjournment was taken until the middle of the afternoon, at which time said counsel again appeared, and asked permission to file written objections against final action being taken upon the petition without a reasonable time allowed appellants herein to investigate its sufficiency. The board thereupon proceeded to examine into the sufficiency and legality of the petition, and continued so doing for the remainder of the afternoon and during an evening session. Just prior to adjourning for the evening, said counsel appeared before the board, and filed his written objections to action being taken upon the petition. These objections consisted in a written statement, unverified, made by counsel on behalf of petitioners and appellants in this case, reciting on information and belief that the petition presented was invalid and insufficient under law and fact to serve as a basis for ordering an election, "in that the petition did not conform to the statute; that large numbers of names on said petition were not signed personally by the alleged electors; that a large number were not verified by the electors; that a large number of persons signing said petition were not qualified electors;" reciting, further, that all the objections, except as to the conclusion of law from the form of the petition, were made entirely upon information and belief. The written objections recited that the persons objecting had no knowledge of the contents of the petition prior to its filing at 2 o'clock that day with the county auditor, and "have no knowledge of its contents from an actual examination;" and that said petition was a bulky document purporting to contain 1,800 or 1,900 names, to "investigate regarding which would necessarily require two or three weeks' time in order that the parties objecting be able to inform themselves upon the questions essential to the validity of the petition," concluding with the request that the board defer action to a time fixed; that a hearing be then had on the sufficiency and legality of the petition, at which hearing the persons objecting might bring before the board competent evidence touching the questions affecting the validity of the petition.

The board refused to defer proceedings as requested on the petition, but, instead, having spent the afternoon and evening in such an examination, immediately passed its resolution, reciting the filing of the petition and its contents, and its verification by each of the signers thereof, stating each signer to be a resident of the county of Pembina, and qualified elector therein, and that each signer personally signed his name to the petition, knowing the contents and purposes thereof, finding the same to be facts, and that the petition was so signed and properly verified by qualified electors of said county, equal in number to at least two thirds of all the votes cast in said county at the election held November 3, 1908, being the last preceding general election. The board, by appropriate and specific resolution, thereupon ordered that the prayer of the petition be fully and completely granted, and that the question of the removal of the county seat of the county of Pembina from the city of Pembina, the place where it is now located by law, to the city of Cavalier in said county, be submitted to the electors of said county of Pembina at the election to be held November 8, 1910, at the same time and place as, and in connection with, and as a part of, the general election to be held on said day in said county.

The defendants and respondents herein are the county commissioners and county auditor of Pembina county; and on return to the writ in the district court they made answer and return, reciting the foregoing matters and the findings and order of the board of county commissioners of said county. They made further return that the county commissioners who passed upon the sufficiency of said petition had all of them been residents for more than ten years, and two of them for twenty and twenty-five years, respectively, of said county; that they were intimately and thoroughly acquainted with the electors of the county, and their joint knowledge thereof was such that some member of the board was able to vouch from personal knowledge as to the signature of many of the petitioners, and the qualifications of many, if not all, the petitioners; that a public examination was had, proceeding, without interruption, from 3:30 o'clock in the afternoon of July 13, 1910, to between the hours of 10 and 11 of said evening, except a short intermission had; that in such examination the names of the signers were read aloud by some member of the board, and the genuineness of each signature determined, and the qualifications of the elector so signing

passed upon by the board; that there were present many persons, among them some of the notaries public who had taken the affidavits of the signers verifying the petition; and such notaries, together with other persons present, when requested, furnished information touching the identification of the signatures and bearing on the qualifications of the petitioners; that full hearing was had and opportunity afforded to anyone who might so desire, to inspect the petition, and object to any name or signature, and to give his reason therefor; that the board acted "in everything done in the utmost good faith and with the honest intent and purpose of complying and fulfiling the intent of the law;" that the board thereupon became satisfied of the legality of the petition, the genuineness of the signatures, and the qualification of the signers, and without any desire to act arbitrarily or unreasonably in said matter, but with the intent to avoid the provoking of any feeling or controversy so far as possible to avoid, and, believing that the matter should be promptly disposed of and that nothing could be gained by delay, made its findings as to the legality of the petition, the genuineness of the signatures, and the qualification of such signers, and its order that the matter be submitted to the electors of the county for determination at the general election in November following.

The return further shows that at the election had November 8, 1910, 2,269 votes were cast in favor of the removal of the county seat to the city of Cavalier, and 815 votes cast against the same, such votes being cast by duly qualified electors of said county at said election, a total of 3,084 votes cast, there being 213 votes cast for such removal, more than two thirds of the number of the voters voting at such election, all as shown by the election returns duly certified by the official board of canvassers of said county. Respondents admit that, unless they are restrained, county-seat removal will be had pursuant to said election. The foregoing recites the substance of the return to the writ issued in the lower court in this action.

Counsel for appellant cites Crews v. Coffman, 36 Neb. 824, 55 N. W. 265, as authority for his contention that the board of county commissioners on July 13, 1910, lost jurisdiction to make a valid order of submission to election, because of their alleged arbitrary and unreasonable action in refusing to fix a date for hearing and granting time for investigation before so acting on the petition. The case relied upon fol-

lows a line of decisions from Nebraska, all of which we have carefully examined. Conceding, without deciding, that the action of the board of county commissioners in acting on such a petition involved judicial determination, rather than the performance of ministerial duties, while recognizing that reputable courts are divided upon this proposition (see Territory ex rel. Ridings v. Neville, 10 Okla. 79, 60 Pac. 790, and Baker v. Louisa County, 40 Iowa, 226, as cases illustrating such conflict), we cannot agree with counsel on the facts in this case coming within the rule announced by the Nebraska authorities. Ayres v. Moan, 34 Neb. 210, 15 L.R.A. 501, 51 N. W. 830, and Crews v. Coffman, 36 Neb. 824, 55 N. W. 265, leading cases, are decided on entirely different facts from those before us. In the former (as will be found on page 215 of 34 Nebraska), charges of fraud and bribery were made and charged in a positive affidavit filed before the commissioners, specifically designating the number and names of the persons whose names were illegally on the petition, and charging many other irregularities and illegalities in positive terms as specific and certain as an ordinary pleading in court, and which controverted facts stated in the petition, by actual facts alleged under oath and established that, if the facts recited in the affidavit be true, the requisite proportion of voters required to present a valid petition was not signed thereto. In Crews v. Coffman the affidavit filed before the board requesting a hearing shows a denial of the privilege of inspection and examination of petition; also, that "it is apparent that a large list of the names signed to said petition are fraudulent and forged." The court opinion shows "there is no contradiction of this in the record, so that it will be regarded as true." The objectors in that case filed with the county board an answer in which they alleged that "said pretended petition is not signed by the requisite number of qualified resident voters of Hitchcock county, Nebraska, to authorize the calling of said election. 3. That a large number, to wit, 111 of said pretended petitioners, are minors, persons under the age of twenty-one years. 4. Because a large number, to wit, 385 of said pretended petitioners, are and were nonresidents of the county of Hitchcock, state of Nebraska. 5. Because a large number of said pretended petitioners, to wit, 600, were procured to sign said pretended petition by being misled, and on account of facts having been misrepresented to them, and by unlawful and undue influences. 6. Because

351 of said petitioners were induced to sign said pretended petition by bribery in this, to wit, that the residents and property holders of Trenton represented that they would build a courthouse free of expense to the petitioners of the county. 7. Because a large number, to wit, 350, of said petitioners desire to withdraw their names from said pretended petition. These remonstrators allege that a large number of said pretended petitioners, to wit, 356, are fictitious names, and that no such persons reside, live, or exist in Hitchcock county. 11. These remonstrators further allege that a large number of said pretended petitioners, to wit, 178, are foreigners who have never become citizens of the United States, nor have they declared their intention to become citizens as by law required. 12. That a large number, to wit, 130, of said names that appear upon said petition were not signed by the persons themselves, nor were they signed to said pretended petition with their knowledge or consent, and were forged thereto."

The above extracts from the opinions in these two cases are sufficient to illustrate that the law cited under such a state of facts has no application in the instant case. The extracts quoted show conditions which, if established, must render the petition void. This is charged on actual knowledge specifically and definitely, and a hearing is asked thereon. Compare with the case on trial. Counsel's principal reasons for deferring action, when summed up, amount to a statement that he desires two or three weeks' time in which to investigate into the genuineness of the signatures and the legality of the petition. Not a single fact is alleged from which it can be assumed that the petition is invalid. On the contrary, the written objections carefully avoid stating any facts except on information and belief. It is true it contains a blanket charge that "large numbers of names on the petition were not signed personally by the alleged petitioners, that a large number were not verified, and that a large number of persons signing said petition were not qualified electors," but carefully avers, also, that "said objections are made entirely upon information and belief." No facts are alleged as a foundation for such conclusions on information and belief. In its last analysis the written objection is a nullity. It brought no fact to the attention of the county commissioners. It cast upon them no duty other than existed before its filing. They were in session to determine, in the performance of their duty, the genuineness of the signatures, the sufficiency of verification, and the number of

petitioners. From various sources, apparently acting in good faith, with no undue haste under the circumstances, they determined for themselves such matters of fact. They were not obliged, in the absence of some good reason therefor, to adjourn at the request of an elector or his attorney that such party might satisfy himself privately and in his own way on the same matters that the county commissioners as a board in the performance of their duty were then determining. We know of no rule of law requiring the delay of public business at the behest of a private individual concerning matters in which he may have at most only the same interest as the general public. Under a decision of our own supreme court in State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958, under § 565 of the Compiled Laws of 1887, the attack on the petition for removal comes too late when made after the necessary two thirds of the electors of the county have at the election determined in favor of county seat removal, thereby approving of the petition and verifying the necessity for election, of which the petition when sufficient is the first official proof when presented to the board authorized to act thereon. The opinion contains the following: "We do not think that, after an election has been held and a sufficient vote has been cast in favor of a place to work a change of the county seat to such place, the question whether the petition had upon it the requisite number of names is open to judicial investigation. While a sufficient petition is undoubtedly necessary, yet the question lies deeper than that. What body is to settle this matter finally? . . . The board is to receive the petition, is to pass upon its sufficiency, and is to order the election if satisfied that it is sufficient. Here is a clear submission of this question of fact to the board for adjudication. The statute contemplates that the board is to settle it one way or the other. No other body is given jurisdiction over the matter. . . . We think such a question may be safely left to the final decision of the county commissioners of a county." See also Hipp v. Charlevoix County, 62 Mich. 456, 29 N. W. 77, and Territory ex rel. Ridings v. Neville, 10 Okla. 79, 60 Pac. 790, to the same effect; and compare with Shaw v. Circuit Ct. — S. D. —, 129 N. W. 907. This was the unanimous opinion of our first court in an action testing the legality of the change of the county seat of Traill county from Caledonia to Hillsboro. We might observe that the Compiled Laws omitted from the petition as essentials now required,

the verification thereof by each of the signers and his statement therein that he "signed his name thereto knowing the contents and purpose of the petition, and that he is a resident of the county and a qualified elector therein." No such requirement was necessary under the law prior to the 1895 Codes, so the Traill County Case was decided under a different petition than now required. But if the action of the board of county commissioners, unchallenged before election was final thereafter, under the loose requirement of the Compiled Laws, in such particulars, it is certainly authority for so holding under a statute prescribing with greater particularity the special proof of way of affidavit of the elector himself, tending to make the petition more certain and more free from fraud, and giving the board of county commissioners more aid and consequently that much less discretion in determining these matters upon which the validity of the petition depends. In this case the sufficiency of the petition stands unchallenged and unquestioned. Appellants, in the proceedings had before the county commissioners, made no charge sufficient to question its validity. From July 13 to November 8, prior to election, the findings of the board were not attacked. Nor does appellant in this action question the sufficiency of the petition, or the verity of the findings of the board, as to the proportion of electors of that county who signed and verified the same. It is possible that instances might arise wherein this court should hestitate to follow the rule announced in State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958. But in the absence of any charge of invalidity of the petition, under the facts in this case, we hold the decision of the board on these matters to be final.

The proceedings had for removal of the county seat from Pembina to Cavalier were based upon the provisions of the Revised Codes of 1905, included within §§ 2358 and 2363, inclusive. As the whole statute as one act is under consideration, we will recite the same, as follows:

"Sec. 2358. County seat, removal of.—Whenever the inhabitants of any county in this state desire to remove the county seat of the county from the place where it is fixed by law or otherwise to another place, they may present a petition to the board of county commissioners of their county, praying such removal and that an election be held to determine whether or not such removal shall be made. Such petition must be verified by the affidavit of each of the signers thereof, stating that he

is a resident of the county, a qualified elector therein, and that he personally signed his name thereto knowing the contents and purposes of the petition. . . .

"Sec. 2359. Commissioners to submit question to vote; when.—If the petition is signed by qualified electors of the county equal in number to at least three fifths of all the votes cast in the county at the last preceding general election, the board must at the next general election submit the question of removal to the electors of the county.

"Sec. 2360. Notice of election.—Notice of such election clearly stating its object must be given, and the election must be held and conducted, and the returns made, in all respects in the manner prescribed by law in regard to the submitting of questions to the electors of a locality under the general election law.

"Sec. 2361. Ballot, how marked; notice of result.—In voting of the question, each elector must vote for the place in the county which he prefers, by placing opposite the name of the place the mark X. When the returns have been received and compared and the result ascertained by the board, if two thirds or more of all the legal votes cast by those voting on the proposition are in favor of any particular place, the board must give notice of the result by posting notices thereof in all the election precincts in the county, and by publishing a like notice in a newspaper published in the county at least once a week for four weeks.

"Sec. 2362. County seat; when deemed changed.—In the notice provided for in the last section, the place selected to be the county seat of the county must be so declared from a day specified in the notice, not more than ninety days after the election. After the day thus named in the notice the place chosen shall be the county seat of the county.

"Sec. 2363. Statement of result of election; where filed.—Whenever any election has been held as provided in this article, the statement made by the board of county commissioners showing the result thereof must be deposited in the office of the county auditor, and whenever the board gives the notice prescribed in the last section it must transmit a certified copy thereof to the secretary of state.

"Sec. 2364. Election held only once every four years.—When an election has been held and at least two thirds of the votes cast at such election are not cast for some other place than that fixed by law as the

former county seat, no second election for the removal thereof must be held within four years thereafter." (Amended by Sess. Laws, 1907, chap. 61, to ten years.)

Following these provisions are those relative to a second removal after one removal has been had, in which the statutory provisions as to voting and marking of ballot with notice and record of result are similar to those required in original removals. We are concerned with the application and interpretation of the statute under its provisions applying to first removals.

The petition prayed for removal of county seat from Pembina, where it was fixed by law, to another place designated, the city of Cavalier in said county. The petition otherwise contained the requisite averments, and was subscribed and verified by the affidavit of electors equal in number to more than three fifths of the votes cast in the county at the last preceding election prior to the date of said petition. Thereupon the county commissioners ordered the question submitted. The ballot used in the election was in the following form:

County-Seat Removal.

Shall the place of the county seat of Pembina county be removed from the city of Pembina, where it is now located by law, to the city of Cavalier?

The voter will indicate his choice by placing an (X) after the name of the place which he prefers below;

For the City of Cavalier for County Seat ☐
For the City of Pembina for County Seat ☐

by making a cross (X) opposite the city you wish to vote for.

The foregoing was the form of the ballot as the same was printed upon a lengthy sheet also containing thereon two proposed constitutional amendments submitted to the vote of the people; and also the question of county aid of a county fair, likewise submitted to a vote, the county-seat removal matter being printed between the constitutional amendments and the tax proposition with the direction as to the cross (X) at the end of the ballot. No question is raised as to any prejudice resulting on the county-seat removal from the manner of the placing of the

same on the ballot, and considering the number of votes cast, 2,249 for removal and 815 against removal, a total of 3,064, on the question of removal of county seat, it is clear that few, if any, voters in the county failed to vote upon the question, notwithstanding the manner of its submission.

Counsel for the appellant Pembina city bases his case on the premise that the petition is restrictive and void, in that it confines the petitioner to the place named therein, contending that the petition should contain but the words of the statute, petitioning the removal from Pembina city, "where now fixed, to another place," the place being unnamed: That likewise the ballot submitting the question of removal to the electors should not have restricted them to a choice between cities of Pembina and Cavalier, thereby preventing the voters from expressing their free choice in the matter of relocation. But that the voters should be free to both designate and vote for the place they prefer for a county seat. Our statute is apparently ambiguous, in that it may be construed as: (1) Authorizing a petition for removal of county seat with place unnamed, followed by an election with an open vote in which any place or location in the county may by the voter be nominated and voted for, with the requirement that the particular place chosen shall have two thirds of all votes cast at the election, otherwise the county seat location to remain unchanged; or (2) it may be interpreted to require that the petition for removal shall be to another place designated therein, to be followed by an election in which the question submitted thereby shall be that of whether a change shall be had from the old location to the one petitioned for, with no other proposed county-seat candidates in the field and no other question presented by the ballot, and followed by removal to the place petitioned for if two thirds of all votes cast in the election be in favor of such removal. In the interpretation of an ambiguous statute to aid in its construction, resort may be had to the history of similar previous legislation, with which the legislature is presumed to have had knowledge. Likewise consideration may be given the source from whence the statute was obtained, if traceable, including departures in the borrowed enactment from the original. The legislative intent is also important as apparent from the entire enactment considered with the subject of the legislator

and the object to be accomplished. In addition to the general intent and object to be attained, should be kept in mind the mandatory portions that must have been intended as modifying other parts thereof. All these may be found to be aids in determining the construction to be placed on this ambiguous statute, the construction of which involves so important a matter as that of determining the location of a county seat in which the inhabitants of an entire county are deeply concerned. A brief review of general county-seat legislation of this state and Dakota territory is in order.

The right of Dakota territorial assembly to legislate on county-seat matters was granted by U. S. Rev. Stat. § 1851, in the organic law common to all territories, providing in general terms: "The legislative power of every territory shall extend to all subjects of legislation not inconsistent with the Constitution and laws of the United States." This remained unchanged by the enabling act, and the enactments of the territorial assemblies on county-seat matters continued in force as they existed at statehood.

The first statute on the subject was enacted by the first legislative assembly of the territory of Dakota, in 1862, as chapter 20, Laws Dak. 1862, reading:

"Sec. 1. That when any number of the legal voters in any county in this territory, equal to one half the highest number of votes cast the last preceding general election in such county, shall, at least thirty days previous to the next ensuing election, petition the county commissioners of such county to be allowed to vote on the removal or location of the county seat of such county *to any point within such county,* the said commissioners shall cause to be inserted in the notices for the next general election an article requiring the voters of such county to vote on the removal of the county seat to, or the location thereof, at the point named in the petition. That only *one point of removal or location shall be voted for* in each year and that point shall be the one presenting the largest number of petitions; provided that the same point was not voted for at the last preceding election, and that it shall be lawful for such petitioners to deposit any sum of money or bonds with the county treasurer which they may propose to donate for the erection of public buildings at the point petitioned for: Provided that in any of the counties of the territory in which the county seat has been or shall hereafter be

located by a vote of the electors of said county, the place at which the county seat is so located shall be and remain the county seat at least three years after the time of taking such vote; and no new vote shall be had on the relocation of the county seat until the expiration of said three years.

"Sec. 2. The voters of any county so qualified shall vote at the next general election on the removal or location of their county seat, by ballot written or printed, as follows: For county seat at ..... (filling the blank with the place named in the petition) or, against county seat at ..... (filling the blank as above), and if a majority of the votes cast are for *the point named in the petition* then that place shall be the county seat, otherwise the county seat shall remain as before."

From the foregoing it is noticeable that the petition for removal contained the name of the proposed county seat, and that the ballot was restrictive in requiring a choice between the old and the proposed new county seat, and not permitting an open vote on the question. The statute was a removal as distinguished from a relocation statute, the difference between which will be more definitely pointed out hereinafter. This statute remained in effect five years until the act of 1867 (chapter 13, Laws Dak. 1866–67), consisting in part of the following provisions:

"Sec. 1. That when any number of the legal voters in any county of this territory, equal to one half the legal number of voters as shown by the census of the last preceding assessment in such county, shall, at least thirty days previous to the next ensuing election, petition the county commissioners of such county to be allowed to vote on the removal or location of the county seat of such county, the said county commissioners shall cause to be inserted in the notices for the next annual election an article requiring the voters of such county to vote on the removal or location of the county seat of such county at the next ensuing election.

"Sec. 2. The voters of any county so qualified shall vote at the next election on the location or removal of their county seat, by ballot written or printed, as follows: For county seat at ..... (filling the blank with the name of the place voted for), and if the vote be for the removal of the county seat which has been previously located by direct act of the legislature, or by vote of the people, it shall require a majority vote to remove any county seat thus located. But if the vote be for the location of a county seat in any new county which has been temporarily designated by special act, a simple plurality vote shall be deemed suffi-

cient for the removal or location of the county seat of such new county at the first election therein; but thereafter the county seat of such county shall not be removed except by a majority vote of the people, equal to one sixth of the total vote cast at the last annual election in such county."

This statute was clearly what is known as a relocation as distinguished from a removal statute; that an open vote was permitted; the electors were not restricted in their choice to any particular place, but, instead, could write the name of their choice for county seat on the ballot; and that a majority or "simple plurality vote," as termed, governed, whether its effect be to remove the county seat from the place previously chosen or to select a county seat in lieu of a temporary choice therefor previously named. In accordance as we may presume conditions required in a new and sparsely settled country just beginning to be organized into counties, the territorial assembly changed from a removal to a relocation statute. The next legislation on the subject is found in chapter 4 of the Laws of Dakota of 1868–69, particularly at §§ 46, 47, and 48 thereof, as follows: "Sec. 46. Whenever any county shall organize in this territory, the qualified voters thereof are hereby empowered to select the place of their county seat by a vote at the first election held in the county for the choice of their county officers. For this purpose each voter may *designate on his ballot the place of his choice* for the county seat, and when the votes are canvassed the place having the majority of all the votes polled shall be the county seat, and public notice of such location shall be given within thirty days by the tribunal transacting county business, by posting up notices in three several places in each precinct in the county." This provision applied only to counties organizing to enable the selection of a county seat by ballot simultaneous with the first election of county officers. The location feature as applied to county-seat matters remains here as in the next provisions, *viz*: "Sec. 47. Whenever the inhabitants of *any county* are desirous of changing the place of their county seat, and upon the petitions being presented to the tribunal transacting county business, signed by two thirds of the qualified voters of the county, it shall be the duty of said tribunal, in the notices for the next general election, to notify said voters to designate upon their ballots at said election the place of their choice, and if upon canvassing the votes so cast it shall appear that any

place has two thirds of the votes polled, such place shall be the county seat, and notice of such change shall be given as hereinbefore provided in the case of the location of county seats of new counties." Under this section, the elector voted for the place of his choice, but the requirement to select was raised from a majority to two thirds of the votes polled. No place was required to be designated in the petition for relocation. Continuing, § 48 of the general act reads: "If no one place has a majority of all the votes polled, as provided for in § 47, it shall be the duty of the tribunal transacting county business, within one month after said election, to order a special election and give ten days' notice thereof by posting up three notices in each precinct in the county, at which election votes shall be taken by the ballot between the three highest places voted for at the first election. And if no choice is made at such election, notice of another election shall be given, as above provided for, to decide between the two highest places voted for at the last election, and the place having the highest number of votes shall be the county seat." The statute remains primarily a *relocation* statute, in which the voter chooses between places, an open field for choice in which he may vote for any place in the county at the first election, and thereafter as a removal statute vote for a choice between the "highest places" in subsequent elections until the site is fixed by, perhaps, a majority between two places.

The next important legislation touching location of county seats is in chapter 27 of the Laws of Dakota Territory of 1874–75, re-enacting §§ 46, 47, and 48 of the Laws of 1868–69 as §§ 41, 42, and 43 of the Laws of 1874–75. The assembly had in 1871 by chapter 12 of the Laws of 1870–71 granted the county commissioners the power to temporarily locate county seats in newly organized counties. In the codification of territorial laws, compiled by authority of the territorial assembly, we find on page 32 of the Laws of Dakota of 1877, under the head of "Location of County Seats," §§ 41 and 42 of the Laws of 1874–75 re-enacted, § 43 thereof being omitted and being expressly repealed by the general repealing act in the Revised Codes of Dakota of 1877, by the repeal of the chapter in which it was contained. And by this repeal a provision for second and third elections, after a first election on the matter of determining location of county seats, passed from the statutes of our state. This remained until amended by chapter 173 of Laws of Dakota Territory of 1887, providing for *relocation* of county seats

where previously located by a majority of less than all the electors voting thereon, the same being accomplished by a petition presented to the judge of the district court or to the chief justice of the territory, signed by at least one third of the electors of the county as shown by the vote cast at the last general election, which petition prayed for an election, and upon which the judge to whom the same was presented acted by ordering a special election to determine "the question of the *relocation* of the county seat of such counties." In the ballot the voter wrote the name of the city or town for which he desired to cast his vote for county seat, and the place thus receiving more than a majority of all votes cast at the election became the county seat; and, in case of no one place receiving a majority of all votes cast at the election, "the question of a relocation of the county seat" was again to be submitted at the annual election in 1887, as between the two places having received the highest number of votes at the preceding special election, and the one receiving the highest number of votes at such general election became thereby the county seat.

Next we find in the Compiled Laws of 1887, § 565, thereof: "Whenever the inhabitants of any county are desirous of changing the place of their county seat, and upon petitions being presented to the county commissioners, signed by two thirds of the qualified voters of the county, it shall be the duty of the said board, in the notices for the next general election, to notify said voters to *designate upon their ballots,* at said election, *the place of their choice;* and if, upon canvassing the votes so given, it shall appear that any one place has two thirds of the votes polled, such place shall be the county seat; and notice of such change shall be given as hereinbefore provided in the case of the location of county seats of new counties." It will be noticed that § 565, Comp. Laws, is § 47 of chapter 4 of the Laws of 1868–69,—the second relocation statute passed in Dakota territory. Thus a relocation law remained in force from 1869 to 1895, when an entirely new statute, the present statute, was enacted with the adoption of the 1895 Code. Just prior to the enactment of our Codes in 1895, Montana had passed a county-seat removal statute entirely different from the existing county-seat removal law in force in this state, and we find the Montana statutes, with but one line omitted, taken bodily and inserted into the Codes of 1895, in lieu of § 565, Comp. Laws 1887. The complete change in the statute generally from

that existing prior to 1895 is strongly indicative of legislative intent to depart from existing law and procedure. This is strengthened when we find the entire new law was borrowed in all its unusual and peculiar features from a sister state, and the former law supplanted thereby expressly repealed. Our statute is identical with that of Montana, even to the wording, arrangement, procedure, and peculiarity in declaring the result obtained by the election, as will be noted by the comparison of §§ 1880 to 1887, N. D. Codes 1895, with §§ 4157 to 4165, Montana Political Code 1895. We do not hesitate to declare the Montana statute as to county-seat removal to be the origin of our present law on that subject. In interpreting re-enacted statutes, the court will follow the construction which they received when previously in force. To be so construed, it is not necessary that the re-enacted statutes should be in the identical words as it formerly existed, 2 Lewis Sutherland, Stat. Constr. § 403. The same rule applies when a statutory provision is taken from a constitutional provision which has been construed. State, Anderson, Prosecutor, v. Camden, 58 N. J. L. 515, 33 Atl. 846. Likewise a statute adopted from another state, when construed by the courts of that state, is deemed adopted with such statutory construction interpreting it. 2 Lewis's Sutherland, Stat. Const. § 404; Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 95; in which case cited the Wisconsin construction of our registration laws adopted from that state were recently followed by this court in a county division election in Ward county. If such force is given a statute adopted as to accept with it the decisions of the foreign state there interpreting it, most assuredly mere minor omissions or changes from the adoption of it literally do not change the intent or meaning or make it other than the statute patterned after (except when an intent that it shall be construed differently plainly appears), especially when the statute as adopted is in entire harmony with the other law of our state on the subject. Among the new features so borrowed are those requiring "a petition," instead of petitions; the submission of the question to the people by an election held and conducted "in all respects in the manner prescribed by law in regard to the submitting of questions to the electors of a locality under *the general election law*;" the requirement that the elector in voting on the question "*must* vote for the place in the county which he prefers *by placing opposite the name of the place the mark* (X);" also providing for the same

declaration of choice for county seat and *notice* thereof as provided in the Montana statutes; also the peculiar phraseology of § 2364, providing that elections for removal cannot be had more than once in four years (since changed by 1907 statutes to ten years). Identical is it in arrangement with the Montana statute. All these provisions—§§ 2358 to and including § 2364, Revised Codes 1905—were taken literally, excepting two alterations. These changes consisted in the use in § 2361 of the words "or more" and " two thirds," instead of majority, so as to read: "If *two thirds* or *more* of all the legal votes cast by those voting on the proposition are in favor of any particular place, the board must give notice of the result" in the manner prescribed. Singularly the other change from the Montana statutes is in the omission of the words *"place named in the petition"* from § 1880, Revised Codes of 1895 (§ 2358, Revised Codes 1905). The Montana statute reads: "Whenever the inhabitants of any county of this state desire to remove the county seat of the county from the place where it is fixed by law or otherwise, to another place, they may present a petition to the board of county commissioners of their county praying such removal, *such place to be named in the petition,* and that an election be held to determine whether or not such removal must be made." The balance of the section and procedure, except as mentioned, was incorporated from the Montana statute into ours unchanged, including the Montana provision for voting by *"placing opposite the name of the place the mark* (X)." Was it intended, by the omission of the words "such place to be named in the petition," to omit the Montana statutory requirement in such respect? To answer this question, let us consider the vital part of the statute regulative of the ballot. Section 2361, Code 1905 (§ 1883, Code 1895), limits to the exercise of the ballot the manner in which the will of the electorate on the question of change of location of county seat is expressed. Such requirements prescribing the ballot and what shall appear thereon are, under all the authorities, held mandatory. To be a valid election, a ballot in the required form must be used and the election had with an official ballot provided. See Perry v. Hackney, 11 N. D. 155, 90 N. W. 483; also Miller v. Schallern, 8 N. D. 395, 79 N. W. 865, construing § 524, Codes of 1895, as to official ballot provisions required by §§ 489, 492, and 493, of the Codes of 1895. Section 1882, Codes 1895, provides that these general provisions here

apply in this election matter. These provisions are found at §§ 614 to 640, Codes of 1905. This ballot provision is at least mandatory to the extent that a ballot must be provided substantially meeting the statutory requirements permitting the elector to vote for a place thereon by making a cross after it. 15 Cyc. 354b; Parker v. Orr, 158 Ill. 609, 30 L.R.A. 227, 41 N. E. 1002, 15 Cyc. 345; McCreary, Elections, §§ 693 et seq.; Perry v. Hackney, 11 N. D. 155, 90 N. W. 483, and authorities there cited. And for a county-seat removal case where the requirement as to ballot was held to control over the general provisions as to the petition, see Allen v. Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867. The ballot provision, therefore, being to such extent mandatory, substantial compliance therewith must be had to have a valid election on the matter. Such ballot provisions must be construed with those as to the petition required.

Our statute provides: "The voter must mark opposite the name of the place the mark X," in expressing his preference for county seat. This provision being mandatory, the question then arises how the name of the place is authorized to be upon the ballot prior to the election? From what source does the county auditor know the names of the proposed county-seat locations to be placed upon the ballot? By what is he guided in the performance of the duty required of him by the election laws, in providing the voters of his county with an official ballot required under §§ 614 and 640 of the Codes of 1905, that shall have thereon the names of the proposed candidates for county seat, that the voter may be enabled to vote on such question by placing, as commanded by statute, the cross *opposite the name on the ballot?* There is but one possible answer, but one reasonable source from which to procure the names,—*the petition for change of location, under and because of which the election itself is held.* Bear in mind the petition brings the question before the people, and in so doing defines the question to be submitted to them, as being whether the county seat shall be changed from the place where fixed by law to another place. Unless the statute relating to the contents of the petition in the light of the required ballot be construed to the effect that the petition shall designate the place, that the ballot may be framed accordingly, the statute as to ballot must be ignored in that mandatory part thereof specifically defining the manner of exercise of franchise, the manner of expression of choice, the chief object to be

obtained by the entire statute. It is certain, then, the statute contemplates that the ballot when presented the voter shall have thereon the names of all places he is able to vote for from which he may make his selection; otherwise why designate that he shall place opposite the name of the place the mark X? Then, again, why repeal the former statute permitting him to *designate* the name of the place he desires, and, instead, prescribe a voting for such place as will require him to place a mark opposite the name of the place, without specifically empowering him to designate the place? By repealing the voter's authority for designation formerly existing by statute, his right to designate was thereby legislated against, repealed, denied. The repeal of a law granting a power is an implied prohibition of the exercise of the power, as plainly so as though in addition to the repeal useless words forbidding the exercise of the power had been enacted. In lieu of the right of the voter to designate the name of the place on the ballot he votes, the legislature substitutes an enactment providing he "must vote for the place in the county which he prefers, by placing opposite the name of the place the mark X." Clearly his power to designate the place does not exist, and his right to vote is confined to the placing of his mark opposite some name on the ballot; also, the words defining the elector's choice in voting, providing he must vote for the *place in the county which he prefers,* is limited as is the voter to the places among the names of the candidates on the official ballot, and cannot, to the contrary, bring upon the ballot names of places for accomplishing which there is not procedure outlined, besides being contrary to the plain prohibition by repeal of the statute formerly giving the power. The source of this language is from relocation statutes adopted indirectly from California. These were modified into removal statutes and so adopted. The phrase loses necessarily its importance, as it must be regarded as limited by amendment changing entirely the nature of the original statute, of which it was first a part. Likewise the statutory provisions, "if two thirds or more of all the legal votes cast by those voting on the proposition are in favor of *any particular place* the board must give notice of the result," that inferentially such place shall be the county seat, is to be construed in connection with the ballot provided for the selection of such particular place, and as in nowise affecting the proposition that the name of the place must appear upon the ballot in order that it may be voted

for. With this statutory requirement in mind as a key to the intent, remembering the whole procedure to be but one legislative act to be harmonized and made operative, to be construed as complete rather than incomplete legislation, the legislative intent as well as the object to be accomplished is plain. Such construction irresistibly leads to the conclusion that § 2358, providing for the petition, is to be construed as it existed in Montana beside which there stood the separate ballot provision—§ 4160, Montana Code 1905—with its mandatory requirement as to marking; and we conclude that the words relative to the petition praying such removal, "such place to be named in the petition," were inadvertently omitted with no intent to change the general intent and object of the act borrowed, or, if not omitted inadvertently, then under the reasonable supposition that such words omitted were useless as rendering the statute no more definite than it was without them. If we were construing the Montana law as to provisions for petition and ballot, such would be the only construction to be given. Being satisfied the statute was adopted from Montana, and should be construed as identical therewith, we have no more hesitancy in declaring the construction to be given, than the source from which our statute was obtained. It is a removal as distinguished from a relocation statute.

Counsel for appellant insists on the right to an unrestricted vote, and that the statute be construed as granting the voter the right to vote his preference as to place, and that the ballot in restricting a vote to a choice between Pembina and Cavalier as county seats was void in not permitting free choice in such respects. However, counsel admits the impossibility of determining the manner in which the ballot should be prepared that it may contain thereon the names of many or all of the various places in the county the voters may desire to select from, and still permit the elector to comply with the statute and exercise his choice by "placing opposite the name of the place the mark X." Counsel was previously before this court in this matter in State ex rel. Atty. Gen. v. Norton, 20 N. D. 180, 127 N. W. 717, asking relief by prerogative writ, there also admitting the impossibility of construction to supplement the statute, and determine how any other candidate for county seat than the one named in the petition therefor could be placed upon the ballot. The statute is entirely silent upon this very important question if the petition be construed as appellants desire. But if

considered as a removal statute, to the effect that the petition named the place proposed shall be the ground work for the ballot presenting the choice of that place or the old county seat to the voters in the election, the statute is complete as to procedure and plain as to intent. The impossibility of counsel to find legal basis for their desired ballot shows the fallacy of the argument under which it would become necessary to adopt the construction urged and attempted performance of the impossible. We are forced to adopt the contrary construction of the statute.

An election was had in 1894 under the relocation statutes, in which the county seat of Pembina county was sought to be located elsewhere than at Pembina, and the requisite two thirds necessary to the relocation failed, and Pembina city has remained the county seat. Counsel for appellants, after calling attention to this, refers to the action of Representatives Restameyer and Johnson in 1907, representing the legislative district in which Cavalier city is situated, in introducing a bill to amend the sections of the statute now under construction, to require the name of the place to be inserted upon the ballot to be that named in the petition for removal of county seat. Counsel urges that the action of the legislative assembly in failing to pass the proposed amendment in 1907 is in line with appellants' construction of the statute, and contrary to the one adopted in this opinion. We fail to see any force to counsel's argument, for the reason that the legislature may have adopted our construction of the statute, and so declined to amend, considering it unnecessary to perform an idle act in further explaining a matter already declared in plain English. Likewise is the discussion in the constitutional convention found on pages 128 to 132 of the Debates of the Constitutional Convention, without significance on this matter, except their action in leaving the matter of change of county seats to legislation, instead of fixing it by constitutional enactment. Undoubtedly the sense of that convention was in accord with their action. They may have, and probably did have, in mind the prior legislation on county-seat matters of the Dakota territorial assembly. If so, they must have known of its earlier adoption of the removal statute and its change thereafter to the relocation system, and declined to bind the state in the future in such important matters by constitutional enactment, leaving this question to future legislation. The wisdom thereof is shown by the fact that subsequent legislatures have deemed it necessary to amend and entirely

change the then existing procedure, and return to the old removal system as manifestly done in the adoption of the Codes of 1895.

Appellant in his brief urges that to so construe the law would permit petitions for the removal to be used by the established county seat to prevent any county-seat removal whatever by the filing at successive elections of a petition for removal to an undesirable location, thereby putting in the field at each election permitted a weak candidate as a contender against the established county seat; and, inasmuch as a vote on removal cannot be had more often than once in ten years, any removal whatever could be prevented. The fallacy in this argument lies in appellant having overlooked the statutory requirements as to the petition. The statute requires the petition to be signed by qualified electors equal in number to at least three fifths of all the votes cast in the county at the last preceding general election, and that the affidavit of each of the signers thereof shall be attached to the petition, and in such affidavit each petitioner must swear he is a resident of the county, a qualified elector, that he personally signed his name thereto *knowing the contents and purposes of the petition.* One reason for the requirement is to compel the petitioner to know what he is signing and the object to be accomplished. The question of instituting removal proceedings rests with the right of petition knowingly exercised by three fifths of the entire electorate of a county. Counsel assumes the possibility that such a petition could be obtained for an undesirable place, "a weak candidate," thereby preventing a needed removal from the established location. It would be a violent assumption for this court to assume, as has counsel, that three fifths of the voters of a county will knowingly join in petitioning an election to bring about something they do not desire, whether because induced against their will to so petition, or that they may defeat the movement at the polls, and thereby prevent removal. This argument does not appeal to us as persuasive. Conceding it to have some force, it amounts to but the practical operation of the county-seat election we are asked to say was intended, if the same be construed as a continuation of, instead of departure from, the statute regulating county-seat removals in force immediately prior to the going into effect of the 1895 Code. Under counsel's illustration, the petition would be obtained in part that the election procured thereby could be defeated by the petitioners at the election. Under the old relocation system, the open vote in prac-

tical operation accomplished the same purpose, in that a sufficient number of weak candidates for county seat could be procured to enter the race as to reduce the total vote sufficiently to prevent the real opponent of the established county seat from procuring the necessary two thirds of all the votes cast on the removal question at the polls. In practical operation to obtain the desired result, the latter was the less difficult.

In discussing the questions involved in this opinion, we have designated our present statute as a removal as distinguished from a relocation statute. We have used these terms advisedly. They are not synonymous when applied to county-seat removal statutes. The terms "removal" and "relocation," as so applied, signify statutes of radically different procedure with different characteristics. Under relocation statutes in election it is the old county seat against the field in which the voter may designate in writing on the ballot any place in the county as the place of his choice. He is not restricted in making such choice to places nominated, but may, instead, nominate and vote his choice. As in voting, so in petitioning. The people desiring relocation may petition not for any particular place, but for the relocation of the county seat. The incidental result may mean a change or removal of the county seat from the place where formerly located to the place where relocated, but the idea prevalent throughout the whole procedure from petition to ballot is not of removal from the established to a proposed county seat, but the question *where the county seat shall be located.*

On the contrary, under removal statutes the primary question is one really of removal. The petition asks it from the county seat to a proposed new county seat designated in the petition. The intent inherent in a petition for removal is of restricting the voters to a choice between two places, the old and the proposed locations, instead of the contrary idea under relocation statutes of an open field with many candidates, and a free and unrestricted choice. As in the petition under removal statutes, so in the ballot. The preference of the voter is restricted to a selection between two locations. Usually the proposed location has additional burdens to be met to be successful, compared with the requirements for relocation, such as a larger petition and greater percentage of vote usually necessary to remove than to relocate. The law governing petitions for relocation and elections thereunder is not therefore strictly applicable to petitions for election under removal statutes. We have ex-

amined most of the county-seat removal and relocation statutes. As heretofore indicated, our present statute, as we construe it, is the Montana removal statute adopted there in 1895, contained in chapter 2, pt. 4, title 1, Mont. Codes 1895, obtained by Montana probably from the early California relocation statutes, the act of 1850 (Stat. 1850, chap. 80) as amended by act of 1854 (Stat. 1854, chap. 47) of that state, declared unconstitutional in Dickey v. Hurlburt, 5 Cal. 343, because conferring upon the county judge to whom the same was to be presented for the order calling the election other than judicial powers. In this early act we find almost the phraseology of the Montana and our own statutes; it reading: "Whenever the inhabitants of any county of this state desire to remove the seat of justice of the county from the place where it is fixed by law or otherwise, they may present a petition to the county judge, praying such removal, and an election shall be held to determine to which place such removal shall be made." This was re-enacted and stands as the present statute, except the petition is presented to the board of supervisors. Section 3976, Kerr's Political Code of California, and subsequent sections. From the similarity of arrangement, phraseology, subject-matter, and peculiarities found in these statutes of California, identical nearly with our own, we assume that our law adopted from Montana was originally taken from California. It is noticeable that, while § 3976 of the California Codes and subsequent sections are relocation statutes, and much similar to Montana's and our statutes, whereby the voter must vote for the place he desires by placing a cross opposite the name on the ballot, is absent from the California statute, and in its stead is § 3980, also, however, providing and showing the source of the phraseology found in our § 2361, in part: "In voting on the question each elector must vote for the place in the county which he prefers," identical with our statute, but closing with the words, "as the seat of justice, plainly designating it on his ballot." This section (3980), enacted in 1872, evidently is the source from which the forepart of § 2361, N. D. Codes 1905 (N. D. Codes 1895, § 1883), identical with and constituting all of § 4160, Mont. Codes 1895, is taken. Again, we find § 3984, Cal. Codes, enacted in 1872, as amended in 1880, identical with § 4164 Mont. Codes 1895, and § 2364, N. D. Codes 1905 (N. D. Codes, 1895, § 1886), with the exception that the Montana statute substitutes the word "majority" for "two thirds" as

the necessary vote required to remove the county seat. Likewise § 3982 of the California Codes is identical with the California statutes passed in 1872, with § 4162 of the Montana Codes of 1895, and § 2362 of the North Dakota Codes of 1905 (§ 1884 of the Codes of North Dakota of 1895). In many other respects the statutes are nearly exact duplicates. So many earmarks of the place of origin are prevalent that we conclude the California statute has been the pattern from which the Montana statutes, copied in our Codes of 1895, were taken. The Montana legislature changed the California statute by slight alteration into a removal statute, and as such it was adopted here in 1895.

We might remark that the following states whose statutes we have examined are removal and relocation statutes, respectively:

Removal: Minnesota, South Dakota, Michigan, Indiana, West Virginia, Iowa, Wisconsin, Washington, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, North Dakota, Ohio, and South Carolina.

Relocation: Alabama, Arkansas, California, Colorado, Florida, Nebraska, and Oklahoma.

Appellants contend that a holding of the statute to be a removal statute would necessarily require it to be held unconstitutional as being special legislation relative to county seats, contrary to § 69 of our Constitution, providing: "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: (3) Locating or changing county seats." The statute is a general one, applying without reference to any particular locality and prescribing procedure only. If this statute should be held unconstitutional, all general statutes regulating the matters covered in the thirty-five different subdivisions of which locating or changing county seats is but one would likewise be determined void. The constitutional inhibition against special legislation does not prevent classification, when such classification is natural, not arbitrary, and standing upon some reason having regard to the character of the legislation of which it is a feature. Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970. All county-seat removal statutes necessarily fall under one of two general heads. We see no reason, so long as the statute has general application, for holding it unconstitutional. To so hold would be to declare there could be no removal statute, and equivalent to holding any general classification statute along removal lines invalid. Counsel has cited

no authority, and, after considerable investigation, we have been unable to find any, to support his contention. As supporting the contrary, see 11 Cyc. 369; Mode v. Beasley, 143 Ind. 306, 42 N. E. 727.

Counsel for respondents contends that appellant has invoked the wrong remedy in proceeding by writ of prohibition; that appellant should have had review by certiorari. We have held with respondents on the merits, it is unnecessary and needless to pass on this interesting question of procedure. Courts and text-book writers disagree on the propriety of the use of the writ of prohibition under the circumstances in which it is sought to be used in this action. Having disposed of the issues on the merits, there remains no necessity for determination of this question, and we do not pass upon it.

The writ heretofore issued, restraining the county commissioners, respondents, from further proceedings necessary to effect the removal of the county seat from Pembina city to Cavalier in said county of Pembina, as provided by law, is hereby vacated and dismissed; that removal may be had pursuant to said election herein declared to be valid and sufficient.

It is so ordered.

MORGAN, Ch. J., not participating. W. C. CRAWFORD, Judge of the Tenth Judicial District, sat by request.

On Rehearing.

GOSS, J. A petition for rehearing was granted in this case that everything throwing light upon the decision of an action of such importance should receive consideration. We fully realized that in a matter so vitally and directly affecting thousands of people, as a decision fixing the permanent location of a county seat, too much discussion and too thorough investigation could not be had prior to its final determination; that in this, as well as in all other matters, no decision should be rendered that will not stand the test of reason as well as the closest analysis from every legal standpoint. With this in mind, the petition for rehearing was granted, that the conclusions in the former opinion might be re-examined, and that any additional law on the subject not heretofore considered could be brought to our attention, that there might be no reasonable doubt as to the verity of the final decision and the prece-

dent thereby established. The case has been fully reargued before this court, and full reconsideration given, with all members participating, and the conclusion has been reached unanimously that the conclusions heretofore arrived at in the opinion filed are correct.

On reargument we have had our attention called to the files in the office of secretary of state, wherein is the original bill enacting in 1895 the revision of the Political Code, of which the county-seat provisions under consideration are a part. It is significant that this enrolled bill originally contained the words the omission of which has rendered this statute ambiguous. Said bill, as drafted, was an exact duplication of the Montana county-seat removal statute in such particulars, and contained the requirement that the petition for removal should pray such removal "to the place named in the petition." But through such words, "to the place named in the petition," a line has been drawn with a pen, and the Codes thereafter printed have omitted the words evidently stricken from the original bill either before or after its enrolment.

The report of the revision commission (of which one member of this court was secretary) was reported to the legislature of 1895, on January 10th of that year. The legislature, acting on such report, appointed a joint committee of five from the house and four from the senate, to which joint committee was submitted the report of said revision commission. See pages 45 and 46, House Journal 1895. Seven bills, each bill a code, were then reported and became, with more or less change, the seven codes, the compilation of which, with amendments, constitutes our present Revised Codes. The legislature of 1895 perpetuated the report of this revision commission in the printed report of the legislative joint committee thereon, found in full as the appendix to the house journal of that year. It is significant that in said committee's report on the proposed Political Code (found in said appendix there numbered as § 2010) is found under the designation of "New Legislation" the present 1905 Code provision (§ 1880, Code 1895), but containing, in addition thereto, that the petition pray removal "to the place named in the petition." With this is found all the provisions of our present law, including that as to marking of the ballot as contained in § 2361, Code 1905 (§ 1883, Codes 1895), except that such ballot provision was not when reported by said joint legislative committee coupled in the same section with the provision as to canvass of returns

as it is in the Codes of 1895 and 1905. In other words, the division and numbering of the sections, as well as the requirements, were as so reported and tendered for passage in all particulars, even to sectional division, identical with the Montana legislation on the subject, in which state, as is cited in the main opinion in this case, the ballot provision was numbered as a separate section of statute, standing alongside of the petition provision requiring the place of removal to be named therein. In the report of the joint committee referred to, and following these county-seat provisions there found, we find in parenthesis the following: "The foregoing sections of this article are intended to take the place of chapter 53, '89, and chapter 56, '90, and §§ 565 to 570 Comp. Laws." And this report as to this Code is prefaced by the following words: "Political Code. Proposed changes in the law shown by the report of the revision commission *which relate to substantive law and amount to new legislation.* Report of joint committee." This Political Code was introduced as house bill 165, and was amended during its passage by the addition, by senate amendment, of the requirement for verification of petition by each signer, found at page 409 et seq of Senate Journal, with other amendments to other legislation all concurred in by the house on conference committee report. See House Journal 812, 813. (For *data* of this legislation, consult House Journal 1895, pp. 45, 60, 80, 184, 210, 249, 491, 533, 536, 590, 591, 778, 812, 813, and Senate Journal, pp. 409–412, 484–489, and 529.) But at no place in the journals of house and senate can it be found where this proposed law (embodied in the report by bill of the revision commission, and thereafter reported by the joint committee of the two houses) was amended by the striking therefrom of the words "to the place named in the petition." The only evidence thereof must arise by presumption from the line made by pen through the words "to the place named in the petition," which words so stricken are found to have been in both the enrolled bill and the (joint committee) report. It must have been reported out of the revision committee with the words "to the place named in the petition" included in the report; otherwise the report of the joint legislative committee, based on the report of the revision committee, would not have contained said words printed therein as they appear under § 2010 of the appendix to the

House Journal. And we might remark in this connection that this legislation, enacting our Political Code, has never been engrossed.

From the foregoing undisputable facts in the history of this legislation, it is established beyond cavil that removal statutes, identical with those then under consideration by the Montana legislature, were by the revision committee reported to and acted upon by our legislature. Whether this bill was the original product of the revision committee of this state, thereafter becoming a law in Montana a week before enacted here, or was conceived in Montana and became a statute here as borrowed enactment from that state, is wholly immaterial, except as it may be of interest from an historical standpoint. The crucial decisive fact remains, that in its original form, from whatever source obtained, this was a removal statute as distinguished from a relocation one; and of equal importance is the additional fact that the legislature understood that this bill was new legislation, and understandingly enacted it as such, and have left the same so designated on their legislative journals of that year to aid in its construction. Whether the omitted words "to the place named in the petition" were stricken unauthorizedly from the bill as it is officially reported to have existed when in progress through the legislature, or whether amended without note thereof, it is not necessary to determine. But the important, uncontrovertible fact exists that it was new legislation, and not amendment of existing law. It was a change from old to new, and not a continuation of the old with amendment. When so construed as originally introduced, there is no chance for ambiguity, and every portion of the statute is plain and simple, of harmonious construction, making all of it effective, including its requirement that there be an official ballot provided as under general law required, and that this official ballot contain thereon the names of the proposed places for county seat from which the voter makes his choice by placing opposite the name of the place on the ballot the mark X as plainly required.

With these ballot provisions mandatory in terms and to be so construed, no compliance could be had if the theory of the appellants should be sustained. Such a holding would overlook the express repeal of the old relocation statutes with its right of designation of a choice, as explained in the main opinion in this case. And, pursuing the appellants' contention to the end, no ballot could be prepared that would not be

open to question on the ground of its being restrictive, unless it be held that, ignoring the repeal of the statute giving the power to designate, such right still remains to the voter, regardless of its express repeal. To hold with appellants we would be obliged to shut our eyes to the history of this legislation, ignoring the fact that the law being construed was introduced as a removal statute, and had the same been enacted as reported on the legislative journals would have absolutely barred the possibility of the appellants' contention. Further, we would be obliged to read into the law a right legislated against by repeal of the very power to designate formerly existing with the right to ballot, and in so doing ignore, again, that this is concededly new legislation enacted as a departure from that formerly existing. And, lastly, we would be obliged to turn from a statute enacted as an intended for a removal statute and as such a complete, definite, usable, and an harmonious and perfect piece of legislation, to a construction making it into an incomplete statute containing uncertainty at every step from petition to the manner of exercise of franchise; so much so that the attorneys who now urge this construction have heretofore, in State ex rel. Miller v. Norton, 20 N. D. 180, 127 N. W. 717, appeared before this court asserting thereunder a failure on the part of the legislature to provide a ballot or the manner of exercise of franchise in such an election, and virtually asking this court to supplement by construction such legislative omission. This alone is strong argument against this court perpetuating further uncertainty in county-seat removal matters by construing this statute as appellants deem the exigencies of this case imperatively demand to sustain their contention. Again, unless it be held that the official ballot desired by appellants shall contain but the name of the old county seat, with the voter the right to designate without statutory sanction any other place as his choice, by sticker or writing upon an official ballot, certain it is that no ballot can be prepared that will not be open to attack on the ground that the same restricts the choice of the voter in the exercise of this franchise in the matter of county-seat choice. An official ballot must be provided by or under direction of the county auditor. If, perchance, on such a ballot he should print the names of a dozen of the leading cities or towns of Pembina county, with intent to cover every possible place that could be considered a contender for the county seat, by what authority, other than the arbitrary caprice of such official,

would such names be so placed upon an official ballot for such purpose? Plainly none whatever. And did any legislature ever intend so important a franchise should go ungoverned and unguided, and wholly subject to arbitrary unofficial action? It is beyond rational belief. Again, if the election be had with such a ballot, unless it can be said that the voter has the right to choose some place other than a place designated on the ballot, an omitted thirteenth village in the county could overturn the election on the identical claim now urged, that such omitted place is restricted from untrammeled competition for county-seat honors, and so on *ad infinitum*. This would be in defiance of the fact that the right to so nominate a choice, as well as vote for it, has been knowingly withdrawn by the repeal of a statute formerly granting it, and for which has been substituted our present one limiting the right of the voter to the act of placing his mark on the official ballot after the name of the place thereon he prefers, with no power granted to add to the ballot. Appellants' construction must needs fly in the face of such declared statutory repeal, and manifestly disregard plain legislation, thereby overriding, instead of interpreting, the law.

In their brief appellants appear solicitous lest we judicially legislate, and charge that the construction of the statute above given places therein by said manner and means the words "to the place named in the petition." It is elementary that a construction requiring an addition amounting to what is so termed judicial legislation cannot be adopted. To this charge we plead not guilty. To appellants the statute may be, as counsel say in their brief, "so plain that he who runs may read," but still counsel has most exhaustively briefed this statute, so plain to them. And a part of what is said in such brief we hereby adopt as sufficient answer to such criticism, as to judicial legislation, and as authority for what has been done in construing this statute broadly from its four corners, aided by the history of its enactment. We refer to §§ 215 et seq. of Sutherland on Statutory Construction, as follows: "The statute itself furnishes the best means of its own exposition, and, if the intent of the act can be clearly ascertained from a reading of its provisions and all its parts may be brought into harmony therewith, that intent will prevail without resorting to other aids or construction. . . . The true meaning of any clause or provision is that which accords with the subject and general purpose of the act and every other part." This

is all we have endeavored to do. And regardless of whether the phrase "to the place named in the petition" legally belongs in as a part of the statute as enacted, or whether it was omitted properly in the printing of the Codes, or whether omitted by amendment, either intentionally or unintentionally, we have construed the statute as we find it (N. D. Codes, 1905, § 2359), as a part of and in connection with the entire legislation on said subject at the time enacted. And, when the statute interpreted is read as a whole with reference to all of its provisions, it appears almost so clear to this court "that he who runs may read," and that the meaning of the law as printed in the Revised Codes is identical with the meaning such county-seat legislation would have had had the words "to the place named in the petition" been retained. Therefore we are forced to construe this county-seat legislation as one enactment and as a removal statute; that the petition required by § 2359 must, instead of being in blank, contain the name of the place to which county-seat removal is proposed to be had; that this petition when presented to the county commissioners, when signed and properly verified by electors in number at least three fifths of those voting at the last preceding election, confers upon the commissioners jurisdiction to determine the matters necessary to submit the county-seat removal petitioned for to the voters of the county. This issue is then submitted upon a ballot containing thereon the names of the old and the proposed new county seat. In voting thereon the voter, complying with the commands of § 2361, Codes 1905, using an official ballot prepared and furnished as are other official ballots, evidences his choice for county seat by making his cross-mark after the name thereon he prefers, and, in the event of the requisite number of voters thus legally expressing a desire for removal of county seat to the proposed new site, removal thereto is to be had, all as provided by law .

We reaffirm what was said in the original opinion as to the action of the county commissioners on the presentation of the petition for removal. They were under no obligation to postpone action without some reason therefor recognized by law as imposing upon them the duty to continue the hearing on the petition. Under the record in this case, not a single fact appears from which fraud or illegality in the petition itself can be inferred, much less be considered as established. And we have before us the specific findings of the county commissioners, the

body authorized by law to pass on the facts, and these findings support the petition, and, besides, are not attacked. The presumption of law is in favor of, and not against, the regularity of performance of official conduct. We cannot then conclude, as do appellants, that the filing of the petition made it the duty of the board to desist from its examination and the determination of the matter petitioned for, until certain persons interested in county-seat removal had examined the petition, verified the signatures thereon, and otherwise satisfied themselves of the very matters their representatives, the board, are required to do in their behalf in impartially safeguarding all public interests.

In the petition for rehearing, appellants' counsel criticized the portion of the opinion dealing with the practice question, raised by respondents' counsel, and insist that they, appellants, are entitled to a decision on such question never raised by them. Our answer is that all questions are fully decided so far as this litigation is concerned, and such decision is binding on all concerned. The remedy here invoked by appellants was, for the purpose of this appeal, conceded by the court to be correct, and we are unable to see how appellant's counsel are in a position to complain of such decision as to remedy invoked; it being favorable to their contention.

The order appealed from is affirmed. Let judgment be so entered.

STATE v. WOODELL.

(132 N. W. 1003.)

Demurrer to information — necessity of writing.

1. Section 9901, Revised Codes 1905, provides that a demurrer to an information must be in writing, signed by the defendant or his attorney, and filed. Those requirements must be met, unless waived. Whether there was a waiver in this case not decided.

Note.—The general question of charging two or more offenses in the same indictment is treated in a note in 58 Am. Dec. 238, where, in harmony with the ruling in STATE v. WOODELL, it is declared that charging in the same indictment different grades of the same offense does not render the indictment bad for duplicity.

Indictment — duplicity.

2. Information in this case examined upon its merits, and, following the rule in State v. Climie, 12 N. D. 33, 94 N. W. 574, 13 Am. Crim. Rep. 211, *held*, that such information does not charge two offenses.

Opinion filed October 3, 1911. Rehearing denied October 31, 1911.

Appeal from District Court, La Moure county; *Goss*, J.

George Woodell was convicted of assault and battery with a dangerous weapon, and appeals.

Affirmed.

Barnett & Richardson, for appellant.

George P. Jones, State's Attorney, for the State.

BURKE, J. The defendant was convicted in the district court of assault and battery with a dangerous weapon, with intent to do great bodily harm, without justifiable or excusable cause. He appeals, assigning as error the ruling of the trial court upon an oral demurrer to the information and upon a motion to compel the state to elect which of the two charges would be relied upon for conviction.

The wording of the charging part of the information is as follows: "That at said time and place said defendant, George Woodell, in and upon the person of one Otto Skidmore, with a heavy hardwood stick (a dangerous weapon, likely to produce death or great bodily harm), wilfully, unlawfully, feloniously, and without justifiable cause or excuse, did make an assault, and he, the said George Woodell, with a heavy hardwood stick (a dangerous weapon as aforesaid), which he, the said George Woodell aforesaid, in his hand then and there had and held, did then and there wilfully, feloniously, unlawfully, and without justifiable cause or excuse, strike, beat, illtreat, and seriously wound in and about the head the said Otto Skidmore, all of which acts of the defendant, George Woodell, were done with great force and violence, and with intent to do great bodily harm to the said Otto Skidmore."

1. No written demurrer was filed to this information, but when the case was reached for trial the attorney for the defendant stated orally in open court that he demurred to the information upon the ground that it stated more than one offense. Section 9901 of the Revised Codes of 1905 provides that the demurrer must be in writing, signed by the de-

fendant or his attorney, and filed in court. Those are reasonable requirements, enacted for the protection of the state, and must be complied with. 22 Cyc. 428; Sims v. State, 110 Ga. 290, 34 S. E. 1020, and cases cited. Appellant, however, insists that the state has waived this point, because the attention of the defendant was not directed to this defect, and because the trial court overruled the demurrer, instead of striking it out. In view of our conclusion that the point presented by the demurrer was not good upon the merits, it is unnecessary to pass upon the question of waiver of the requirements of § 9901.

2. Assuming, without holding, that the defendant had interposed a sufficient demurrer, we pass to a consideration of its merits. When asked by the trial court to point out the two crimes charged in the information, the defendant said that "one is assault with a dangerous weapon and the other is assault and battery with a dangerous weapon." This identical question was passed upon by this court in the case of State v. Climie, 12 N. D. 33, 94 N. W. 574, 13 Am. Crim. Rep. 211, where it was squarely held that the offense of assault and battery with a dangerous weapon included the lesser offense of assault with a dangerous weapon. We see no reason to change our holding in this case. As pointed out in the Climie Case, the case of State v. Marcks, 3 N. D. 532, 58 N. W. 25, is not in point, as it construed an old law since amended, Comp. Laws 1887, § 6510. Said section read merely, "Any person guilty of assault with a dangerous weapon," etc., while the present law reads, "any person guilty of any assault, or *assault and battery* with a dangerous weapon," etc.

While it is true that the caption of the information states that the offense charged is assault with a dangerous weapon, yet this designation does not govern over the body of the information. In the main part of the information the facts set forth show the offense charged to be assault and battery with a dangerous weapon. No doubt the state was induced to designate the crime as assault with a dangerous weapon, because of the caption over said section in the Code. Holding, as we do, that the information charges the larger offense, the fact that the lesser is also set forth does not make the information duplicitous. State v. Maloney, 7 N. D. 119, 72 N. W. 927; State v. Belyea, 9 N. D. 353, 83 N. W. 1; State v. Climie, 12 N. D. 33, 94 N. W. 574, 13 Am. Crim. Rep. 211.

The rulings of the trial court were correct, and the judgment is affirmed.

Goss, J., having tried the case below, did not sit; his place being taken by Honorable A. G. Burr, of the Ninth Judicial District.

STATE v. FINLAYSON.

(133 N. W. 298.)

Appeal — construing charge to jury as a whole.

1. The supreme court on appeal should not separate paragraphs of the charge to the jury from others which relate to the same subject, but must read and construe them together; and, when this is done, it is not cause for reversal if, when so construed, they state the law correctly.

Appeal — construction of instructions as a whole.

2. It is the duty of this court to take into consideration the whole of the instructions to the jury, the connection of one part with another and the relation of separate paragraphs to each other and to the subject, and then arrive at a conclusion as to whether the jury should have reasonably been misled by portions, which, if taken separately or alone, may or do state the law incorrectly.

Appeal — correctness of instructions — error cured by other instructions.

3. Certain instructions examined, and *held*, that the paragraphs complained of, while if taken separately do not correctly state the law, yet when read in connection with phrases and sentences explaining and modifying them correctly state the law, and furnish no ground for a misunderstanding on the part of the jury.

Opinion filed November 8, 1911.

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

Frank Finlayson was convicted of making a public nuisance in violation of the prohibition law, and appeals.

Affirmed.

T. R. Mockler, for appellant.

Andrew Miller, Attorney General and *Alfred Zuger*, Assistant Attorney General, for the State.

SPALDING, Ch. J. The appellant and one Sandy were jointly proceeded against by information filed in the district court of Burleigh county, charging them with keeping and maintaining a common nuisance on certain lots in the city of Bismarck, in said county, in violation of the law commonly designated the prohibition law of this state. A jury trial was had, both defendants were found guilty as charged in the information, and separate judgments entered in accordance with the verdict. From the judgment against him, the defendant, Finlayson, appeals to this court.

No part of the evidence is brought up. All the errors assigned are upon the instructions of the trial court to the jury. We need only consider one of these assignments separately. After cautioning the jury not to be influenced by feeling or sympathy for or against the defendants, and to treat them fairly and impartially, and that they were not called upon to determine whether the law under which the prosecution was maintained was a good or a bad law, the learned trial judge proceeded by instructing the jurors that they were there to determine whether these defendants or either of them were guilty of having violated a certain law; that that was the inquiry before them, and the only inquiry which they were called upon to determine. This caution is contained in the first page of the charge.

He then continued his instructions, of which no complaint is made, until a point is reached where he informs the jury that the charge is of maintaining a nuisance between January 1, 1910, and up to and including May 4, 1911, and informs the jury that it was not necessary that the defendants should have kept or maintained such a nuisance during the whole period between those dates, but if satisfied beyond a reasonable doubt that the defendants, or either of them, kept and maintained it during any considerable portion of the time between those dates, they should find them guilty. It is clear that this charge alone, if there had been nothing further said on the subject, might be prejudicial, yet when we consider that it is in the very early part of the lengthy charge, and its connection, we are satisfied that the jury could only have understood it as relating to the time when the offense was committed, if the offense was committed. It was an instruction that it was not necessary the nuisance should have been maintained during all the time intervening between the two dates to warrant a conviction, but

that, if they had maintained it during any considerable portion of such time, it would justify conviction.

If there was any inclination to misunderstand it, such misunderstanding must have been removed by subsequent portions of the instructions, which will be mentioned later. We may say that the instructions are not models, or to be commended, in form. They were delivered orally, and, when parties are jointly charged with an offense, it requires close concentration of the mind in delivering a charge of many pages to refer to them individually and separately in every instance where reference is made. Had the learned trial court taken the precaution to place his charge in writing, he would unquestionably have obviated the objections which are made to its character by the appellant.

Several assignments are based upon other portions of the charge wherein reference was made to the defendants, and the jury was told, if they found the facts to be thus and so, they should be found guilty. These paragraphs of the charge are separated by appellant from the remaining portions; and it is contended that, because they each, standing alone, mis-state the law, which they undoubtedly do, if they alone are to be considered, the judgment should be reversed. But this court cannot consider instructions in that manner. It is its duty to take into consideration the whole charge to the jury the connection of one part with another, and the relation of the separate paragraphs to each other and to the subject, and, after doing so, arrive at a conclusion as to whether the jury could reasonably have been misled by the portions which, taken separately and alone, may or do state the law incorrectly.

The occasion is rare when the trial court can embody in one sentence all the law on a subject. It frequently happens that a statement made must be followed by a qualifying statement, and that is what we find to have occurred in the instructions which we are considering. While the parts of the charge on which error is assigned, as we have indicated, when standing alone are unquestionably not the law, yet they were followed by explanatory or modifying sentences to the effect in each case that if the jury found only one of the defendants had committed the acts charged, and which had been explained by the court, then they should convict him and acquit the other one. For instance, after a paragraph which, standing alone, was erroneous, the court continues as fol-

lows: "And in this connection let me say to you, gentlemen, that you have a right, in the consideration of this matter, to find either one or both of these defendants guilty, according as you find the facts to be. That is, if you are satisfied beyond a reasonable doubt that one of the defendants is guilty as charged in the information, and you are not so satisfied as to the other defendant, then you have a right to find one of them guilty and the other one not guilty." The substance of this statement was repeated several times at intervals throughout the charge, qualifying preceding statements, and immediately preceding the end of the charge the court again cautioned the jury on the subject by stating that, if they were not satisfied beyond a reasonable doubt that one of them was guilty, they could find one guilty, and the other not guilty. We are agreed that, taken as a whole, the jury could not have understood the court to instruct it that, if only one of them was engaged in the maintenance of the place or in doing the things charged which he had advised the jury constituted the offense, both should be convicted; but that, on the contrary, they were plainly advised that, if they were satisfied beyond a reasonable doubt that both were guilty, both should be convicted, or, if both were innocent, both should be acquitted, or that if one was guilty, and that they were not satisfied beyond a reasonable doubt of the guilt of the other, such defendant should be acquitted. That the jury could not have misled by any seeming conflict or ambiguity is more apparent because other portions of the charge state the law more favorably to the defendants than it should have been stated.

One or two other minor assignments are found which contain no merit, and need not be noticed.

The judgment of the District Court is affirmed.

CITY OF MINOT et al. v. AMUNDSON et al.

(133 N. W. 551.)

Statutes — harmonizing conflicting provisions.

1. It is the duty of courts to harmonize conflicting statutory provisions as far as possible, to the end that effect may be given to the legislative intent.

Tax statute — construction — conflicting provisions.

2. On consideration of the whole law providing a revenue system for this state, and particularly with reference to the apparent conflict between the provisions of § 1553, Rev. Codes 1905, that the board of county commissioners may, upon affidavit or other evidence, when satisfied beyond doubt as to the illegality or unjustness of the assessment, or in case of error, abate a tax, whether real or personal, and of § 2722, Rev. Codes 1905, among other things, permitting the board of county equalization to increase or diminish the valuation placed by inferior boards of equalization on any class of property, so as to make such valuation uniform with the valuation of the same class of property throughout such county, but prohibiting such board from otherwise changing any individual assessment; and in the light of First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836, it is *held* that the county commissioners, sitting as a board of county commissioners, have no power to reduce individual assessments or abate individual taxes, except in certain instances, not necessary to mention here.

Tax statute — construction — reading several sections together.

3. When §§ 1553 and 2722, Rev. Codes 1905, are read together, the provision in the first-mentioned section, appearing to permit the board of county commissioners to abate taxes, applies only to exceptional cases, and particularly those mentioned in § 2722, where boards of equalization fail to hold meetings.

Opinion filed November 8, 1911.

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

Action by the City of Minot and others against Arne Amundson and others, as the Board of County Commissioners of Ward County, and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

Reversed.

George A. McGee, for appellants.

Dudley L. Nash, for respondents.

SPALDING, Ch. J. The sole question on this appeal is the legality of the board of county commissioners of Ward county, as county commissioners, in reducing the assessment for the year 1909 on lots 13, 14, and 15, in block 4, in the city of Minot, from $5,460 to $3,000, and as a result abating the taxes levied on such real estate in the same proportion. This was done in February, 1911, on petition of the owner to the board of county commissioners, based upon his affidavit to the effect

that the assessment of such property was too high, and out of proportion to other property of the same class in the city of Minot.

The board of county commissioners and other defendants demurred to the complaint of the city and certain taxpayers, through which a judgment was sought to nullify and avoid the action of the commissioners, and to enjoin the county treasurer from crediting the taxes on any valuations reduced by the board, upon the grounds stated. The demurrer was general, and raises the question of the power of the board of county commissioners, acting as such, and after its adjournment as a board of equalization, to reduce the valuations and abate the taxes on property in a city.

The difficulties arising in the determination of the question involved in this case spring from the apparent conflict between the provisions of § 1553, Rev. Codes 1905, and § 2722, Rev. Codes 1905.

Section 1553 reads as follows: "The board of county commissioners may, upon affidavit or other evidence, when satisfied beyond a doubt as to the illegality or unjustness of the assessment, or in case of error, abate taxes whether real or personal. Full record of such abatement must be made, showing the reason for their action, and the county auditor shall certify such abatement to the county treasurer, who shall enter such facts opposite the tax so abated, which shall have the effect of discharging such tax. And whenever taxes on any real estate remain unpaid and such property has not been sold to any purchaser other than the county, by reason of depreciation in value or other cause, the board of county commissioners may compromise with the owner of such property by abating a portion of such delinquent taxes on payment of the remainder. The county auditor shall also make out a certified statement of the amount of state taxes so abated, which statement shall be forwarded to the state auditor, who shall give the county credit for the amount so abated."

Section 2722 is in the following language: "Within ten days after the completion of the equalization of the assessment as herein provided, the city auditor shall deliver the same to the county auditor of the county in which such city is situated, with his certificate that the same is correct as equalized by said board of equalization, and the same shall be accepted by the board of county commissioners of such county in lieu of all other assessment rolls for said property in said city, and the

board of equalization of such county may increase or diminish the valuation therein placed on any class of property, so as to make such valuation uniform with the valuation of the same class of property throughout such county, but no individual assessment shall be otherwise changed; and a failure of any county or city board of equalization to hold its meetings shall not vitiate or invalidate any assessment or tax except as to the excess of valuation, or tax thereon, shown to have been unjustly made or levied."

This court, in First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836, held that, except as to assessments in unorganized districts or townships, the county board of equalization had no power to change individual assessments, except as a change in the assessment of different kinds of property by class would effect such a change; and that the law regarding equalization by boards of equalization provided a harmonious scheme, to wit, that the township, village, or city board of equalization equalizes as between individuals, the county boards equalize as between classes of property, and the state board equalizes as between counties; and certain sections of the Code were therein passed upon. But this did not determine the powers of the board of county commissioners when not acting as a board of equalization.

In accordance with elementary law, and as held in First Nat. Bank v. Lewis, supra, it is the duty of this court to harmonize conflicting statutory provisions as far as possible, so as to give effect to the legislative intent. We see but one way in which the principle can be applied to the two sections in question.

Section 1553 is found in the chapter of the Code relating to revenue and taxation, and on its face permits the board of county commissioners to abate real or personal taxes illegally, unjustly, or erroneously assessed. Section 2722 is a part of the chapter relating to cities, but contains a prohibition against the county commissioners changing any individual assessment, other than as such a change may be effected by equalizing classes throughout the county, and requires the board of county commissioners to accept the assessment as equalized by the city board. These provisions as indicated appear to be in direct conflict; but § 2722 contains a further condition, to wit, that a failure of any county or city board of equalization to hold its meetings shall not vitiate or invalidate any assessment or tax, "except as to the excessive

valuation or tax thereon shown to have been unjustly made or levied." The language of this last-quoted provision fits directly into the language of § 1553, supra, and, although the legislative intent is not clear, in view of all the provisions on the subject, we consider it reasonably certain that the intent can be gathered from a combination of these two provisions. They must be read together, and when so read it would appear that a taxpayer or person whose property has been assessed, can be protected, on the failure of a city board of equalization to hold its meetings, by making the affidavit, or producing the other evidence mentioned in § 1553, necessary to satisfy the board of county commissioners beyond a doubt that his assessment is illegal, unjust, or erroneous; and that thereupon the board of county commissioners may abate the taxes, or such part thereof as is based upon an illegal, unjust, or erroneous assessment.

In like manner, where the board of county commissioners sits as a board of review to equalize assessments in unorganized districts or townships, and fails to meet in that capacity, we think this statute was intended to furnish protection for the aggrieved property owner, and save the whole levy from failure. While this construction may be somewhat far-fetched, yet a consideration of still other provisions of the Code seems to support our view. Section 2721, among other things, prohibits the city council from recommending to the board of county commissioners any change or alteration of any assessment or assessments, or otherwise, and makes provision for the appearance of aggrieved parties before the city board of equalization, in person or by attorney, for the purpose of having errors and irregularities in assessments corrected.

Other sections provide for notice to property owners of changes in assessment. Section 1552 places the duty upon the county auditor to correct errors in names of persons assessed or taxed, and to enter upon the assessment roll and assess the value of property omitted therefrom. And § 1529 provides for the chairmen of the boards of township supervisors, presidents of city councils, and of the boards of trustees of towns and villages, attending the meeting of the county boards of equalization, and makes it their duty to advise such board in regard to the equalization of the assessment for such county, and the amount of taxes to be levied.

If § 1553 is to be read literally, each taxpayer of a city may, subsequent to the meeting of the city board of equalization, and after the adjournment of the county board of equalization (in this case nearly two years thereafter), appear before the county commissioners, and secure a reduction of his assessment and an abatement, in whole or in part, of his taxes, without any representation by the city, which is an interested party, and thereby decrease the assessed valuation of the city from above to below the debt limit; and the action of the county commissioners in reducing or abating such assessment and taxes might result in a serious deficiency in the revenues of the city, rendering appropriations excessive, and otherwise interfering with the administration of municipal affairs, leaving the city no means of protection.

When the board of county commissioners meets as a board of equalization, it is done with notice to all interested. City officials are presumed to be present in the interest of their constituency, and there is at least opportunity for the board to hear both sides on any question of reduction; but if it is precluded from doing this as to individual property owners, as held in First Nat. Bank v. Lewis, supra, much less can it be presumed, without the plainest and most conclusive provisions, that the legislative intent was to provide for action of this kind by the board when sitting as county commissioners.

The rights of injured parties are adequately protected by a subsequent provision, found in § 1553, permitting the county commissioners, after a sale of real property to the county, to compromise with the owner of such property by abating a portion of delinquent taxes on his paying the remainder, when certain facts are disclosed, and by the right of the property owner to maintain appropriate legal proceedings.

The act of the county commissioners in reducing the assessment of the respondent, because alleged by the petitioner to be out of proportion to the other property of the same class in the city, is an act of equalization; and if it can be done in this case we see no reason why the board of county commissioners may not, when sitting as a board, wholly ignore all of its equalization proceedings, as well as the proceedings of the city council, sitting as a city board of equalization. In such case there would be no limitation on the action of the commissioners. Taxation would be a matter of uncertainty until the payment of the tax. No

municipality could rely upon the finality of the action of the boards of equalization, and the whole subject would be thrown into chaos. But if, on the contrary, the legislature has provided a complete system, and the provisions referred to only furnish methods applicable to exceptional cases, as where one or another of the boards has failed to perform its function, then our construction of these sections is in harmony with such system, and the rights of all concerned are subject to protection as nearly as may be in any such revenue system.

These conclusions result in reversing the order of the District Court, which sustained the demurrer to the complaint of the appellant.

UMSTED v. COLGATE FARMERS ELEVATOR COMPANY.

(133 N. W. 61.)

Injuries to servant on elevator — Contributory negligence and assumption of risk.

Plaintiff, while in defendant's employ, received injuries while he and one B, who was in charge of defendant's elevator as agent, were experimenting with, or testing, a mechanical contrivance which they had installed for moving cars by attempting to utilize power for such purpose from the engine used to operate defendant's elevator.

Evidence examined, and *held*, that it conclusively appears that plaintiff was not only guilty of contributory negligence, but that he assumed the risks incident to such experimental tests.

Hence his recovery cannot be sustained.

Opinion filed October 26, 1911. Rehearing denied November 10, 1911.

Appeal from the District Court of Cass county; *Honorable Charles A. Pollock*, J.

Action by Ray Umsted against the Colgate Farmers Elevator Com-

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Note.—As to the general question of liability of master for injury to servant caused by defective elevator and the negligence of a fellow servant, see note in 2 L.R.A.(N.S.) 647.

As to contributory negligence of servant in adopting a dangerous method, see note in 97 Am. St. Rep. 895.

pany. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, defendant appeals.

Reversed.

Ball, Watson, Young, & Lawrence, for appellant.

W. J. Courtney, for respondent.

FISK, J. This cause was before us on a former appeal. See 18 N. D. 309, 122 N. W. 390. For a general statement of the nature of the litigation, see the former opinion.

At the first trial the lower court, in effect, directed a verdict in plaintiff's favor on all the issues except that involving the extent of the damages suffered by him. We reversed the judgment on such appeal, and awarded a new trial, for the reason that as the record then stood we deemed the questions of defendant's negligence, of plaintiff's contributory negligence, and his assumption of the risks, properly questions for the jury, and not the court, to decide. We there fully stated the rules of law governing such questions as applicable to the subject of master and servant, under the facts there presented, and it will not be necessary to restate them here. The statement there made of such rules now constitutes the law of the case, and must control so far as applicable in the disposition of this appeal. The last trial resulted in a verdict for plaintiff for $3,500, and this appeal is from an order denying defendant's motion for judgment *non obstante veredicto* or for a new trial. Appellant assigns a great many alleged errors predicated upon rulings denying its motions for a directed verdict or for a new trial, and also upon numerous alleged errors of a prejudicial character in the admission and exclusion of testimony, and the refusal to give certain requested instructions, and the giving of certain other instructions, to which rulings it duly excepted.

In brief, appellant contends that under the record there was nothing for the jury to pass upon; that there is an entire failure of proof showing negligence on defendant's part causing the injury, and that it conclusively appears that the injury was the direct result of plaintiff's own negligence. Further, that in any event, numerous prejudicial errors were committed against defendant as above stated, entitling it to a new trial. We will consider the assignments in the order in which they are presented in appellant's printed argument. These numbered 15, 29, 49,

and 50 relate to the rulings denying the defendant's motions for a directed verdict, judgment notwithstanding the verdict, and the alleged insufficiency of the evidence to justify the verdict.

Following are the grounds upon which defendant based its motion for a directed verdict:

"That upon the undisputed testimony in the case, the plaintiff has failed to show that the appliance in question was a dangerous appliance, and that its character was known to him, as alleged in his complaint.

"That the injury which the plaintiff sustained was one of the risks of the business in which he was engaged at the time of the accident, and under the statute he is not authorized to recover.

"Upon the undisputed evidence, the plaintiff was himself guilty of negligence which contributed to some degree in the operation of this appliance to causing his injury.

"Upon the ground that if there was any negligence other than his own causing the injury, it was the negligence of Mr. Borneman, who was then engaged in the same work and enterprise, and who, together with the plaintiff, installed this apparatus, and such negligence was negligence of a fellow servant and under the statute the plaintiff cannot recover.

"On the ground that from the evidence offered by the plaintiff, the cause of his accident is purely speculative and conjectural, and a verdict in his favor could therefore not be sustained, for the reason that he has not shown, by any certain and definite or substantial evidence, the cause of his injury, or that it was a cause for which the defendant was responsible.

"From the undisputed evidence the appliance in question was installed jointly by the plaintiff, his fellow servant, Borneman, and for plaintiff's benefit, and was outside of the regular business of the machinery of the defendant company, and was purely for the plaintiff's own personal benefit in doing the work which the defendant had employed him to do."

And the following is defendant's specification of the particulars, wherein it contends that the evidence is insufficient to justify the verdict:

"1. That under the undisputed testimony the plaintiff was of ma-

ture age and judgment at the time of the accident, and knew or ought to have known all of the dangers, if any, there were attending the operation in which he received his injury.

"2. That the undisputed testimony shows that the operation, if conducted with ordinary prudence, was entirely safe.

"3. The plaintiff's testimony does not disclose the manner in which the accident happened, and leaves it entirely a matter of speculation and conjecture. The only testimony of eyewitnesses shows that plaintiff's injury was caused by plaintiff's own negligence; that if there was any negligence on the part of the defendant it was the negligence of Borneman, who was then a fellow servant of the plaintiff; that the apparatus was merely being experimented with by the plaintiff and his coemployee at the time of the accident, and had not been installed and approved as a part of the appliances of the defendant elevator company; that plaintiff knew and understood the plan of its operation and assisted in constructing it, and knew or ought to have known any dangers attending its use, and voluntarily assumed any risk of injury resulting therefrom.

"4. That the undisputed evidence shows that the accident could not have happened, and did not happen, from any cause for which the defendant is responsible, and could have happened only from the plaintiff's own negligence."

Do the facts on this appeal so materially differ from those presented on the former appeal as not only to justify, but to require, a different conclusion by this court on the questions presented by these assignments? If not, then nothing need be here added to our views on such questions, as expressed on the former appeal. If, however, such question must receive an affirmative answer, it necessitates a reversal of the order and a dismissal of the action, rendering a consideration of the other assignments of error unnecessary.

After a careful consideration of the entire testimony presented on this appeal, we are agreed that under the view of the same most favorable to plaintiff he has wholly failed to establish any liability on defendant's part; and while we are loath to disturb the ruling of the trial court upholding the verdict, our duty so to do appears to us to be plain. On the former appeal the record presented for our consideration, among other things, the correctness of the rulings of the trial

court in denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict. There, as here defendant's counsel vigorously insisted that plaintiff had failed to establish a cause of action, and that there was no evidence sufficient to warrant the submission to the jury of the questions of negligence, contributory negligence, and assumption of the risks, and that such questions should have been determined in defendant's favor by the court as matters of law. In approving the rulings denying defendant's said motions, we, among other things, said:

"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 laying 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 obs'ante 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, he put the entire coil of rope 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."

There we assumed, for the purposes of a decision of such law questions, the correctness of plaintiff's version or theory as to how the accident happened. Unfortunately for plaintiff we are unable to do this in the light of the record now before us. Plaintiff's proof at the last trial materially differs from that at the former trial in numerous partic-

ulars. On the first trial plaintiff relied solely on his own testimony to prove the cause and manner of the accident. On such trial he testified that Borneman installed the car puller. That he, plaintiff, had no prior experience with machinery, and did not know that the place he went into was dangerous, and had no knowledge of the car puller when he went in there, and that he had not been notified or warned of its dangerous character. He claimed to have obeyed the instructions of Borneman and Foster as to the manner of handling the rope; and, in describing how the accident happened, he testified: "Mr. Borneman 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, and it caught me and took me around this drum, and the last thing I remember I saw the spring of the rope and the next thing I remember Mr. Foster was cutting me loose and Borneman was coming out of the elevator." On cross-examination he testified: "When he started the engine the rope slid, the drum went around and the rope did not; burned the rope and the drum too. . . . Borneman then disconnected the shaft. I was standing there holding the rope. Borneman said to me to take another hitch, and I took it. . . . The part that went to the car came out from the upper side and went down toward the car, and the part that I had came out from the under side and back toward me, and I stood there and held it. I had no talk with Borneman at the time, except that he told me to take another hitch. He went back into the engine room. The next thing I knew I see the slack coming. I was pulling there and just watching the whole thing. I did not know just when it was going to start. I stood holding the rope, with the drum in front of me. I was looking at the rope. I piled the rope back by my side after I took the second hitch about the place where it was before. I did not see the drum begin to move. First noticed the slack coming toward me from where the rope broke. I did not see the rope break, but saw the slack coming toward me from down by the pulley. I did nothing when I saw the slack coming. Did not look at the pile of rope near me. Foster said nothing to me. I just stood there and held on. The next thing I remember Foster was cutting me loose. The last thing I remember was seeing the slack coming towards me. . . . I do not remember kicking the pile of rope and did not kick it. Borneman did not tell me to be careful, neither did Mr. Foster. Mr. Foster did not tell

me to look out for the rope, and I did not tell Mr. Borneman I could take care of myself. I do not remember saying a word to anyone."

The record now before us presents a materially different showing on plaintiff's part in important particulars. He did not see fit to rely upon his own testimony, but called Borneman as his witness. It is true plaintiff testified, as before, that Borneman caused this car puller to be installed, and his testimony as to the manner of the accident is about the same as his former testimony; but when plaintiff's entire evidence is considered, as it must be, we think there is no room for reasonable men to differ as to the truth of the following controlling facts: The car puller was installed as a result of numerous mutual conversations between plaintiff and Borneman regarding the feasibility and practicability of some such a contrivance, the sole object being to lighten the burdens of plaintiff in moving cars to and from the proper position for loading, which work he was obliged to do by the old and laborious method of using a crowbar to pinch them along the track. No definite scheme was decided on for such new contrivance, but Borneman talked with the witness, Fred Mews, a carpenter, and also with one Russ, about such a contrivance, and asked them if there was any way that they could contrive a car puller of some kind, and Mews said he thought there was, but nothing definite was decided on at that time. Afterwards Borneman again talked the matter over with plaintiff, and they finally decided to install a car puller; and Borneman, just before leaving for a few days' absence, authorized plaintiff to see Mews and have one installed, if he, plaintiff, desired, while he, Borneman, was away. As a result of such talk the contrivance in question was partially installed by Russ, a former employee of Mews, with the assistance of plaintiff, who, during such time, was in sole charge of defendant's said elevator. On Borneman's return he expressed dissatisfaction with the same and told plaintiff to remove it. This was not done, however, and after several days had elapsed without attempting to try it, during which time plaintiff, on several occasions, importuned Borneman to test the same before removing it, Borneman finally consented to do so, and they both proceeded to complete the apparatus by procuring the necessary rope and pulley and adjusting them as described in the former opinion. It therefore clearly appears from plaintiff's evidence that he had at least as much to do with installing such car puller as Borneman, and had equal

opportunity with him of acquiring knowledge of its dangerous character. He also knew that it was a new and untried mechanical contrivance, and that they were engaged in a mere experimental test as to its efficiency and practicability. It also appears from plaintiff's evidence that, after the first and unsuccessful attempt to operate such car puller and before the second attempt, which proved disastrous to him, plaintiff was instructed how to adjust the rope on the capstan by taking another lap, and was instructed to put the entire surplus rope over and around such capstan, and he was also warned by Borneman to "keep clear of the rope" which lay on the ground in a coil near his left foot. While it is true that plaintiff, in a way, attempted on rebuttal to deny the latter fact, this testimony fell from the lips of his own witness, Borneman, and such witness is fully corroborated by the only eyewitness to the accident, George Foster. Furthermore, in the light of the facts disclosed in this record we deem such fact immaterial, as plaintiff was as well informed as to the risk of possible or probable danger as was Borneman, and a warning thereof was therefore unnecessary. It is, we think, equally established beyond the peradventure of a doubt, that the proximate cause of the accident was not, as plaintiff sought to show, the springing back of the rope running from the capstan to the car, but was unquestionably the counter-winding on the capstan of the surplus rope in the coil lying on the ground near plaintiff's left foot. Plaintiff does not undertake to state definitely how the accident happened. On the contrary he disclaims any accurate knowledge on the subject, but advances a mere theory as to how it happened. In the light of this record such theory is entitled to no probative weight, and must give way to the direct, positive, and undisputed testimony to the contrary. On the last trial the correctness of such theory was most effectually exploded by the evidence which conclusively rebuts the facts on which it rested. All the testimony in the record points with irresistible force to the fact that the accident happened by reason of the counter-winding of the surplus rope, as before stated. This being true, we are forced to the conclusion that plaintiff was not only guilty of negligence contributing directly to his injury, but he must be held to have assumed the risk of danger which was as fully apparent to him as to anyone else. He admits that Borneman told him to put the entire coil over and around the drum at the time he took another lap, but he insists that he did so. We think the proof conclu-

sively demonstrates that plaintiff is mistaken in this respect, as the evidence clearly discloses that the accident could not otherwise have happened. We are unable to see how, under the rules announced in the former opinion, the defendant can justly or legally be held liable in any way for plaintiff's injuries, and while we very much dislike to interfere with the trial court's action in upholding the verdict in plaintiff's favor, we feel that it is clearly our duty to do so under the present status of the record.

A recent decision in Minnesota in a somewhat similar case lends support to our views. Murphy v. Duluth Crushed Stone Co. 115 Minn. 308, 132 N. W. 294.

In this connection we deem it proper to state that the case was apparently tried the last time largely upon the theory that there could be no recovery if the proximate cause of the injury was, as testified to by Foster and as conclusively shown by all the other testimony in the case, the manner in which plaintiff placed the rope around the capstan whereby it counter-wound from the coil on the ground catching and pulling plaintiff's foot upon such drum. Among other things the learned trial court charged the jury: "If you find that the apparatus in question could be operated with safety by a person exercising ordinary care and prudence; that the plaintiff, through his own carelessness and neglect, placed the coil of rope, which was under his control, so that his left foot was caught in it and dragged upon the drum,—then the fault was his own, and he was the author of his own injury, and he cannot recover." As we view the testimony, there is no room for reasonable minds to differ as to the fact that the injury happened in the very manner stated in such instruction, and that the same might have been obviated by the exercise of reasonable care on plaintiff's part. Hence there was nothing to submit to the jury, and the motion for a directed verdict should have been granted.

The above conclusion renders it unnecessary to consider the other assignments.

Reversed, and the District Court is directed to enter judgment for the defendant.

MORRISON v. LEE.

(38 L.R.A.(N.S.) 412, 133 N. W. 548.)

Illegal sale of oil — injuries to person by explosion — contributory negligence.

In an action based on the statutory liability of defendant under § 2223, Rev. Codes 1905, by a person who has sustained injuries as the result of an explosion of oil sold in violation of law,—

Held, construing said statute, that the legislature did not intend to abrogate the defense of the contributory negligence of the person injured, where such contributory negligence was the proximate and efficient cause of such explosion.

Opinion filed November 14, 1911.

Note. — A case very similar in its facts to MORRISON v. LEE is that of Berger v. Standard Oil Co. 126 Ky. 155, 11 L.R.A.(N.S.) 238, 103 S. W. 245, deciding that one using unsuitable lubricating oil sold by another cannot hold him liable for injuries caused by its explosion if, by the exercise of ordinary care, he could have learned of the defects so as to prevent the injury. This case is distinguishable, however, since no statute regulating the sale of oil was involved. A case similar in principle, though different in its facts, is that of Ford v. Chicago, R. I. & P. R. Co. 91 Iowa, 179, 24 L.R.A. 657, 59 N. W. 5, holding that the defense of contributory negligence is not defeated, although the burden of proof is thrown on the defendant, by a Code provision that an injured party, in order to recover damages from a railroad company for neglect or refusal to comply with the statute requiring safe crossings and cattle guards, need only prove such neglect and refusal. And again, in Queen v. Dayton Coal & I. Co. 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460, it is held that liability to persons for whose protection a statute was made, in case of their injury by breach of it, is subject to the defense of contributory negligence. And that this is in harmony with the general rule is shown by the authorities reviewed in a note in 9 L.R.A.(N.S.) 342.

The effect of contributory negligence as a defense in case of the violation of a statutory duty by a master where the statute excludes the defense of assumed risk is considered in a note in 13 L.R.A.(N.S.) 1152. And the right of one employing a child under statutory age to rely on contributory negligence to defeat liability for personal injuries sustained by the latter is the subject of notes in 12 L.R.A.(N.S.) 461, and 20 L.R.A.(N.S.) 876. The general question of, when contributory negligence does not prevent recovery, is treated in a note in 8 Am. St. Rep. 850. And various aspects of the question of the liability of the manufacturer or vender of a dangerous product or machine for personal injuries caused thereby are considered in notes in 2 L.R.A.(N.S.) 303; 5 L.R.A.(N.S.) 1103; and 19 L.R.A.(N.S.) 923.

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

Action by James T. Morrison against Peter P. Lee. From an order sustaining a demurrer to the answer, defendant appeals.

Reversed.

James Johnson and *Guy C. H. Corliss*, for appellant.

Arthur LeSueur and *Bangs, Cooley, & Hamilton*, for respondent.

FISK, J. This is an appeal from an order of the district court of Ward county, sustaining plaintiff's demurrer to the answer of the defendant. Plaintiff seeks to recover damages for personal injuries sustained by him as the result of an explosion of a mixture of kerosene and gasolene which he purchased of the defendant as and for kerosene oil. Plaintiff relies for a recovery upon § 2223 of the Revised Codes of this state, which reads as follows: "Whoever shall knowingly use, sell, or cause to be sold unlawfully any of the illuminating oils specified in this article which are below 105 degrees Fahrenheit, as tested by the official tests herein prescribed, shall be liable to any person purchasing such oil or to any person injured thereby for any damage to person or property arising from any explosion thereof." In other words, plaintiff bases his cause of action upon the statutory liability of defendant under the above section. The answer pleads a former adjudication. By such plea defendant alleges that the former action was instituted for the recovery of damages for the same injuries resulting from the same explosion, and that such explosion was caused by defendant's negligence in selling to plaintiff as and for kerosene oil a mixture of kerosene and gasolene; such cause of action being based upon the alleged common-law liability of defendant. By such plea it is also alleged that the issues in such former action, including that of contributory negligence on plaintiff's part, were duly considered and adjudicated and finally decided in defendant's favor, and judgment was finally entered, dismissing plaintiff's action.

The ground of demurrer to the above answer is that it does not state facts sufficient to constitute a defense to plaintiff's cause of action. Respondent's counsel advance two propositions of law in support of the action of the trial court in sustaining their demurrer: First, that the cause of action upon which the plaintiff seeks a recovery in this case is different and distinct from that set up in the case which appellant has

pleaded in bar. Second, that contributory negligence is not a defense to this action. Appellant's counsel deny the soundness of both of these propositions. It is conceded that, if either of such propositions is untenable, the demurrer was improperly sustained. We will take up these questions in the inverse order thus stated, and proceed to determine whether contributory negligence is a defense to this action. Does § 2223, Rev. Codes, "impose a positive and absolute liability, regardless of any contributory negligence on the part of the person injured," as contended by plaintiff's counsel? They assert that unless it does so the section would be superfluous and meaningless. We can best give their line of reasoning by quoting from their brief as follows: "For the sale of oil that will omit a combustible vapor at less than 105 degrees, a person injured has a right of action at common law, because this is an act prohibited by § 2222. That section contains many other prohibitions for the violations of any one of which an action may be maintained under the common law, by a person injured in consequence of such violation. But under the provisions of § 2223 the legislature has seen fit to single out but one of these acts prohibited by § 2222, and has declared, in effect, that for the commission of that act the offender shall be absolutely liable to the person injured. If contributory negligence is a defense to an action under this section, the purpose of the statute would be in a great measure, if not wholly, defeated."

In support of their contention, counsel for plaintiff rely chiefly on a line of authorities under statutes making railroad companies liable for injuries to stock where they have neglected to fence or otherwise protect their right of way; and authorities under so-called "factory acts;" and also under statutes requiring owners of mines to take certain precaution for the protection of miners. Among the authorities thus relied on are the following: Corwin v. New York & E. R. Co. 13 N. Y. 42; Harwood v. Bennington & R. R. Co. 67 Vt. 664, 32 Atl. 721; Congdon v. Central Vermont R. Co. 56 Vt. 390, 48 Am. Rep. 793; Jensen v. South Dakota C. R. Co. 25 S. D. 506, 35 L.R.A.(N.S.) 1015, 127 N. W. 650; Flint & P. M. R. Co. v. Lull, 28 Mich. 510; Welty v. Indianapolis & V. R. Co. 105 Ind. 55, 4 N. E. 410; Chicago, St. L. & P. R. Co. v. Fenn, 3 Ind. App. 250, 29 N. E. 790; Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131; Caspar v. Lewin, 82 Kan. 604, — L.R.A. (N.S.) —, 109 Pac. 657; Atchison, T. & S. F. R. Co. v. Paxton, 75

Kan. 197, 88 Pac. 1082; Louisville & N. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418; Johnson v. Marshall, Sons & Co. [1906] A. C. 409, 75 L. J. K. B. N. S. 68, 94 L. T. N. S. 828, 22 Times L. R. 565, 5 Ann. Cas. 630.

There are a great many authorities holding to the same effect, and they are collated in the valuable note to the case of Wolf v. Smith, 9 L. R.A.(N.S.) 338. An examination of the opinions in most, if not all, of these cases will disclose, however, that the plaintiff's negligence was remote rather than proximate to the injury; and it is nowhere held that the railway company is liable where the owner of the stock killed or injured wilfully or recklessly drove his stock upon the track. As said by Taft, Ch. J., in Kilpatrick v. Grand Trunk R. Co. 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827: "These cases can well be put upon the ground that the negligence of the plaintiff in permitting his animals to escape, stray away, and pass upon the railroad track was remote, and not proximate. If the negligence of the plaintiff consisted in his negligently driving cattle upon the track, at the time of the accident, it might well be claimed that such negligence was proximate, not remote, and that his neglect would bar a recovery. When the negligence of the plaintiff did not occur at the time of the accident, but was prior thereto, and consisted in permitting his animals to stray away, it is not mutual with that of the defendant, and was not one of the proximate causes of the accident; for, in the use of the words 'proximate cause,' negligence occurring at the time the injury happened is meant. The case, in principle, is analogous to the one which formerly arose under the provisions of our early statutes, which enacted that 'if any special damage shall happen to any person, his team, carriage, or other property, by means of the insufficiency or want of repairs of any highway or bridge in any town, which such town is liable to keep in repair, the person sustaining such damage shall have the right to recover the same,' etc. In these cases it has been universally held that if the plaintiff is guilty of contributory negligence, as one of the proximate causes of the accident, if his negligence contributes to his injury to any extent, he is not entitled to recover. But in such highway cases it was held that when the plaintiff's negligence consisted in taking a road constructed to avoid the dangerous place, which caused the accident, the plaintiff was not barred from a re-

covery, for the reason that his negligence was remote, not proximate. Templeton v. Montpelier, 56 Vt. 328."

It is no doubt true, as contended for by respondent's counsel and as held in many of the authorities, that statutes similar to the one under consideration in the case at bar were enacted in the legitimate exercise of the police power and are penal in their nature, being designed for the protection of the public against injuries to persons and property, and are highly beneficial and should be strictly enforced. It does not follow from this, however, that a person who violates the statute is civilly liable for all damages occasioned by an explosion of the oil under all circumstances. We are here confronted with a question of statutory construction. Did the legislature intend by the statute in question to impose on a person who has sold oil in violation of the statute, an *absolute* liability, regardless of whether such violation had, in fact, anything directly to do with causing the explosion? It seems to us that it would be a forced construction of the statute to say that the legislature intended to create a liability for an explosion, the direct or proximate cause of which was plaintiff's wilful, reckless, or gross negligence. No authority has been called to our attention permitting a recovery under a like statute where the plaintiff thus caused the injury. Yet, if respondent's contention be sound, that the legislature, by this statute, created an *absolute liability,* it would logically follow that, in an action to recover under such statute, a plaintiff's wilful or gross negligence, which alone was the immediate and efficient cause of an explosion, would be no defense.

After a careful consideration of the matter, we are forced to hold that contributory negligence on plaintiff's part directly causing the explosion bars a recovery. Hence the ruling complained of was erroneous. We deem it well settled that, while a violation of a statutory duty may constitute negligence *per se* and actionable in case of resultant injury, yet statutes imposing such duties do not abrogate the defense of contributory negligence, unless the legislative intention so to do is clearly evinced in such statute. Such is the rule recently announced by the Minnesota court in Schutt v. Adair, 99 Minn. 7, 108 N. W. 811. It was there said regarding the violation of a statute requiring elevator shafts to be guarded and protected: "Though the violation of a statutory duty may constitute negligence *per se,* and actionable if injury result therefrom,

nevertheless statutes imposing such duties are not so construed as to abrogate the ordinary rules of contributory negligence, unless so worded as to leave no doubt that the legislature intended to exclude the defense. 20 Am. & Eng. Enc. Law, 2d ed. 159; Caswell v. Worth, 5 El. & Bl. 849, 25 L. J. Q. B. N. S. 121, 2 Jur. N. S. 116, 4 Week. Rep. 231; Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; Whitcomb v. Standard Oil Co. 153 Ind. 513, 55 N. E. 440; Queen v. Dayton Coal & I. Co. 95 Tenn. 458, 465, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; Holum v. Chicago, M. & St. P. R. Co. 80 Wis. 299, 50 N. W. 99; Taylor v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308. It was not the intention of the legislature in enacting this statute to create an absolute liability, but rather to impose a duty upon persons operating warehouses and manufacturing establishments to guard and protect their employees from injury, the noncompliance with which constitutes negligence justifying a recovery by an injured servant, without further proof of a failure to exercise that degree of care enjoined by the rules of the common law. The general principles of the law underlying the right of action for personal injuries founded upon negligence remain the same, though the proof of negligence is simplified by showing merely a failure to obey the statutory commands. Contributory negligence will bar such an action precisely as it bars an action at common law. Anderson v. C. N. Nelson Lumber Co. 67 Minn. 79, 69 N. W. 630; Swenson v. Osgood & B. Mfg. Co. 91 Minn. 509, 98 N. W. 645."

We have a statute (Rev. Codes § 4295) requiring railway companies to give certain signals on approaching public crossings, and providing a penalty for neglect to comply therewith, and also prescribing that such companies shall be liable for all damages which shall be sustained by any person by reason of such neglect; but it has never been contended that the contributory negligence of the person injured at such a crossing will not bar his recovery. On the contrary, such defense is recognized by all courts. Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co. 20 N. D. 642, 127 N. W. 993, and cases cited in note. See also Mankey v. Chicago, M. & St. P. R. Co. 14 S. D. 468, 85 N. W. 1013, holding that before a recovery can be had under said statute it must be shown that the failure of defendant to give the statutory signals was the proximate cause of the plaintiff's damage.

A case arose in Mississippi under a statute, on principle, in all respects like the one involved in the case at bar. The Mississippi statute limited the speed of trains through towns, cities, and villages, and fixed a penalty for its violation, and which also provided: "And the company shall, moreover, be liable for any damage or injury which may be sustained by anyone from such locomotive or cars whilst they are running at a greater rate of speed than 6 miles an hour through any city, town, or village." A young man was killed by a train which was operated in violation of said statute, and in a suit by his mother to recover thereunder Campbell, Ch. J. said: "It is so clear that the unfortunate man who was killed contributed directly to his own death by his incautious and reckless action that the court properly told the jury the plaintiff was not entitled to recover. It is true that the defendant was guilty of a violation of law in the rate of speed at which the train was run, but this was *causa sine qua non,* while the *causa causans* was the imprudence of the person killed, so unmistakable as to authorize the assertion that he was the cause of his death." Crawley v. Richmond & D. R. Co. 70 Miss. 340, 13 So. 74.

Our views also find support in the following authorities: Meyer v. King, 72 Miss. 1, 35 L.R.A. 474, 16 So. 245; Reynolds v. Hindman, 32 Iowa, 146; Dodge v. Burlington, C. R. & M. River R. Co. 34 Iowa, 276. See note in 9 L.R.A.(N.S.) 339 and 342, and cases therein cited; Curtis v. St. Louis & S. F. R. Co. 96 Ark. 394, 34 L.R.A.(N.S.) 466, 131 S. W. 947, Ann. Cas. 1912, B. 685; Dumphy v. New York, N. H. & H. R. Co. 196 Mass. 471, 13 L.R.A.(N.S.) 1152, 82 N. E. 675; Queen v. Dayton Coal & I. Co. 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; 29 Cyc. 436, 437, 508; 21 Am. & Eng. Enc. Law, 483; Quimby v. Woodbury, 63 N. H. 370; Bush v. Wathen, 104 Ky. 548, 47 S. W. 599; 1 White, Personal Injuries on Railroads, § 404, and case cited; 1 Thomp. Neg. §§ 10, 834.

Having reached the above conclusion, it becomes necessary to notice the other question.

The order appealed from is reversed, and the cause remanded for further proceedings.

Goss, J., did not participate; Honorable W. C. CRAWFORD, of the Tenth Judicial District, sitting in his place by request.

GUNDERSON v. HOLLAND.

(133 N. W. 546.)

Public lands — contest — replevin for crops — determining title to land.

Defendant was in possession of 160 acres of land under a deed to his wife from the heirs of one John M. Holland; said heirs having completed proof of deceased and obtained patent as a homestead. After defendant had planted the crops thereon in 1907, the patent running to the heirs was canceled in a proper action by the United States government. The Northern Pacific Railway then applied for the land under a lieu script entry. This application was rejected by the local land office and an appeal taken. The defendant was a licensee under any rights had by the Northern Pacific Railway. Thereafter, and while the crops were yet unharvested, the plaintiff made application to enter the tract as a government homestead. This application was suspended and held in abeyance pending the appeal by the Northern Pacific Railway. Plaintiff squatted upon the land and built a cabin, but made no effort to dislodge the defendant in his possession of the land, and the defendant harvested the crops therein and began threshing same. The plaintiff thereupon begun his action in replevin to recover the grain. After nearly fourteen months the local land office was affirmed in its ruling, and the Northern Pacific script entry was rejected and plaintiff's entry accepted. *Held*, that the plaintiff was entitled to maintain the action in replevin at the time it was begun. His remedy, if any he had, was for the use and occupation of the land. Courts will not determine the title to land in an action for replevin of the crops. If the title is in dispute as to the land, and the plaintiff has no other claim to crops than his right as owner of the land, the action in replevin should be dismissed. The plaintiff, having alleged ownership of the crops in himself, must prove it; he cannot reply upon the weakness of defendant's title thereto.

Opinion filed November 18, 1911.

Note.—The rule undoubtedly is, as shown by a review of the authorities in notes in 69 L.R.A. 732, and in 85 Am. Dec. 322 and 89 Am. Dec. 429, that replevin, or an action of that nature, is not maintainable against one in adverse possession of land for things severed therefrom, the reason upon which the rule is based being that title to land cannot be tried in a transitory action.

The question of replevin for products of land held adversely is also considered in notes in 18 Am. Dec. 445; 85 Am. Dec. 322; and 95 Am. Dec. 429.

The right as between successful plaintiff and evicted defendant to crops not severed at time of final judgment is considered in a note in 23 L.R.A.(N.S.) 531.

That one who buys or makes lawful entry on public lands is entitled to crops thereon not yet severed and to all improvements placed thereon by another is shown by a review of the authorities in a note in 70 L.R.A. 799.

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

Action by Melvin A. Gunderson against Lars Holland. From a judgment for defendant, plaintiff appeals.

Affirmed.

Skulason & Burtness, for appellant.

Scott Rex and *A. V. A. Peterson,* for respondent.

BURKE, J. There is no serious dispute as to the facts in this case. The defendant, Holland, and his wife were in possession of a quarter section of land under a deed, running to his wife, from the heirs of one John M. Holland. While in such possession, the defendant, through a tenant, planted the crops for the year 1907. Thereafter, about June 26, 1907, the patent to the land was canceled in the local land office pursuant to a decree of the United States district court. This decree declared that the patent was obtained through fraud, and was void from its inception. May 28, 1907, the Northern Pacific Railway applied to the local land office to script the land under its lieu script. The local land office rejected the application and an appeal was taken. The defendant, Holland, it appears, had procured the railway to make the application, and was a licensee under them. On June 26, 1907, the plaintiff made application to enter the land as a government homestead; but his application was held in abeyance pending the appeal of the railway company, until long after the cause of action herein accrued. Plaintiff squatted upon a part of the claim and built a cabin thereon. He worked as assistant cashier of a bank at a town some 6 miles distant, and slept in the cabin nights. He saw the defendant in possession of the rest of the tract, and protested against his occupancy, but brought no action in ejectment. He had no farming tools or stock. Defendant in the meanwhile was in full possession of all of the tract excepting the cabin, and kept his stock in the pasture. He had other buildings upon the tract but did not live thereon. He asserted his right to the land as against the world in general and against this plaintiff in particular, and was so asserting it when this suit was begun, October 9, 1907.

Plaintiff having alleged that he was the owner and entitled to the immediate possession of the grain upon the 9th of October, 1907, he must prove the allegation. He claimed no title or interest therein, however, excepting what he might have by virtue of his interest in the land

upon that date. When called upon to prove his ownership of the grain, he replies that it is his because he was upon said date a contestant and applicant for land upon which the grain had been grown. He attempts to prove a material allegation of his complaint by claiming that he is going to win in another action involving the title to the land. This is not permissible. To maintain a replevin he must first gain possession of the land, and must gain such possession before the crop has been severed from the land and reduced to personalty. To be sure, more than a year afterwards the contest to the land was decided in favor of the plaintiff; but at the date of the bringing of this suit it was still undecided. Plaintiff's right to the grain must be tried as of the time of the commencement of the action. See 34 Cyc. p. 1387, and cases cited. In order that the court might decide the replevin case in favor of the plaintiff, it would be necessary to decide the contest regarding the title to the land, which contest was at the very time in litigation in another proceeding before the Department of the Interior. This courts will not do. See Cooper v. Watson, 73 Ala. 252; Lieberman v. Clark (Wheeler v. Clark) 114 Tenn. 117, 69 L.R.A. 732, 85 S. W. 258; Adler v. Prestwood, 122 Ala. 374, 24 So. 999; Johnston v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979; Brothers v. Hurdle, 32 N. C. (10 Ired. L.) 490, 51 Am. Dec. 400; Baker v. Campbell, 32 Mo. App. 529; Anderson v. Hapler, 34 Ill. 436, 85 Am. Dec. 318; Street v. Nelson, 80 Ala. 231; Brown v. Caldwell, 10 Serg. & R. 114, 13 Am. Dec. 660, 12 Mor. Min. Rep. 674; Halleck v. Mixer, 16 Cal. 574; Hines v. Good, 128 Cal. 38, 79 Am. St. Rep. 22, 60 Pac. 527; Washburn v. Cutter, 17 Minn. 361, Gil. 335; Caldwell v. Custard, 7 Kan. 303; Barnhart v. Ford, 37 Kan. 520, 15 Pac. 542; Lehman v. Kellerman, 65 Pa. 489; Hull v. Hull, 1 Idaho, 361; 34 Cyc. 1365; 42 Century Dig. title Replev. § 23; 34 Cyc. 367, § "e;" Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479. Plaintiff has clearly mistaken his remedy. If he could establish his contention in this case, to wit, that his rights as entryman dated back to June, 1907, when he tendered his filing, and that he became in legal effect upon that day the owner of the land, yet he would not be entitled to the crop. He might possibly be entitled to recover for the use and occupation of the land while it had been withheld from him, but that is altogether a different remedy. In the case of Aultman & T. Co. v. O'Dowd, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756, the

court says: "It is the value and use of the land which the owner recovers, and not the fruits of the land. A contrary rule would give the owner the value of the use of the land, and the value of the labor of the farmer in producing the crop, for the crop contains the value of both." See also Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 97, 128 N. W. 691; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479.

If, then, it be conceded that plaintiff was the owner of the land at the time of the commencement of the action, which, however, we do not decide, he would not be entitled to the severed crops. There is much authority, however, holding that the defendant was not a trespasser, but a good-faith claimant and applicant for the land. See Phillips v. Keysaw, 7 Okla. 674, 56 Pac. 695; Rathbone v. Boyd, 30 Kan. 485, 2 Pac. 664; Page v. Fowler, 28 Cal. 605; Stockwell v. Phelps, 34 N. Y. 363, 90 Am. Dec. 710. In which he would, of course, be entitled to the grains grown upon the land.

The trial court made findings herein which have the same effect as though found by a jury; a jury having been waived. These findings have not been challenged by any assignment of error in the statement of the case, and have been accepted by us as correct. They are supported by the evidence. At the close of the plaintiff's case he had failed to show any title to the grain in suit, and the trial court properly found so, and ordered the grain to be returned to the defendant from whom it had been taken.

Judgment affirmed.

ENGLUND v. SOUTHER et al.

(133 N. W. 301.)

Chattel mortgage — right of mortgagee to take possession when security impaired.

Evidence examined, and *held*, that it shows the property described in two chattel mortgages had been neglected and placed in jeopardy by the mortgagors.

Note.—As stated in the opinion in ENGLUND v. SOUTHER, the courts are not in harmony as to the effect of a power conferred upon a mortgagee to take possession

and its value thereby lessened, and the debts secured rendered insecure, so that, under the terms of the mortgages, the mortgagee was justified in commencing foreclosure proceedings before the apparent maturity of the debt.

Opinion filed October 10, 1911. Rehearing denied November 18, 1911.

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

Action by J. A. Englund against Preston Souther and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

F. B. Lambert and *F. A. Leonard*, for appellants.

George N. Gray, for respondent.

SPALDING, J. This action was brought to foreclose two certain mortgages given by the defendants upon a farm engine and separator, certain crops, and horses, as security for the payment of the purchase price of the engine and separator, as evidenced by one note for $600 and another for $400, bearing date September 6, 1907, and due, respectively, November 1, 1908, and November 1, 1907. Upon the last-mentioned note, payments had been made, aggregating $297, prior to the commencement of foreclosure proceedings.

The answer to the complaint admits the ownership of the notes, that they are unpaid, except as to the $297, but denies that any sum was due thereon at the time this action was commenced or tried, and alleges, on the contrary, that, on the 29th of October, 1908, the plaintiff, for a valuable consideration, contracted and agreed with the defendants that the time for the payment of the principal sum named in said notes, with interest, should be extended until the 1st day of November, 1909, and that such agreement was then in full force and effect. The trial court found that there had been such an agreement for an extension of payment, but that a portion of the security had been removed from the county of Ward, without the knowledge or consent of the plaintiff, and

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of mortgaged chattels when he deems his security impaired or in danger of being impaired. Some cases hold it to be an absolute right to be exercised at pleasure, but the weight of authority, as shown by a careful review of all the authorities in notes in 23 L.R.A. 780 and 19 L.R.A.(N.S.) 915, requires that such right shall be exercised in good faith, based upon such reasonable apprehension of danger as will cause a reasonable man to act.

that defendants had in various ways abused, neglected, and injured the property covered by the mortgages; that the same was being scattered and depreciated in value, and that the plaintiff had elected to take possession thereof under the provisions of his mortgages, entitling him to do so for foreclosure purposes; and that he had declared the whole debt due and payable December 18, 1908; and that such property was seized on a warrant of foreclosure. The provisions referred to and contained in such chattel mortgages are as follows: "And it is hereby agreed that if default be made in the payment of said debt, or any part thereof, or the interest thereon, or if any attempt be made to remove or dispose of said property, or if at any time said mortgagee shall deem himself insecure, that thereupon either himself or his agents are hereby authorized to enter upon the premises where the said property may be, and remove and sell the same at private or public sale," etc. And: "If default be made in the payment of said debt or any part thereof, or any attempt be made to remove the said property or any part thereof from the place where it now is, or to dispose of the same or any part thereof without written consent of the said mortgagee or....., his administrator or assigns, or if at any time the said mortgagee, heirs, ..., administrators, assigns, shall deem the said debt unsafe or insecure, that he is hereby authorized, either by ..... or agent, to enter upon the premises where the said property may be and take possession and remove and sell the same," etc.

The action was tried by the court, findings made, and judgment entered. At such trial a stipulation was made that the only questions for determination by the court were whether the note and mortgages sued upon and foreclosed were, in the fall of 1908, extended until the fall of 1909, and, if so, whether the plaintiff was justified in taking possession of the security and commencing foreclosure proceedings thereon, on the 19th day of December, 1908.

The case is before us for trial *de novo* of the question of facts regard- the grounds for the mortgagee deeming himself insecure. The other findings are not here for review. Hence they must be taken as warranted by the evidence. Among these is that the time for payment of the debt was extended to November 1, 1909. The facts necessary to an understanding of this action may be summarized as follows: That the defendants, to secure the payment of the notes described in the complaint,

gave a chattel mortgage on certain crops to be harvested during the year 1907, upon a second-hand farm engine and separator and attachments, one half of the earnings of such machine until the debt should be paid, and also upon four horses. The mortgage contained a provision that the horses should be released therefrom, if the $400 note was paid in full in the fall of 1907.

It appears that the parties defaulted, with the exception of a payment of $297, in the fall of 1907, on the $400 note; that the mortgagee sent an agent to the parties, with instructions that the notes could not be carried longer, unless real estate security should be given. In violation of his instructions, he took a new chattel mortgage,— the mortgage, dated October 29, 1908, by defendants Louis and Horatio Souther,— covering four horses, one five years old, one eight, and two twelve, owned by Horatio Souther; and the court found that there was an extension of one year at the time this mortgage was given.

The proof shows that at the time the new mortgage was given the engine was at or near the farm of one of the mortgagors. One of them lived on the eastern edge of Williams county, and the other close by, in Ward county. Immediately after the giving of that mortgage, such engine was moved to a coal mine in Williams county, more than 35 miles away, and put in use there, pumping water from the mine, and that some of the horses were taken from Ward county to the mine for employment, all without leave of the mortgagee. It also appears that at the time possession was taken the horses were suffering from a disease known as mange; that they were in very poor condition, evidencing lack of feed, which was conceded by one of the mortgagors, and hard work. They were intending to use the engine all winter in pumping water. It developed afterward that one of the horses was so reduced that it could not be driven into town, and was of no value. The evidence on one side tends to show the value of seven horses at about $35 each, and the value of the remaining security, aside from the engine, as nothing, and the value of the engine at about $400. On the other side, testimony was received to the effect that one pair of horses was worth $300, and three others $100 each. We think, however, from the evidence as to the condition and character of the horses, that the court was justified in concluding that they were not worth more

than the smaller figures, and that they had greatly depreciated in value by reason of hard work, poor care, and feed.

It would then appear that the plaintiff, when the action was commenced, had security on some horses in very poor condition and of little value, on an old farm engine which the defendants had used during the threshing season, without turning over to the plaintiff, as they had agreed to do, any considerable part of the proceeds, and being used in a most hazardous business for the winter season. It was liable to freeze up at any time, and be ruined in consequence.

This is all of the evidence that it is necessary to consider. The question arises whether, under these facts and the law applicable, the plaintiff could legally proceed to take possession of the security and foreclose his mortgages at the time he did so. There is much conflict in authorities as to the legal effect of the provisions contained in so many chattel mortgages, authorizing the mortgagee to take possession of the security, declare the whole debt due, and proceed to sell under foreclosure, whenever he may deem himself insecure; there being no less than three well-defined rules on the subject.

Under one rule, it is held that no proof is required to show that he has grounds to consider himself unsafe, as the legal presumption is that such was the fact, and that he is made the sole judge thereof; that it rests in him an absolute discretion on the subject, not depending upon the fact of reasonable grounds for deeming himself insecure. In Wisconsin it is held that when parties have made their own contract, the courts will not set it aside and make a new one for them, and that to consider and decide upon the reasons of the mortgagee for deeming himself insecure would be to do so. Cline v. Libby, 46 Wis. 123, 32 Am. Rep. 700, 49 N. W. 832.

The second rule is that the mortgagee has a right to take possession, if he had good reason to think, and did think, himself insecure; or, what is equivalent, that he must have a reasonable apprehension of insecurity or danger of losing his debt by delaying its collection.

The third rule seems to be that the mortgagee must act in good faith and upon facts rendering his debt insecure in fact. See Jones, Chat. Mortg. § 431, and authorities cited; 2 Cobbey, Chat. Mortg. §§ 856, 857, 858, and 859; 7 Cyc. 12. The first rule prevails in Iowa, Kansas,

New York, and Wisconsin, while the third is adopted in Nebraska and South Dakota.

We need not in the case at bar determine which of these rules should be applied in this state; for it is sufficient to say that, in our judgment, the evidence clearly justified the plaintiff in taking possession and foreclosing under either of such rules. He certainly had reason to deem himself insecure, by reason of the condition of the horses and the use which the engine had been put to, and we are satisfied he was insecure in fact. In Nebraska the courts adhere to the third rule; but in J. I. Case Plow Works v. Marr, 33 Neb. 215, 49 N. W. 1119, that the fact that a farm engine was left exposed to the elements through the winter justified the mortgagee in taking possession, under a clause identical in effect with those we are considering. See Allen v. Vose, 34 Hun, 57. We conclude that the judgment of the District Court must be affirmed.

Goss, J., being disqualified, did not sit in this case; FRANK FISK, District Judge, sitting in his place. MORGAN, Ch. J., did not participate.

COOKE v. NORTHERN PACIFIC RAILWAY COMPANY.

(133 N. W. 303.)

Pleading — character of action.

1. The character of an action as brought must be determined by the complaint.

Carriers — limitation of liability — notice of claim for damage or injury.

2. A clause in a special contract with a common carrier, which provides in substance that when property is injured, as a condition precedent to a right

Note.—Under the general rule that a carrier cannot exempt itself from liability for losses caused by its negligence, the stipulation in a carrier's contract, requiring notice of losses to be given within a specified time, would be void if restricted to a carrier's liability for its negligence. But it is generally held, however, as shown by the cases on the subject collated in a note in 17 L.R.A.(N.S.) 628, that the stipulation is not a restriction of liability, but is rather a condition precedent, affecting not the carrier's liability, but the shipper's remedy; the general purpose of such a stipulation being, of course, to permit the carrier to make an investiga-

of action, plaintiff must give notice in writing of any claim for damages or injury to the officer or station agent, before said property is removed from the place of destination, is not prohibited by the provisions of law limiting the right of such common carrier to exonerate itself from certain liabilities for negligence, fraud, and wilful wrongs.

Pleading — amending — statement of new cause of action.

3. Plaintiff, having elected to bring an action *ex delicto*, must stand or fall by the allegations as made. The power to amend is limited. A new and distinct cause of action cannot, at the time of the trial, without consent, be thrust into a complaint by amendment.

Review of former decisions.

4. Certain cases considered, and regarded as not an authority against, but rather supporting, the procedure adopted by the parties in this action.

Opinion filed May 2, 1911. On rehearing June 22, 1911.

Appeal from District court, Stutsman county; *Burke*, J.

Action by John D. Cooke against the Northern Pacific Railway Company. From an order denying a new trial after direction of verdict for defendant, plaintiff appeals.

Affirmed.

John Knauf and *S. E. Ellsworth*, for appellant.

Ball, Watson, Young, & Lawrence, for respondent.

POLLOCK, Special Judge. This is an appeal from an order denying a motion for a new trial. Certain irregularities with reference to the admission of testimony, as well as errors of law occurring at the trial, are claimed, all of which were duly excepted to. There are twenty-two specifications of error, most of them with reference to the introduction of evidence. In order to properly consider these alleged errors, it will be necessary to analyze the issues as presented by the pleadings.

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tion of the claim while the matter is fresh and easily investigated; and the great majority of the cases discuss the validity of the stipulation solely from the standpoint of its reasonableness. The reasonableness of the time fixed in a contract of shipment of live stock for presentation of a claim for damages is the subject of another note in 7 L.R.A.(N.S.) 1041.

The effect of the removal of live stock from the carrier's premises before notice of a claim for damages, where such notice is given in time for examination, is treated in 24 L.R.A.(N.S.) 866.

Among other things, the plaintiff alleges: That on March 7, 1907, he delivered, in good condition, to the Chicago, Rock Island, & Pacific Railway Company, at Reynolds, Illinois, eight horses for transportation to McHenry, North Dakota. Said railroad company delivered said horses, still in good condition, to the Burlington, Cedar Rapids, & Northern Railway Company, a connecting common carrier. Later, and on March 9, 1907, the last-named company delivered said horses, in good condition, to the defendant company as a common carrier at the Minnesota transfer, near St. Paul, Minnesota, for final transportation to McHenry, North Dakota. That defendant received said horses for adequate reward agreed to be paid. That while said horses were in the possession of the said defendant, it operated the train of cars in which said horses were being transported, in a manner that was grossly careless and negligent, causing said car to receive violent shocks and jolts, which threw down, maimed, injured, and bruised all of said horses, and caused the death of two of them. Plaintiff further alleges carelessness and negligence in providing proper facilities for unloading said horses, for their exercise, refreshment, feeding, and watering, and claims that on March 15, 1907 (the time the horses were delivered to him by defendant), they were bruised, disabled, in very poor order, and were greatly reduced in value; and further alleges that, "by reason of the careless, negligent, and cruel treatment of said horses by defendant, and its failure to use ordinary care to provide for the safety and welfare of the same while in its possession for transportation as aforesaid, the plaintiff has sustained the entire loss of two of said horses, and six others have been injured and reduced in value, to plaintiff's aggregate loss and damage in the sum of $1,000, and therefore demands judgment for that amount."

Defendant, in his answer, denies each and every allegation in said complaint contained, except so much as was thereinafter specifically admitted. After admitting the corporate capacity, it admits and alleges that, on or about the 9th day of March, 1907, a written contract was made and entered into between plaintiff and defendant for the delivery and shipment of certain goods and stock by the defendant company from the Minnesota transfer to McHenry, North Dakota; and further alleges that said contract of shipment contained the following provisions and conditions precedent, to wit: "The said shipper

further agrees that as a condition precedent to a right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock." And further alleges that no such notice in writing of any claim for damages or injury was served on the defendant at any time prior to the commencement of said action, and demands that the plaintiff take nothing by this suit.

At no time throughout the trial were any amendments asked or made to the pleadings as above set forth. The important error complained of is the granting of defendant's motion for an instructed verdict, after both parties had rested. The motion was made as follows: "The defendant moves to strike out all of the testimony of the plaintiff with reference to any duty, liability, undertaking, or implied contract, and to strike out all of the testimony with regard to any duty or obligation upon the part of the defendant, except the written contracts introduced upon the cross-examination of the plaintiff's witness, *viz.*, Exhibits A1 and A2. In connection with the motion to strike out this testimony, the defendant moves the court to direct a verdict in favor of the defendant and against the plaintiff for a dismissal of the action on the ground of failure of proof and total absence of proof to support the allegations of the complaint, and upon the ground that the complaint of the plaintiff charges a delivery of the stock in question, and for which the plaintiff seeks to recover damages, to the Burlington, Cedar Rapids, & Northern Railway Company, to the Chicago, Rock Island, & Pacific Railway Company, being a delivery by one company to the other as a connecting carrier. Said complaint also charges a delivery by the Chicago, Rock Island, & Pacific Railway Company to the Northern Pacific Railway Company, as a connecting carrier, and in no other manner whatsoever. That all of the allegations of the complaint are based upon a duty and liability of the defendant company as connecting carrier, and the plaintiff asks damages for a breach of duty under the common-law liability, or for a tort or wrong; and there now appears in evidence an express contract, entered into between the plaintiff and defendant for a special consideration, and upon terms and conditions agreed to by the parties, and there is therefore a total failure of proof to sustain the allegations of the complaint." This same motion was

made at the close of plaintiff's case, and was overruled *pro forma*, and thereafter, when both parties had rested, was renewed for the same reasons, at which time the court allowed the motion, and instructed the jury to find for the defendant, which they did by a proper verdict duly entered.

1. The character of this action as brought must be determined by the complaint. Plaintiff's allegations stated a cause of action *ex delicto*, and charge a violation of the common-law duties of a carrier. Some dispute arises between counsel as to whether the violation of this duty was charged as the result of ordinary or of gross negligence. Our Statute (§ 5678, Revised Codes 1905), with reference to exoneration of common carriers by agreement, being limited, at the time the facts above stated occurred (March 7 to March 15, 1907), contained the words, "gross negligence." The amendment of that section by the Laws of 1907, taking out the word "gross," did not take effect until July, 1907. A careful examination of the complaint leads us to the conclusion that gross negligence was not charged. However, we do not deem a discussion of this matter as important, in view of another situation which presents itself upon the record.

2. Section 5678 of the Revised Codes of 1905 reads as follows: "A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants." It will help to clarify the dispute growing out of the pleadings in this case to first determine whether the clause in the contract with reference to the condition precedent to the right of recovery,—namely, that of giving notice in writing of any claim for damages or injury to the officer or station agent of said company before said stock has been removed from the place of destination or mingled with other stock,—is prohibited by the law of the state of Minnesota, where the contract was made, or by § 5678, above, and whether such a clause in a special contract with a common carrier, made for a valuable consideration, can be supported as between the parties. We think the principle involved in this question has been settled by this court in the case of Hanson v. Great Northern R. Co. 18 N. D. 324, 138 Am. St. Rep. 768, 121 N. W. 78. Judge Fisk discusses the proposition, beginning on page 328 of 18 N. D. wherein he had under consideration a contract with a common carrier entered into

in the state of Minnesota. After reviewing the authorities at length, he says at the bottom of page 331 of 18 N. D.: "The contract in question, . . . in so far as it does not attempt to limit defendant's liability for loss or damage occasioned by gross negligence, fraud, or wilful 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 question, then, is sharply presented by this record whether the contract does in any manner, otherwise than as above expressed, attempt to limit such liability. A similar question was before this court in the case of Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 493, 107 N. W. 1087. Chief Justice Morgan held that similar conditions or stipulations are not unreasonable as a matter of law, quoting numerous decisions. This precise question was recently presented to the supreme court of Tennessee, in the case of Mobile & O. R. Co. v. Brownsville Livery & Live Stock Co. 123 Tenn. 298, 130 S. W. 788, wherein an agreement, essentially the same as the one in the case at bar, was under consideration. That court, among other things, says: "It imposes no unnecessary burden on the consignee of stock; while it is evident that by a failure to give notice promptly the carrier is at a disadvantage, and is more or less exposed to the peril of fraudulent claims, made at a time so long after the delivery of the stock claimed to be injured that an intelligent investigation of the claim is difficult, if not impossible. If a notice, given one day after the receipt and removal of stock, will suffice, then equally would notice to the carrier months after the stock were removed be sufficient. Given, however, before or at the time of their removal, the agent of the carrier has an opportunity of examination, with the view of seeing the extent of the injury, and of ascertaining whether the animals were sound, or not, at the time of their delivery for carriage; while delay, from the many transactions of a similar character which the carrier has, would render it impossible, as is clear, to make a satisfactory investigation of the one as to which complaint is made. As against consignees, to which class, unquestionably, the defendant in error belongs, there may be no necessity for such a provision. But the rule covers both honest, as well as dishonest, shippers, and, if reasonable, as we hold it to be,

must be applied to all alike." This statement of the laws, and the cogent reason assigned, meets with our cordial approval. We therefore hold that this clause of the contract is legal and binding upon the parties.

3. We might pause here, because it is not contended that there was any proof of notice given under the terms of this special contract, except for the insistence upon the part of counsel for the plaintiff that the learned court below exceeded his powers in directing a verdict at the time and manner in which he did. As shown by the pleadings, the action was not brought upon the special contract, and we hold that that was unnecessary. The plaintiff had a choice of either bringing an action for the wrong under what is known as the common-law liability, or upon the special contract made by the parties. Counsel for the plaintiff regards the action as one which he styles *ex delicto quasi contractu.* and further insists that all of the matters growing out of the special contract are purely defensive in their nature, and that when the plaintiff proved a violation of the common-law obligation, and the extent of the damage, that was sufficient to put the burden upon the defendant to show any special defense in view of the *quasi contractu* nature of the action. The word "quasi" has already been working overtime for so long a period in fitting certain conditions of fact to meet other settled requirements of law that its use ought not to be invoked further to break down the settled distinctions between actions *ex delicto* and *ex contractu.* As Bliss, in his excellent work on Code Pleading, 2d ed. p. 7, says: "The whole case often clusters around the name, and the action is just as much an action of trover or of replevin or of ejectment as though so called in the pleading. When the statute says there shall be but one form of action, form, and not substance, is spoken of. Without classification, there is no science. Such distinctions as exist in the nature of things must be recognized, and they are equally recognized, whether a specific name be given to the suit or action, with a corresponding formula, or whether they arise from and are known only by the nature of the grievance and the character of the relief."

As was very appropriately remarked by Judge Spalding, in Taugher v. Northern P. R. Co. 21 N. D. 120, 129 N. W. 750, when, having under discussion an action for conversion, he said: "In most cases more than one remedy is applicable, and . . . [plaintiff] has his

election; while in others an action for conversion does not lie, though one for damage for breach of contract may. If the shipper elects to sue for conversion, and is unable or fails to establish the elements necessary to constitute conversion, he must fail in that form of action. The burden is on the shipper, when he elects to seek the benefit of the measure of damages in an action charging conversion, to prove the act of conversion by showing a wrongful disposition or wrongful withholding of the property."

It should be constantly remembered in this case that the issue, as framed, charges a tort. This is denied by the answer. The defensive matter of the special contract is set forth also in the answer. The record shows that the plaintiff in offering his testimony, in addition to introducing evidence to support the claim of negligence, likewise gave evidence (the contract itself), which was competent, showing the entire nature of the transaction between the parties as set forth in the answer, and which, in the very nature of things, if true, would prevent the plaintiff from recovering. In this state of the record, it appears to us that there was only one conclusion to be reached. The plaintiff himself had shown that he was not entitled to a verdict. It was not incumbent upon defendant to offer any evidence when, at the close of plaintiff's evidence, a prima facie case had not been made. Under the situation confronting plaintiff at the trial, he could not have furnished further evidence without openly confessing that a wrong form of action had been chosen. Even if plaintiff had offered to amend his complaint, a serious question might have arisen, because a radical change would have been wrought in the essential character of the action. In Mares v. Wormington, 8 N. D. 332, 79 N. W. 443, Judge Wallin, speaking for the court, says: "It is true that the authorities are not entirely harmonious upon the point; but the decided weight of the cases, and, we think, the better reason, is against allowing an entirely new cause of action to be set up by way of an amendment to a complaint. This could never be done, either at common law or in the chancery practice. . . . The power of amendment has been much enlarged by statute, but the power is nevertheless limited, and cannot be arbitrarily exercised. A new and distinct cause of action cannot be thrust into a complaint by amendment."

Reduced to its lowest terms, this record shows that the plaintiff

charged a tort, proved a contract, and asked judgment. As said by Dixon, Ch. J., in Kewaunee County v. Decker, 30 Wis. 624: "It would certainly be a most anomalous and hitherto unknown condition of the laws of pleading were it established that the plaintiff in a civil action could file and serve a complaint, the particular nature and object of which no one could tell, but which might and should be held good as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon money demand on contract, and one in equity, all combined or fused and moulded into one charge or declaration, so that the defendant must await the accidents and events of trial, and until the plaintiff's proofs are all in, before being informed, with any certainty or definiteness, what he was called upon to meet."

Chief Justice Ryan, in Pierce v. Carey, 37 Wis. 235, commenting on Chief Justice Dixon's language above quoted, said: "Golden words, which should ever be present to the mind of every pleader under the Code, which was designed to substitute a plain and concise statement of causes of action, and of defenses, for the intricacies of pleading at common law. All that goes to the administration of justice should be definite and certain. This is almost equally essential to the claim, the defense, and the judgment. When these become vague and loose, the administration of justice becomes vague and loose, with a tendency to rest, not so much on known and fixed rules of law, as on capricious judgment of the peculiarities of each case; on a dangerous and eccentric sense of justice, largely personal to the judges, varying as cases vary, rather than on abiding principles of right, controlling equally the judgments of courts and the rights of suitors. And it is time that those who administer the Code should recur to its policy of plain and direct certainty, and rescue it from prostitution to duplicity and ambiguity, and all the juridical evils of loose and uncertain administration, more dangerous to even and uniform justice than the worst technicalities of the most intricate system. Simplicity, not uncertainty, is the object of the Code. And pleadings under it should be as certain in substance as they were before it; more certain in form, because freed from technical formality."

We hold that the plaintiff, having elected to bring an action *ex delicto* and sue for the alleged wrongful act of the defendant, under the

record in this case, having failed to establish such a relation existing between the parties, failed to make out a prima facie case; and therefore the lower court committed no error in instructing the jury to find for the defendant.

4. This practically disposes of all the specifications of error. However, counsel for the plaintiff has called the attention of the court, with special emphasis, to a certain class of cases, as, for example, the cases of Nelson v. Great Northern R. Co. 28 Mont. 297, 72 Pac. 642, and Southern P. Co. v. Arnett, 50 C. C. A. 17, 111 Fed. 849, upon which they rely for the procedure claimed by them to be correct in this case. An analysis of the issues as framed by the pleadings in those cases does not support this conclusion. In Nelson v. Great Northern R. Co. there were sixteen paragraphs in the complaint, the first three, with reference to corporate capacity, etc., being admitted by the answer; 5, 6, 7, 8, and 9 were denied; 10 was partially admitted; while 4 and 11 to 16, inclusive, were neither denied, specifically admitted, nor qualified. Paragraph 4 charged the common-law duty. The remaining paragraphs, undenied, alleged a tort, the damage, and its extent. The plaintiff then filed a reply, denying the facts with reference to the special contract in the answer. The pleadings, as thus framed, practically places the defendant in the attitude of having confessed the tort and voluntarily proceeded to trial upon the issues involved in the special contract. No such condition arises in the case at bar, because, as before stated, there was the allegation of a tort, a general denial, and no issue in fact was taken by the plaintiff with the defendant upon the defensive matter of the special contract set forth in the answer.

The Southern Pacific Case, found in 50 C. C. A. 17, 111 Fed. 849, and its companion case (Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.) found in (C. C.) 129 Fed. 480, wherein Judge Pollock, of the United States district court of Kansas, followed the rule laid down by Judge Thayer in the Arnett Case, 50 C. C. A. 17, 111 Fed. 849, as presented to this court, amounts to no more, when applied to the facts in this case, than a statement that a special contract is purely defensive matter; and Judge Thayer, at page 851 of 111 Fed., at page 20 of 50 C. C. A., of the Arnett Case, specifically states, when referring to the contention of the defendant that he should have had a directed verdict: "We do not find that any question of this sort was raised or discussed

in the trial court, and, not having been raised below, it is not open to discussion here." In the decision by Judge Pollock (C. C.) 129 Fed. 480, the matter came up by way of motion by the defendant, requiring plaintiffs to amend their petition by stating whether the contracts of shipment of the cattle were in writing or oral, and that they be required to attach copies of such contracts to their petition; and the exact question before the court was, admitting the contract of shipment between the parties in writing to exist, and in the possession of the plaintiffs, as was admitted at the oral argument: Must the plaintiffs plead and bring such contracts as a part of their case, or are such contracts a matter of defense to the carrier? And upon a situation as there set forth the court held, following the opinion of Judge Thayer: "A special contract, when executed by the carrier, is a defensive weapon, to be made use of by the carrier when sued by the shipper, against any dereliction of duty against which it was designed to offer protection." To require the plaintiff to attach copies of the contract to the petition would be tatamount to taking from him the right to elect to sue for the tort, which, under well-sustained authority, cannot be done. Plaintiff knows beforehand, however, whether he has a special contract; and if he has, and the provisions thereof are legal, he might as well bring his action *ex con'ractu;* but, if he believes the conditions of the contract are unlawful, he can fully protect his rights by bringing his action for the tort, when the defendant can plead the special contract as defensive matter, and have its legality tested in the tort action, under the rules as laid down by the decided weight of authority. Bliss, Code Pl. 2d ed. § 14; Clark v. St. Louis, K. C. & N. R. Co. 64 Mo. 440; Oxley v. St. Louis, K. C. & N. R. Co. 65 Mo. 629.

From the foregoing, it follows that the order and judgment of the lower court must be affirmed.

Morgan, Ch. J., not participating. Burke, J., being disqualified, did not sit; Honorable Chas. A. Pollock, Judge of the Third Judicial District, sitting in his place by request.

On Rehearing.

The petition of the plaintiff for a rehearing having been granted, a reargument of the case was had, and extended briefs were filed

At the beginning of paragraph 3 of the main opinion, the writer hereof made an error in saying, "Because it is not contended that there was any proof of notice given under the terms of this special contract." There is evidence that such notice was given, and counsel for defendant does not dispute the fact. The petition for rehearing was based largely upon this inadvertent misstatement of the evidence. We wish to say, however, that the language of the opinion, with the above-quoted words omitted, expresses the real and paramount thought, and what follows is not changed in the slightest degree by a reversal of that particular statement of fact. The record was being discussed in the light of the pleadings, the evidence, and the motion made. From such discussion, the conclusion followed that "plaintiff charged a tort, proved a contract, and asked judgment," which cannot be permitted, unless, indeed, the rule of pleading is different when a common carrier, and not a private citizen, is being sued.

In the case at bar, the defendant made a lawful contract with plaintiff. That contract in no manner violated the provisions of § 5678, Rev. Codes 1905, with reference to exempting defendant from liability for negligence. Plaintiff must have known that fact. His counsel in argument concedes it; and yet, because the suit is brought against a common carrier, a special privilege is invoked, which would result in violating well-settled rules of pleading, to the utter confusion of that uniform practice so essential in securing justice in the courts of the land.

The discussion of the matter by counsel upon the rehearing, and their complete briefs filed, serve only to amplify and make clear the rule adopted by the court in the first instance. In addition to the cases cited and considered in the main opinion counsel for plaintiff calls attention to the cases of Nicoll v. East Tennessee, V. & G. R. Co. 89 Ga. 260, 15 S. E. 309, and Estes v. Denver & R. G. R. Co. 49 Colo. 378, 113 Pac. 1005, and cases in that opinion cited.

In Nicoll v. East Tennessee, V. & G. R. Co. supra, there is no discussion of the principles invoked whatsoever. It is simply a *per curiam* decision, "Judgment reversed."

In the Colorado case (Estes v. Denver & R. G. R. Co.), it must be conceded that language is used fully sustaining plaintiff's contention. Yet, when the pleadings are examined, it will be noticed that, unlike

the case at bar, there is found no general denial; while in the answer a special contract was pleaded, and a reply followed, admitting the contracts. A failure to deny the allegations of the complaint was tantamount to admitting them to be true, and evidently reliance was laid wholly upon the defense of a contract. The facts in that case seem also to be different from those in the case at bar. The court, in referring to them, uses this language (49 Colo. 387, 113 Pac. 1008): "Where, then, as in the present instance, the carrier undertakes *by special contract to exempt itself from liability* for negligence [the italics are ours], such contract to that extent is a nullity. Consequently the carrier is still liable for negligence as at common law, and necessarily suit may be maintained by the shipper for a breach of the carrier's duties in this respect. In other words, *in such circumstances,* the carrier is not liable for the violation of the terms of a special contract, but for the violation of a duty imposed by law, which it cannot escape by contract."

In the case at bar, we are not dealing with a contract which undertakes "to exempt itself [the defendant] from liability for negligence," but, upon the contrary, with an agreement, every part of which concededly recognizes the liability for negligence, but, coupled with that, for the consideration of reduced rates given, are found new contractual relations between the parties, every one of which is legal.

In attempting to analyze the apparent conflict between the cases, it seems to us there has been a failure to recognize certain fundamental principles always found existing in cases where dealings are had with common carriers. Counsel for defendant, on rehearing, have pointed out so clearly these relations that we quote directly from their brief (page 6): "It seems that this case is made intricate and puzzling only because of a failure to carefully discriminate between the common-law liability, and the contractual liability, and the use of general expressions, which, it is claimed, cover both situations. If we had a case where the statutory and contractual liability was the same as the common-law liability, then it is possible, and it would not be unreasonable, to establish a rule that all of the matters in controversy could be determined in one action; for there would then be no conflict as between the common-law liability and the contractual liability, and the modifications contained within the contract would not change the *nature* of the liability, but would merely go to incidents connected with the *same*

kind of liability that was present under both the common-law liability and the contractual liability; and this is where counsel has been misled, and where some of the decisions do not discriminate when they use the term 'special contract.' In many of the cases, the special contract referred to is nothing more nor less than a bill of lading, a shipping receipt, or an instrument signed by both parties—papers which do not change the nature of the liability, nor the relations of the parties, but merely contain restrictions or modifications of that liability. That, however, is not the fact in this case; for we do not have a contract in which the liability is the same as a common-law liability, but we have a contract in which the liability of the carrier has been absolutely and directly changed by the agreement of the parties for a special consideration going to the benefit of the shipper, and which he accepts. It cannot be disputed but that there is an entire change in the nature of the liability, and, in fact, the entire groundwork of liability is different."

As was stated in Baltimore & O. S. W. R. Co. v. Ragsdale, 14 Ind. App. at page 410, 42 N. E. at page 1107: "The complaint declares upon the common-law liability. It did not declare upon the special contract,—the bill of lading. It seems to be settled by the decisions in this state that, if the shipper declares upon an implied contract, or the common-law liability, and it appears that the shipment was made in pursuance of a special contract, or bill of lading, he must fail. The moment it appears that the contract is a special one, and was not an implied one, there is a fatal variance, and it would be the duty of the court to instruct or find for the defendant." See also Stewart v. Cleveland, C. C. & St. L. R. Co. 21 Ind. App. 218, 52 N. E. 91; Honeyman v. Oregon & C. R. Co. 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 630; Brounton v. Southern P. R. Co. 2 Cal. App. 173, 83 Pac. 265; Stump v. Hutchinson, 11 Pa. 533; Nashville, C. & St. L. R. Co. v. Parker, 123 Ala. 683, 27 So. 323, 324; Harris v. Hannibal & St. J. R. Co. 37 Mo. 309, 310; Indianapolis, D. & V. R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Baltimore & O. S. W. R. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1107, supra; Davidson v. Graham, 2 Ohio St. 132; Parrill v. Cleveland, C. C. & St. L. R. Co. 23 Ind. App. 638, 55 N. E. 1031; Lake Shore & M. S. R. Co. v. Bennett, 89 Ind. 471; Kimball v. Rutland & B. R. Co. 26 Vt. 247, 62 Am. Dec. 567; Baltimore & O. R. Co. v. Rathbone, 1 W. Va. 87, 88 Am. Dec. 665; Squire v. New

York C. R. Co. 98 Mass. 239, 93 Am. Dec. 165–167; Camp v. Hartford & N. Y. S. B. Co. 43 Conn. 333; George N. Pierce Co. v. Wells, F. & Co. 110 C. C. A. 645, 189 Fed. 561. And, as involving the principles, see also Exposition Cotton Mills v. Western A. R. Co. 83 Ga. 441, 10 S. E. 113; Harris v. Hannibal & St. J. R. Co. 37 Mo. 307; Hackett v. Bank of California, 57 Cal. 336; Minneapolis Harvester Works v. Smith, 30 Minn. 399, 16 N. W. 466; Walter v. Bennett, 16 N. Y. 253; Kewaunee County v. Decker, 34 Wis. 378. See also 3 Enc. Pl. & Pr. 849; 6 Cyc. 513.

The order and judgment of the lower court are affirmed.

BURKE, J., disqualified.

WHITMORE v. BEHM.

(133 N. W. 300.)

Summons by justice — error in date in copy served on defendant.

1. Where the summons issued by a justice on January 5, 1907, was made returnable on January 15, 1907, and was regular in all respects, but the copy served on defendant was defective merely in designating the year of the return day as "1906," instead of "1907," such defect was not jurisdictional, as defendant was in no manner misled thereby to his prejudice.

Justice of the peace — appeal — trial de novo.

2. Defendant, having appealed from the justice's to the district court solely on the questions of law, is not entitled, on being defeated on his law points, to a trial on the merits, although at the time of taking his appeal he served and filed an answer. A trial upon the merits is permissible in the district court only where the decision on such an appeal reopens the case for a trial of an issue of fact.

Opinion filed October 26, 1911. Rehearing Denied November 25, 1911.

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

Action by Charles Whitmore against Nick M. Behm. From a judgment for plaintiff, defendant appeals.

Affirmed.

Dorr H. Carroll, for appellant.

Arthur LeSueur (*Noble, Blood, & Adamson,* of counsel), for respondent.

FISK, J. This litigation originated in justice's court, where plaintiff recovered judgment by default. Concededly the proceedings before the justice were regular in all respects, with the exception that the copy of the summons served on the defendant designated the return day as "the 15th day of January, A. D. 1906," instead of the 15th day of January, 1907, which was the return day designated in the original summons. The record discloses that the summons was served by delivering a copy thereof, as aforesaid, on January 5, 1907. On the return day designated in the original summons, the defendant made a special appearance, and moved that the cause be dismissed for lack of jurisdiction, basing his motion solely upon the ground that the copy of summons served upon him designated an impossible date for his appearance, and consequently it was the same as no date. Such motion was overruled and defendant suffered a default judgment to be taken against him. Subsequently he took an appeal to the district court from the judgment on questions of law alone, alleging said ruling of the justice as error. At the time of taking such appeal, he also filed an answer to the complaint. The district court subsequently entered a judgment, affirming the judgment of the justice, and this appeal brings up for review the correctness of the judgment of the district court.

We find no error in the record. There is no merit in appellant's contention that the justice did not acquire jurisdiction. Defendant could not possibly have been misled by the designation of the wrong year in the copy of the summons. It was palpably a mere clerical error. The month and day of the month were correctly designated, and plaintiff was bound to know that the summons could not legally be made returnable during any month, other than the month of January, 1907, for the Justice's Code (§ 8362) prescribes that "the time specified in the summons for the appearanec of the defendant shall be not less than three or more than fifteen days from the date on which it is issued." The test as to whether such an error in the copy of the summons will prove fatal to the jurisdiction of the justice seems to depend upon the fact as to whether it operated to mislead the defendant to his prejudice. A case in all respects identical on principle with the case at bar arose

in New York, and in disposing of the point here raised the court said: "What effect, then, does the service of a defective copy have on the proceeding, particularly where the defect on its face is but an apparent clerical error, as in this case? The rule seems to be that where the return day is made reasonably certain, so that the defendant cannot be misled thereby, a clerical error between the original and the copy served will be disregarded by the courts. Griffin v. Jackson, 36 N. Y. S. R. 110, 13 N. Y. Supp. 321.[1] I cannot see how the defendant in this case could have been misled by the omission of the year, so long as the hour and day of the month were properly filled in. The defendant and his attorney must have known that under the provisions of § 2877 of the Code the summons must be made returnable not less than six nor more than twelve days from its date of issue, and that the justice had no authority to compel an appearance in any other year than the year 1906. This fact put the defendant on his inquiry, and he certainly should have known that the omission of the year in the copy could have been nothing less than a clerical omission at most." Lenham Mercantile Co. v. Herke, 55 Misc. 310, 105 N. Y. Supp. 472. See also Bradbury v. Van Nostrand, 45 Barb. 194; Mayerson v. Cohen, 123 App. Div. 646, 108 N. Y. Supp. 59; 23 Cyc. 459, and cases cited.

It is contended, however, by appellant's counsel that in view of the fact that defendant filed an answer in the district court that it was error for the district court not to retain jurisdiction of the cause and try the same on its merits, instead of affirming the justice's judgment, but we are unable to concur in such contention. Defendant saw fit to appeal to the district court solely on questions of law. By his appeal he invoked the jurisdiction of the district court merely on a question of law, and, having been defeated in this, he was not entitled to a trial on the merits. The filing of the answer availed him nothing. In support of this view, see Hanson v. Gronlie, 17 N. D. 191, 115 N. W. 666.

Finding no error in the record, the judgment appealed from is affirmed.

Goss, J., being disqualified, took no part in the decision; Honorable W. C. Crawford, Judge of the Tenth Judicial District, sitting in his place by request.

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 59 Hun, 620.

UELAND v. MORE BROTHERS et al.

(133 N. W. 543.)

Mortgage — subsequent deed in payment for machinery purchased conditionally — rescission of contract — effect of delivery of deed to convey title under statute.

1. Plaintiff claims right to sheriff's deed on foreclosure after expiration of period of redemption, and denies the validity of More Brothers' redemption under a subsequent mortgage. The owner gave his first mortgage, the one foreclosed upon by plaintiff. Thereafter he deeded the land as a part payment for threshing machinery purchased of his grantees, with the understanding that the same should not be recorded and the purchase of the machinery be closed until the machinery should be tested and be approved by him. The machinery was delivered, proving worthless, and he rescinded the contract and delivered back the machinery, which was accepted by his grantors. More Brothers had full knowledge of the transaction, but, prior to said rescission, procured delivery to them by the grantors of the unrecorded deed, together with a mortgage given by said grantees to More Brothers, securing a past indebtedness, and thereupon recorded both deed and mortgage. Thereafter the grantor obtained judgment against his grantees for reconveyance and cancelation, and the land was accordingly reconveyed. But More Brothers were not made parties to, and did not appear in, said action. Thereafter foreclosure of the first mortgage was had by this plaintiff, and More Brothers redeemed under said second mortgage. Plaintiff brings this action to cancel said voidable mortgages to More Brothers and compel sheriff to issue deed on foreclosure to plaintiff, instead of to More Brothers, to whom sheriff has issued certificate of redemption. It is *held*: Under § 4954, Rev. Codes 1905, following holding in Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576, the manual delivery of the deed to

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Note.—The holding in the case of UELAND v. MORE BROTHERS is in harmony with the well-settled rule of law, as shown by the authorities collated in a note in 16 L.R.A.(N.S.) 941, that, where a grantor delivers his deed to the grantee, without, any express reservation of the right to recall it, and with intent that in a certain contingency it shall be effective without any further act on the part of the grantor, such delivery is effectual to pass the title immediately. There are two different grounds upon which the courts arrive at such conclusion: first, the well-known rule of evidence that parol testimony is inadmissible to vary the terms of a written instrument; and, second, that such delivery is an attempt to deliver the deed in escrow to the grantee, which cannot be done, since delivery to a stranger is essential to an escrow.

The general question of what is a delivery of a deed which will convey title is the subject of a note in 53 Am. St. Rep. 537.

the owners' grantees being admitted, the intent of the parties that a condition precedent to its operation shall exist is abrogated by the statute, and such a delivery is absolute, and conveys title to the grantees, to whom the same was by the grantor delivered.

Judgment — conclusiveness against persons not parties.

2. Legal title existing in such grantees, their mortgage to More Brothers is valid until set aside, and the judgment obtained to which said mortgagees were not parties in no wise affects their right of redemption under their mortgage, the judgment not operating against them *in personam* nor binding them as a judgment *in rem;* the judgment being subsequent to and no part of More Brothers' chain of title.

Mortgage — statutory right to redeem; right to sheriff's deed.

3. More Brothers, under their statutory right to redeem, are entitled to sheriff's deed on their redemption made.

Opinion filed October 26, 1911. Petition for rehearing November 25, 1911.

Appeal from District Court, La Moure county; *Burke,* J.

Action by L. A. Ueland against the More Brothers and another. From a judgment for plaintiff, defendants appeal.

Reversed and rendered.

Davis, Warren, & Hutchinson and *Ball, Watson, Young, & Lawrence,* for appellants.

F. H. Larsen and *Engerud, Holt, & Frame,* for respondent.

Goss, J. Briefly recited, the following are the facts in this case: Plaintiff L. A. Ueland was a purchaser at a foreclosure sale, and there was issued to him the usual sheriff's certificate on foreclosure. The land so sold had previously belonged to and was mortgaged by M. A. Ueland, a brother of L. A. Ueland. Plaintiff brings this action to quiet title in him and to compel issuance to him of a sheriff's deed. He claims no legal redemption has been made during the redemption year, and that a subsequent mortgage of the premises by M. A. Ueland's grantees, Hiller & Hasz, under which More Brothers have sought to redeem, is void, and confers on them no right to redeem.

Some years after giving the mortgage on which foreclosure was had, M. A. Ueland and wife purchased certain threshing machinery through Hiller & Hasz, who, in turn, dealt with the machine company through More Brothers as state agents for said machine company. In

addition to the usual order for machinery signed by M. A. Ueland and Hiller & Hasz, M. A. Ueland had the following separate agreement with Hiller & Hasz, *viz.*: "It is hereby agreed by and between Hiller & Hasz, as party of the first part, and M. A. Ueland, party of the second part, that, if the machinery (describing it) does not fulfil the guaranty as given by manufacturers of above machinery, then Hiller & Hasz are to take the same off from my land, and return papers and all notes given in payment for above-mentioned machinery without expense to me." Contemporaneous with such agreement, and as the papers mentioned therein, M. A. Ueland and wife, grantors, executed their warranty deed to the land involved to Hiller & Hasz as grantees for and as a $2,165 payment of the contract purchase price of the machinery; also executing notes, secured by chattel mortgage, for $1,135, to Hiller & Hasz as payees, as the balance of the $3,300 purchase price for such threshing machinery. These papers were delivered to Hiller & Hasz with the understanding that the same would not be recorded until the machinery had proven satisfactory to M. A. Ueland, purchaser, which fact, together with the details of the agreement between Hiller & Hasz and M. A. Ueland, was known to More Brothers, one of whom, J. L. More, was present during the transaction and signed as a witness the deed and chattel mortgage, and became fully aware of all of the details of the entire transaction. Under the terms of the order, the machinery was shipped to More Brothers in care of Hiller & Hasz, with purchase price to be paid by Hiller & Hasz to More Brothers, with whom all settlements were to be had, practically making More Brothers the sellers of the machinery to Hiller & Hasz, their agents, who, in turn, resold to M. A. Ueland, the real purchaser. Delivery was thereafter had of the machinery; the same proving worthless. Thereupon Hiller & Hasz, in fulfilment of their contract, accepted the machinery back from M. A. Ueland on his rescission of the contract. Prior to such rescission, during the time the machinery was being tried, More Brothers demanded a settlement with Hiller & Hasz, and procured from them the unrecorded deed from M. A. Ueland to Hiller & Hasz. They also procured Hiller & Hasz to give them, More Brothers, a mortgage on the land to which Hiller & Hasz still held the unrecorded deed of M. A. Ueland and wife. This mortgage was for $1,805 and interest, the amount then owing on this and other transactions by Hiller & Hasz to

More Brothers, and was, together with said Ueland deed, immediately placed on record by More Brothers. Afterwards M. A. Ueland began an action for rescission of the contract and cancelation of the deed of himself and wife to Hiller & Hasz, and secured a judgment against Hiller & Hasz by default, adjudging the mortgage void, canceling the notes given, and directing Hiller & Hasz to redeed the land to M. A. Ueland, which was done. More Brothers were not made parties to this action, and did not participate therein, although they held the mortgage of Hiller & Hasz to them, which mortgage was of record at and prior to the time of commencement of the action by M. A. Ueland against Hiller & Hasz. The deeds above mentioned and the mortgage from Hiller & Hasz to More Brothers, were all subject to a prior recorded mortgage of $500 and interest on the same land, which mortgage was, two years after the entry of the judgment in favor of M. A. Ueland and against Hiller & Hasz, assigned to L. A. Ueland, plaintiff in these proceedings, and foreclosed by advertisement by a sale of the premises on June 1, 1908. On May 22, 1909, More Brothers, claiming the right to redeem under their $1,805 mortgage, then amounting to $2,309, paid the sheriff $826.87, the full amount necessary to redeem said premises from the foreclosure sale under the prior mortgage, and demanded and secured to be issued and delivered to them the usual sheriff's certificate of redemption. Plaintiff refused to receive such redemption money, insisting that the mortgage to More Brothers, under which said redemption was made, was void and insufficient to entitle More Brothers to redeem. Plaintiff began this action to compel the sheriff to issue sheriff's deed to him, and that the mortgage under which More Brothers attempted to redeem be declared void and title to said premises be quieted in L. A. Ueland under the foreclosure of said first mortgage. Neither M. A. Ueland and wife nor Hiller & Hasz are made parties to this action.

While there is some conflict in the testimony on the question of the intention of the parties, M. A. Ueland and wife, as grantors, in delivering the deed to Hiller & Hasz as grantees, we are satisfied the evidence shows the same was intended to be delivered Hiller & Hasz in escrow, and to be held by them until such time as M. A. Ueland declared himself to be satisfied with the machinery purchased, of which conditional delivery More Brothers had actual knowledge, that M. A. Ue-

land never accepted the machinery, and consequently never became the owner of it, and that the same was accepted back by Hiller & Hasz. We are also satisfied that the mortgage was taken by More Brothers to secure a pre-existing indebtedness, and with full notice that the contract was subject to rescission by M. A. Ueland, in which event the property, the sole consideration for the deed, should be returned to Hiller & Hasz. Hiller & Hasz have never paid More Brothers the indebtedness purported to be secured by their mortgage to them.

Under the foregoing facts, do More Brothers have the right to redeem? If not, sheriff's deed should issue to L. A. Ueland, all rights of M. A. Ueland having elapsed by his failure to redeem during the year of redemption. So far as the equities are concerned, the plaintiff is asking a court of equity to give him by forfeiture several thousand dollars' worth of property. Likewise, the defendants More Brothers are brought with unclean hands into court to demand that a court of equity keep hands off and permit them to secure, at least, full payment of a debt, because of lien security procured by them under circumstances amounting to a fraud on a stranger to the action, conceding, as their counsel does, that the mortgage upon which they seek to redeem, was, as between their mortgagor's grantors and themselves, voidable, but never avoided and still in force, granting them the statutory right because of its want of rescission to perfect redemption, and thus secure title to the premises in question. Granting that the deed from M. A. Ueland and wife to Hiller & Hasz was intended to be delivered in escrow, such a delivery is a legal impossibility, as a delivery in escrow by the grantor to the grantee named in the deed is impossible, and amounts to legal delivery under the statute and authorities. The law to that effect is settled in this state. See Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576, construing § 3517, Rev. Codes 1899 (§ 4954, Rev. Codes 1905), reading: "A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such is necessarily absolute; and the instrument takes effect thereupon discharged of any condition upon which the delivery was made." It is here admitted that the manual delivery of the deed was made, subject, however, to an intended condition precedent to its operation. The effect of the statute is to abrogate the condition precedent, and make the delivery absolute. To hold otherwise would be to abrogate the statute, and, regard-

less of equities, this we cannot do. As is said in Sargent v. Cooley: "The deed in this case being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It could not have been delivered to take effect upon the happening of a future contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed between the parties at the time the deed was delivered, it must be held to be an absolute conveyance, operative from that time."

The deed, therefore, subject to M. A. Ueland's right to set it aside, or have the property therein described reconveyed, was valid, and at the time the mortgage to More Brothers under which redemption is sought was given legal title to the premises mortgaged was in Hiller & Hasz, mortgagors; and, notwithstanding M. A. Ueland's right once existing to set aside this mortgage, the mortgage remains until canceled by satisfaction or court decree, even as against M. A. Ueland, the former equitable owner of the property; and based thereon a statutory right of redemption exists as against this plaintiff, unless barred, as contended by him, by the judgment obtained by M. A. Ueland and wife, adjudging the deed void and under which the reconveyance was had to M. A. Ueland. The title of Hiller & Hasz, under the M. A. Ueland deed, was valid until so set aside by judgment, and therefore sufficient in law to render the mortgage valid when given. The mortgage was voidable, not void, and More Brothers were not parties to the action to cancel the deed, and hence had no interest in its outcome. It was begun after their lien interests had been acquired with their mortgage existing on the land, and any judgment therein rendered could not constitute a muniment of title and thereby bind them, as More Brothers could not in any way claim under or through such judgment. They were not bound *in personam* by the judgment to which they were not parties, nor *in rem* by having to claim title through or under said judgment. Consequently their rights are unaffected by it.

More Brothers are in a position to deraign their interest by mortgage lien in a regular, legal, and still existing channel by deed or mortgage from the former common owner of the land, M. A. Ueland. It follows that they now have the right of redemption sought by them and conferred upon them by statute; and, as equity follows the law, the decision of this court must be that the judgment of the district court be

reversed, and that the defendants More Brothers prevail, and that defendant N. J. Cruden, sheriff of La Moure county, or his successor in office, as between the parties to this action, execute and deliver sheriff's deed to the property in question to More Brothers, copartners, consisting of A. Y. More and J. L. More, under the certificate of redemption issued by said sheriff May 22, 1909, and prior to the commencement of this action, August 26 following, and that defendants, appellants, recover of plaintiff taxable costs and disbursements of this action.

Judgment is ordered entered accordingly.

BURKE, J., not participating.

On Petition for Rehearing.

GOSS, J. Respondent petitions for a rehearing, claiming the evidence to be sufficient to show that the delivery to the grantees, Miller & Hasz, by the grantor, M. A. Ueland, was under the agreement that said grantees should immediately deposit the deed in escrow in the bank at Kulm, it to remain there until the grantor should be satisfied with the machinery. We have re-examined carefully all the testimony. The trial court failed to find any delivery in escrow whatever. But, conceding respondent's contention as sufficiently supported by the evidence, it conclusively appears therefrom that, after the expiration of the six days mentioned in the contract of purchase of the machinery as the period allowed for testing the same, that, if the grantees delivered the deed to the bank in escrow at all, they, after said period, procured its delivery by the bank to them, fulfilling any escrow agreement, after which they recorded the deed under the supposition that Ueland was satisfied with the deal. Ueland had kept the machine then a month. In this connection Ueland testified that he did not even take the trouble to ascertain whether the deed had ever been delivered to the bank during the period from August 20, the date of sale, to the return of the machinery, October 28, and pending which time on September 22, a month after sale, delivery and recording of the deed was had, conceding that the same was deposited in the bank.

Under the evidence, we deem it immaterial whether the delivery was made without any escrow agreement whatever, or whether, as found in

the main opinion which we deem supported by the evidence, an attempted delivery in escrow was had by the grantor to the grantees, or whether the contention urged on rehearing, to wit, a delivery in which the grantees were to act as agents merely in the transmission of the deed to the bank. We deem it immaterial whichever of the three positions be chosen by respondent, as the result must inevitably be the same—that of a final delivery to the grantee with voidable title thereby vesting in them, but sufficient to sustain a voidable mortgage now outstanding and unassailed, and under which the redemption sought by appellants can be made. And what we have said in this opinion assumes the right of L. A. Ueland, certificate holder on foreclosure, to question the record title of the appellants under which they seek to redeem, as to which we do not think it necessary to determine in this action.

After resolving all doubt in respondent's favor in the above matters, he has shown no defense against the right of appellants to redeem.

The petition for rehearing is therefore denied.

HAGERT v. HAGERT.

(38 L.R.A.(N.S.) 966, 133 N. W. 1035.)

Action to compel wife to support infirm husband.

1. A separate and equitable action at the suit of the husband against the wife will lie to compel the wife to support and maintain the husband when

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Note.—The power, in the absence of statute, to decree alimony or maintenance independently of proceedings for divorce is considered in a note in 38 L.R.A.(N.S.) 950. The cases there reviewed show that the view that there is an inherent power in a court of quity to decree a separate maintenance to a wife, apart from statute or divorce proceedings, is constantly growing in favor in American courts, although other courts deny any such inherent power. That equity may decree a separate maintenance to the husband in a proper case is declared in Livingston v. Superior Court, 117 Cal. 633, 38 L.R.A. 175, 49 Pac. 836.

As to allowance of alimony or suit money to husband in action for divorce, see State ex rel. Hagert v. Templeton, 18 N. D. 525, 123 N. W. 283, and cases in note thereto in 25 L.R.A.(N.S.) 234.

The right of the wife to maintain a separate suit for maintenance independent of a suit for divorce is also treated in a note in 77 Am. St. Rep. 228.

amply able to do so, and when she has not been deserted or abandoned by the husband, when he, because of age and infirmity, is unable to gain his own livelihood.

Action by husband for separate maintenance independently of divorce.

2. Such an action may be maintained without joining therewith an action for divorce, and the statutes governing alimony in divorce cases do not bar an equitable action for maintenance and support brought by one spouse against the other.

Action by husband for separate maintenance — jurisdiction.

3. Such an action for maintenance was cognizable in equity at statehood, under the then prevalent equitable usage, continued under § 103 of our state Constitution as formerly vested, and thereunder the district courts of this state have jurisdiction of separate maintenance actions in the absence of a statute devesting them thereof.

Action by husband for separate maintenance; proceedure.

4. In actions of this nature, the practice follows, as far as practicable, the practice in alimony proceedings in applications for alimony pending suit for divorce; and the trial court has the power of granting, on good cause shown, temporary maintenance, counsel fees, and expense money pending hearing and before judgment in the main action.

Statutory duty of wife to support husband.

5. Section 4077, imposing upon the wife the duty of supporting the husband under these circumstances, does not declare merely an unenforceable duty, but, coupled with § 4078 of the statutes, grants one spouse an inchoate interest, to the extent of necessary support, in the property, real and personal, of the other.

Husband's suit for separate maintenance — injunction against alienation of property by wife.

6. Such an interest is of itself sufficient to vest a court of equity with jurisdiction to fully administer relief to the indigent spouse as against the other; and, where necessary to do so, to prevent the offending husband or wife from defeating the order of the court by alienation of property, a lien may be declared on real property, and, where prayed for in the complaint, injunctional relief against alienation or encumbering the property, real or personal, may be granted and enforced by appropriate order.

Opinion filed November 25, 1911.

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

Action by Claus Hagert against Emma Hagert. From a judgment for plaintiff, defendant appeals.

Affirmed.

Skulason & Burtness, for appellant.
Geo. A. Bangs and *Geo. Robbins,* for appellee.

Goss, J. This is an independent action for permanent alimony brought in equity and based on the provisions of our Codes as to the duties and obligations of husband and wife toward each other, and particularly with reference to §§ 4075, 4077, 4078, 4079, Rev. Codes 1905. To the husband's complaint the wife demurred, and the matter is before us with no issue of fact involved. For our determination is presented the right of the husband to maintain an action in equity against his wife to recover from her as equitable relief his maintenance, permanent alimony, and this independent of an action for divorce.

A glance at the pleadings is sufficient to convince us that, if such an action can be maintained, it is certainly justifiable in this instance. Plaintiff and defendant have been married thirty-one years. The plaintiff is fifty-five years old, and physically unable to work, suffering from the effects of paralysis. He is utterly destitute, without means, and infirm. His wife, on the contrary, is wealthy, owning property within this state of the value of more than $30,000 with a net annual income of at least $3,000, with no one dependent upon her for support except a twelve-year-old son, the issue of said marriage. Plaintiff has not deserted defendant, but she refuses him maintenance. He asks for support money pending suit to afford him the necessaries of life, and that his wife be required to make such monthly payments as necessary for future provision for his maintenance, and also that counsel fees and expenses of this action be allowed him. The trial court passed upon the matter of maintenance pending suit, on the affidavit of the respective parties, in the same manner as an application by a wife for alimony pending suit in an action for divorce would be determined. An allowance was made him of $50 per month pending suit, with $100 for attorney fees, from the making of which order defendant promptly appealed, refusing to make such payments and questioning the authority of the court to order the same or to entertain the action at all, charging insufficiency of the complaint to state a cause of action.

The statute in the sections heretofore referred to provides: Section 4075: "Husband and wife contract toward each other obligations of mutual respect, fidelity, and support." Section 4077. "Duty to sup-

port. The husband must support himself and his wife out of his property or by his labor. The wife must support the husband when he has not deserted her out of her separate property, when he has no separate property and he is unable from infirmity to support himself." Section 4078: "Except as mentioned in § 4077, neither the husband nor the wife has any interest in the property of the other, but neither can be excluded from the other's dwelling." We also have the statutory provisions as to divorce, among them § 4070, providing: "Though a judgment of divorce is denied, the court may in an action for divorce provide for the maintenance of a wife and her children, or any of them, by the husband,"—and § 4071, providing for alimony pending action for divorce. But we have no statutory provision expressly authorizing an action by one spouse against the other for maintenance or support, unless chapter 167 of Session Laws of 1890 is unrepealed.

Defendant therefore insists that § 4077, declaring the duty of the wife to support the husband under the circumstances before us, is merely the declaration of an unenforceable right, for the reason that the legislature has not seen fit to declare the manner of its enforcement; further, that at common law no right of action exists in such a case, and hence until the legislature expressly provides the procedure to enforce the right, the courts are powerless to grant relief; and the husband, to whom the statutory duty is owing, is remediless, and must console himself with whatever comfort he can obtain from his situation, enduring a wrong without a remedy, meanwhile securing his own livelihood as best he may. So defendant eloquently proclaims that the law in its application to this case, notwithstanding the provisions of § 4077, points the way "over the hills to the poorhouse" for the husband, that the wife may continue to miserly hoard her wealth. This is a case of first impression in this state. At first blush, and from other than a careful investigation of the subject, it would seem that courts would be obliged to accept defendant's position as correct. It is in part true that there is no sanction in the common law for this action. More accurately speaking, there is no English common law on the subject. It is true authorities may be found declaring that at common law a husband cannot sue his wife for support. Likewise is it true that case law can be found supporting almost any proposition in divorce and alimony matters one may care to advance and within reason. On the right of the

wife to maintain a separate action for alimony, independent of divorce, and in the absence of statutory authority, courts were once in hopeless conflict, dependent largely upon how they saw the light of the supposed common law, the state of mind from which research was made, and the inclination of the court in the particular case.

Necessarily connected with marriage and divorce no one subject of the law is historically more interesting than the one under consideration, involving as it does marital rights of a personal as well as a property kind. The proper application of the decisions thereon compels their being read in the light of the advance of the rights of womankind from a position of subordination to man to the present plane of civil equality of the sexes in personal and property matters. When so viewed, it is easy to conceive why in England no action similar to this can be found. Under the common law, since it can be said to there exist, the husband was the lord of the manor, with the wife an inferior in all respects. And even to-day in that country the wife is not, in divorce or property matters, on a footing of equality with the husband. Under early English jurisprudence, the wife completely lost her identity after marriage, and husband and wife became one, with the husband the one. And this was true as to property as well as to personal rights growing out of the marriage relation. By virtue of the marriage the husband had supreme control even of the real estate of the wife, and became owner of her personal property. She had no power to contract or control it. She could not sue others except through her husband, much less sue him. He possessed and exercised the means of sustenance, and there could not exist the necessity, as in this case, of a suit by the husband against the wife for support. He had all she possessed, and no necessity for suit existed. Herein lies the reason for the absence of common law on this subject. Can it be said that such a condition can constitute a precedent under the situation before us? Courts may accept decisions coeval with Columbus, but it is only when similar conditions make the reason for the holdings applicable. As a matter of fact, when paralleling conditions, there are certain eras in Rome when Roman law would be more fittingly applied to present day divorce in these United States than any English precedent, which latter is really, when considered with procedure, often without weight under our present system. As illustrating, Rome gave to the world the first body of law on marriage. It was in

Rome that the state first asserted its interest in the marriage relation. It was in Rome, in the later days, that the influence of the Christian religion first gave coloring to the marital laws. It was in Rome that equity was first administered to protect the estate of the wife as against the husband; and it was there, too, that womankind first enjoyed approximately the equality in personal rights possessed to-day under what we are pleased to term our advanced civilization. It was in Rome in her last days also that the divorce became, as many assert it now to be in this country, a national evil; but even in those days the wife enjoyed equal and sometimes superior rights of divorce to those of the husband. To further study the applicability of English precedent in these particulars, let us further digress. England in adopting the civil law took with it the Roman institution of marriage, and much of what that law so prescribed, but at a time when the civilization of the age demanded the mastery of the man and the obedience of the woman, and in general the assertion of superiority of the male over the female. But here is again reflected a racial characteristic modifying the law growth. The English are as a race conservative in governmental matters, never adopting anything tending toward instability or uncertainty. This tendency is always toward system and permanency. They are as much so in domestic and religious matters, and, following such trait, they rejected the idea of divorce, and for centuries no absolute divorce existed. During this period the ecclesiastical courts came into existence, and their jurisdiction over personal (styled temporal) matters growing out of the marriage relation became clearly defined and generally asserted. But such court, so-called, was an adjunct of the Church, with Church and state allied; and in administering to matters arising from the marriage relation there always remained, because of religious zeal for morality, the idea of the perpetuity of the marriage relation; and the vows assumed at the altar were recognized as covenants and enforced to the letter. This was wholly inconsistent with the idea of an absolute divorce. *But a divorce a mensa et thoro* was recognized as a necessity and gradually became more frequent. Then, too, the English Parliament in recent times assumed to themselves the right, and began to grant absolute divorces. But divorce remained under English law the privilege of the rich until 1857, when the ecclesiastical theory was abandoned, and "the court for divorce and matrimonial causes" created, with power to grant

either a complete dissolution of the marriage, our absolute divorce, or a judicial separation, a divorce *a mensa et thoro,* and also a decree of nullity of marriage, with a Queen's proctor, a public official, authorized to intervene in all cases where necessary to protect the rights of the nation against collusive divorces. See 97 Statutes at Large of United Kingdom; 20 and 21 Vict. 532; and Stat. 36 and 37 Vict. 8 Law. Rep. 194–195, and amendments there scheduled.

We have divorce discussed in Blackstone's Commentaries. See 2 Andrew's Cooley's Bl. Com. p. 383. But it is noticeable that the absolute divorce there mentioned corresponds to our present decree of annulment of marriage; and always prior to that time, except when granted by a religious decree or act of Parliament, an absolute divorce rested upon some cause existing prior to the marriage and recognized as a canonical disability, at the creating of which disabilities as grounds for divorce the ecclesiastical courts became very proficient. And so whatever common law has grown up on this subject has run the gauntlet of a conflict of jurisdiction between English chancery and ecclesiastical courts, as a side issue to matters equitable and temporal so-called, and under force of the necessities peculiar to the case; hence, roundabout procedure or none at all. And it was not until the last century that alimony pending suit was allowed, and then only as an incident to a suit for divorce. So we do not go to England for common law on this subject, but, instead, we may reasonably conclude American holdings have possibly influenced English legislation thereon, the basis for English present day decisions. However, in English chancery courts, whenever it became necessary for the husband to invoke their aid to procure his legal rights and rights of property as against the wife, the same was withheld on the ground that the husband seeking equity must do equity or forego the benefits of the action. And the doctrine was there created that the real property of the wife could be taken in trust in chancery under circumstances demanding it. Then, again, the necessities of trade compelled the fiction at law that, though the wife could not contract generally, she could bind the husband for necessaries, enabling the third party to collect therefor in an action at law against the husband on the theory that a husband by sending her forth destitute clothed her with his credit to that extent.

In this case counsel for the defense have generously conceded that this so-called common-law right exists to the plaintiff. But at English

common law the husband did not enjoy such right to necessaries as against the wife, as she owed him no duty or obligation of support until the enactment of married women's property act of 1882, § 20; 45 & 46 Vict. chap. 25. See also 16 Laws of English by Halstead, § 626; 21 Cyc. 1599. But the courts of America have generally assumed this to be a proper subject-matter to be dealt with by courts of equity, and, in the absence of statute, generally entertain applications for alimony pending suit for divorce as an incident to the equitable divorce relief sought.

The next step in the same line was the recognition by the courts of equity of the right in the wife to, independently of divorce, maintain an action for alimony or support, and procure judgment from the husband similar to that asked by the husband of the wife in this action. As to the right of the wife to maintain such an action the courts of this country are in conflict. The early common-law rule was followed on that question in many jurisdictions and the right denied, the courts conceding themselves powerless to afford relief until statute clothed them with express authority. But gradually the trend of authority turned in favor of the maintenance of such an action. The strongest pioneer case on the subject is Butler v. Butler, 4 Litt. (Ky.) 202, which was followed by Galland v. Galland, 38 Cal. 265, by a divided court, in which case about all that can be said on either side of the subject is covered by the main and dissenting opinions. Shortly thereafter Garland v. Garland, 50 Miss. 695, exhaustively reviewed the same subject, following the cases cited, and Glover v. Glover, 16 Ala. 440, and Prather v. Prather, 4 Desauss. Eq. 33, all of which are authority for the maintenance of an action by the wife independent of statute and separate from an action for divorce.

These cases point out the cause of conflict in the decisions as arising from the reluctance of the England chancery courts to assume jurisdiction of such matters considered by them as more properly within the jurisdiction of the ecclesiastical courts; and that chancery courts in this country, following those in England, refused to take equitable jurisdiction, and this without considering the reason why the courts of England had refused to do so, and without including as part of the common law the procedure of the same class in the ecclesiastical courts. If the term "common law" be used to include ecclesiastical as well as chancery matters, precedent is found in England for such jurisdiction; otherwise not.

We are satisfied that the greater weight of authority follows the holdings cited in favor of the right to maintain such an action as a matter of equitable jurisdiction. Such was the better rule at the time of the adoption of our Constitution, in 1889; and in pursuance of the provisions thereof contained in § 103, continuing the original jurisdiction of district courts "of all cases, both at law and equity," the right to maintain such an action here exists in the absence of statute. Such equitable jurisdiction was originally assumed in the face of exactly the same objections as are confronting us in this case; that is, that the moral right to support was conceded; but it was urged that the common law in its narrower sense did not recognize such an action, and that until legislation conferred the right to maintain the action to enforce the duty of support the courts must keep hands off and decree themselves powerless to remedy the wrongs existing. In Glover v. Glover, 16 Ala. 440, speaking of this duty, and this objection urged to its enforcement in equity, the court said: "If it be true that the law as well as enlightened conscience creates this obligation, and no court can enforce its performance or compensate for its most cruel and flagitious violation, then, indeed, has one class of cases been found which falsifies the boasted maxim, 'That for every wrong there is a remedy, and for every injustice an adequate and salutary relief.'" "So stands the law in England, and, since her learned chancellors have not been able to reconcile their own decisions, we feel that we shall not be wanting in respect for them in adopting a rule of decision for ourselves, which we conceive to be more consonant with the enlightened equity and with the fundamental principles and maxims upon which the jurisdiction of our courts of chancery is based." In Garland v. Garland was urged the right of the wife to bind the husband for necessaries, and because thereof (herein also urged as adequate relief) that she should be denied the right to maintain a separate action for alimony apart from divorce. On this the court says: "The law's delays are proverbial. The credit of a man stubbornly determined not to support his wife will not feed the hungry nor clothe the naked. A man might be worth a large fortune, yet so situated as to defy judgment and execution. The credit of one so disposed would avail nothing in the market in the way of procuring supplies, as merchants will not part with their goods upon such uncertain security."

The later authorities allow the wife a separate action in equity for

maintenance. See Cureton v. Cureton, 117 Tenn. 103, 96 S. W. 608, carefully reviewing many authorities, and holding that "a court of equity has inherent power, independent of statute, to grant a wife a separate maintenance out of her husband's estate, because of his abandonment of her in cases where no application for divorce is made." This is the rule in Alabama, Arkansas, California, Colorado, Florida, Georgia, Iowa, Kentucky, Maryland, Missouri, Mississippi, Minnesota, Montana, North Carolina, South Carolina, Ohio, South Dakota, Washington, Virginia, and by statute in Illinois, Michigan, and New Jersey (Brewer v. Brewer, 79 Neb. 726, 13 L.R.A.(N.S.) 222, 113 N. W. 161; Wood v. Wood, 54 Ark. 172, 15 S. W. 459; Williams v. Williams, 136 Ky. 71, 123 S. W. 337; Hite v. Hite, 136 Ky. 529, 124 S. W. 815; Parker v. Parker, 134 Ga. 316, 67 S. E. 812; Christopher v. Christopher, 18 S. C. 600; Reifschneider v. Reifschneider, 144 Ill. App. 119; Graves v. Graves, 36 Iowa, 310, 14 Am. Rep. 525; Clisby v. Clisby, 160 Ala. 572, 135 Am. St. Rep. 110, 49 So. 445; Milliron v. Milliron, 9 S. D. 181, 62 Am. St. Rep. 863, 68 N. W. 286; Levin v. Levin, 68 S. C. 123, 46 S. E. 945; Baier v. Baier, 91 Minn. 165, 97 N. W. 671; Dunnock v. Dunnock, 3 Md. Ch. 140; Edgerton v. Edgerton, 12 Mont. 122, 16 L.R.A. 94, 33 Am. St. Rep. 557, 29 Pac. 966; Donnelly v. Donnelly, 39 Fla. 229, 22 So. 648; Dye v. Dye, 9 Colo. App. 320, 48 Pac. 313; Branscheid v. Branscheid, 27 Wash. 368, 67 Pac. 812; Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781), and now granted in Michigan, Massachusetts, and New Jersey by statute. See Meyerl v. Meyerl, 125 Mich. 607, 84 N. W. 1109; Blackinton v. Blackinton, 141 Mass. 432, 55 Am. Rep. 484, 5 N. E. 830; Enslin v. Enslin, — N. J. Eq. —, 37 Atl. 442. Same in District of Columbia. See Shaw v. Shaw, 2 App. D. C. 204. See also 26 Am. Dig. cols. 2854 et seq., and 10 Decen. Dig. under Husband and Wife, §§ 283 et seq., and 21 Cyc. 1598–1603.

In passing we might remark we have not overlooked chapter 167, Sess. Laws (N. D.) 1890, construed in Bauer v. Bauer, 2 N. D. 108, 49 N. W. 418. The Codes of 1895, enacted revision, does not contain chapter 167, Laws of 1890, and on page 1519 of the Codes of 1895 as published, designated as expressly repealed, we find chapter 167 enumerated as repealed; but, on consulting the enrolled and engrossed bill in the office of secretary of state, so enumerating such express repeals, we

do not find said chapter 167 designated as repealed. Whether the enactment of the Codes with said chapter omitted, and the erroneous publication of the Codes claiming such repeal, and acquiesced in by common usage for fifteen years, leaves said chapter 167 in force, it is unnecessary to determine in this action. If it be in force, the statute adds nothing to the power of the court, the same being limited as construed by the opinion in Bauer v. Bauer to procedure only, and there being nothing in the statute inconsistent to the application of the same procedure to the suit of the husband as is therein provided for the wife. The rights of both coming from the common source—§§ 4075, 4077, 4078, of our statutes —in themselves providing said rights are mutual, equal, and reciprocal, the husband is entitled to the same relief as the wife would be if she were suing him for support under said statutes. And the fact that the husband in divorce proceedings is denied alimony does not infer that by analogy, if said chapter 167 of the Laws of 1890 is in force, the husband is excluded on the ground that the providing of the remedy for the wife excludes the use of the remedy by the husband for his benefit. In divorce proceedings the allowance of alimony as incidental thereto depends solely upon the statute, and the provisions of § 4075, defining the relations of husband and wife toward each other and their corresponding duties and rights as to support, do not enter into, modify or enlarge the provisions of the statute as to alimony pending divorce. In other words, the legislation on divorce, with alimony pending suit, temporary and permanent as incidents thereto, is complete legislation on that subject. The power to allow maintenance in an action therefor is a different matter, and in no wise governed by the statutory provisions limited to alimony incident to divorce.

But one further step forward need be taken. Courts have but to apply the reasoning supporting actions in favor of the wife against the husband for maintenance, to actions of the same class brought by the husband against the wife for the same purpose. What can be said in favor of the wife maintaining such an action must surely exist in reality in favor of the husband when the wife, as in the case at bar, is the offending spouse. And authority therefor exists. See Livingston v. Superior Court, 117 Cal. 633, 38 L.R.A. 175, 49 Pac. 836, in which the court applies the rule to a suit of the husband against the wife in which a judgment for support was obtained, and where the wife was held in contempt

for disobedience thereof. That court concludes that, independently of statute, a court of equity in the exercise of its general powers has the authority to entertain an action for maintenance brought by the husband against the wife, and to award such judgment as is necessary to the granting of adequate relief. The statutes of California are identical with all those under consideration.

But our decision need not depend alone upon the principle that this is properly a subject of equitable jurisdiction, independently of statute. Under § 4077 the duty under the circumstances in suit is imposed upon the wife to support the husband, this plaintiff; and under § 4078 it would seem that, coupled with this duty, as inchoate interest to the extent of support is granted the husband in the wife's property under the facts of this case. Else why the provision of § 4078, reading: "Except as mentioned in § 4077 [prescribing the duty to support] neither the husband nor the wife has any interest in the property of the other?" Unless an inchoate interest in property is conferred by this legislation, why this exception? This provision of statute is the equivalent of a statement that the husband or wife has conditionally an interest in the property of the other to the extent necessary for their support, but has no further interest therein. In addition, then, to general equitable jurisdiction to enforce personal rights growing out of the marriage relation, we have conferred by statute a property interest as an additional matter for equitable regulation and cognizance. It would be unquestioned that a written agreement between husband and wife, dividing their property or otherwise granting such a property interest to one or the other, would be enforceable in equity; and no one would challenge the right of the court to entertain such an action, because the statute has not declared the form in which it should be maintained, usage having supplied that. And it is no violent stretch of equitable jurisdiction to assume authority to grant relief under this phase of the statute vesting in this plaintiff under certain conditions an enforceable interest to the extent of his support in his wife's property, real and personal.

In conclusion, then, we hold that, if there is no common law on the subject, supporting equitable jurisdiction and plaintiff's right to maintain this action against his wife, it is because at common law such an action would not arise. That the holdings of English courts of chancery of several hundred years ago are without force as founded upon different

conditions in every respect, as well as arising because of the divided jurisdiction of chancery with ecclesiastical courts, the latter unknown to our judicial system; that prior to statehood actions similar to this, but brought by the wife on identical grounds and in the absence of a statute so authorizing, were cognizable in equity, and are therefore properly maintainable at present without the aid of legislation; that no good reason exists in these days of equality of husband and wife to grant the wife a remedy and withhold the same from the other party to the marriage relation; and, lastly, that defendant's statutory duty to support plaintiff is not merely an obligation declared by statute, but is coupled with plaintiff's interest in his wife's property to the extent of his necessary support, to be determined by this equitable action for such purpose.

One other matter deserves consideration. Defendant urges that the interpretation of this court in State ex rel. Hagert v. Templeton, 18 N. D. 525, 25 L.R.A.(N.S.) 234, 123 N. W. 283, wherein this plaintiff was denied suit money and counsel fees pending his wife's action against him for divorce, and wherein the right of such alimony was denied, applies by parity of reasoning to an action of this kind. We fail to see the application. That was a case for divorce in which the legislature, by § 4071, has granted to the wife a right to require the husband to pay alimony pending suit, without making any alimony provision for the husband when sued for divorce by the wife. Following the universal holdings and aided by the familiar rule of statutory construction, this court held that the legislature, by granting the right expressly to the wife, necessarily limited alimony relief in divorce proceedings to such as so granted, and to the exclusion of such a right to the husband. Such holding is in line with decisions in divorce matters. The courts cannot made a ground for divorce, but are limited to the statute. By legislative acts courts are granted limited power to divorce matters and kindred or auxiliary proceedings, as alimony pending suit for divorce, an incident of the main divorce action, is regarded. Herein we are not considering any question of divorce or any incident of it. This same argument was advanced in Galland v. Galland, and is disposed of by the following from the opinion: "The main subject-matter of the statute was the regulation of divorce, and only as incidental to that subject the statute prescribes the power of the court in respect to alimony in that class

of cases. The legislature was not dealing with the general subject of alimony as an independent subject-matter of legislation, but only as one of the incidents of an application for divorce. It saw fit to define the power of the court over the allowance of alimony on an application for divorce, but was not considering the subject of alimony in any other class of cases. If it had provided that a writ of ne exeat or distringas might issue against a defendant in an action for divorce, it would scarcely be claimed by any one that this was equivalent to a declaration that such writs should not issue in any other class of actions. For the same reason, a provision for alimony in a suit for divorce is not to be considered as a declaration that alimony shall not be allowed in other actions." This action is founded upon a different provision of statute and under a different head of equitable jurisdiction. Defendant's contention is as unsound as would be an attempt to assert any claim arising out of that action as a bar against this proceeding.

Defendant questions the power of the court to order alimony pending the action. Where it appears that probable cause for the suit exists, the court may make such allowance, and include therein reasonable counsel fees to be incurred in prosecuting the suit, as an actual expense of the litigation. 21 Cyc. 1605; Clisby v. Clisby, 160 Ala. 572, 135 Am. St. Rep. 110, 49 So. 445; Decen. Dig. §§ 295, 298, 299.

As to the right to make provision for future maintenance also challenged by defendants, such is the main object of the action, the reasons for the granting of which are the reasons for equitable cognizance of this class of actions, and that full equitable relief may be administered as well as a multiplicity of suits avoided. Hence the court's decree in amount should be measured by the means of the defendant as well as by the requirements of the plaintiff, and by all general rules usually governing in the granting of permanent alimony in divorce decrees, including such injunctional relief against alienation of property to defeat the objects to be attained by the action as the court may, on showing, consider necessary. And we see no good reason why the property interest of plaintiff in all real property of the defendant, necessary to his support, may not be secured by decree awarding a lien thereon. Any and all relief granted, while in a sense permanent, is so only while the relative conditions of the parties remain unchanged, and the necessity therefor, the ability to support and the marriage relation itself, continues.

Hence, if plaintiff prevails, any relief granted as permanent relief must be subject to change or modification on application and for good cause shown.

The order appealed from is affirmed.

Honorable A. G. BURR, Judge of the Ninth Judicial District, sitting by request in place of Honorable D. E. MORGAN, Chief Justice at the time of hearing, who did not participate therein.

KLEMMENS v. FIRST NAT. BANK OF CASSOPOLIS.

(133 N. W. 1044.)

Cloud on title — adverse claim.

1. In the statutory action to determine adverse claims under § 7519, Rev. Codes 1905, it is not an essential prerequisite to plaintiff's recovery that he prove that defendant, in fact, asserts some estate, interest, or lien upon the real property in controversy.

Cloud on title — what plaintiff must prove.

2. In an action to determine adverse claims to real property brought by a homestead claimant against his judgment creditor, a cause of action is established by merely showing plaintiff's homestead right and the existence of such judgment. Plaintiff is not required to establish the fact that such judgment creditor in fact asserts a lien under the judgment on the property constituting plaintiff's homestead. The allegation in the complaint of such fact is a non-issuable allegation.

Cloud on title — construction of statute as to action to remove.

3. The above construction of our statute does not work a hardship to judgment creditors as no costs can be taxed against them, unless they appear and contest plaintiff's right to recover.

Cloud on title — enjoining adverse claimant from asserting lien.

4. In such an action, it is error to perpetually enjoin the judgment creditor, as was done in the case at bar, from asserting any lien under the judgment, for manifestly such creditor ought not to be deprived of the right to assert such lien at any future time if such real property, while owned by the judgment debtor, shall cease to be impressed with the homestead character. Judgment is ordered modified accordingly.

Opinion filed November 27, 1911.

Appeal from District Court, Ward county; *A. G. Burr,* Special Judge.

Action by Anton Klemmens, against the First National Bank of Cassopolis. From a judgment for plaintiff, defendant appeals.

Modified and affirmed.

Pierce, Tenneson, & Cupler, for appellant.

Murphy & Wooledge, for respondent.

FISK, J. This is the statutory action to determine adverse claims to real property. The complaint is in the usual form, alleging title in fee in plaintiff, and that defendants wrongfully assert claims thereto in the form of judgment liens thereon. The defendant bank alone appeared and answered. By its answer it expressly admits plaintiff's ownership of the real property, but denies that it wrongfully, or at all, claims any lien or encumbrance upon the same. Such answer alleges that such real property consists of less than 160 acres, and is of the value of less than $5,000, and that the same is and at all times mentioned in the complaint was the homestead of the plaintiff. The answer also alleges that said defendant holds an unsatisfied judgment against plaintiff, which is docketed in the office of the clerk of the district court of the county wherein such property is situate; but that such judgment is not now, nor has the same at any time been, a lien or encumbrance upon said property or any part thereof. The lower court, on motion of plaintiff's counsel, thereafter gave judgment on the pleadings quieting the title of such property in plaintiff, and forever enjoining defendant bank from asserting any lien thereon under its judgment, from which judgment this appeal is prosecuted by such defendant bank.

The assignments of error present but two questions for our consideration: First, under the facts pleaded, will the statutory action lie; or, in other words, is plaintiff entitled to any relief? If so, then second, is he entitled to all the relief granted by such judgment; or, in other words, is that portion of the judgment perpetually enjoining appellant from asserting a judgment lien on the premises proper?

Our statute authorizing the maintenance of an action to determine adverse claims to real property is § 7519, Rev. Codes 1905, which reads as follows: "An action may be maintained by any person having an estate or interest in or lien or encumbrance upon real property . . . against any person claiming an estate or interest in or lien or encum-

brance upon the same, for the purpose of determining such adverse estate, interest, lien, or encumbrance." Section 7522 prescribes the form of the complaint in such actions; and the form thus prescribed, as well as § 7519, supra, expressly requires as a necessary ingredient to plaintiff's cause of action a showing that defendant claims certain estates or interests in or liens upon the property adverse to plaintiff. We are therefore confronted with the question whether, in the light of said statute, the action will lie against one asserting no adverse claim against the plaintiff, but who holds a judgment of record against him, which, on the face of such record, unaided by extrinsic evidence, apparently creates a cloud on the title. Did the legislature, in enacting said statute, intend to confer a cause of action under such circumstances?

The only authorities relied on by respondent's counsel in support of their contention that such action will lie are Corey v. Schuster, 44 Neb. 269, 62 N. W. 470; Dalrymple v. Security Improv. Co. 11 N. D. 65, 88 N. W. 1033; and 32 Cyc. 1324. The North Dakota case is not in point. There the defendants, who were judgment creditors, expressly asserted that their judgments constituted liens upon the property in litigation; nor does the citation in Cyc. in any way support respondent's contention. The well recognized principle there announced is merely that "an action in equity will lie to cancel an invalid judgment or decree which is an apparent cloud on the title to land." The Nebraska court in Corey v. Schuster, supra, says: "It is sufficient, to authorize the interposition of a court of equity, that the existence of the apparent liens of the judgments upon the premises may be used injuriously or vexatiously to harass the owner of the homestead, and injure and depreciate his title to the property." It appears from the opinion, however, that the judgment creditors who were made defendants expressly asserted liens on the premises under their judgments, both upon the ground that plaintiffs had abandoned the premises as their homestead and that such premises were of a character not entitling them to claim the same as such homestead under the Nebraska statute. What was said by the court on the first proposition was therefore unnecessary to the decision of the case; but it is no doubt true, as stated by said court, that it is not an essential prerequisite to the maintenance of such an action that the judgment creditors should be threatening or about to cause executions to be issued and levied upon the exempt homestead; and we think, in the light

of our statute, that it is not an essential prerequisite that the judgment creditor should be actually asserting a right of lien upon the premises under his judgment. The mere fact that the judgment record discloses an apparent lien upon the homestead, and thus creates an apparent cloud upon the title, is, we think, sufficient to give rise to a cause of action in plaintiff's favor. While defendant bank has in no manner questioned plaintiff's homestead rights, and has done nothing which it did not have a strict legal right to do, still the fact that the record of defendant's judgment on its face casts an apparent cloud on plaintiff's homestead interest is sufficient to give him a right under the statute to maintain the action.

We realize that, under this holding, each owner of a homestead and who is a judgment debtor has a cause of action against each of his judgment creditors, although they, in fact, are asserting no claim hostile to the rights of such homesteader; but this works no hardship on such a judgment creditor, for he need not appear in the action, and in such event no costs can be allowed against him. Section 7528, Rev. Codes.

California has a statute analogous to ours, authorizing actions to determine adverse claims, and the supreme court of that state has in numerous instances held in accordance with the views above expressed. Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Bulwer Consol. Min. Co. v. Standard Consol. Min. Co. 83 Cal. 589, 23 Pac. 1102; Dranga v. Rowe, 127 Cal. 506, 59 Pac. 944. In Castro v. Barry the distinction between the statutory action to determine adverse claims and the old chancery proceedings to quiet title is clearly pointed out; among other things the court saying: "The distinction between the two kinds of action is clear. They are different not merely in form (for we have no forms of action in the common law sense), but in purpose. In the former case the proceeding is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights, and which may be ordered to be destroyed in whosesoever hands it may happen to be. While in the latter, the proceeding is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff's property, whether such claim be founded upon evidence, or utterly baseless. It is not aimed at a particular piece of evidence, but at the pretensions of an individual. The statutory action to determine an adverse claim is an improvement upon the old bill of peace. The statute enlarges the class

of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should first establish his right by an action at law. 'He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted.' Curtis v. Sutter, 15 Cal. 262, 263. And see Stark v. Starr, 6 Wall. 409, 18 L. ed. 926. Nor is it necessary that the adverse claim should be of any particular character. As said by Baldwin, J., delivering the opinion in Head v. Fordyce, 17 Cal. 151, 12 Mor. Min. Rep. 470, the statute 'does not confine the remedy to the case of an adverse claimant setting up a legal title or even an equitable one; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretension.' See also Horn v. Jones, 28 Cal. 204; Joyce v. McAvoy, 31 Cal. 287, 288, 89 Am. Dec. 172. And the rule may be even more broadly stated, *viz.*, that the action may be maintained by the owner of property to determine any adverse claim whatever. For, if the defendant by his answer disclaims all interest whatever, judgment may, nevertheless, be entered against him, though in such case it must be without costs." And in Bulwer Consol. Min. Co. v. Standard Consol. Min. Co. 83 Cal. 589, 23 Pac. 1102, the court remarked: "Conceding that the averment of an adverse claim is necessary in a complaint to quiet title under § 738 of the Code of Civil Procedure, yet, if the defendant, in his answer, claim an adverse interest or estate in the land described in the complaint, a denial that he had made such adverse claim before the commencement of the action would be immaterial. If, on the other hand, the defendant, as here, expressly disclaim any estate or interest in the land described in the complaint, and at the same time deny that he ever made any such adverse claim, the plaintiff would still be entitled to a decree quieting his title, but without costs. This is implied in § 739 of the Code of Civil Procedure. The object of §§ 738 and 739 is to enable the plaintiff in such action to dispel whatever may be regarded by third persons, as well as by the defendant, as a cloud upon his title; for, even though the defendant makes no adverse claim, third persons may regard plain-

tiff's title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed by the decree of the court, so that his record title may appear perfect not only to the defendant, but to all persons whom it may thereafter concern. The only purpose of the averment of an adverse claim is to notify the defendant of the nature of the action, and that he is required to set forth and litigate any adverse title he may claim to have, or to disclaim any such adverse title, either expressly or by default. The case of Pfister v. Dascey, 65 Cal. 403, 4 Pac. 393, cited by appellant, is not in point. The point under consideration here was not presented in that case. The only material issues tendered by a complaint in this class of cases relate to the title of the real property described in the complaint. Therefore there was no necessity for a finding upon the formal but immaterial issue, as to whether the defendant had asserted an adverse title before the commencement of the action." With the reasoning and conclusion of the California court in the above cases, we are in entire accord. The appellant's first contention is therefore overruled.

Regarding appellant's second contention, it is clear that the judgment entered is too broad. Such judgment forever enjoins appellant from asserting any lien to the premises under its judgment. As was in effect said by the Nebraska court in Corey v. Schuster, 44 Neb. 269, 62 N. W. 470, appellant will be entitled to assert a lien under its judgment on these premises at any time while owned by plaintiff, should they cease to be impressed with the homestead character, or should they enhance in value to an amount in excess of the limit fixed by statute, appellant will be entitled to subject the excess value thereof to the payment of its judgment.

The district court is therefore directed to modify its judgment in such a manner that it will not interfere with appellant's right in the future to assert a lien under its judgment on such real property, if the facts shall entitle it to do so.

As thus modified, the judgment will be affirmed, appellant to recover costs on this appeal.

SHERWOOD v. BARNES COUNTY.

(134 N. W. 38.)

Taxes — recovery of money paid at void sale — statute as to.

1. Following Paine v. Dickey County, 8 N. D. 581, 80 N. W. 770, it is held that § 88, chap. 126, Laws of 1897, relating to the recovery of money paid at tax sales, made subsequent to the enactment of that chapter, when such sales have since been held void, is not in conflict with § 61 of the Constitution, as the provision permitting such recovery was germane to the matter of collecting taxes on land by means of the sale thereof.

Taxes — recovery of amount paid at void sale — failure to pay subsequent taxes.

2. The holder of a tax-sale certificate which has been adjudged void may recover the amount paid therefor, with interest, in accordance with § 84, chap. 132, Laws of 1890, and § 88, chap. 126, Laws of 1897, notwithstanding the fact that he has not paid subsequent taxes.

Taxes — recovery of money paid at void sale.

3. The limitations contained in chapter 165, Laws of 1901, have no bearing on the right of the holder of a certificate of tax sale which has been adjudged void, to bring an action against the county for the recovery of the money paid for such certificate.

Taxes — recovery of money paid at void sale — failure of judgment holding deed void to give reasons therefor.

4. When the holder of a certificate void for reasons which, under the terms of §§ 84 and 88 of the acts referred to, are required to be stated in the judgment holding them void, relies upon such judgment as evidencing his right to recover from the county the money paid, it is immaterial that the judgment holding his certificate void fails to state the reason for its invalidity, as that provision was made for the benefit of the county, to enable its officials to know whether the tax still continued a lien on the land and whether to advertise and resell the same.

Taxes —setting aside sale — necessity that judgment state reasons.

5. In an action adjudging a tax sale certificate void, and to which the county was a party, the burden rests on it to see that the reasons for holding the certificate or sale invalid are stated in the judgment.

Taxes — recovery of money paid at void sale; when limitations begin to run against right of action for.

6. The Code (Rev. Codes 1905, § 2414) prohibits the county auditor from

[1] R. L. Supp. 1909, § 2651-91.

drawing his warrant (except for salaries of county officials), except upon the order of the board of county commissioners, signed by the chairman thereof and with the county seal affixed. Hence, after a tax sale is adjudged invalid, action by the board of county commissioners is a necessary prerequisite to a return of the money paid for a void certificate; and as, in the absence of voluntary action on the part of such board, a demand by the holder of the return of his money becomes necessary, the cause of action against the county for such return does not accrue until a demand is made therefor, when no question of unreasonable delay is involved; and the statute of limitations runs from the date of the rejection of the appellant's demand.

Opinion filed December 2, 1911.

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

Action by J. K. O. Sherwood against Barnes County. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. P. Paulson and *D. S. Ritchie,* for appellant.

William J. Clapp, for respondent.

SPALDING, Ch. J. This is an appeal from a judgment of the district court of Barnes county, entered on the 23d day of April, 1910, in favor of the plaintiff and respondent, for the recovery of certain sums paid by him at tax sales in that county, which sales had previously been set aside by judgments of that court. The county appeals. It involves certificates as follows: Nos. 372 and 395, on sale made December 4, 1894, for taxes of 1893; Nos. 356 and 374, on sale made December 3, 1895, for taxes of 1894; No. 25, on sale made December 7, 1897, for taxes of 1896; No. 321, on sale made December 6, 1898, for taxes of 1897; No. 196, on sale made December 5, 1899, for taxes of 1898; No. 262, on sale made December 4, 1900, for taxes of 1899. For convenience we shall hereafter refer to these transactions by the numbers of the certificates. Nos. 372 and 356 were held void in an action to quiet title, wherein this respondent was one of the defendants, by judgment entered February 4, 1903. All the other certificates mentioned were held void in another action wherein this respondent was one of the defendants, by judgment entered April 29, 1903. The action resulting in the appeal now being considered was begun February 15, 1909. Demand was made upon the board of county commissioners

of Barnes county by respondent for return of the moneys paid by him, with interest, August 3, 1908. The sales on which certificates Nos. 372, 395, 356, and 374 were issued were attempted to be made under the provisions of chapter 132, Laws of 1890, and the relief sought by the respondent was claimed under the provisions of § 84 of said chapter, which provides that "when a sale of land, as provided in this act, is declared void by judgment of court, the judgment declaring it void shall state for what reason such sale is declared void. In all cases where such sale has been, or hereinafter shall be, so declared void, or any certificate or deed issued under such sale shall be set aside or canceled for any reason, or in case of mistake or wrongful act of the treasurer or auditor land has been sold upon which no tax was due at the time, the money paid by the purchaser at the sale, or by the assignee of the state upon taking the assignment, and all subsequent taxes, penalties, and costs paid by such purchaser or assignee, shall, with interest at the rate of 10 per cent per annum from the date of such payment, be returned to such purchaser or assignee, or the party holding such right, out of the county treasury on the order of the county auditor. . . . " The judgment of February 4, 1903, holding certificates Nos. 372 and 356 valid, recites that the claims of the respondent Sherwood, based on the tax purporting to have been levied on said premises for such years, are wholly null and void, owing to defective assessments or levies; and for the further reason that the failure of the defendants to redeem said premises from a sale of the tax assessed and levied thereon for the year 1895 cut off their rights under the prior taxes, were they otherwise valid. The sales under which certificates Nos. 25, 321, 196, and 262 were issued were made when chapter 126 of the Laws of 1897 was in force, and the provisions therein under which respondent claims to recover are found in § 88. The provisions of § 88 are much the same as those of § 84, supra, and need not be quoted. The language varies somewhat, and the rate of interest is 7 per cent, instead of 10 per cent. The judgment, holding such sales and those at which certificates Nos. 395 and 374 were issued void, fails to state the reasons for such holding; but the conclusions of law found by the court state that such judgment is ordered because the sales for taxes involved in the certificates numbered 395, 374, 25, 321, 196, and 262 are absolutely void because no legal levy of taxes against said real

estate for each and all of said years was made by the proper authorities, and because said real estate was not in any manner assessed by taxation during each and all of said years. The respondent Sherwood is a resident of the state of New York, and the only service made upon him in either of the actions referred to was constructive service. In one action the summons and complaint were mailed to him at Ogden, Utah; in the other, they were not mailed, but publication was made. He never heard or knew of the actions until immediately preceding the date of making demand for the return of his money, and this action was begun within a few months after such demand.

1. Appellant contends that there can be no recovery of the money paid for certificates issued under chapter 126 of the Laws of 1897, because § 88 of that chapter is unconstitutional and void, as violating § 61 of the Constitution, in that the title to such law is inadequate to cover the provisions authorizing a recovery, and cites Divet v. Richland County, 8 N. D. 65, 76 N. W. 993, as authority. This court held indirectly to the contrary in Paine v. Dickey County, 8 N. D. 581, 80 N. W. 770. It had then under consideration § 84 of the Laws of 1890, supra, and distinguished between its holding and its conclusion in the Richland County Case, and held that the provision permitting the recovery of the amounts paid on invalid sales, after the enactment of that chapter, was germane to the matter of collecting the taxes on land by means of a sale thereof. The case at bar in no sense involves the recovery of moneys paid on invalid sales prior to the enactment of the statute under which recovery is claimed. The court in the Paine Case expressly limits the holding of the Richland County Case to the facts then before the court, namely, that it was an action to recover for moneys paid on invalid sales prior to the enactment of the law under which the recovery was attempted. As in all respects material to this appeal the titles of the two acts are the same, we see no reason to depart from the conclusion of the court in the Paine Case, and therefore hold with the respondent on this point, without further extending our reasons for so doing.

2. Appellant insists that, before respondent can recover, it must affirmatively appear that he has paid the subsequent taxes on the lands covered by the certificates of sale, assessed thereon after the certificates were issued. This contention is answered by the statement that no

such requirement is found in the law as a condition precedent to his recovery.

3. It is also insisted that respondent cannot recover, by reason of limitations contained in chapter 165, Laws of 1901, reading as follows: "The purchaser of any piece or parcel of land shall, if there be no redemption, be entitled to the possession, rents, and profits at the end of three years from the date of the certificate, and if on demand of such purchaser to the party or parties in possession, such party or parties refuse or neglect to render such possession, such party or parties may be proceeded against as parties holding over after the determination of his or their estate, which proceedings may be instituted and prosecuted pursuant to the provisions of law in such case made and provided; provided, however, that all rights of such purchaser and his assigns to possession, title, or lien of any kind, of, to, or upon such piece or parcel of land, shall cease absolutely and be deemed forfeited and extinguished, unless possession thereof be taken by him, or them, or proceedings for such possession be by him or them instituted, or deed therefor be executed and delivered to him or them by the proper officer, prior to the expiration of six years from and after the date of such certificate, or in case of sales heretofore made and where five years or more have already elapsed since the date of such certificate, then prior to the expiration of one year after the taking effect of this section."

Appellant fails to grasp the meaning of the law quoted. It has no bearing whatever on the rights of the respondent as against the county. It relates solely to the rights of a holder of a certificate and those of the owner of the land, as between themselves, and does not purport to change or establish any statute of limitations as between such holder and the county in case of a void sale; and if the legislative intention was to terminate the life of all certificates issued prior to the passage of said act, on the conditions therein stated, as contended by appellant, such intention is immaterial, as the respondent does not assume to claim under live certificates. The foundation of his claim is the fact that the certificates have been adjudged void. He is claiming under the rights given him by the statute, if he has brought himself within its terms, to a recovery of his money paid for invalid and void certificates. He could not maintain the action if the certificates were valid. The

certificates are still evidence of the sale, and also to show the plaintiff is the holder thereof; but this does not impart life or validity to them as evidence of title or interest in real estate. The respondent could not maintain an action to have the certificates held by him adjudged void, nor could he maintain this action until a judgment, or judgments, of the district court were entered in appropriate proceedings, holding them void. Van Nest v. Sargent County, 7 N. D. 139, 73 N. W. 1083; Comstock, F. & Co. v. Devlin, 99 Minn. 68, 108 N. W. 88; State ex rel. Brodie v. Krahmer, 112 Minn. 372, 128 N. W. 288.

4. It is urged that the judgment rendered on the 29th day of April, 1903, furnishes no ground for maintaining this action as to the money paid for certificates thereby adjudged void; for the reason that the judgment itself states no reason why such sales or taxes were void, or that they were void by reason of the mistake or wrongful act of the treasurer or auditor; and that it does not show any taxes due, or that the lands were not subject to taxation, or that the entry therefor had been canceled, and that therefore the certificates in question have never been adjudged void, by reason of which fact respondent has not brought himself within the terms of the statute entitling him to recover. Appellant contends that the legal effect of this is that there is no judgment setting aside such sales or the certificates. The judgment, in express terms, sets them aside. It is true that the judgment itself fails to specify the grounds of their invalidity, although such grounds are stated in the findings of the court. No authorities are cited in support of appellant's contention. It occurs to us that the reason for this requirement of the statute should be looked into. That reason is found in those provisions of both §§ 84 and 88 which we have not quoted thus far. Both sections contain provisions to the effect that, except when the judgment declares the tax illegal, the tax and all subsequent taxes returned to the purchaser or assignee shall remain and be a lien upon the land sold; and they require the county auditor to advertise and resell the same at the next succeeding and annual sale for the full amount of penalty, taxes, and costs due thereon. In our opinion this requirement furnishes the reason for requiring the judgment to state why the sale is declared void, namely, to give the county auditor the information necessary to govern his actions as to advertising and reselling the land, and perhaps to perpetuate the lien if one exists.

Whether the tax for which the sale was wrongfully made continue a lien, or a resale should be made, are subjects in which the purchaser at a void sale has no interest, and it is not incumbent on him to protect the interest and rights of the county. When the reason of a rule ceases, so should the rule itself. Section 6657, Rev. Codes 1905.

5. A contention like the last is made with reference to the other judgment. This needs no consideration because, as we have shown in our statement of the facts, that judgment gives the reasons; and, if it did not, the same grounds for overruling appellant's contention given in paragraph 4 would be applicable. Further, the county was a party to that action, and had the opportunity to protect itself by having satisfactory and appropriate reasons shown why the sale was invalid. The burden was not on respondent to do so.

6. It is next contended that as to the rights of the respondent by virtue of certificates Nos. 272 and 356 the statute of limitations has run, in that more than six years had lapsed when the case at bar was commenced, and that the certificates were issued more than ten years prior to the commencement of this action. The argument of appellant is based upon the theory that respondent is claiming that the certificates named had been revived by the demand made upon the county commissioners for a return of the money paid, and because it is not shown that respondent had possession of the premises or secured a deed on said certificates. These contentions have already been considered, and we might rest our further decision upon the point that nowhere does appellant indicate when he maintains the statute commenced to run; but we apprehend if we should do so we should shortly be confronted with a petition for a rehearing on the ground that counsel and court had overlooked the controlling question, so we will attempt to pass upon this question broadly at this time. It will be observed that the statutes to which we have referred provided for the county auditor issuing his warrant on the treasurer for a refundment of the taxes paid by the purchaser on a sale, in certain instances. Under § 84, supra, the reasons for issuing such warrant are stated to be either one of the following: When the sale is declared void by judgment; when any certificate or deed issued shall be set aside or canceled for any reason; in case of mistake or wrongful act of the treasurer or auditor by selling land upon which no tax was due at the time. And in § 88, supra, when any

sale is adjudged void, and in cases where, by the mistake or wrongful act of the treasurer or auditor, land upon which no taxes are due, or where taxes are paid on land not subject to taxation, or where subsequent to payment the entry has been canceled. It would seem that the statutes contemplated the refunding of the money in some instances without a judgment first being entered; but in the case at bar we are proceeding on the provisions relating to recovery where a judgment has been entered. Hence the statute cannot commence to run, at least until the entry of judgment declaring the tax or sale void. This action is not upon the judgment. The judgments are only evidence of the right to recover. Hence the ten-year statute of limitations relating to actions on judgments has no application. We do not determine whether the six-year statute of limitations, applicable to contracts, applies, because it is evidence that paragraph 2 of § 6787, Rev. Codes 1905, making the limit six years upon a liability created by statute, does apply. But that statute only commences to run from the date when the cause of action accrues, so we are confronted with the question as to when the cause of action relating to the two certificates involved in the one judgment accrued. It is insisted by respondent that it did not accrue until demand was made upon the board of county commissioners for a return of his money, with interest. As we have said, this question is not discussed by appellant, and it is therefore treated but briefly in the brief of respondent. To arrive at a determination of this question, it is necessary to consider some other provisions of law. The refund could not be made except upon the warrant of the county auditor. Sections 84 and 88, supra. Under the provisions of § 2414, Rev. Codes 1905, the county auditor is prohibited from drawing any warrant upon the county treasurer (except those for salaries of county officers), except upon the order of the board of county commissioners, signed by the chairman thereof and with the county seal affixed. We conclude from this that action by the board of county commissioners was a prerequisite to the issuance of a warrant by the county auditor in favor of the respondent. Until the action of such board, the fund would lie in the county treasury, subject only to a demand on the part of the respondent; and the only officials who could act upon such demand were the county commissioners as a board. It is not contended that there was any unreasonable delay in making such demand, and six years did

not expire after such demand before this action was brought. The county commissioners rejected respondent's claim. Until such rejection he had no ground for action. It therefore appears to us that the cause of action arose on the rejection of his demand. The money was rightfully in the hands of the county treasurer, and the board of commissioners did not take it on itself to act upon the matter in the absence of a demand. This made a demand imperative as a prerequisite to a recovery; and, where a claim against a county must be presented for allowance before suit, the statute of limitations does not run against such claim until its presentation and rejection by the body or board to which it is necessary to present the claim. 25 Cyc. 1204; Shaw v. County Ct. 30 W. Va. 488, 4 S. E. 439; Caldwell County v. Harbert, 68 Tex. 321, 4 S. W. 607.

Some authorities hold that the claimant only has a reasonable time in which to make such demand, and that the question of the reasonableness of the time of demand depends upon the circumstances. Applying that rule to the case at bar, it is clear that, a demand having been been made immediately after knowledge of the existence of the judgments, it was made within a reasonable period of time.

Some other questions are suggested, but they are without merit.

The judgment of the District Court is affirmed.

BURKE, J., being disqualified, did not participate; W. C. CRAWFORD, Judge of the Tenth Judicial District, sitting in his place by request.

LOWERY et al. v. HAWKER et al.

(37 L.R.A.(N.S.) 1143, 133 N. W. 918.)

Wills — omission of children — remedies.

1. The unexplained omission of children in a will does not necessarily invalidate the instrument, even though such will may be ineffectual as to such persons. Their remedy is to appear in the proceedings and demand a dis-

Note.—The conclusiveness of a decree admitting probate as *res judicata* is considered in notes in 21 L.R.A. 680; 45 Am. Dec. 720; and 73 Am. Dec. 53.

tribution of the estate, which, as to them, shall be uninfluenced by the provisions of the will.

Wills — probate — issues determined.

2. On the probate of a will, the due execution and publishing of the will, the sound and disposing mind of the testator, and his freedom from duress, menace, fraud, or undue influence, and the fact as to whether the instrument is in fact his last will and testament, are the only issues before the court.

Wills — probate — conclusiveness as to validity or construction of instrument.

3. The mere probating of a will is not final and conclusive as to the validity and construction of the instrument. Such matters may be discussed and adjudicated at any time before the final distribution of the estate.

(Opinion filed December 7, 1911.)

Appeal from District court, Bottineau county; *Burr*, J.

Action by Lizzie Lowery and others against Martha Hawker and G. H. Dale, guardian of Mark Languenett Hawker. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Mark Hawker, now deceased, devised and bequeathed his entire estate to his wife and minor son, but omitted to provide in his will for his children and for the children of a deceased child by his first wife. It did not appear upon the face of the will that such omission was intentional, neither did it so appear from any of the evidence which was introduced by the widow and petitioner, Martha Hawker, when she applied to the county court to have said will admitted to probate. The will, among other things, provided for the appointment of the said Martha Hawker as executrix without bond. On the hearing before the county court, the appellants herein (the children and the children of a deceased child by a former wife of the said deceased) appeared in person or by counsel, and, after hearing the proof of the county court, admitted the will to probate, and appointed said Martha Hawker executrix thereunder. From this order an appeal "upon questions of law alone" was taken by appellants herein to the district court of Bottineau county, and on such appeal the latter court entered a judgment or order to the effect that "it is hereby ordered that the said order of the county

court of Bottineau county admitting to probate the purported will of the said decedent, Mark Hawker, and appointing Martha Hawker as executrix thereof, be, and the same is hereby, affirmed in so far as it admits said will to probate; the said will to govern in the distribution of the property and estate of the said Mark Hawker, deceased, in so far as the respondents Martha Hawker and respondent Mark Languenett Hawker, the youngest son of said Mark Hawker, deceased, are concerned, but subject to the rights of each and all of the plaintiffs herein in and to said estate as may hereafter be established by the said county court." From this latter judgment or order this appeal is taken, and the following are the principal assignments of error: "(4) That the said county court erred in appointing Martha Hawker executrix of the purported will of said decedent, Mark Hawker; (5) that the district court erred in entering the order appealed from herein on the grounds and for the reason, among other things, that, said appeal being upon questions of law alone, said district court could only rule upon the questions of law raised and presented for decision, and should have either affirmed the order of the county court in admitting the will to probate, or reversed the same without qualification; (6) that the district court erred in not entering an order reversing the order of the county court admitting said will to probate and directing the said county court to enter an order denying probate to said will."

Noble, Blood & Adamson, for appellants.
Bowen & Adams, for respondents.

Bruce, J. (after stating the facts as above). The appellants maintain that on an appeal upon questions of law alone the district court is a court of appellate jurisdiction merely, and that, although the said court has the power to reverse or affirm the judgments of the county court, it has no power to change or modify them. They also maintain that because the respondents at the time of the hearing of the petition to probate the will failed to offer proof to overcome the statutory presumption raised by § 5119, Rev. Codes 1905, that the omitted children were unintentionally omitted, the county court should have refused the probate of the will. They also assume that the unexplained omission of children by the testator from his will renders such will

utterly invalid, and that the appellants and all of the heirs of the said deceased were entitled to share in his estate in the same manner and to the same extent as if he had died intestate. The respondents, on the other hand, maintain that at the hearing of the petition to probate the will, evidence to overcome the statutory presumption raised by § 5119, Rev. Codes 1905, would have been immaterial, and that the only questions at issue were the due execution of the will, the sanity of the testator, and his freedom from duress, menace, or fraud and undue influence. They further maintain that the testator's omission of the children from his will does not render the will invalid, but merely raises the question whether such omission was or was not intentional; the statutory presumption being that said omission was not intentional. They maintain that, since appellants were duly cited to appear and show cause why the petition for the probate of said will should not have been granted, the finding of the county court and the admitting of the will to probate was final upon this point, although it is admitted that the proponents of the will failed to introduce testimony tending to show that said omission was intentional, or that any share or shares of the appellants, or any of them, had been advanced to them. The questions, then, for determination by this court, appear to be: Was the order of the county court erroneous, which admitted the will to probate and appointed Martha Hawker executrix thereunder, for the reason that there was no evidence before the said county court to overcome the statutory presumption raised by § 5119, Rev. Codes 1905? Was the hearing on the petition to probate the will the proper and only time and place for the proponents of the will to offer such testimony, or should they, or could they, have waited until the hearing of the petition for final distribution, or until the filing or hearing of a petition filed before that time by some or all of the appellants, asking that they be allowed to share in the testator's estate?

We are of the opinion that the probating of a will is not final as to the validity and construction of the instrument, and that such matters may be discussed and adjudicated within a year from the probating of the will (§ 8014, Rev. Codes 1905), or, in fact, at any time before the final distribution, as was done in the case of Schultz v. Schultz, 19 N. D. 688, 125 N. W. 555. A will is a will, even though it merely provides for the appointment of an executor. Bunce v. Bunce, 27 Abb.

N. C. 61, 14 N. Y. Supp. 659; Schneider v. Koester, 54 Mo. 500; Doane v. Lake, 32 Me. 268, 52 Am. Dec. 654; Trotter v. Trotter, 31 Ark. 145; Branton v. Branton, 23 Ark. 569; Re Pforr, 144 Cal. 121, 77 Pac. 825; Cox v. Cox, 101 Mo. 168, 13 S. W. 1055; Re Murray, 141 N. C. 588, 54 S. E. 435; Ainsworth v. Briggs, 49 Tex. Civ. App. 344, 108 S. W. 753; Re Lamb, 122 Mich. 239, 80 N. W. 1081; Mears v. Mears, 15 Ohio St. 90; Woodruff v. Hundley, 127 Ala. 640, 85 Am. St. Rep. 145, 29 So. 98; Montrose v. Byrne, 24 Wash. 288, 64 Pac. 534; Bliss v. Macomb Probate Judge, 129 Mich. 127, 88 N. W. 390; Lindemann v. Dobossy, — Tex. Civ. App. —, 107 S. W. 111; Clearspring Twp. v. Blough, 173 Ind. 15, 88 N. E. 511, 89 N. E. 369; Re Hobbins, 41 Mont. 39, 108 Pac. 7. Section 5119, Rev. Codes 1905, upon which appellants rely, merely provides that "children omitted succeed as in intestacy. When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." In construing this statute, this court, in the case of Schultz v. Schultz, supra, held that "the fact that the lawful issue of the testator is omitted from his will merely raises a prima facie presumption that such issue was not intentionally omitted, and such presumption is rebuttable by extrinsic proof;" and, although in this case the court did not directly pass upon the question before us, it everywhere took the position that a will is a will whether children are omitted or not. The same is true of Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276. See also Brown v. Brown, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632; Doane v. Lake, 32 Me. 268, 52 Am. Dec. 654; Schneider v. Koester, 54 Mo. 500; Pearson v. Pearson, 46 Cal. 609. In Brown v. Brown, supra, the only particular in which the Nebraska statute differed from our own was on the question of the burden of proof. It provided that "when any testator shall omit to provide in his will for any of his children or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child or the issue of such child shall have the same share in the estate of the testator as if he had died intestate." In it, after the probating of the will, and after the final

report of the administrator had been filed, the omitted children were allowed to file a petition in the county court, and to assert their rights. It has, in fact, been held in more than one case that this is practically the only mode of procedure, and that an omitted child cannot appear and contest the probating of a will on the ground of his omission, as his rights are independent of the will, and are not affected by it, and we so hold. See McIntire v. McIntire, 64 N. H. 609, 15 Atl. 218.

The question has been thoroughly discussed in Washington, where the county courts, like ours, have the power not merely to probate, but to construe and to pass upon the validity of, wills. "This question" the court said in Re Barker, 5 Wash. 390, 31 Pac. 976, "has received much discussion in the courts, and under the various statutes of the different states the courts have held differently as to what was such naming of or providing for children as would prevent their avoiding the will. This court has lately considered this question, and has come to the conclusion that under our statute (Gen. Stat. § 1465) there must be some substantial provision for the children of which they can legally avail themselves, or else there must be an actual naming of such children in the will, or the same will be ineffectual as against such children. See Bower v. Bower, 5 Wash. 225, 31 Pac. 598. We are satisfied with the conclusion to which we arrived in that case, and it is conclusive upon the question under consideration. It follows that the will is ineffectual as against the petitioner. Such being the fact, what was her remedy? In our opinion it was simply to move the court to proceed with the administration of the estate of her mother, and, as a part of such administration, to decree and set over to her the proportion to which she would have been entitled if her mother had died intestate. Under the rule established in the courts of many of the states, it would not be necessary for her to go into the probate court at all, as she could, by a direct proceeding for partition, assert her rights as tenant in common with others who were entitled to any interest in the estate of her said mother. But in this state it has been held that as a general rule an heir cannot assert her rights to the property of her ancestor excepting in pursuance of a proper decree of distribution of the probate court in which such estate is entitled to be administered. Hence it follows that here the proper relief to be sought by the petitioner is to so move the proper probate jurisdiction, that a speedy ter-

mination of the administration of her mother's estate may be had, and the proper decree of distribution rendered therein. . . . The will, though ineffectual as to her, was not void; hence the administration of the estate had been properly set on foot by the probating of said will, and should continue until the estate is finally closed. The only effect that the failure to name the children in said will could have upon the proceedings would be to compel a determination thereof without regard to any extension provided for by the terms of the will, and a distribution that, as to them, should be uninfluenced by any of the provisions thereof." The statute of Washington is even stronger than our own. It provides: "If any person make his last will and die, leaving a child or children, or descendants of such child or children in case of their death, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as he shall regard such child or children or their descendants not provided for, shall be deemed to die intestate; and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part." [Gen. Stat. § 1465.] See also Bunce v. Bunce, 27 Abb. N. C. 61, 14 N. Y. Supp. 659; Branton v. Branton, 23 Ark. 569; Trotter v. Trotter, 31 Ark. 145.

If there were, at any time, any doubt upon the subject, it would seem to have been absolutely removed by § 5120, Rev. Codes 1905, which reads as follows: "When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child or the issue of a child omitted in a will as hereinbefore mentioned, the same must first be taken from the estate *not disposed of by the will, if any;* if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated; in such case, such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment consistent with the intention of the testator may be adopted." As is well said by counsel for respondent, this section assumes that there is a will, and that this will is valid. If there were no

will, there would be no necessity for either §§ 5119 or 5120. All of the heirs of the deceased would inherit in accordance with the statutes of distribution set out in chapter 42 of the Civil Code. There being a will, and this will coming under the provisions of § 5119, the estate must be distributed in accordance with it, as construed according to §§ 5119 and 5120.

The appellants cite Newman v. Waterman, 63 Wis. 612, 53 Am. Rep. 310, 23 N. W. 696, as supporting their contention; but in that case the court expressly refused to consider the question now before us; and in the subsequent cases of Moon v. Evans, 69 Wis. 667, 35 N. W. 20, and Sandon v. Sandon, 123 Wis. 603, 101 N. W. 1089, it allowed pretermitted children to petition the probate court for their shares of the decedent's estate, after the respective wills had been admitted to probate. Even the *dictum* of the case of Newman v. Waterman does not go further than to hold that the attack upon the title of the devisees to the property should be made in the probate, and not in the circuit, court. See note to Brown v. Brown, 115 Am. St. Rep. 568, 580.

We are of the opinion that the order of the district court was substantially correct, and that it should be affirmed. It did not as a matter of fact modify or change in any manner the order of the county court from which the first appeal was taken. It merely construed that order and gave to it the meaning which, irrespective of such modification or construction, the law would have implied and would have given to it.

The judgment of the District Court is affirmed.

Goss, J., being disqualified, did not participate. Honorable Chas. A. Pollock, Judge of the Third Judicial District, sat in his place.

GETCHELL v. GREAT NORTHERN RY. CO.

(133 N. W. 912.)

Appeal — effect on jurisdiction of lower court.

1. Defendant made application to the district court to be relieved from a default judgment. The application was denied. Defendant appealed from the order of denial. Pending the appeal, application was made to the dis-

trict court to vacate the order appealed from. *Held*, that the said district court was without jurisdiction to entertain the application.

Appeal — effect on jurisdiction below — abandonment of appeal.

2. Under the above facts, *held*, that the filing with the clerk of the district court of a notice that the defendant had abandoned the appeal did not restore jurisdiction to the lower court. An order from the supreme court is necessary before the appeal is dismissed.

Opinion filed December 2, 1911.

Appeal from District court, Cavalier county. *Cowan*, J.

Action by C. P. Getchell against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Murphy & Duggan, for appellant.

W. A. McIntyre, for respondent.

BURKE, J. The plaintiff, having sustained a loss of stock, sued the defendant railway company. The summons and complaint were served upon the acting station agent at Langdon, North Dakota, September 26, 1907. The company were not notified of the receipt of the papers, and judgment was entered against them by default, January 3, 1908. They received notice of the entry thereof upon the 21st day of January, 1909, and upon the 15th of February, 1909, applied to the court wherein the judgment was entered, being the district court of Cavalier county, to be relieved from their default. Their affidavits show rather conclusively that the company itself had no notice of the service of the papers, but it was almost as well established that the acting agent received them and neglected to forward same. This application was denied by an order dated February 19, 1909. Upon the 19th day of April, 1909, the defendant appealed from said order to the supreme court, and stayed all proceedings by a supersedeas bond. This appeal was never passed upon by this court, and was abandoned, as we shall presently see. March 23, 1909, the defendant company made an application to the court to set aside the order of February 19, 1909, upon affidavits used upon the original hearing, supplemented by further affidavits along the same line. This second application was made before the appeal from the first order, but the trial court had made no

decision upon the second application at the time the appeal was perfected, and he then concluded that he had lost all jurisdiction of the subject-matter, and refused to make a ruling. The appeal was not prosecuted in this court, and the plaintiff served notice to have the records sent up, or that an application to dismiss would be made. Thereupon, September 6, 1910, the defendant filed with the clerk of the district court of Cavalier county a notice that the appeal from the order of February 19, 1909, had been abandoned. No application was made to this court for an order of withdrawal or dismissal, and no order was made by this court. September 12, 1910, defendant made a third application to the trial court, based upon the affidavits already filed and some new ones, and asking that the trial court assume jurisdiction of the application, made April 19, 1909, to set aside the order of February 19, 1909; its wording being: "That this (district) court make its further order herein, setting down for hearing the second motion above referred to,"—the second motion referred to asking as relief that the order of February 19, 1909, be vacated and set aside. It thus appears that the trial court was in effect asked to change his order of February 19, 1909, upon the third application. The trial court entered an order dated November 12, 1910, denying the last application, and this appeal is from such order.

Two questions present themselves: First, Did the appeal from the order of February 19, 1909, devest the trial court of jurisdiction to vacate such order? and, second, if so, did the filing with the district court of a notice that the appeal had been abandoned restore such jurisdiction?

Upon the first question, the authorities are unanimous. This court, in the case of Moore v. Booker, 4 N. D. 543, 62 N. W. 607, says: "The simple matter of fact is that when an appeal is taken all power of the court below over the parties and the subject-matter of the controversy is lost until the cause, or some part thereof, is remanded." See also 4 Enc. L. & P. 246; 2 Enc. Pl. & Pr. 327; 2 Cyc. 977, and cases therein cited. Indeed, the appellant does not contest the above authorities, but rests his argument upon an analogous situation arising when an application is made to the trial court for a new trial upon newly discovered evidence, which may be heard by the trial court, even pending an appeal upon the merits of the case; this being the doctrine of the

case of Fuller v. United States, 182 U. S. 571, 45 L. ed. 1235, 21 Sup. St. Rep. 871, cited and relied upon by appellant. We think there is a wide distinction in the two situations. In the Fuller Case, the trial court had denied a new trial upon one set of facts. An appeal was taken. Pending the appeal, new facts came to light, showing the verdict to be unjust. The appeal already taken will not consider those new facts. Therefore a new application must be made to the trial court. This must be made within one year. Therefore the trial court cannot wait the determination of the appeal, but must rule at once. *But* suppose that the second application made to the trial court had been upon the *same grounds* passed upon by the trial court in the first application. Would the trial court have jurisdiction to decide the first application again? We think not. In the instant case, the third application was not a new application upon *newly discovered grounds,* but was an application to have the old matter reopened. Instead of bringing up a new matter, as was done in the Fuller Case, supra, an old matter, once ruled upon and once appealed from, was made the basis of the application. Whether or not the trial court could have entertained an application upon *new* grounds pending the appeal is an interesting question, which we are not called upon to decide at this time. Certainly the trial court had no jurisdiction to pass upon the same matters again pending the appeal.

The second question remains. Was the jurisdiction of the district court restored when defendant files its notice of the abandonment of its appeal? We think not. The rule seems to be correctly stated in 3 Cyc. p. 182: "After the jurisdiction of the appellate court has attached, the trial court is without power to dismiss an appeal." And again, at page 184, same book: "An appeal cannot be dismissed but upon leave of court, and sometimes the consent of the appellee is also necessary." For a list of late cases holding upon this question, see 1911 Ann. Cyc. p. 355, and especially see Merrill v. Dearing, 24 Minn. 179, where it is said: "He should make application to the court for leave to dismiss. A mere notice that he dismisses is a nullity." See also Re Seattle, 40 Wash. 450, 82 Pac. 740; Burnett v. Harkness, 4 How. Pr. 158; and Wienman v. Dilger, 14 Jones & S. 101. It follows that the trial court has, even since the first appeal, been without jurisdiction to reconsider

its order of February 19, 1909, and its order of November 12, 1910, from which the present appeal arises, was correct.

It may be stated in passing that if defendant considered the last application as a *new* application so as to escape the above reasoning, the plaintiff has then the perfect defense that such application was made more than a year after defendant had notice of the entry of judgment.

Affirmed.

GUNDERSON v. HAVANA-CLYDE MINING COMPANY et al.

(133 N. W. 554.)

Corporations — liability for deceit.

1. A corporation is liable in an action at law for deceit to the same extent as is a natural person. It was therefore error in the trial court to enter judgment upon the pleadings in favor of the corporation defendant upon the ground that it was not so liable.

Sale — deceit — measure of damages.

2. The measure of damages for deceit is the difference between the actual value of the article sold and its represented value; both values being determined at the time of sale, and the damages being limited to those particulars wherein misrepresentations have been made. The purchaser who believes himself defrauded has an election of two remedies. He can rescind, or he can affirm the contract and sue for damages for deceit. In the latter case he cannot recover damages for the failure of the speculation. Those he assumed when he elected to affirm his contract and sue for deceit. He can recover only for the damages incident to the deceit. In the case at bar it was proven that the mine proved to be worthless. No evidence was offered showing damages occasioned by the deceit. *Held*, that the purchasers might possibly have rescinded their contract and recovered their money, but that by electing to sue for damages for deceit they waived that right and affirmed the sales. They are limited therefore to the difference between the actual and represented values of the stock at the time of sale, when purchasers and sellers alike believed the mine would become valuable. Being no evidence of

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Note.—The liability of a corporation for fraud of its officers in issuing stock is the subject of a note in 19 L.R.A. 331; and the question of the liability of a corporation for torts or wrongs generally is considered in notes in 5 Am. Dec. 42; 13 Am. Dec. 596; 34 Am. Rep. 495, and 59 Am. St. Rep. 589.

such difference in values, the trial court properly directed a verdict for the defendants at the close of the plaintiff's case.

Appeal — prejudicial error — exclusion of evidence.

3. During the trial the trial court excluded certain evidence. As this evidence had it been received, would have only tended to prove the fraudulent representations, and in no manner attempted to supply the proof of damages, such exclusion, if error, was without prejudice.

Appeal — presumptions — new trial.

4. This court will not assume that the evidence offered against the remaining defendants would have been the evidence offered against the corporation had it remained in the case. Neither will this court assume that the evidence at a new trial will be the same as at this. Therefore the plaintiff is granted a new trial as against the corporation. In other respects the judgment is affirmed.

Opinion filed November 17, 1911. Rehearing denied December 9, 1911.

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

Action by M. T. Gunderson against the Havana-Clyde Mining Company and others. From a judgment for defendants, plaintiff appeals.

Affirmed as to defendants Leach and others, and reversed and new trial granted as to defendant corporation.

F. B. Lambert, for appellant.

Wolfe & Schneller and *J. E. Bishop,* for respondents.

BURKE, J. At the time the transactions hereinafter referred to took place, the defendant mining company was a foreign corporation, of which the three other defendants were directors. About April 1, 1906, the plaintiff and ten other persons purchased capital stock in the mining company from one Canan, also a director, but not a defendant in this action. The ten other purchasers having assigned their claims to the plaintiff, he brings this action for deceit, alleging that the sales were induced by fraudulent statements of Canan and of the corporation through its prospectus. No attempt was made to rescind the contract.

1. The defendants answered separately, admitting the sales, but denying the fraudulent representations. When the case was reached for trial, and after a jury was duly sworn, the defendant mining company moved for judgment upon the pleadings. This motion was granted, and such ruling has been challenged by appeal. The complaint was

in ordinary form, and the sole objection raised to its sufficiency, as we understand it, is the fact that the mining company is a corporation, and, the defendants claim, cannot be sued for deceit under the circumstances, but is liable only to a rescission. We do not think the weight of authority sustains this contention. On the contrary, the better doctrine seems to be that a corporation is in exactly the same position as an individual, and may be sued for deceit. This is especially true in the present case, where it is alleged that the fraudulent statements were contained in a prospectus issued directly by the corporation. N. D. Rev. Codes 1905, §§1480, 6707, 9535, 9536, attempts to place "persons" and "corporations" upon the same footing. While there has been a time when courts pretty generally held that a corporation could not form a fraudulent intent, the modern rule is to the contrary. See Benedict v. Guardian Trust Co. 58 App. Div. 302, 68 N. Y. Supp. 1082; Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208; Stewart v. Wright, 77 C. C. A. 499, 147 Fed. 321; 10 Cyc. 1220. It was therefore error to order judgment upon the pleadings in favor of the corporation.

2. The trial then proceeded against the three remaining defendants, the defendant Leach being first called for cross-examination under the statute. He identified the prospectus, and said it had been gotten out by the corporation; also, that Canan had been employed by the corporation to sell stock, and that he had the prospectus with him at the time the sale was made; that the directors were not mining experts, and knew nothing of mining; that in April, 1907, the company had employed experts to make an examination of the mines, and said experts reported them to be worthless. He also identified several circular letters sent by the corporation to its stockholders, but as it appears that those were dated and mailed after the sales in suit, and could not have influenced the purchase of the stock, we will not further refer to them. The reports of the experts were introduced in evidence, and received over the objection of the defendants that they were not the best evidence, and will not therefore be further considered, their admission being clearly wrong. The plaintiff testified that Canan had produced to him a piece of ore, and said it had come from the mine; that he had reiterated the claims set forth in the prospectus, and said that the directors were reliable business men of Havana, North Dakota, and had put their own money

into the enterprise; that there was no promoter's stock; that the directors and officers acted without salary, and that the stock was worth par; that 1,000 shares would make him independent for life. It was stipulated that the testimony of the other purchasers would be similar to that of plaintiff, and should be considered as given. The prospectus was offered and received in evidence. It set forth the names and addresses of the officers; stated that the company owned a large number of valuable mines in the Cripple creek mining district; that samples of ore taken from said mines had disclosed always the presence of gold; that most of the samples had run from $3 to $30 per ton—some higher; that there was a large amount of low-grade ore upon the dump, of sufficient value to warrant the erection of an extracting mill, and the money obtained by sales of stock was to be used in erecting such mill; that the mines were valuable. It was then stipulated between the parties that the mining company owned the mines as claimed; that at the time of the sales there had been dug some 1,200 feet of first-class tunnels; that there was a large amount of rock upon the dump that yielded, according to assays made after the sales, from nothing to $1.60 per ton; that such ore was not of sufficient value to warrant its treatment; that in the opinion of competent expert mining engineers the mines were of no value as mines; that there never had been any justification for the erection of an extracting mill upon the property. There was also some testimony as to other sales of stock to the same purchasers, and designated as mill stock, for which the money had been returned by the mining company, but it has no bearing upon this suit.

With the evidence in this condition the plaintiff rested, and the three defendants Leach, Ellingson, and Johnson moved for a directed verdict in their favor. This was allowed, and is also challenged by this appeal. We think the ruling was correct. This is an action for deceit, not for rescission. There is a vast difference between the actions, and this difference must be constantly kept in mind in considering this case. When the plaintiff had reached the conclusion that he had been defrauded, he had his election of two remedies: First, he could rescind upon the grounds that this assent to the contract had never been freely given, and return his stock and recover the money paid by him; or, second, he could ratify the sale, accept his stock with its consequential profits or losses, and maintain an action for damages against his deceivers. In

the second case he refuses to rescind, in effect, and demands that the representations of the sellers be made good in damages. He, the purchaser, assumes all of the risks of the speculation, as he has in effect affirmed the contract of sale. Therefore his damages for the deceit must not include damages occasioned by the failure of the speculation. In this case Gunderson having elected to ratify the sale, instead of repudiating it as he might, assumed the speculation, and would be the winner if the mine made good, and the loser, if the mine failed. His damages would be the difference between what his stock would have been worth at the time of the sale if as represented, and what it was actually worth at that time. Or stated a little differently, he can compel the sellers to make good their representations by paying damages for those things they have misrepresented. We must go back to the day the stock was sold, and determine how much more plaintiff's stock would have been worth had the statements made to him been true. At such time both the buyer and seller believed, or at least hoped, that the mine would be a success. How much less would the plaintiff have been obliged to pay for the stock had he known the truth. Taking up the evidence, and remembering that the plaintiff has the burden of proof, we find that many of the statements of the prospectus were true. They owned mines; they had dug tunnels; they had much low-grade ore on the dock; they believed their mines to be valuable; they had put in their own money; the officers served without compensation; they were reputable business men; they intended the money to be used for an extracting mill and in developing their property. It is not claimed that they wilfully misrepresented the prospects of the mine, but that they made statements without knowing whether the said statements were true or false. An examination of the evidence will disclose, however, two kinds of misrepresentations: First, it may be said that the ore upon the dump was misrepresented. If so, it may further be said that the stock of the plaintiff would have been of greater value had the ore upon the dump been there, for it could be treated and sold. This seems to be true, but, when we come to measure the damages for this false representation, we find much difficulty. If, for example, it had been falsely represented that there was upon the dump $10,000 worth of ore, the plaintiff would be entitled to his proportionate share of the $10,000; but as no evidence was offered as to the amount of ore, or of

its probable value, to base a verdict upon this item would be the wildest kind of guesswork. It may be said that, had the plaintiff known that the ore was of such little value, he would not have bought the stock. The complete answer to that proposition is that the plaintiff by bringing an action for deceit elected to ratify the contract, and did, in effect, buy the stock after he knew the value of the ore. The second representations proven false are those made by Canan to the purchasers that the stock was worth par, and that 1,000 shares would make the purchaser independent. We do not believe, however, that the plaintiff will be heard to say that he believed Canan when he told him the stock was worth par when he was selling it at 15 cents upon the dollar. The purchaser has no right to rely upon the truth of statements so obviously false. The seller must state truthfully the facts upon which he and the purchaser may base an opinion as to values. Having done so, he is not liable for conclusions equally apparent to both. All of the above conclusion are in line with the best decisions of the courts of this country and England, and have been twice before approved by this court. Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409 (103 N. W. 632, 8 Ann. Cas. 1057, a well considered case); Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Van Epps v. Harrison, 5 Hill, 63, 40 Am. Dec. 314 (very instructive); Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172, 6 Mor. Min. Rep. 544; Smith v. Bolles, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39, 16 Mor. Min. Rep. 159; 4 Sutherland, Damages, 3d ed. p. 3401; Crater v. Binninger, 33 N. J. L. 513, 97 Am. Dec. 737, 10 Mor. Min. Rep. 124. The rule for the measure of damages being well settled in this state, and there being no evidence upon which such damages could be based, it follows that the direction of the verdict for defendant was proper. If it seems a hardship upon the buyers of the stock, we can only reply that they had a chance to repudiate the sales if fraudulent, and recover back their money. This they refused to do, but, on the contrary, kept their stock until further developments proved it worthless, and then demanded that the defendants pay them six times the amount plaintiffs had paid for it. They wished to keep the stock and take all the chances there were of the mine paying out, and then, in case of failure, compel the defendants to make good Canan's representation that the stock was worth par. Only their modesty,

probably, prevented them from demanding that they all be "made independent" according to the promise of Canan. The purchasers' losses were occasioned by sticking to a bad bargain after they knew they had been deceived. For this poor judgment the defendants are not liable. Neither are they liable for the unkindness of nature in placing the mother vein outside of the defendants' property.

3. Appellants have assigned error upon the ruling of the trial court in the admission and exclusion of testimony, but an examination of the record discloses that none of the testimony excluded went to the question of the damages to which the plaintiff was entitled. The evidence, if admitted, would not have supported a verdict any more than the evidence received by the trial court does. Such evidence all went to the question of the falsity of representations made by Canan, and would be merely cumulative. We have already conceded, for the purposes of this decision, that the plaintiff had proved their right to rescind. The exclusion of further evidence of that right did not hurt them. They failed to prove the damages contemplated by law, and, unless the evidence excluded tended to prove such damages, it was immaterial to this decision.

4. Respondent urges in his brief that, in case this court reaches the decision above announced, the error in allowing the motion of the defendant mining company upon the pleadings is without prejudice, for the reason that the plaintiff has failed in the proof as against the other defendants; that it would do the plaintiff no good to be granted a new trial wherein he must fail. This sounds plausible, but this court cannot assume that the evidence offered to a new trial will be the same as was offered here. Nor can we assume that in the trial already had that plaintiff had not other evidence that he would have offered had the mining company remained a defendant.

From the above, it follows that the judgment must be affirmed as to the defendants Leach, Ellingson, and Johnson, and reversed as to the defendant the mining company.

Appellant will recover his costs from the mining company, and the other respondents will recover their costs from the appellant.

MURPHY et al. v. MISSOURI & KANSAS LAND & LOAN COMPANY et al.

(133 N. W. 913.)

Service of summons by publication — time for answer.

The mailing of summons and complaint within ten days from the date of the first publication of the summons is not a personal service thereof, and is but a part of the statutory service of summons by publication; and, when there is served by the defendants at any time before sixty-six days from the first publication of the summons a written notice of appearance and demand for service of copy of complaint, compliance therewith must be had, and after such service the period of answer is extended thirty days from that time. Accordingly, the defendants are held not to have been in default in answer.

Opinion filed December 11, 1911.

Appeal from District court. Logan county; *Burke,* J.

Action by J. J. Murphy and Charles L. Merrick against the Missouri & Kansas Land & Loan Company and others. Judgment for defendants, plaintiffs appeal.

Affirmed.

O'Donnell & Atkins, for appellants.

Miller & Costello, for respondents.

NUCHOLS, District Judge. The record discloses service of summons by publication, with the first publication thereof on March 11, 1910. On April 21, 1910, the defendants appeared by attorneys, and served upon attorneys for plaintiff a written notice of appearance and demand for service of copy of complaint pursuant to § 6835, Rev. Codes 1905. A copy of the complaint was served upon counsel for defendants on April 23, 1910. On May 22, 1910, the answer of defendants was received by the attorney for plaintiffs, and the following day returned with the indorsement thereon that the time for answering had expired; attorneys for plaintiff evidently treating defendants as in default in answer. Plaintiff's counsel was evidently acting under the belief that the time for answer when service is made by publication of summons expired at the expiration of the thirty-day period from the completion

of the service of summons by publication, or sixty-six days from the date of the first publication of the summons, and this notwithstanding the service of copy of complaint made under the provisions of the statute cited. Counsel for plaintiff was in error in such conclusion. Nor was this affected by the mailing of a copy of the complaint to the record address of the defendants within ten days from the first publication of the summons, as required by § 6842, Rev. Codes 1905. Such mailing, like the publication of the summons, was but a part of the constructive service of the summons, and it in no wise affected the rights granted by § 6846, to the defendants, at any time before default, to appear in the action by the service of written notice of appearance and demand for copy of complaint. After such notice of appearance, and demand for copy of the complaint, and service thereof upon them on April 23, 1910, defendants were not in default in answer until after the expiration of the thirty-day period therefrom, excluding the day of service of answer. The answer having been served in time, its subsequent return with refusal to accept service thereof did not change the situation, and defendants were not then, and are not now, in default.

In view of the conclusion above reached, it becomes unnecessary to notice the regularity of the subsequent proceedings based on the order to show cause, as well as the order made thereon extending the time for answer, further than to state that such order was in no manner prejudicial to the plaintiffs. They are in no position to predicate error thereon. The appeal is without merit, and is accordingly dismissed.

BURKE, J., being disqualified, S. L. NUCHOLS, Judge of the Twelfth Judicial District, sat in his place by request.

ADAMS v. McINTYRE et al.

(133 N. W. 915.)

Mortgage-deed absolute in form as.

1. A deed, absolute on its face, may be shown to be in fact a mortgage securing a debt existing at the time of its execution.

Note.—Whenever a deed absolute in form is sought to be treated as a mortgage, equity always looks beyond the form of the instrument to the real transaction, and

Mortgage-deed absolute in form as.

2. A deed, absolute in form, will not be held to be a mortgage, unless the proof is clear, convincing, and satisfactory that such was the intention of the parties when it was executed and delivered.

Mortgage-deed absolute in form as.

3. The evidence in this case examined, and *held* that it is not of that clear, convincing, and satisfactory character necessary to establish a deed, absolute in form, as a mortgage.

Opinion filed December 11, 1911.

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

Action by Rush S. Adams against Colin McIntyre, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Purcell & Divet and *S. A. Sweetman*, for appellants.

Rourke & Kvello, for respondent.

SPALDING, Ch. J. In 1886 one McIntyre acquired title to the N. E. ¼ of section 16, in township 131, range 58, in Sargent county, subject to two mortgages aggregating $460 and accrued interest. He shortly entered into a contract in writing with Maria Wilke, wife of Albert Wilke, one of the defendants herein, and agreed to convey to her such real estate upon her delivery to him, in accordance with the terms of such contract, 2,500 bushels of wheat. This contract was in duplicate, and both copies were recorded in the office of the register of deeds of Sargent county, one on December 3, and the other on December 6, 1887. The contract price was never wholly paid by Mrs. Wilke. Such contract was made subject to the above-mentioned mortgages. On

when that is shown to be one of security merely, and not of sale, it will give effect to the actual contract of the parties and treat the instrument as a mortgage, the gist of inquiry in every case being, what was the intention of the parties. This is shown by the authorities collated in notes in 17 Am. Dec. 300 and 4 Am. St. Rep. 707. But, as held in ADAMS v. MCINTYRE, the intention of the parties to treat the instrument as a mortgage must be shown by clear and convincing evidence.

The right to foreclose a deed intended as security for debt as an equitable mortgage is the subject of a note in 22 L.R.A.(N.S.) 572. And the effect of a deed absolute on its face, but intended as a mortgage, to convey the legal title is considered in a note in 11 L.R.A.(N.S.) 209.

September 7, 1889, about three years after the execution of the contract, the parties met in the office of one Austin, in Lisbon, Ransom county, and on that day McIntyre, who still held the legal title, mortgaged the land to Adams, the respondent herein, to secure a loan of $600, and also gave him a commission mortgage of $62. The money received on the Adams mortgage was applied in payment of the mortgages first mentioned. On the same day McIntyre conveyed by warranty deed the title to Mrs. Wilke for an express consideration of $2,000, and Mrs. Wilke and her husband executed and delivered to McIntyre a mortgage on the same land to secure the payment of $455. None of these instruments were filed for record until November 9, 1889, when they were filed in the following order: Adams' $600 mortgage at 9 o'clock A. M.; Adams' $62 mortgage at 10 o'clock A. M.; deed, McIntyre to Wilke, at 11 o'clock A. M.; mortgage, Wilke to McIntyre, at 1 o'clock P. M. On September 26, 1899, at 9 o'clock A. M., a quitclaim deed was filed for record in said office, executed by Mrs. Wilke and her husband, for an express consideration of $1, to McIntyre for this land. It bore date September 20, 1889, and the date of the certificate of acknowledgment was September 20, 1889. Mrs. Wilke has deceased, and Albert Wilke, her husband, was the only witness on behalf of the defendants and appellants; the other appellants being minor heirs of Mrs. Wilke and their guardian *ad litem*. The witness Wilke testified that this quitclaim deed was executed and delivered in Austin's office on September 7, 1889, with the other instruments hereinbefore referred to.

The result of this appeal depends mostly on questions of fact, and we shall consider them as far as we deem it necessary to do so after a statement of the grounds of action and defense. Respondent brought this action in the ordinary form to foreclose his $600 mortgage, alleging that no part of the principal had ever been paid; that he had been compelled to and had paid the taxes on the premises described for the years 1894, 1895, 1896, 1897, 1898, 1900, 1901, 1902, and 1903; and that no interest had been paid since the 1st day of November, 1894. Appellants answered, admitting the execution and delivery of the note and mortgage and its record, alleging payment of interest to the 1st day of November, 1902, admitting the conveyance as alleged in the complaint; and they further alleged that they claimed title in fee sim-

ple thereto as the heirs of said Maria Wilke, deceased, subject only tc the lien of the plaintiff's mortgage, and that the respondent took possession prior to the farming season of 1896 as mortgagee under his mortgage, and assumed to use, farm, and occupy the same, and had appropriated to his own use the rents, profits, and income thereof. The answer contained an allegation of the value of such use and occupancy, and that respondent had never accounted therefor. They expressly admitted the execution and delivery of the quitclaim deed as on or about the 20th day of September, 1889, then alleged that said deed did not operate as a conveyance of the title to said lands to McIntyre, but was, by an understanding between the parties, intended to operate only as a mortgage securing indebtedness from said Maria Wilke to said McIntyre, and that, while in form a deed, it was in truth and in fact intended and given, and operated only, as a mortgage. They prayed for an accounting between the respondent and themselves. Respondent replied, and among other things alleged that no part of the principal of the note in question had ever been paid by the defendants or any of them subsequent to November, 1894, and showed that the payments that had been made by him as a guarantor at a time when the note was held by a third party, and that it had been retransferred to him, and denied the other allegations of the answer. The trial resulted in findings in favor of the plaintiff and respondent, and that all the allegations in the plaintiff's complaint were true and those of the defendant's answer inconsistent therewith not true; that said McIntyre had been at all times mentioned in the complaint except from the 7th to the 20th of September, 1889, the owner of such premises; and that the appellants had no right, title, or interest therein. The defendant McIntyre did not appear. Judgment was entered directing a sale of the premises to satisfy the sum found due. From such decree this appeal was taken.

It rests with us to determine whether the evidence is sufficient to sustain the claim of the defendants that the quitclaim deed in question was in fact and truth a mortgage. In doing so, we leave out of consideration all questions of notice to respondent on the subject, although it is clear that he had no notice of any such claim at the time he made the loan and took the mortgage involved.

That a deed absolute on its face may be shown to be in fact a mort-

gage given as security for a debt existing at the time of its execution is well established. Rev. Codes, 1905, § 6153; Miller v. Smith, 20 N. D. 96, 126 N. W. 499; Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677.

It is equally well settled that a deed absolute in form will not be held to be a mortgage unless the proof is clear, convincing, and satisfactory that such was the intention of the parties. Smith v. Jensen, 16 N. D. 408, 114 N. W. 306; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856; Northwestern F. & M. Ins. Co. v. Lough, 13 N. D. 601, 102 N. W. 160; Miller v. Smith, supra.

We will now consider whether the evidence on the part of the appellants in this case sustains their contention that the deed in question was given as security only with that degree of clearness necessary to make it satisfactory and convincing that the finding of the trial court was erroneous. The witness Wilke was apparently a man well advanced in years. His mind was cloudy on many of the facts. He had resided for many years in the vicinity of the land in question. Notwithstanding the fact that his answer alleged the giving of the quitclaim deed on the 20th of September, 1889, he insisted in his testimony that it was in fact given on the 7th of September, when the other instruments were executed. At times he testified that this deed was intended as a mortgage to secure a debt of $400, and at other times he referred to it as the mortgage given to McIntyre for $455, on the 7th day of September; and it is clear that during much of his examination he was confused and undecided as to whether the mortgage given by Mrs. Wilke to McIntyre on September 7th for $455, or this deed, was the security. He failed to account for the mortgage as security for a different debt. His testimony as to these items leaves on our minds a strong impression that, instead of the deed being given as security for what he claims his wife owed McIntyre on the 7th of September, the mortgage referred to was given for that purpose, and that the deed was executed for some other purpose which he fails to remember. The evidence shows that neither he nor his wife had paid interest since 1894, and fails to show that they had paid any before that date. It is shown that the respondent had paid all taxes since and beginning with the taxes for 1894; that appellants have never paid anything on the debt they claim to owe to McIntyre, for which it was claimed the se-

curity was given; that they have never paid any interest on such debt; that he has never called on them for any payments of interest or principal; that they have not communicated with him, although knowing where he was; that they stood by and made no claim against respondent of any interest whatever in the premises until this action was commenced. They have permitted him to make expenditures on the land and to pay the taxes all these years without any protest, and with no intimation that they were to assert a claim of title or a right to redeem.

The testimony of the appellant, Albert Wilke, conflicts with the allegations of his answer, and is in direct conflict with the certificate of acknowledgment attached to the quitclaim deed as to date of its execution. All these facts, together with many other inconsistencies and incredible statements of the witness for the defense, as well as the unreasonableness of his contention, in view of the undisputed facts, together with the imperfections of his memory, cast upon his story such doubt that this court cannot say that he has proven by clear, convincing, and satisfactory evidence that the deed referred to was a mortgage. While this case is in this court for trial *de novo,* and we are required to arrive at a decision independently of the conclusions of the trial court, yet, where an improbable or inconsistent story is told by a witness in the presence of the trial court, that court has a much better opportunity to judge of its correctness than has this court, with nothing but the cold print before it; and, if there were any doubt in our minds after reading the evidence, we feel that in a case like this it should be resolved in favor of the findings of the judge who saw and heard the sole witness for appellants testify.

A further detailed statement of the evidence would be of no use. We may add that the testimony of the witness Wilke does not impress us as having been wilfully false, but rather as being the testimony of an aged man, unused to business transactions, with an imperfect memory and very confused ideas as to transactions which took place twenty years ago.

The judgment of the District Court is affirmed.

PICKETT v. THOMAS J. BAIRD INVESTMENT COMPANY.

(133 N. W. 1026.)

Banks — collections — sending checks directly to drawee.

1. It is negligence for a collecting bank to transmit its checks directly to the bank or party by whom payment is to be made, with request that remittances be made therefor; "it being considered that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce, in behalf of another, a claim against itself."

Banks — sending checks directly to drawee—burden of proof.

2. In such cases, the burden of proof is upon the transmitting bank to prove that the maker of the check has not suffered injury.

Banks — sending checks directly to drawee — burden of proof.

3. *Held*, that, where defendant, a resident of Lakota, in this state, sent to Duluth, Minnesota, a personal check on one of two of his local banks, and such check was deposited by the payee in his bank at Duluth, for collection, it was negligence on the part of such bank to send such check, with a request for remittance, to the drawee bank, and not to the other local bank, or some other agent at Lakota.

It is further *held* that, in a suit by the payee against the maker, because of the dishonor of a draft sent by such drawee bank in payment of such check, on account of the insolvency of the drawee, the defendant could offset his losses occasioned by such negligence, which were presumptively the face of the check; it being shown that the drawee bank continued to pay out money after the receipt of such check from the Duluth bank and the sending of such draft.

Opinion filed December 11, 1911.

Note.—The American cases are almost unanimous in support of the doctrine that it is negligence in a bank having a draft or check for collection to send it directly to the drawee, as shown by the authorities on the question which are collated in notes in 27 L.R.A. 248; 2 L.R.A.(N.S.) 194, and 18 L.R.A.(N.S.) 441. And it is generally held that the fact that it is the custom to send checks or drafts directly to the drawee bank where there is no other bank in good standing at the place of payment does not justify that course. It has been held in New York, however, that the drawee bank may be constituted an agent for the collection of the obligation. McIntosh v. Tyler, 47 Hun, 99. The court in this case relied on Indig v. National City Bank, 80 N. Y. 100; Briggs v. Central Nat. Bank, 89 N. Y. 182, 42 Am. Rep. 285, neither of which cases decided that exact question. It therefore appears that even in New York there is no direct decision of a court of last resort upholding the practice of mailing checks directly to the drawee, and the effect of the decision in the case of McIntosh v. Tyler is weakened by the fact that it is based on cases which do not exactly support it.

Appeal from District court, Nelson county; *Templeton*, J.

Action by W. N. Pickett against the Thomas J. Baird Investment Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Facts: Defendant, the Thomas J. Baird Investment Company, which was located at Lakota, North Dakota, was authorized by plaintiff to collect $480 from one Radcliffe, at Larimore, and to transmit the same to plaintiff at Duluth. Radcliffe sent to the defendant, at Lakota, his personal check on a Larimore bank for the sum of $480, and defendant indorsed this check and deposited it to its own account and credit in the People's State Bank at Lakota. This check was soon after, and on January 14th, collected by the People's State Bank from the Larimore bank, and about two weeks after the receipt of the Radcliffe check defendant sent its own check on the People's State Bank of Lakota to the plaintiff at Duluth. The check was in the ordinary form, but in addition contained the words "payable if desired in New York, Chicago, or Minneapolis exchange at par." It was received by the plaintiff at Duluth on January 17, 1910, and on January 19th plaintiff deposited it to his own account in the First National Bank of Duluth. It was, on January 19, 1910, indorsed by the Duluth bank: "Pay to the order of any bank, banker, or trust company. Jan. 19, 1910,"—and sent by such bank to the People's Bank of Lakota for collection. There is no testimony in the record as to exactly when it was sent, but the proof is positive that it was received by the People's Bank of Lakota on or before January 21st, on which day it was honored by the People's State Bank of Lakota, and a draft in payment thereof was sent by the said bank to the First National Bank of Duluth, drawn on the Security National Bank of Minneapolis. This draft was then sent to Minneapolis by the Duluth bank for collection, and presented for payment to the Minneapolis bank on January 25th. Payment was refused for lack of funds to the credit of the People's State Bank of Lakota, and the original check was charged back to the account of the plaintiff, Pickett, by the Duluth bank, and plaintiff brought this action against the defendant, the Baird Investment Company, to recover the $480 involved.

The evidence further showed that the People's State Bank of Lakota

had been insolvent for six months previous to the issuance of the draft, and that it was closed by the bank examiner on January 27th, and six days after its issuance, and that "general depositors will receive little, if anything, in the way of dividends or otherwise from the said bank." It, however, did not appear in any way whether there were ever any funds deposited with the Minneapolis bank, or, if so, when those funds were exhausted; and it shows that the People's State Bank of Lakota remained open until January 27th, and, up to the close of business on January 26th, "was engaged in the transaction of its business and received deposits and made payments;" that, until closed on January 27th, it "was of general repute in the community, and the fact of its insolvency was concealed from and was unknown to the general public and to the defendant;" and "that during all of the times mentioned in the pleadings the defendant had on deposit and subject to check in said bank moneys more than sufficient to pay the check in question." The testimony also showed that there was another local bank, the National Bank of Lakota, to which the check might have been sent. It did not show, however, whether the People's State Bank of Lakota was a regular correspondent of the Duluth bank or not. There was some evidence tending to show that it was customary for the People's Bank to get checks from its correspondents and other banks, such as the one in controversy, sent direct to it for collection, and not through the agency of the other bank; and that it was customary for such bank to transmit the money therefor in the form of drafts. This evidence, however, rather proved the custom to be one of the People's State Bank than a general custom among bankers in the Northwest. In fact, it did not go far enough to prove this last point. The testimony also showed that when the People's State Bank received checks drawn on itself for collection from foreign banks, it was its custom to pay for such in drafts; but that when presented for payment by the other local bank, to pay such in "cash, or its equivalent."

The trial court found that the "plaintiff was negligent in causing the check in controversy to be forwarded for collection direct to the drawee thereof, and in accepting said draft in payment therefor; and that the defendant had been damaged by such negligence in the full sum of the face of the said check." In accordance with this finding, he dis-

missed the action, with costs against, but without prejudice to, the plaintiff. From this judgment, the plaintiff appeals to this court.

Frich & Kelly, for appellant.
Scott Rex, for respondent.

BRUCE, J. (after stating the facts as above). Two questions are before us for discussion: (1) Was appellant negligent in depositing and transmitting the check received from the Baird Investment Company; and (2), if negligent, was respondent damaged by such negligence, so as to be discharged from liability? Section 6488, Rev. Codes 1905, requires that a check be presented for payment within a "reasonable time" after its issue, and declares that if not so presented the "drawer will be discharged from liability thereon to the extent of the loss occasioned by the delay." On this subject of presentment, Bolles, in his work on Banking (vol. 2, p. 603), says: "As a check is not intended to circulate like money it should be promptly presented for payment. Indeed, the holder must observe very definite rules in presenting it; for if he does not his rights against the drawer may be impaired. First, when the holder and drawee live in the same place, a check must be presented on the same day or on the next after receiving it. Second, when they live in different places, the holder must send it forward, in a reasonably direct way, on the same day or the next, for presentation. Third, when there is a clearing house in the place of the drawer, a day longer may be given for collection through the medium of this institution. Fourth, on some occasions, for example, when the holder knows that the bank's failure is impending, he must make an immediate presentation, if possible, to prevent the drawer from loss. This rule is with less urgent reason denied. Fifth, when the last day for making direct presentation, or sending it away for this purpose, falls due on Sunday, the check is payable the following day." These statements are, no doubt, borne out in the main by the authorities. In order that negligence in presentment, however, shall preclude a recovery, it is necessary to prove that the defendant was injured thereby, and it is only the loss occasioned by the delay which can be used in avoidance of the original liability. Since, in the case at bar, the check was presented for payment before the suspension of the bank, and while it

was still "enjoying a general good repute and paying out money," there is nothing in the evidence to show that the defendant was injured by this negligent delay, and the question of delay in the presentment of the check is, as far as this suit is concerned, immaterial.

But this is only part of the negligence claimed by the respondent to have been committed by the plaintiff. Its chief ground of complaint is that the plaintiff, Pickett, gave the check to the First National Bank of Duluth for collection, and that that bank acting as the agent of plaintiff, instead of sending the same to the other local bank, the National Bank of Lakota, for collection in cash, sent it to the drawee of the check, the People's State Bank. There can be no question as to the strength and conclusiveness of this contention. The law is well settled that a collecting bank "must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittances be made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce, in behalf of another, a claim against itself." See Dan. Neg. Inst. §§ 328a, 1599; National Bank v. Johnson, 6 N. D. 180, 69 N. W. 49; Drovers' Nat. Bank v. Anglo-American Packing & Provision Co. 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; 5 Cyc. 506; German Nat. Bank v. Burns, 12 Colo. 539, 13 Am. St. Rep. 247, 21 Pac. 714; Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105, 61 Am. St. Rep. 550, 69 N. W. 765; Pinkney v. Kanawha Valley Bank, 68 W. Va. 254, 32 L.R.A.(N.S.) 987, 69 S. E. 1012, Ann. Cas. 1912 B. 115; Anderson v. Rodgers, 27 L.R.A. 248, and note (53 Kan. 542, 36 Pac. 1067); Bank of Rocky Mount v. Floyd, 142 N. C. 187, 55 S. E. 95; Winchester Mill. Co. v. Bank of Winchester, 18 L.R.A.(N.S.) 441, and note (120 Tenn. 225, 111 S. W. 248); Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 44 L.R.A. 504, 77 Am. St. Rep. 609, 78 N. W. 980; First Nat. Bank v. Citizens' Sav. Bank, 123 Mich. 336, 48 L.R.A. 583, 82 N. W. 66; R. H. Herron Co. v. Mawby, 5 Cal. App. 39, 89 Pac. 872; Givan v. Bank of Alexander, — Tenn. —, 47 L.R.A. 270, 52 S. W. 923; Bedell v. Herbine Bank, 62 Neb. 339, 86 N. W. 1060; Jefferson County Bank v. Hendrix, 147 Ala. 670, 1 L.R.A.(N.S.) 246, 39 So. 295; Farley Nat. Bank v. Pollock & Bernheimer, 145 Ala. 321, 2 L.R.A.(N.S.) 194, 117 Am. St. Rep. 44, 39 So. 612, 8 Ann. Cas.

370; Inter-state Nat. Bank v. Ringo, 72 Kan. 116, 3 L.R.A.(N.S.) 1179, 115 Am. St. Rep. 176, 83 Pac. 119; American Exch. Bank v. Metropolitan Nat. Bank, 71 Mo. App. 451. Nor can there be any question that the Duluth bank was the agent of the plaintiff, Pickett, and that the negligence of this bank would be attributed to its principal. National Bank v. Johnson, 6 N. D. 180, 69 N. W. 49; Interstate Nat. Bank v. Ringo, 72 Kan. 116, 3 L.R.A.(N.S.) 1179, 115 Am. St. Rep. 176, 83 Pac. 119.

The only possible contention that appellant can put forward is that there is nothing to show that if the check had been sent to the other bank in Lakota for collection and presented for payment that payment would have been made in cash. On this question, however, the burden of proof is under the authorities, upon the party guilty of the primary negligence to negative the presumption of injury, and where due presentment is not made the burden of proof is upon the holder of the check to show that the drawer has not suffered injury.

"In this case," says the supreme court of Kansas, in Anderson v. Rodgers, 53 Kan. 542, 27 L.R.A. 248, 36 Pac. 1067, "the check seems to have been forwarded for payment in due time, but it was sent directly to the drawee by mail, with the request that the bank of Richfield remit the amount by mail in exchange in Kansas City. The Hamilton County Bank therefore selected the drawee of the check as its agent for collection. That this was negligence is well settled by the authorities. It is said, in 1 Daniels on Negotiable Instruments, § 328a: 'For the purposes of collection, the collecting bank must employ a suitable subagent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittances be made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce, in behalf of an other, a claim against itself.' This proposition is sustained by abundant authorities. Drovers' Nat. Bank v. Anglo-American Packing & Provision Co. 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; German Nat. Bank v. Burns, 12 Colo. 539, 13 Am. St. Rep. 247, 21 Pac. 714; Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687; First Nat. Bank v. Fourth Nat. Bank, 6 C. C. A. 183, 16 U. S. App. 1, 56 Fed. 967; Farwell v. Curtis, 7 Biss. 160, Fed. Cas. No. 4,690.

"It is insisted that, inasmuch as the check was forwarded in due time, and came into the hands of the drawee, which refused payment and returned the check with the statement, 'No funds in bank,' the defendant was not injured by the mode of presentment; that an answer of 'no funds,' sent by mail, is as effectual a refusal to pay as though made across the counter at the bank. Where due presentment is not made, the burden of proof is upon the holder of the check to show that the drawer has not suffered injury. Little v. Phenix Bank, 2 Hill, 425; Ford v. McClung, 5 W. Va. 166; 2 Parsons, Bills & Notes, 71; 2 Dan. Neg. Inst. § 1588; Daniels v. Kyle, 1 Ga. 304. From the agreed statement, it appears that the check reached Richfield on the 12th of December, 1889, after business hours; that the bank on which it was drawn was open, doing a general business, receiving deposits, and paying money on checks during its regular banking hours on the 13th. During that day a letter was written, addressed to the Hamilton County Bank, within which was inclosed the check and the statement, 'no funds in bank.' This letter was deposited in the postoffice after banking hours, and received at Syracuse after business hours on the 14th. . . . Can it be presumed that if the check had been regularly presented over the counter to the Richfield bank, on the 13th, a false answer would have been given, as was in fact given by letter, and payment refused? It is admitted that the defendant had more than money enough to his credit to meet the check. Had presentment been made by another agent of the plaintiff, and payment refused, steps might have been taken immediately to protect the drawer's rights; but, the check being in the hands of the drawee, of course, no effort would be made by it to prosecute itself, and the fact that payment was refused was not communicated to the Hamilton County Bank until the night of the day following the last one on which the Richfield bank was open for business. It might be that the answer, 'No funds in bank,' was literally true, and that the Richfield bank had not the money with which to make payment at any time during the day of the 13th; but we are not at liberty to indulge in any presumption of that kind, the agreed facts showing that it received deposits and paid checks during the whole of that business day. This case must be decided in accordance with established principles; and the fact that the Richfield bank was a small concern in a very sparsely peopled part of the state, and, perhaps,

never had any large amount of funds in its possession, cannot be made a pretext for breaking down those wholesome rules of business which have been built up and defined with so much care and precision. The request in this case by letter was not an ordinary demand of payment, calling for current funds, but was a request for Kansas City exchange, which the drawee would, of course, be at perfect liberty to refuse. In cases of this kind, a hardship necessarily results to one party or another. Courts, in their decisions, must be guided by fixed rules. The plaintiff, having trusted in the good faith of the Richfield bank by sending the check to it, must bear the burden of the loss occasioned by its failure, occurring after the day on which regular presentment should have been made."

This case discusses nearly all of the questions involved on this appeal, and is abundantly supported by authority. See Anderson v. Rodgers, 53 Kan. 542, 27 L.R.A. 248, 36 Pac. 1067; Little v. Phenix Bank, 2 Hill, 425; Ford v. McClung, 5 W. Va. 166; Daniels v. Kyle, 1 Ga. 304; Hamlin v. Simpson, 105 Iowa, 125, 44 L.R.A. 397, 74 N. W. 906; Watt v. Gans & Co. 114 Ala. 264, 62 Am. St. Rep. 99, 21 So. 1011. It is true that some cases, such as First Nat. Bank v. City Nat. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458, seem generally to hold that the rule does not apply where the drawee bank was insolvent; but in these cases, unlike the case at bar, there appears to have been no evidence that, though technically insolvent, the bank was continuing to pay out money, and was of general good repute.

Nor do we believe that any usage or custom among the banks, even if proved, would, as far as the respondent, the Baird Investment Company, is concerned, change the rule. The Baird Investment Company certainly had the right to rely upon the general rule of law, at any rate, without proof of a knowledge by it of the custom, and an express or implied consent thereto. Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 44 L.R.A. 504, 77 Am. St. Rep. 609, 78 N. W. 980; American Exch. Nat. Bank v. Metropolitan Nat. Bank, 71 Mo. App. 451. The authorities just cited, indeed, even go so far as to hold that any such custom would be unreasonable and void, and such is undoubtedly the general rule. All authorities agree that, in order that such a custom may be pleaded and taken advantage of, it must be proved to have been a custom which was general and well

known, or consented to by the drawer of the check; and there is no proof whatever of such a custom or consent in the record before us. The only evidence upon the point is to be found in the testimony of Mr. Drake, the cashier of the other, the National Bank of Lakota; and he testified that he spoke solely from his own experience "as cashier of the National Bank here in Lakota, and that he never had any experience in any other bank; that it was a frequent occurrence for *his* bank to receive checks that were drawn on it, sent to it direct by the terminal bank, but that, except in the case of correspondent banks, such collections were usually sent for collection to other banks than the drawee; or, at any rate, all items in a town were sent to some one bank in that town, regardless of whom they were drawn on. There is, in this testimony, no proof of a custom which would bind the respondent.

The judgment of the District Court is affirmed.

DEVEREAUX v. KATZ.

(133 N. W. 553.)

Appeal — from order overruling demurrer — intermediate order — stay of proceedings.

1. An order overruling a demurrer to the complaint is an "intermediate order" within the meaning of § 7216, Rev. Codes 1905, and consequently a stay of proceedings on an appeal from such an order is, under the express language of such statute, within the discretion of the trial court, and the proper exercise thereof will not be interfered with by the supreme court.

Appeal — supersedeas bond — discretion of trial court as to.

2. An application to the supreme court for an order allowing and fixing a supersedeas bond on appeal from an order overruling a demurrer to the complaint will be denied where it appears that the trial court denied a similar application, and it not clearly appearing that in so doing such court abused its discretion.

Opinion filed December 11, 1911.

Action by L. L. Devereaux against C. E. Katz. Judgment for plaintiff, and defendant appeals. Original application for an order allowing a supersedeas undertaking on appeal.

Application denied, and order to show cause vacated.

Paul Campbell, for appellant.

A. E. Coger and *T. A. Toner* (*C. L. Young,* of counsel), for respondent.

FISK, J. This is an original application to this court for an order fixing the amount and conditions of a supersedeas undertaking on appeal. The facts, briefly stated, are that appellant, defendant in the court below, demurred to the complaint upon the ground that it fails to allege facts sufficient to constitute a cause of action. From an order overruling such demurrer an appeal to this court has been duly taken and perfected prior to entry of judgment on the overruling of the demurrer. The district court denied an application similar to that now made to us. Respondent resists this application: First, upon the alleged ground that the record discloses that the demurrer is frivolous and was interposed merely for the purpose of delay, and that the appeal was taken for a like purpose; and, second, that the legislature, by § 7216, Rev. Codes, has vested in the district court and in the judge thereof a discretion to allow or disallow a supersedeas on appeals from such orders.

We shall not notice respondent's first contention, as it goes to the merits of the appeal, which merits are not now before us, except in so far as they may furnish information on the question whether the trial court abused its discretion in refusing a supersedeas. That the district court is vested with a sound judicial discretion under § 7216, Rev. Codes, in disposing of such applications, is clear. The statute reads: "No appeal from an intermediate order before judgment shall stay proceedings unless the court or presiding judge thereof shall, in his discretion, so specially order." That an order overruling a demurrer to the complaint is an intermediate order within the meaning of § 7216, Rev. Codes, there can be no doubt. This being true, said section expressly vests a discretion in the lower court or presiding judge thereof to refuse a supersedeas on an appeal from such an order. Did the lower court abuse its discretion in denying defendant's application?

If not, then clearly this court will not interfere with the action of that court.

After duly considering the application, we are unwilling to say that the district court clearly abused its discretion in the matter. The statute above cited is so plain that we deem it unnecessary to cite authorities or to enter into an extended discussion of the question. We have carefully considered the brief filed by the appellant's counsel and the various authorities therein cited. Suffice it to say that we do not deem any of such authorities in point in the light of our statute, which is, of course, controlling, and it would be a waste of time to notice counsel's various contentions in detail.

Application denied, and order to show cause vacated.

STATE v. REILLY.

(133 N. W. 914.)

Criminal law — testimony of accomplice — corroboration.

Under § 10004 of the Revised Codes of 1905, which provides that "a conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof," it is not necessary that the corroborative evidence shall cover every material point testified to by the accomplice, or be sufficient in itself to warrant a verdict of guilty. If the accomplice is by such testimony corroborated as to some material fact or facts

Note.—Various phases of the question of the admissibility and sufficiency of testimony or declarations of an accomplice are treated in notes in 98 Am. St. Rep. 169, 177; 21 L.R.A.(N.S.) 878, and 35 L.R.A.(N.S.) 1084. That the court cannot permit a jury to convict on the testimony of an accomplice which merely tends to show the guilt of an accused is shown in Thorp v. State, 59 Tex. Crim. Rep. 517, 29 L.R.A.(N.S.) 421, 129 S. W. 607. And that a conspirator cannot be convicted upon the uncorroborated testimony of an accomplice is declared in Powers v. Com. 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 735, 13 Am. Crim. Rep. 464; Com. v. Hollister, 157 Pa. 13, 25 L.R.A. 349, 27 Atl. 386. No evidence can be legally competent and sufficient to corroborate an accomplice, which does not tend to confirm the tes-

tending to connect the defendant with the commission of the offense, the jury may from that infer that he speaks the truth as to all.

Opinion filed December 16, 1911.

Appeal from District court, Cavalier county; *Kneeshaw*, J.

James J. Reilly was convicted of maintaining a liquor nuisance, and appeals.

Affirmed.

Geo. M. Price, for appellant.

Andrew Miller, Attorney General, *Alfred Zuger,* Assistant Attorney General, and *G. Grimson,* State's Attorney, for the State.

BRUCE, J. Appellant was convicted of the crime of keeping and maintaining a common nuisance, merely, a place where intoxicating liquors were sold and delivered to be drunk as a beverage, between December 15, 1908, and May 26, 1909, in the village of Osnabrock, Cavalier county. Prior to the trial one James Wilkinson pleaded guilty to the charge of maintaining the same nuisance, and he was allowed to testify for the state in this case. His testimony, as given on cross-examination by defendant's counsel, was in part as follows: "I myself was arrested and pleaded guilty to the charge of maintaining a common nuisance on the premises described in the complaint in this case. I understood, when I pleaded guilty to that charge, that I was charged with running this place. I have been talking about myself, and now come in here and say that Dr. Reilly was a proprietor of that place of business. He got all the proceeds while I was there, and put me in charge. He never told me that he was running the place him-

timony of the accomplice upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant. United States v. Lancaster, 10 L.R.A. 333, 44 Fed. 896; State v. Kent, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631. But the confirmatory evidence need not extend to the whole testimony of an accomplice, but, it being shown that he has testified truly in some particulars, the jury may infer that he has in others. United States v. Lancaster, supra. And a statutory requirement of corroboration of an accomplice to warrant a conviction on his testimony is sufficiently met by admissions and acts of the accused tending to connect him with the commission of the offense. State v. Chauvet, 111 Iowa, 687, 51 L.R.A. 630, 82 Am. St. Rep. 539, 83 N. W. 717.

self, or that he owned this stock there. The reason I say Dr. Reilly was a proprietor was because I said I turned over the proceeds to him, and that it was him I was working for." This witness Wilkinson was the principal witness for the state. His evidence in chief disclosed that he was in the actual charge and control of the premises, and made the sales; and counsel for appellant contends that no witness except Wilkinson testified to any control of the premises by the defendant Reilly, or any sales made by the defendant Reilly; nor is there anywhere in the record, outside of Wilkinson's testimony, any direct evidence to show that Reilly knew of Wilkinson's unlawful sales. There is no doubt that, as defendant contends, Wilkinson cannot be looked upon other than as an accomplice in the commission of the crime. State v. Kellar, 8 N. D. 563, 73 Am. St. Rep. 776, 80 N. W. 476; and it is also, no doubt, true, as contended upon this appeal, that no conviction of any crime can be had upon the uncorroborated testimony of an accomplice; that there must be other testimony tending to connect the defendant with the commission of the offense. State v. Kellar, supra. If, therefore, there is no corroborative testimony in the legal sense of the word, the judgment should be reversed. State v. Coudotte, 7 N. D. 109, 72 N. W. 913.

It is contended by the defendant that the only facts in the record, tending in any way to implicate the defendant, are the facts shown by the record books of the station agent, Conroy. That between February 4th and March 22d some forty-nine consignments of beer and whisky were received at the depot, consigned to the defendant, J. J. Reilly, and an order to the station agent, dated January 1, 1907, as follows: "Please deliver shipments to J. J. Reilly, or C. P. Franklin, to James Wilkinson. [Signed] J. J. Reilly." And that the signing of Reilly's name for such consignments (which was shown by the record books) was an admission merely of Wilkinson, the accomplice, and was uncorroborated. This contention, however, and the general contention as to lack of corroboration, are not borne out by the facts. The receipt of liquor in such large quantities as shown by the evidence in this case should certainly be considered some evidence, at least, of the consignee's intention to sell the same, or to have the same sold. Klepfer v. State, 121 Ind. 491, 23 N. E. 287; State v. Dahlquist, 17 N. D. 40, 115 N. W. 81. Witnesses other than Wilkinson testified that liquor was sold

in the store by Wilkinson. A drayman testified that he delivered some of the liquor at the store. Reilly himself testified that, though he had no financial interest in the store, he was looking after it for a certain Mrs. C. P. Franklin; that he was in the store nearly every day, sometimes twice a day, and used the store behind the prescription case for consulting patients, for convenience; that he looked after the financial end of the business, and had received money from Wilkinson, taken out from the till; that he had a supervisory interest in the hiring of help, and, "like Mr. Wilkinson, in the care of the business;" that the clerks obeyed him pretty well; that he remitted some of the proceeds of the till to Mrs. C. P. Franklin. The witness Wold also testified: "I have been told that he was doing business there. I know, from the fact that I have seen him there, and I have seen him handing out goods." He also testified that he and another person had sold the place to Reilly.

All this was corroborating testimony. It is not essential that such corroborative evidence should cover every material point, or be sufficient alone to warrant a verdict of guilty. State v. Kent, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631. If an accomplice is corroborated as to some material fact or facts, the jury may, from that, infer that he speaks the truth as to all. 13 Cyc. 455; Bell v. State, 73 Ga. 572. If the trial judge is satisfied that there is evidence tending to connect the defendant with the commission of the crime, he may send the case to the jury, whose province it is to determine whether the corroboration is sufficient. People v. Mayhew, 150 N. Y. 346, 44 N. E. 971.

We cannot find any prejudicial error in the record, and we believe that essential justice has been done. The judgment of the District Court is affirmed.

STEWART et al. v. DWYER.

(133 N. W. 990.)

Costs — bond for, by nonresident.

1. The undertaking for costs required of a nonresident by § 7196, Rev. Codes

1905, cannot be limited in amount, but must be sufficient to cover all costs incurred.

Costs — bond for.

2. Such undertaking should run to the defendant.

Costs — dismissal for failure to furnish bond for.

3. Under failure to furnish such undertaking, the court may dismiss the action, with costs, and without prejudice to the bringing of another action upon the same subject-matter.

Opinion filed December 16, 1911.

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

Action by J. A. Dwyer against J. H. Stewart and J. J. Barrett. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

C. J. Kachelhoffer, C. R. Fowler, E. R. Lynch, and *Balentine & Smith,* for appellants.

J. A. Dwyer, pro se.

BURKE, J. Plaintiff, a nonresident, sued the defendant, a resident, in the district court of Richland county, North Dakota. No undertaking being furnished, as provided by § 7196, Rev. Codes 1905, defendant moved that plaintiff's complaint be dismissed. The court made the order that the complaint be dismissed unless plaintiff furnished such undertaking by January 10, 1911. Plaintiff furnished a purported undertaking upon January 7th; but said undertaking was objected to by defendant on several grounds, among which, that it was not signed by resident of Richland county; that it ran to the clerk of court, instead of the defendant; that it was limited to the sum of $100 costs. Upon January 12, 1911, a new undertaking was furnished, with the American Surety Company of New York as surety, but executed by a resident of Richland county as agent, but said bond was conditioned as follows: " . . . Are held and bound unto the clerk of the district court aforesaid . . . in a sum not exceeding $100." This new undertaking was also objected to by the defendant, for the reasons advanced against the first bond, and for the further reason that it was filed two days too late to comply with the order of the court. Upon this objection an order was entered dismissing the action, with costs, and with prej-

udice to the bringing of another action. An appeal has been taken from such order and the judgment based thereon.

We think the undertaking was defective upon two grounds at least. It limited the liability of the principal and surety to the sum of $100. Section 7196 says that they should furnish a sufficient surety for costs. It is possible that the costs incidental to this suit should exceed the sum of $100, and for the excess the defendant would be unprotected. The other defect is that the bond ran to the clerk of court. It should run to the defendant personally. Those defects justify the action of the trial court in dismissing the complaint, with costs. However, inasmuch as the merits of the case were not passed upon, the plaintiff should not be thereby deprived of a trial upon the merits in another action. 6 Enc. Pl. & Pr. 986, 987, where the rule is stated and authorities cited. See also 23 Cyc. 1146–1150.

The order and judgment should be modified in this respect, and as so modified is affirmed. Neither party shall recover costs of the other upon this appeal.

STATE v. PIERCE.

(133 N. W. 991.)

Criminal law — examination of witnesses whose names are not indorsed on information.

Section 9794, Rev. Codes 1905, requires the names of witnesses for the prosecution, known by the state's attorney to be such at the time of filing the information, to be indorsed or otherwise exhibited thereon, but provided that other witnesses may testify in behalf of the prosecution the same as if their names had been indorsed on the information. *Held*, that witnesses whose names are not indorsed on the information may be examined by the state on the

Note.—In State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 677 N. W. 1052, it is held that it is the duty of the state's attorney to indorse upon an information at the time of filing the same the names of all witnesses for the state known to him at that time, and that ordinarily no witnesses should be permitted to testify for the state whose names are not so indorsed, unless it is clearly made to appear that such witnesses were not known to the state's attorney at the time of filing the information.

trial of a criminal case, when the prosecution had no knowledge of the witnesses or of their knowledge of anything material to the issues prior to the filing of the information, and in the absence of a showing that the defendant was prejudiced thereby.

Opinion filed December 18, 1911.

Appeal from District Court, Nelson county; *Templeton*, J.

T. E. Pierce was convicted of maintaining a common nuisance in violation of the prohibition law, and he appeals.

Affirmed.

Frich & Kelly, for appellant.

Andrew Miller, Attorney General, *Alfred Zuger*, and *C. L. Young*, Assistant Attorneys General, for the State.

SPALDING, Ch. J. The appellant was informed against on a charge of maintaining a common nuisance, in violation of the statute prohibiting the sale of intoxicating liquors in this state. Upon a verdict of guilty, judgment was pronounced. From this judgment he appeals.

The information charges the offense to have been committed in a building on lot 9, block 7, townsite of Lakota, in Nelson county, North Dakota. The names of a number of witnesses were indorsed on the information, but the names of one Johnson and one Rustebakke were not indorsed thereon. Upon the witness, Johnson, being sworn for the state, he was asked if he knew the place where the appellant was doing business during the time covered by the information, whereupon counsel for appellant objected to the examination of such witness or the introduction of any evidence from him, on the ground that his name was not indorsed on the information. Thereupon, on leave of court, the state's attorney stated that prior to the day of the commencement of the trial he had no knowledge of any facts which would lead him to believe that the witness named had any information which would be relevant, material, or competent as testimony in the case, and that he had that day discovered the possession by the witness of information competent, relevant, and material. The court then overruled the objection of appellant.

Again, when it became apparent, from the statement of the state's attorney, that he was going to attempt to prove by the witness Johnson,

who was the owner of the building in which the nuisance was alleged to have been maintained, and then prove, by the register of deeds, the description of the lot on which it stood, further objection was made, on the ground that the name of the witness was not indorsed on the information, and that the matter sought to be proved by him was a material issue in the case, and one as to which the state's attorney must have necessarily had information prior to the preparation and filing of the information. This objection was overruled, and exception was taken. Whereupon the witness testified, under objection to each question, that the building was owned by one Herne. Thereafter the witness Rustebakke was sworn for the state, and the same objection was interposed to the reception of any testimony from him, and similar explanation made by the state's attorney as in case of the witness Johnson. Rustebakke was the register of deeds, and the purpose of his testimony was to show the description of the lot on which the building described stood. The witness Rustebakke testified as to his holding the office of register of deeds, and identified certain books of record showing the title to the lot, on which the building in question stood, to be in one Herne, and that the same was lot 9, block 7.

The question before us is the ruling of the court in admitting the testimony of these two witnesses over objection and after the statement made by the state's attorney. Section 9794, Rev. Codes 1905, requires the state's attorney, or person appointed to prosecute, to subscribe his name to an information, and indorse or otherwise exhibit thereon the names of all witnesses for the prosecution known to him to be such at the time of the filing of the same; and concludes with the following paragraph: "But other witnesses may testify in behalf of the prosecution on the trial of said action, the same as if their names had been indorsed upon the information."

This court had under consideration, in State v. Albertson, 20 N. D. 512, 128 N. W. 1122, the identical question here presented, and it was therein held that the admission of the testimony of a witness not known to the prosecuting attorney to be competent to testify, and whose name was not indorsed on the information when filed, did not constitute reversible error. But appellant attempts to distinguish, on the ground that the state depended upon the two witnesses named in the case at bar for proof of a material element necessary to sustain the prosecution;

and that in other authorities cited, and particularly in the Albertson Case, the testimony of the witness to whom objection was made was only cumulative. The opinion in the Albertson Case may not disclose what the fact was with reference to this, but in fact the witness whose testimony was objected to on that prosecution was the witness on whom the state relied for proof of the place where the offense was committed. We see no reason for overruling that decision.

Aside, however, from the authority of the Albertson Case, we find that courts on somewhat similar statutes, but much more mandatory in terms than our own, seem to be more liberal in recent years than they were formerly in the admission of the testimony of witnesses, under similar circumstances, the disposition seeming to be to hold that it is not reversible error unless the discretion reposed in the trial court is abused. In other cases it seems to depend on whether the defendant was prejudiced by the admission of the testimony of such witnesses. If this were the rule in this state we should be compelled to hold that the appellant, in the case at bar, could not have been prejudiced by the action of the trial court. The trial was conducted in Lakota, the county seat of Nelson county, and the location of the nuisance was alleged to have been in Lakota. Lakota is a city which is duly platted, and the plats of all cities in this state are required to be on file in the office of the register of deeds. And had either of these witnesses incorrectly located the nuisance or misdescribed the lot or block, it is apparent to any intelligent mind that in a place of the size of Lakota any number of witnesses could have been produced within the space of a few moments, able to correct the error. We can imagine circumstances surrounding trials by reason of which a failure to indorse the names of witnesses might occasion great hardship to the defendant, but even then the trial court is permitted to use such a degree of good judgment and discretion as to secure to the accused party the opportunity for making a full and fair defense, and the question presented would doubtless be properly raised on an application for a delay or continuance of the case. However, it will be ample time to pass upon such questions when presented. They are only touched upon here by way of explanation and to show that a literal application of this permissive statute does not, of necessity, deprive a defendant of any rights. We construe State v. Kent (State v. Pancoast), 5 N. D. 516, 35 L.R.A.

518, 67 N. W. 1052, as holding that the failure to indorse may be error, but that it must be prejudicial or it is not ground for reversal.

In Michigan and in South Dakota the state's attorney is required to indorse upon the information the names of witnesses then known to him, and is authorized to indorse the names of other witnesses at such time before the trial as the court may, by rule or otherwise, prescribe; but in our sister state it has been repeatedly held that one accused of a crime is not entitled, as a matter of right, to previous notice of all witnesses that may be called by the state, and that it is within the discretion of the trial court, and dependent upon the intentional withholding from the accused the names, and the state's knowledge thereof, to permit the state to use, on a prosecution for felony, witnesses whose names were not upon the indictment. See State v. Matejousky, 22 S. D. 30, 115 N. W. 96; State v. Cambron, 20 S. D. 282, 105 N. W. 241.

And in State v. Frazer, 23 S. D. 304, 121 N. W. 790, it is held that in a prosecution for assault one who objects to the testimony of a witness because not indorsed on the information must show that the witness was known to the state's attorney when the information was filed.

For an interesting reference to the history of provisions of the kind found in the section to which reference has been made, see the opinion of Chief Justice Christiancy, in Hill v. People, 26 Mich. 496.

The judgment of the District Court is affirmed.

STATE EX REL. MILLER, ATTORNEY GENERAL v. TAYLOR et al.

(133 N. W. 1046.)

Construction of Constitution — resorts to debates of convention.

1. When the meaning of words or terms employed in the Constitution is uncertain or ambiguous, resort may be had to the debates of the convention

Note.—As to the right to consult debates of the constitutional convention in determining the meaning of words or terms employed in the Constitution, see Rasmussen v. Baker, 7 Wyo. 117, 38 L.R.A. 773, 50 Pac. 819, holding that, while de-

which framed and submitted the Constitution, as an aid in determining their meaning; and for the same purpose the interpretation placed upon such provisions by several sessions of the legislative assembly and by the people in voting thereon is entitled to great weight; and the intent, if it can be gathered from such proceedings, without doing violence to the words employed, is controlling.

Amendment of Constitution — method — construing "revise" as "amend."

2. Article 15 of the state Constitution provides the only method named in the Constitution for making changes therein, to wit, that any amendment or amendments thereto may be proposed in either house of the legislative assembly, and if agreed to by a majority of each of the two houses, it or they may be referred to the next legislative assembly when, if agreed to in the same manner, it or they shall be submitted to the people for ratification or rejection.

Article 19 of the Constitution locates the public institutions of the state, and, among others, two state normal schools. Appended to such article is a proviso to the effect that no other institution of a character similar to any one of those located therein shall be established or maintained, without a revision of such Constitution. *Held*, that the meaning and purpose of such proviso is to prohibit the legislative assembly from locating any similar additional institutions, and that, in the light of the debates of the constitutional convention, the action of several legislative assemblies, and the votes of the electors

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bates of the constitutional convention may for some purposes, but in a limited degree, be consulted in determining a doubtful phrase or provision of the Constitution, they are, as a general rule, deemed an unsafe guide. For cases as to the effect of legislative interpretation of the Constitution long established and acquiesced in, see State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; People ex rel. Mooney v. Hutchinson, 172 Ill. 486, 40 L.R.A. 770, 50 N. E. 599; State v. Narragansett, 16 R. I. 424, 3 L.R.A. 295, 16 Atl. 901; Indianapolis v. Navin, 151 Ind. 156, 41 L.R.A. 337, 47 N. E. 525, 51 N. E. 80; Re Bank of Commerce, 153 Ind. 460, 47 L.R.A. 489, 53 N. E. 950, 55 N. E. 224.

That the rule of construction by long and continuous usage should be applied to a constitutional provision only in cases of doubt is declared in Pingree v. Auditor General (Pingree v. Dix) 120 Mich. 95, 44 L.R.A. 679, 78 N. W. 1025. And that long usage and practical interpretation cannot control in the interpretation of the Constitution unless the language is obscure and doubtful is decided in State ex rel. Morris v. Wrightson, 56 N. J. L. 126, 22 L.R.A. 548, 28 Atl. 56. But that the contemporaneous interpretation of a Constitution by those who had opportunity to understand the intention of the instrument is a strong presumption in its favor is held in State ex rel. Guerguin v. McAlister, 88 Tex. 284, 28 L.R.A. 523, 31 S. W. 187. And that a practical construction of the state Constitution for nearly forty years will be conclusive of its meaning when that would otherwise be doubtful is declared in French v. State, 141 Ind. 618, 29 L.R.A. 113, 41 N. E. 2.

of the state, as well as the spirit of the Constitution, and the fact that the words "revise" and "amend" are popularly, and often, in a legal sense, employed synonymously, said article 19 may be amended so as to provide for the location of additional similar institutions by the method provided in article 15 for submitting and adopting amendments to the Constitution.

Appropriation for normal school building — conditions.

3. The appropriation made by chapter 22, Laws of 1911, p. 25, for the erection of normal school buildings, and providing for furnishing and maintenance thereof, at Minot, is not rendered invalid by a proviso therein contained to the effect that none of the sums appropriated shall become available unless the citizens of Minot shall donate to the state a suitable location and site for such school.

Opinion filed December 11, 1911.

Original application by the State, on the relation of Andrew Miller, Attorney General, for an injunction permanently restraining E. J. Taylor and others, as the State Board of Normal School Trustees, from establishing a state normal school in the City of Minot, and Gunder Olson, as Treasurer, from paying out the money of the State therefor.

Denied, and temporary order quashed.

Andrew Miller, Attorney General, and *Alfred Zuger* and *C. L. Young,* Assistant Attorneys General, for the State.

John E. Greene, Francis J. Murphy, Robert H. Bosard, H. L. Halvorson, Dorr H. Carroll, and *V. B. Noble,* for defendants.

SPALDING, Ch. J. This is an application for a permanent injunction restraining the defendants, who are the State Board of Normal School Trustees, and the state treasurer, from locating a proposed normal school at the city of Minot, in Ward county, and expending any money belonging to the state of North Dakota for such purpose or for the erection of buildings therefor. The questions involved are of great temporary interest and importance; but, as the main question is unlikely ever to arise a second time, we shall content ourselves with stating the reasons for our conclusions as briefly as possible.

Article 19 of the Constitution prepared by the constitutional convention in 1889, and in October of that year approved by the voters of that part of the territory now comprised in the state of North Dakota, locates the public institutions of the state. It is composed of §§ 215

and 216. Section 215 provides that the following public institutions of the state are permanently located at the places thereinafter named, each to have the land specifically granted to it by the United States in the enabling act, to be disposed of and used in such manner as the legislative assembly may prescribe, subject to the limitations provided in the article on school and public lands, contained in the Constitution: The seat of government, the state university, the school of mines, the agricultural college, a normal school at Valley City and one at Mayville, a deaf and dumb asylum, a reform school, and a state hospital for the insane and institution for the feeble minded in connection therewith. And provision is made for the apportionment of public lands among some of them.

Section 216 provides that the following named public institutions are permanently located, each to have so much of the remaining grant of 170,000 acres of land made by the United States for other educational and charitable institutions as allotted by law, namely: A soldiers' home, or such other charitable institution as the legislative assembly may determine, at Lisbon; a blind asylum, or such other institution as the legislative assembly may determine, to be determined by an election, in Pembina county; an industrial and manual training school, or such other educational or charitable institution as the legislative assembly may provide; a school of forestry, or such other institution as the legislative assembly may determine, at a place to be selected by the electors of four specified counties.

The locations of the foregoing institutions are named, and a portion of the land granted apportioned among them. The fifth subdivision of § 216 reads: "A scientific school, or such other educational or charitable institution as the legislative assembly may prescribe, at the city of Wahpeton, county of Richland, with a grant of 40,000 acres; provided, that no other institution of a character similar to any one of those located by this article shall be established or maintained without a revision of this Constitution."

Article 15, comprising § 202 of the Constitution, reads as follows: "Any amendment or amendments to this Constitution may be proposed in either house of the legislative assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on the journal of the house,

with the ayes and nays taken thereon, and referred to the legislative assembly to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice and if in the legislative assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislative assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the legislative assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislative assembly voting thereon, such amendment or amendments shall become a part of the Constitution of this state. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately."

The tenth legislative assembly adopted a concurrent resolution for an amendment to the Constitution by adding to the institutions named in § 216 a state normal school at the city of Minot, in the county of Ward. This resolution was certified to the eleventh legislative assembly, adopted by it, and submitted at the general election held in November, 1910, when it met with approval. By these proceedings the amendment took the form of a submission of all formerly contained in § 216, with the addition of a sixth paragraph providing for the Minot normal school.

The main contention of the state on this application is that by the terms of the proviso found in the 5th subdivision of § 216, supra, the legislative assemply had no power to submit to the electors an amendment increasing the number of normal schools. The substance of its claim is that at the time of the adoption of our Constitution the word "revise" or *"revision,"* used in reference to changes in Constitutions, had a definite or technical legal meaning, and that the word "amend" or "amendment," in such connection, had a quite different meaning; that the word "revise" or "revision," in such connection, was associated only with the calling and holding of a constitutional convention, with power to make or submit complete or partial changes in the constitution as it might deem expedient; that the method provided by our Con-

stitution for making amendments through the means of submission by the legislative assembly to the electors was known as the *legislative method,* and was well understood in law to refer only to specific or definite changes or additions to the Constitution as it existed; and that the word did not relate or refer to any other than the legislative method, and certainly not to changes made by means of a convention. In other words, that "to revise" means to submit the subject to the people through a constitutional convention, and to "amend" relates only to a submission through the legislative assembly. It is urged on the part of the state that, by the use of the words, "without a revision of this Constitution," the constitutional convention, and the people adopting the Constitution, have said that the powers of the legislative assembly as defined by article 15, supra, are limited, and that article 19 cannot be changed by amendment so as to increase the number of similar institutions, and that the hands of the legislative assembly are tied regarding the submission of amendments.

On the other hand, respondents' contention is that *revision* and *amendment* are synonymous terms, in connection with the changes in a Constitution; and that the proviso in § 216 means precisely the same as though it read, "without amendment of this article," and that the courts are not concerned with the technical or strict legal meaning of the word "revision."

Having thus stated the main question and the claims of the respective parties concerning it, we proceed to consider some of the reasons which impel us to the conclusion which we reach. And in doing so we may concede that in a general way the word "revision" and the word "amendment," in connection with changes in Constitutions, are treated by some authorities as applying to two distinct methods of making changes such as those to which reference has been made.

The question before us is what meaning attaches to the word "revision," as employed in § 216. In the states of the American Union, sovereignty inheres in the people. Constitution North Dakota, § 2. Constitutions are adopted to insure a stable system of government, including a division into departments, fixing the number and character of offices in each, and in general providing a scheme or system of government. In addition to this, such Constitutions are a means employed by the sovereign people to limit the powers of their agents, especially

those of the legislative department. When a method of submitting amendments to the Constitution, originating in the legislative assembly, is provided, that body, in framing and submitting them to the electors for ratification or rejection, does not act in its legislative capacity, but as the agent of the sovereign people appointed by and through the terms of the organic law. Livermore v. Waite, 102 Cal. 118, 25 L.R.A. 312, 36 Pac. 424.

In determining whether this agency of the sovereign people was authorized by its principal to submit the amendment in question, we first consider what the nature of the change attempted in article 19 was. Was its character such as to make it essentially an amendment which could properly, in the absence of limitations, be submitted through the legislative method, or was the nature of the subject, its relation to other parts of the Constitution, or the extent of the change made, such that it could more properly be made through the medium of a constitutional convention? If essentially an amendment in its nature, rather than of such a character as to call for a reconsideration of the whole Constitution, we may much more readily conclude that no strained construction should be employed and no technical meaning given words to support the contention of the state in this proceeding and thereby defeat the will of the people as expressed by means of the ballot.

An examination of the Constitution and of this change in article 19 can lead to but one conclusion, and that is that in its essential elements the addition of one normal school to the public institutions enumerated is, as the word "amendment" is understood popularly, and even generally understood in a legal sense, an amendment; that it calls for and necessitates no general review of the Constitution. It is unrelated to any other subject or article in the Constitution. No other paragraph is affected by the change, and its relation to the whole Constitution, and to each of its parts, is such that we cannot assume that a review of a single remaining paragraph of the Constitution would be considered by anyone as necessary in connection with the increase of the number of public institutions to the extent attempted.

The change made is essentially in the nature of an amendment, rather than of a revision, using the word "revision" in the sense in which it is employed by counsel for the state and as several authorities

seem to hold it as generally employed in this relation. This may also be said of any similar change regarding the institutions.

The next question is: What was the intent of the constitutional convention in employing the language contained in the proviso in question? The intent of the convention is not controlling in itself; but, as its proceedings were preliminary to the adoption by the people of the Constitution, the understanding of the convention as to what was meant by the terms of this provision goes a long way toward explaining the understanding of the people when they ratified it. The people depended largely upon the interpretation and construction placed upon the various constitutional provisions by the delegates who framed them. An examination of the journal and debates of the constitutional convention sheds some light upon the understanding of the delegates. It is true that no reference is made in such debates to the proviso under consideration, but by one familiar with the history of that convention the absence of any such reference is readily accounted for. The article which locates the public institutions was the subject of the most general interest of any contained in the Constitution. The reported debates are very meager as to the meaning of any words or phrases employed, but the reason for this is readily explainable. The convention and the people were divided into two factions. Those advocating the adoption of article 19 were in the majority. The article was formulated and discussed outside the convention, in caucuses and committees, at which the line of action of each faction was determined upon. The contest raged around the fact of the location of the institutions through the medium of the Constitution, and the number to be so located. Many contended that they should be the subject of legislation, and others that the number created was excessive. The details of the provisions were not discussed in the convention, and the effect of the majority was directed toward securing the adoption of the provisions, and also, at the same time, to prevent the legislature from adding to the number of state institutions without a change being made in the Constitution to provide for an increase. The details and interpretations have been considered in caucuses and committees, and no record preserved.

When we come to article 15, relating to the method of amending the Constitution, we find a more general discussion. It will be observed that the subject of article 15 is that "any amendment or amendments

to this Constitution," etc. A review of the debates shows that one faction of the convention—in the main the faction which located the institutions—advocated methods by which changes in organic law would be rendered somewhat difficult; and amendments to article 15, as adopted, were offered, providing, in addition to the legislative methods, one of calling constitutional conventions; but the proposed amendments were all rejected. Remarks of different members of the convention disclose that the words "revise" and "amend" were used indiscriminately and interchangeably, and clearly indicate that in the minds of the participants in such debates, as well as others, no distinction was drawn in the application of those words to the two methods of changing the Constitution.

It is also reasonably clear that the body of the delegates failed to understand, what seems to be the consensus of authorities at the present time, that the legislative assembly has the inherent power to submit the question of calling a constitutional convention to the electors; that the delegates and the convention acted on the supposition that article 15 provided the only method by which the Constitution could be changed; and that its terms were broad enough to permit of submitting sufficient amendments to change much or little of the Constitution. through the legislative method. Whether they were correct in their suppositions or conclusions is immaterial; but the fact that they entertained opinions, which, as we have said, it is reasonably clear they did entertain, sheds great light upon their intent in the use of the word "revision" and their understanding of its meaning and application.

It would be too violent an assumption to assume that it was intended to disregard the history of new states in the West, the possibility and the probability of their steady and enormous increase in population, and the consequent necessity for an increase in their school facilities. The debates themselves indicate that they anticipated a rapid increase in the population of the new state. These facts being apparent, is this court justified in assuming that the delegates, or a majority of them, intended to preclude the legislative assembly from submitting any amendments, increasing the number of educational institutions, to the electors for ratification, and are we justified in assuming that they used the word "revision" advisedly in its technical or, as contended, in its legal sense, as applicable to changes in Consti-

tutions, and thereby excepted article 19 from the general provisions of article 15 regarding amendments, and intended to foreclose the legislative assembly and the people from making such an increase in public institutions? We think to assume that it was intended to eternally prohibit the people from this would be unwarranted.

The records of the convention show, and by some knowledge of contemporaneous history we know, that one of the chief concerns of the people and of the constitutional convention was to provide adequate school facilities, not only for the children of that day, but for those of future generations. It being reasonably apparent that the interpretation of the provision in question contended for by the legal department of the state is not borne out by the attitude and understanding of the delegates in the convention, the next inquiry is: How shall we reasonably assume the people, in ratifying the Constitution, understood it?

As we have observed, their understanding must have been largely derived from the understanding of the provisions of the Constitution had by the delegates who framed it; but, in addition to this, we may suggest that if the 6th Amendment, changing subdivision 8 of § 215, and separating the institution for the feeble-minded from the state hospital for the insane, adopted some years since, is construed as the location of a new and additional institution, their vote in ratifying such change furnishes practical evidence of their understanding that the word "revision" was synonymous with "amendment." However, we do not decide whether that was an addition or a separation. The amendment providing for the normal school at Minot was adopted by a vote of 45,792, for, as against 25,743, opposed, and it is clearly evident that in casting this vote the electors understood the meaning of the proviso the same as it had been understood by the members of the convention. These considerations are not controlling, but tend to show the understanding of the people on the subject, and are proper subjects of consideration when courts are attempting to arrive at the meaning of ambiguous language in a statute or Constitution.

Again, assuming that the legislative assembly has the power to submit the question of calling a constitutional convention without express provision contained in the Constitution for doing so, would a constitutional convention be the most appropriate instrument by which

to make an addition of one institution to those originally contained in article 19, or could it be more readily, intelligently, economically, and appropriately provided for by means of a simple amendment? In discussing the expediency and appropriateness of employing the two methods of making changes, Jameson, in his work on Constitutional Conventions, indicates the character of changes which are most appropriate to each of the two methods. His reasoning on the subject is commonplace, and its correctness must be apparent to a person of the most ordinary intelligence. It is, in effect, that where only a few, and those simple, changes are desired, the legislative method is most expedient and appropriate, but that where the relation of one part to another is important, and a general review of the whole Constitution is desired, the convention system is most expedient and furnishes means for the most intelligent and effective consideration. But, as we have said, we see no call, on any of these considerations, for a convention to make the change attempted. This is quite persuasive evidence that it was not intended to require the action of a convention to make such increase.

We think it is evident that the language employed in this proviso is ambiguous and its meaning not free from doubt. If any doubt can exist of the ambiguity of this language or of the meaning of the word "revision," some light may be shed upon it by considering one or two imaginary conditions. Leaving out the Declaration of Rights and the schedule, our Constitution contains about 190 sections. Let us suppose the legislative assembly should submit, at each session, amendments to 19 sections, charging each section in such a manner that it in no way resembled the original section; that all such changes were ratified by the people; and that this should continue for ten sessions. We would have a new Constitution *in toto*, bearing no resemblance to the original Constitution. On the theory adopted by the state, we should then have only an amended Constitution. We should have had no revision of the Constitution. Now, let us take another step. Suppose in this process all articles had been amended except article 19, and at the eleventh session of the legislative assembly there should be considered proposed changes in article 19, increasing the number of institutions. It would become apparent that on the theory of the state, notwithstanding the fact that the whole Constitution, aside from that

article, had been changed, the legislative assembly would have no power to submit the proposed changes, and that the number of institutions could not be increased except through the means of a constitutional convention; and to effect such an increase a convention must be called for that purpose alone. On the other hand, suppose a convention were to be called in the immediate future, the delegates should be elected, the convention convened, and after due deliberation it should be adjourned, having submitted no changes in the Constitution except one to increase the number of state institutions. If the contention of the state were to be maintained, a revision of the Constitution would have taken place. Undoubtedly in a legal sense this would be true, because the convention would have reviewed the whole document; but in a popular sense and in any way except by the most technical interpretation, the result of the first illustration would be deemed a revision of the Constitution and that brought about through the last only an amendment. And we think this is clear.

The mere fact that two legislative assemblies have interpreted its meaning, and the intent of the people in adopting it, one way, and the legal department of the state another, is also some evidence of such ambiguity or uncertainty, and to this we may add that the members of this court have only, after diligent effort, been able to reach a decision. We do not regard the question as beyond doubt even now; the fact that it is not so, among other things, impels us to our present determination.

We have proceeded, in our discussion of the question presented, upon the theory that the intention should be followed if it can be discovered, and that the spirit of the Constitution has an important bearing upon its construction, and that if the contention of the state as to the generally accepted legal meaning of the word "revision," is correct, its meaning, as employed in the proviso in question, is disclosed by the spirit of article 19 and article 15, rather than by following the obscure and generally unknown technical meaning given it by the legal department. People ex rel. Atty. Gen. v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243; Ryegate v. Wardsboro, 30 Vt. 746; Atkins v. Fibre Disintegrating Co. 18 Wall. 302, 21 L. ed. 844.

In other words, we are satisfied that the convention and voters all believed it was used in its popular sense, and meant precisely the same

as though "amendment" had been used. We find nothing in the authorities so clearly defining and distinguishing between the meanings of the words "revision" and "amendment," in this connection, so as to overcome the reasons mentioned and the undoubted fact that in popular use they are often employed interchangeably.

There is still another principle bearing directly upon this question. It may be thus stated: When the legislative assembly repeatedly construes or interprets a constitutional provision, such construction or interpretion should be followed by the courts, when it can be followed without doing violence to the fair meaning of the words used, in order to support the legislative action and give effect thereto, if the language construed admits of such construction. Ogden v. Saunders, 12 Wheat. 213, 270, 6 L. ed. 606, 625; Grenada County v. Brogden (Grenada County v. Brown) 112 U. S. 268, 28 L. ed. 708, 5 Sup. Ct. Rep. 125; Sykes v. Columbus, 55 Miss. 115; Cooley, Const. Lim. 218; Adams v. Howe, 14 Mass. 340, 7 Am. Dec. 216; State ex rel. Wells v. Tingey, 24 Utah, 225, 67 Pac. 33.

Leaving out of consideration the action of the legislature and the people in reference to the institution for the feeble-minded, two sessions of the legislative assembly of this state have construed the proviso to § 216. They did this by adopting the resolution submitting the amendment making an increase to the number of normal schools to the vote of the people. And unless all reasonable doubt as to the meaning of such proviso is removed from the minds of the court, leaving it clear that no increase can be made except through the medium of a constitutional convention, it is the duty of this court to sustain the action of the legislature and uphold the result of the election.

It cannot be said that a right has been established by legislative construction or interpretation; certainly not unless of very long continuance. Yet it is entitled to great weight, unless it can be said to be a clear usurpation of power or an arrogation of the text. Cooley, Const. Lim. 81–86. And it is said in 8 Cyc. 436, that this rule should be adhered to where the doubt turned upon the meaning of a single word, and it appears that the legislative interpretation is consistent with the common usage and understanding, as opposed to a strictly technical definition.

Again, article 15 contains the general provisions for amending the

Constitution. No sections of the Constitution are made exceptions to this application; and we see no reason why, in conformity with the terms of this article, the legislative assembly may not submit amendments to article 19. It certainly can do so as to all its provisions except the increase of institutions, and if this be true, it could submit an amendment to the proviso changing the word "revision" to "amendment," or eliminating it entirely. Should it be amended and the proviso eliminated, what would then prevent the legislature from itself increasing the number of similar institutions? If their number could be increased by the legislature, after such amendment, why cannot they be increased by the more direct method of amending the Constitution? In other words, it appears reasonably clear to us that to remove the question from all doubt it would be necessary to add directly to article 15 an exception, limiting its application, and that, in the absence of such an exception, we must hold that article 19 may in any respect be amended in the usual way.

The legal department of the state has presented its side of this question with great earnestness and ability. It was highly important that the expenditures called for by the location, establishment, and maintenance of this institution should not be made without the legal right to make them being first established by appropriate proceedings and the judgment of this court, and in instituting the proceeding the attorney general was but performing a duty imposed upon his office by law.

Our conclusion is that the proviso was intended to prevent the legislative assembly from increasing the number of institutions, and that its meaning is the same as though it had read that no other institution of a character similar to any one of those located by this article shall be established by the legislative assembly. See Mr. Freeman's valuable note, 86 Am. St. Rep. 276, ¶ 12.

One other question remains for decision. The last legislative assembly, by chapter 22 of its acts, made an appropriation of $200,000 for the erection of buildings, heating plant, construction of sewer, and for maintenance for two years. Attached to the provision making the appropriation was a proviso to the effect that, before any of the sum appropriated should become available, the citizens of Minot should donate a suitable location of not less than 60 acres, free from all en-

cumbrances, and deed the same to the state; the selection of said site to be determined by the normal school board.

The state contends that this is not a valid appropriation because not effective except upon the action of the citizens of Minot. It appears to us that this point is not well taken. The legislature, in effect, said: "It will require $200,000 to put this school into operation during the next two years, and in addition to that, sufficient to procure a suitable site. The school is located by the Constitution at Minot, but it is discretionary with the legislative assembly when to provide an appropriation and to determine the amount necessary to set the school in operation. We have not sufficient money available for the purpose at this time. If the citizens of Minot are enough interested in the subject to furnish the site, and thereby relieve the state from that burden, we will make an appropriation of so much money as is available; the amount named to be subject to use if and when the site is furnished."

We see no reason why this is not a valid exercise of legislative power, under circumstances like these. The weight of authority seems to sustain its validity, and we know that this method has been in use by numerous legislatures for many years. We think that Walton v. Greenwood, 60 Me. 356, and Edwards v. Lesueur, 132 Mo. 410, 31 L.R.A. 815, 33 S. W. 1130, are directly in point. In the first-cited case the Maine court passed upon the validity of an act which removed the county seat from Norridgewock to Skowhegan, and authorized the county commissioners to locate a courthouse in the latter place, and held that such act was not invalidated or rendered unconstitutional by the terms which made it void and of no effect unless the town of Skowhegan, or its citizens, should on or before a day named, without expense to the county, provide a suitable room and other accommodations for the court and officers, to the acceptance of a majority of the county commissioners, and execute and deliver a lease to secure the use thereof for five years, and also convey a suitable site for county buildings in Skowhegan.

And a similar provision in a proposed constitutional amendment was passed upon in the last-cited case and sustained.

The people of Minot are not parties to this action,—at least not of record,—and are not complaining of the condition attached to the appropriation. The state is certainly not injured by the donation of a

site for a school which has been located by the Constitution, and is not in position to object to the condition.

The temporary writ is quashed, and the application for permanent injunction is denied.

WEBB v. DINNIE BROTHERS.

(134 N. W. 41.)

Master and servant — injury to servant by fall of walls — question for jury as to negligence.

1. The general manager of defendant put plaintiff to work in a basement that had stood unprotected two months during rainy weather, and the walls of which had started to slide, and of which sliding and general condition the general manager had actual knowledge. Under all of the testimony, it is *held* that the question of defendant's negligence was a question of fact for the jury.

Note.—As to the effect of an assurance of safety by a master or vice principal on the question of a servant's contributory negligence or assumption of risk, which is considered in the case of WEBB v. DINNIE BROS., the general rule of law to be gathered from the authorities which are reviewed in notes in 48 L.R.A. 542, and 23 L.R.A.(N.S.) 1014, is that where a servant undertakes certain work, or continues to perform work, relying upon the assurance of his master or the latter's representative that such work may be performed in safety, the mere fact that before such assurance was given the fears of the servant to the possibility of injury had been excited by circumstances that had come to his knowledge will not, as a matter of law, charge him with contributory negligence or with assumption of the risks involved in the work, unless the danger was so obvious that no man of ordinary prudence would incur it.

The servant's assumption of risk from changing conditions of a working place during progress of the work in excavations is considered in a note in 19 L.R.A. (N.S.) 350.

The question of a servant's assumption of risks from latent dangers or defects is treated in notes in 17 L.R.A.(N.S.) 76, and 24 Am. St. Rep. 320.

And that a master who seeks to escape liability to a servant on the ground that he assumed the risk as a part of his contract must lay a foundation for the defense by proving that he understood the risk is shown by the authorities collated in a note in 47 L.R.A. 164.

Master and servant — injury to servant — servant's knowledge of danger — contributory negligence.

2. The plaintiff was rushed to the work, and did not know of the dangerous condition of the walls. He was at work less than an hour when injured. *Held*, that the question of his negligence as a contributing factor was a question for the jury.

Master and servant — assumption of risk — question for jury.

3. Under the above facts, *held*, that whether the plaintiff assumed the risks of the employment was also a question for the jury.

Opinion filed December 18, 1911.

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

Action by Henry J. Webb against Dinnie Brothers, a corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

G. A. Bangs and Murphy & Duggan, for appellant.

Skulason & Burtness, for respondent.

BURKE, J. Upon the 4th of June, 1909, plaintiff was a common laborer working for the defendant, a corporation engaged in contracting and building. James Dinnie was general manager, and one Morrow foreman, for said defendant. After dinner of said day, Dinnie and Morrow took a cement crew to some lots owned by the Elks, in Grand Forks, North Dakota, prepared to erect the concrete walls of a basement thereon. The only work done upon such lots was the excavating for the basement and the digging of a trench around the sides thereof for the foundations of the basement walls. The two jobs of digging had been done in separate contracts and at different times, and by different contractors than defendant. The basement proper had been dug first, some time in the fore part of April, and was something over 10 feet deep, and the walls had not been supported in any manner to prevent a cave in. During the time the wall stood unprotected, a great deal of rain had fallen, but the basement had been kept reasonably dry by pumping the water out. Defendant was to do the concrete work upon the walls only, and such walls were to be some 18 inches thick in the main, but the bottom thereof was in the nature of a subwall or foundation, some 4 feet thick and some 18 inches in height. To re-

ceive this base, a trench was dug around the edge of the basement proper, 4 feet wide and 18 inches deep. Fluid concrete would be poured into this trench until it was full, and thereafter brick walls would be built. This trench was not quite completed when Dinnie and his men arrived, but enough of it was ready so they could commence with the concrete work. Dinnie went with a buggy to a different part of the city, where plaintiff was engaged in tearing up board sidewalks, and took him to the Elks' job, where he was put to work laying planks on the edge of the trench above mentioned, so wheelbarrows with fluid concrete could pass along and fill the trench. In laying the plankway, plaintiff encountered some loose dirt thrown out of the trenches. This dirt he proceeded to shovel further into the basement, so his planks might lie upon the solid dirt of the basement floor. While so engaged, he stood in the trench with his back to the wall, and while so standing about half a load of dirt slid out of the wall over his head, and fell around and upon him, but did him no injury. He looked at the source of the slide, and saw Dinnie upon the surface of the ground, also watching the slide. He asked Dinnie if the wall was safe, and Dinnie replied: "It is just a little loosened up from the rains; all went down that is going down. Go ahead and go to work. We want to get that machine working." Plaintiff resumed work, and was injured some ten minutes later by a large slide of dirt from the same place. He sued, and recovered a verdict of $5,265. It is stipulated that this verdict is not excessive, and defendant, who appeals, does not want a new trial. The only error complained of is the refusal of the trial court to direct a verdict in favor of the defendant at the close of the testimony, or to grant judgment in their favor, notwithstanding the verdict. Defendant claims that no actionable negligence has been shown against it, and if there has plaintiff was guilty of contributory negligence, and that he assumed the risk of the work in which he was engaged.

1. Upon the first proposition, it will be remembered that Dinnie was the general manager of the corporation. He was the managing officer, and acted for the defendant in furnishing a place for plaintiff to work. He was thus a vice principal, and not a fellow servant. His negligence was the negligence of the corporation. Mast v. Kern, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580, note, p. 584. His testi-

mony shows that he was forty-five years of age, and had been for more than twenty years engaged in similar work in Grand Forks, and was in every way familiar with the nature of the work. He was an experienced builder and contractor. He had examined the basement the day before carefully, with a view to beginning work the next day. He had measured the basement and marked the place for the walls. He had noticed then that there had been several slides, and had talked with others about it. He knew that the walls had stood unprotected some two months. He had found that the basement was too short, and had ordered it lengthened, and must have known, as the jury found, that this lengthening would be done by digging under the walls while preparing the trenches. He knew of the heavy rains that had fallen. He had stood upon the ground above, and had seen the first slide strike plaintiff, and had advised him that the wall was safe. He knew that plaintiff had been taken from a different part of the city, not an hour before, and rushed into the basement to work, without any opportunity to examine the safety of the walls. He says that the walls might have been made safe with little expense by throwing down into the basement any unsound portions of the walls. He had the authority to put one of the men at work doing this very thing. Notwithstanding all this, he assured plaintiff that the wall was safe, and told him to hurry up and go to work. This court is not called upon to weigh the evidence. This was a case for the jury, and if there was any competent evidence showing negligence upon the part of the defendant it was proper for the trial court to submit the question to them. We have no hesitancy in saying that there was sufficient evidence to warrant the case being so submitted. Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390.

2. Taking up the question of contributory negligence, we are bound by the same rules. The question whether the plaintiff was negligent, and whether his negligence contributed to his injury, is always a question for the jury, if there is any evidence reasonably in conflict thereon. The facts already show that this plaintiff knew none of the things that Dinnie knew, excepting that the dirt fell upon him, and what he could see with his eyes. He did not know how long the walls had stood. He did not know that cracks had appeared in the surface of the wall over his head. He had never seen the basement until an hour earlier

in the day. He had no authority to make the walls safe by bracing them or shoveling the dirt down. There was sufficient conflict in the matter to necessitate its submission to the jury.

The same question can be made to the contention that the plaintiff assumed the risk of his employment. He cannot be said to have assumed the risks of which he knew nothing. The risks from the long standing of the walls, from their being undermined to receive the base of the cement wall, and from the negligence of the general manager, he did not assume, because he did not know of them, and they are not incidental to that class of work. Upon proper instructions, the jury returned a positive finding that Dinnie knew, or should have known, that the walls were unsafe. They further found that the walls had been undermined some 8 inches at the place of the slide, to accommodate the base of the cement wall. The jury also found that the wall could have been made safe by bracing it up, and that such would not have hindered the workmen in erecting the wall. There is evidence supporting each of these findings, and, holding as we do that the case was one for the jury, it follows that the judgment must be affirmed.

FRIED v. OLSEN et al.

(133 N. W. 1041.)

Trial — direction of verdict.

1. In an action to recover for the alleged conversion of grain upon which plaintiff claims to hold an unsatisfied seed lien, the trial court, at the conclusion of the testimony, denied defendants' motion for a directed verdict, and subsequently granted a like motion in plaintiff's favor. *Held* not error, as there is no substantial conflict in the testimony, and the evidence sufficiently established each of the essential facts entitling plaintiff to recover.

Lien of vender of seed on grain grown from — presumption that grain was grown from seed sold.

2. There is no direct evidence showing that the grain in controversy was grown from the identical seed sold by plaintiff, but, in absence of proof to the contrary, and none appears in the record, such fact will be presumed in view of the provisions of § 9443, Penal Code, which makes it a misdemeanor

for the vendee of seed grain to use the same for any purpose other than the purpose agreed upon at the time he purchased it.

Presumption of innocence of crime.

3. The presumption that a person is innocent of crime or wrong is expressly recognized by our Code of Civil Procedure (§ 7317, Rev. Codes), and by § 7315 it is provided that, unless controverted, the jury are bound to find according to the presumption.

Appeal — discretion of trial court as to reopening case.

4. Trial courts are vested with a broad discretion in permitting or refusing to permit parties to reopen their case for the purpose of introducing further proof, and their rulings on such motions will not be disturbed, where there is not a clear abuse in the exercise of such discretion.

Lien on grain for purchase price of seed from which grown — market value thereof.

5. Plaintiff's testimony as to the making of a demand on the defendant for the grain in controversy, and as to the market value thereof at the date of such demand, examined, and *held* competent and sufficient in the absence of any showing to the contrary.

Opinion filed November 24, 1911. Rehearing denied December 19, 1911.

Appeal from District Court, Griggs county; *E. B. Goss,* Special Judge.

Action by Anton Fried against N. J. Olsen and others, doing business under the firm name of N. J. Olsen & Sons. From a judgment in plaintiff's favor, defendants appeal.

Affirmed.

Lee Combs, for appellants.

Bartlett & Gladstone, for respondents.

FISK, J. Action to recover damages for the alleged conversion by defendant of certain wheat upon which plaintiff claims to hold a seed lien. During the times herein mentioned, defendants were public warehousemen engaged in operating an elevator at Hannaford, in this state; and it is not in dispute that they purchased from one Brunsvold at their elevator, in the fall of 1909, 470 bushels and 20 pounds of wheat which was raised by one Sabby during said year on the N. ½ of section 15, township 144, range 61; that such wheat was thereafter demanded from them by plaintiff, which demand was refused; and

that at the date of such demand the value thereof was $402.15. Nor is there any serious controversy as to the fact that plaintiff in the spring of said year furnished to Sabby certain seed wheat to be sown on said land, the agreed price of which was $385, no part of which has been paid, and, to secure the payment of such purchase price, plaintiff in due form filed the necessary verified statement to entitled him to the statutory seed lien on the crops raised on said land from such seed. The vital question of fact in dispute is whether the grain purchased from Brunsvold by defendants was, in fact, grown from the seed thus furnished to Sabby by plaintiff. There are other questions raised, but we find it unnecessary to notice them except in a general way.

At the conclusion of the testimony, defendants' counsel moved for a directed verdict, which was denied. Thereafter the court, on plaintiff's motion and over the objection of defendants, directed a verdict in his favor. Exceptions to both rulings were preserved. Whether these rulings were erroneous depends on the state of the proof at the time they were made. Was there any substantial evidence to prove the alleged fact that the wheat in controversy was raised from the seed thus furnished by plaintiff to Sabby? If not, then manifestly there is no proof of the essential fact of plaintiff's special property in such grain, and a verdict should have been directed the other way.

Aside from the proof that plaintiff sold such seed to Sabby to be sown on the land above described, that such seed was blue stem wheat, and that Sabby raised a crop of this kind of wheat on said land in 1909, there is no direct evidence in the record that the identical seed thus furnished was in fact sown on the land. It is true the evidence shows that in 1909 Sabby agreed at the time of the purchase thereof to use this seed on such land, and there is no proof that he did not do so. The fact that Sabby absconded in the fall of 1909 no doubt accounts for the meager showing on this important point. However, we think, in the absence of some evidence to the contrary, the presumption will be indulged that Sabby used the seed for the purpose for which he purchased it, as by § 9443 of our Penal Code of 1905, which was then in force, it is expressly made a misdemeanor for him to have done otherwise. The section reads: "Every person who, having procured upon credit under the provisions of chapter 84 of the Civil Code any seed to be sown or planted upon any designated tract or piece of land, either: (1)

Uses the same or any part thereof for any other purpose; or, (2) sows or plants the same or any part thereof upon any tract or piece of land other than that designated, without the written consent of the party who furnished such seed, is guilty of a misdemeanor."

It is a universally recognized presumption of law that no one has committed a public offense, and this is embodied in statutory form in this state. Section 7317, Rev. Codes 1905. By the aid of such presumption we reach the conclusion, therefore, that the trial court was justified, in the light of the record, in assuming as an established fact that Sabby sowed such seed on the land above described, and that the wheat in controversy was raised therefrom. Having reached this conclusion, it follows that the judgment must be affirmed, unless the record somewhere discloses prejudicial error in the rulings of the trial judge.

We have carefully considered the various assignments of error set out in appellants' brief, and find none of them meritorious. The first assignment challenges the ruling of the court in denying defendants' motion made at the time plaintiff first rested, but counsel for plaintiff at that time asked to reopen the case for the purpose of proving a demand. Such request was granted, and clearly this was not an abuse of discretion.

Assignments Nos. 5 and 6 challenge the ruling of the trial court in refusing to submit the cause to the jury after denying defendant's motion for the direction of a verdict, but we fail to discover any testimony requiring its submission to the jury. We fail to comprehend how the fact that Brunsvold sold 450 bushels of wheat to Sabby in November, 1908, and that the seed grain which plaintiff furnished to Sabby in the following spring was purchased by him from Sabby in December, 1908, and is a portion of the grain thus previously sold by Brunsvold, is at all material. As the evidence stood, there was no dispute that plaintiff sold to Sabby certain seed wheat in the spring of 1909 to be sown on this particular land, that Sabby sowed the same on such land and raised a crop therefrom, a portion of which is the wheat in controversy, and consequently as to those issues there was nothing to submit to the jury.

Appellant complains of the action of the trial court in permitting the reopening of the case for the purpose of permitting proof of a de-

mand and of the value of the grain at the date of its alleged conversion. It is too well settled to require discussion that trial courts are vested with a broad discretion in permitting parties to open the case after resting; and an appellate court will not interfere with such ruling except in case of a clear abuse of discretion. There was no abuse of discretion in this respect in the case at bar. A previous showing of oversight or inadvertence on the part of plaintiff's counsel as a basis for moving to reopen the case was unnecessary. The case of Wood v. Washington, 135 Wis. 299, 115 N. W. 810, cited by appellant's counsel, is not in point. There the plaintiff, who sued to recover for the value of services, submitted proof solely on the theory of an express contract stipulating the sum. After trying the cause on that theory, and resting, and some of defendant's witnesses had left the court room, the plaintiff sought to change his theory of recovery by showing the reasonable value of the services. This the trial court refused, and the supreme court very properly held that there was no abuse of discretion. There is nothing in Thompson on Trials, § 348, cited by counsel, which militates against the views above expressed.

It is next insisted that it was error to admit plaintiff's evidence as to the value of the grain. We have read the testimony carefully, and find no merit in appellant's contention. Plaintiff testified that he knew the market value of wheat at Hannaford at the time he made the demand. He testified that he acquired such knowledge from the defendants' agent, and that farmers were hauling and selling grain at Hannaford on that day, and he made inquiry as to the price of grain and learned from different sources what the market price was. Similar testimony was held competent in Cochrane v. National Elevator Co. 20 N. D. 169, 127 N. W. 725, and we quote from certain language in the opinion, which is applicable in the case at bar, as follows: "It is a significant fact that defendant nowhere attempted to show that the prices were other than as testified to by plaintiff and his witnesses, although it no doubt had in its possession at all times definite record information upon the subject. While it is true plaintiff had the burden of establishing such market price, and it was in no way incumbent on defendant to furnish evidence upon the question, the fact that no attempt was made by defendant to refute plaintiff's testimony is a strong circumstance tending to corroborate the accuracy thereof." We have noted

what appellants' counsel say regarding the alleged insufficiency of the demand made by plaintiff upon defendants for the wheat covered by his seed lien, and, while the proof is somewhat meager and the criticism thereof is not without some force, still we think the evidence of such demand in the absence of any countershowing was sufficient.

Having, as we believe, sufficiently answered the various assignments of error of appellants' counsel in so far as such assignments have been argued in the brief, it follows that the judgment must be, and the same is accordingly, affirmed.

Goss, J., being disqualified, took no part in the decision; Honorable W. C. CRAWFORD, of the Tenth Judicial District, sitting in his place by request.

SLEEPER v. BAKER et al.

(39 L.R.A.(N.S.) 864, 134 N. W. 716.)

Pleading — objection to — sufficiency of.

1. An objection to the introduction of any evidence upon the ground that the complaint does not state facts sufficient to constitute a cause of action must specially point out wherein the complaint is defective.

Pleading — objections to introduction of evidence under — sufficiency to reach formal defects in pleading.

2. An objection to the evidence, which is based upon and calls attention to substantial defects in a count of a complaint merely, will not reach a misjoinder of actions or formal defects in pleading.

Pleading — objection to introduction of evidence under — misjoinder of causes.

3. As against such a motion to exclude all of the evidence, one count, although misjoined, if otherwise stating a cause of action, will be allowed to stand.

Conspiracy — to induce breach of contract — civil action for.

4. The civil action of conspiracy is a tort action, and cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff the consequence at law being only a broken contract for which the party to

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Note.—The general question of the liability of a person in damages to another for inducing a third party to break his contract is treated in notes in 21 L.R.A. 233; 16 L.R.A.(N.S.) 746; and 28 L.R.A.(N.S.) 615.

the contract may have his remedy by suing upon it. In order to sustain such an action, it is generally necessary that there shall be an averment and proof of the commission of an act which, if done by one alone, would at the common law constitute a ground for an action on the case. The action will not generally lie for merely inducing another to break his contract, except where direct fraud or force or coercion has been used.

Opinion filed December 19, 1911.

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

Action by S. H. Sleeper against G. W. Baker and others. Judgment for defendants, and plaintiff appeals.

Reversed and remanded.

Facts: This action was brought by S. H. Sleeper, appellant, to recover damages for the breach of two contracts, one with the defendants G. W. Baker and C. E. Brace, copartners, known as "Baker & Brace," and the other with Frank D. Banta and Lincoln Banta, copartners, known as "Banta Bros.," and joining these defendants and each of them as individuals in a tort action by reason of an alleged conspiracy to break said contracts. The trial court sustained a motion to exclude all of the testimony under the complaint on the grounds that no cause or causes of action were therein set forth. This motion specifically stated wherein the several counts failed to state causes of action, but made no point as to misjoinder of actions, or as to any other defects in the pleadings. After the granting of this motion and the exclusion of the testimony, another motion was made to dismiss the action "on the ground and for the reason that the complaint failed to allege facts sufficient to constitute a cause of action." This request was also granted, and the action was dismissed, but without prejudice to the plaintiff. The error complained of, and for which a reversal is asked on this appeal, is the action of the court in granting such motions.

The first count of the complaint is in contract against the defendants Baker & Brace. It first sets up a contract between the plaintiff, S. H. Sleeper, and the defendants Banta Bros., made on the 1st day of May, 1906, wherein and whereby it was agreed that the plaintiff, Sleeper, "should furnish lands for sale to purchasers to be furnished by said defendants (Banta Bros.), and that, for each acre sold to purchasers

furnished by said Banta Bros., the plaintiff should allow them the sum of $3 per acre, and a refund of $29 railroad fare for each purchaser who actually purchased land shown by the said Sleeper, plaintiff herein, to said defendants or their customers. That in the months of August and September, 1906, the plaintiff, having listed and inquired about and arranged for the sale of a large amount of lands to customers of said Banta Bros., did show to defendants Banta Bros. large quantities of said lands so to be had for their said customers, and which this plaintiff had the right, as agent, to sell, and for which he had the right to procure customers under contract hereinafter more particularly set forth, together with other lands also shown to customers of said defendants, Banta Bros., in the months of August and September of the year 1906. That said lands were so exhibited to defendants and their customers, about fifty in number, in said months of August and September, and large quantities of land hereinafter more specifically set forth were, by reason of said showing and exhibition, sold to the customers of the defendants Banta Bros., all of the land in this complaint mentioned being so sold, and the said lands were exhibited to said customers at an expense to this plaintiff of not less than $630.50. That in the month of July, A. D. 1906, and for the purpose of carrying out the contract between the defendants Banta Bros., and the plaintiff, Sleeper, the said Sleeper made and entered into a certain contract, partly oral and partly written, with Baker & Brace, the other defendants, wherein and whereby it was agreed that the said Baker & Brace, would and did, by the terms of said contract, give authority to said plaintiff, Sleeper, to sell any of the lands which they had in their hands as agents for sale, to any person whomsoever; and that, as compensation to said Sleeper, if said sale was made, he, the said Sleeper, should receive the difference between the price given him upon the said lands as a net price by said last-named defendants, Baker & Brace, or that, in case of a sale by Baker & Brace to any customers furnished by said S. H. Sleeper or procured or introduced to said Baker & Brace by said Sleeper, they (Baker & Brace) were to pay to said Sleeper $1.50 an acre. That under the terms of said contract with Baker & Brace, the plaintiff, Sleeper, exhibited 5,080 acres of land (in said complaint particularly described) to said Banta Bros., and a number of other persons, 'all of said persons as aforesaid being furnished by said S. H. Sleeper to Baker & Brace under

the terms and provisions of the contract before set forth, and that Baker & Brace sold to said persons the said land, amounting in all to 5,080 acres of land,' and that the plaintiff, Sleeper, was entitled to receive from said Baker & Brace $1.50 per acre for such land, amounting in all to the sum of $7,620, with interest thereon from the 1st day of March, 1907, and amounting in all to the sum of $8,642.35, no part of which has been paid."

The second count is in contract against Banta Bros., and is substantially as follows: "That in the sale of said lands this plaintiff is informed and verily believes the fact to be that Banta Bros. & Co., a copartnership hereinbefore named as defendants, and Frank D. Banta and Lincoln Banta, received as commission on the sale of said lands and retained lands by way of commission in the sum of not less than $35,000. That of said commissions so received by the said Frank D. Banta, Lincoln Banta, and Banta Bros. & Co., the sum of $19,760 is justly due and owing from said Lincoln Banta, Frank D. Banta, and Banta Bros. & Co., under the terms and provisions of the contract between plaintiff and said defendants in this paragraph mentioned, no part of which has been paid, though payment thereof has been demanded, and no account for which has been rendered the plaintiff, though a demand for an accounting has been made upon the defendants in this paragraph mentioned, and each of them. That the said amount of $19,760 and interest from the 1st day of March, 1907, is justly due and owing, as this affiant is informed and verily believes, by said defendants, in this paragraph mentioned, to the plaintiff, said interest amounting, at the date hereof, to the sum of $2,651.14, making a total now justly due and owing of $22,411.14, no part of which has been paid, though payment thereof has been demanded."

The third count purports to be an action in conspiracy, and is as follows: "That in reliance upon the said contracts with the several defendants named in this action, and depending in good faith upon the same, and fulfilling the same on the part of this plaintiff in good faith, the plaintiff expended large sums of money and time for the purpose, and in showing prospective purchasers the lands alleged hereinbefore to have been sold, and in furnishing buyers to said Baker & Brace and furnishing lands to Frank D. Banta, Lincoln Banta, and Banta Bros. & Co., and did, in all things, comply with the terms of the two said contracts in this

complaint mentioned, and performed in all things the said contracts and did earn, as this plaintiff is informed and verily believes, the sums of money hereinbefore alleged to be due and owing, and the said services and sums of money so expended were of reasonable value to the defendants in this action of the sums claimed to be due and owing this plaintiff under the terms of said contracts. That heretofore, and in pursuance and performance of said contracts, this plaintiff did procure and introduce to Baker & Brace, as purchasers for lands, all persons hereinbefore named, and others, about the month of August or September, in the year 1906, and by reason of said procuring of said lands for said Banta Bros. & Co., Frank D. Banta, and Lincoln Banta, so sold and purchased as aforesaid, this plaintiff did in all matters and things comply with the terms of said contracts with all of the defendants hereinbefore named. That the said Frank D. Banta, Lincoln Banta, and Banta Bros. & Co., and G. W. Baker and C. E. Brace, disregarding the terms of said contracts hereinbefore set forth and alleged, which were then known to all of the defendants, and with the intent to cheat and defraud this plaintiff, did, in the months of August and September, A. D. 1906, and afterwards, and prior to the date hereof, falsely, fraudulently, and with the intent to cheat and defraud the plaintiff, conspire together to prevent this plaintiff from collecting any of the moneys due to this plaintiff, and hereinbefore alleged, by ignoring this plaintiff as the agent of all of said parties under the terms of said contracts, and by dealing directly with each other without the intervention or the agency of this plaintiff, and by pretended sales and various and sundry of the said lands hereinbefore described, prior to the actual and bona fide sales which were thereafter made, after said pretended sales, and by various and sundry unlawful and deceitful schemes to deceive, each and all of said defendants have conspired together for the purposes of defeating and cheating this plaintiff out of moneys alleged to be due and owing by fraud and deceit as aforesaid. That this plaintiff did not know for about the period of one year or more after the consummation of said conspiracy aforesaid that the same existed, does not know exactly how much land was sold, but believing that large amounts were sold, on which this plaintiff is entitled to commissions in addition to those hereinafter set forth and alleged. That the plaintiff was deceived by said defendants and each of them to his damage in the sums hereinbefore alleged to be due and owing, having relied

on the honesty and integrity of the said defendants and each of them, by false and fraudulent transactions and statements hereinbefore made in pursuance of and carrying out the said conspiracy in this paragraph alleged, and that said defendants and each of them did profit and have kept and retained for the use and benefit of said defendants and each of them commissions and lands received by them as commissions by reason of the agency and performance of the contract hereinbefore set forth, by plaintiff, the said sums of money hereinbefore alleged to be due and owing by defendants to plaintiff in the respective sums alleged against them and each of them, together with the other and large commissions, aggregating much more than the amounts alleged to be due, and that said defendants were entitled to keep and retain."

The prayer for relief is as follows: "Wherefore plaintiff prays judgment in his favor and against Frank D. Banta, Lincoln Banta, and Banta Bros. & Co., for the sum of $22,411.14, and against G. W. Baker, C. E. Brace, and G. W. Baker and C. E. Brace, copartners, as Baker & Brace, for the sum of $8,622.45, and against all of the defendants herein for the sum of $31,000, with interest from this date until paid at the rate of 7 per cent per annum, and that the defendants Baker & Brace be enjoined, pending this litigation, from collecting the judgment in favor of Baker & Brace and against this plaintiff; that the defendants and each of them be compelled to render a full and complete account of all of said transactions set forth in this complaint by order of this court; and that the plaintiff have such further relief as to the court seems just and meet in the premises."

Le Sueur & Bradford and *Reyerson & Nash,* for appellant.
Winslow Evans and *Bowen & Adams,* for respondents.

BRUCE, J. (after stating the facts as above). Three causes of action are intended to be set forth in the complaint. Two are separate and distinct actions upon the contract, against separate and distinct defendants, and one is an action of tort against all of the defendants.

It is for this court to determine whether such complaint is vulnerable to a motion to exclude all of the testimony for the failure of the several counts to state sufficient causes of action, and which motion, though specifically pointing out wherein such failure consists, raises no objection

to the misjoinder of the parties or of the actions, nor to the form of the pleadings.

We are of the opinion that the first count of the complaint states a cause of action in contract against the defendants Baker & Brace, and that the trial court erred in excluding all of the evidence thereunder, and in directing a dismissal of the action in so far as this count was concerned. There is, it is true, a question as to whether the joinder or attempted joinder of two causes of action upon the contract with separate and distinct defendants, and with another separate and distinct action in tort against all of the defendants, does not render the complaint defective; but, since this point was not raised by motion or demurrer preliminary to the trial in the court below, nor even by a specific objection pointing out the defect in the motion to exclude the evidence, or in the motion to dismiss on that trial, we hold that these objections, if any, were waived, and that the lower court erred in excluding *all* of the evidence under the complaint. "If there is but one righteous man in Sodom, the city may stand,"—and there appears to be at least one righteous count in this complaint. James River Nat. Bank v. Purchase, 9 N. D. 280, 83 N. W. 7.

We now come to the second count in the complaint, which also is on the contract. This count is against the defendants Banta Bros. The causes of action against Baker & Brace and against Banta Bros. are separate and distinct, and should be separately stated (see § 6877, Rev. Codes 1905), even if they can be properly joined, and there is some doubt as to whether the former portions of the complaint can be prefixed to the paragraphs just quoted and be made a part thereof, so as to constitute a cause of action. Even if they could, however, no cause of action in contract is stated against Banta Bros. The complaint, indeed, as we view it, does not allege that Banta Bros. owe Sleeper anything on the contract, but rather that Sleeper owes Banta Bros. commissions at the rate of $3 per acre. The fact, if fact it be, that Banta Bros. received thereunder $35,000 commission from other parties is, under this count, no concern of the plaintiff. No cause of action on the contract is stated in the complaint against Banta Bros.

The next count, if count it be, is a count in tort or for conspiracy, and, although on the oral argument counsel for appellant hardly mentioned the subject, it was the sufficiency of this count that furnished the

main matter in controversy, both on the trial below and in the printed briefs of counsel on this appeal.

We must remember at the outset that, although the complaint seeks to establish a conspiracy, mere opprobrious epithets do not change, in any way, the nature of the action. The action is a civil, and not a criminal, one. Indeed, as was said by Lord Holt in the case of Savile v. Roberts, 1 Ld. Raym. 374: "Though in the old books such actions are called conspiracies, yet they are nothing in fact but actions upon the case." It is generally only when men conspire to violate the primary, and not the mere contractual rights of another, that the civil action of conspiracy will lie. As one authority puts it: "An act which, if done by one alone, constitutes no ground of an action *on the case,* cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." "The quality of the act, and the nature of the injury inflicted by it," the courts say, "must determine the question whether the action will lie." Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Savile v. Roberts, 1 Ld. Raym. 374.

Although there are a number of cases to the contrary, the weight of American authority seems to hold to this rule. See 1 Jaggard, Torts, p. 636; 1 Addison, Torts, p. 8. Even the cases which are often cited in contradiction to it often fail to bear out the contention of their proponents. In the case of Van Horn v. Van Horn, 52 N. J. L. 284, 10 L.R.A. 184, 20 Atl. 485, for instance, the act was done by an outsider, and was a malicious libel to character and to business; and the same is true of Lally v. Cantwell, 30 Mo. App. 524. In the case of Jones v. Stanly, 76 N. C. 355, a malicious desire to injure the plaintiff, and not the mere desire to profit one's self, is the gravamen of the action. The same is also true of the case of Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111, and even of the leading English case of Lumley v. Gye, 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706, on which the minority American rule seems to be grounded. In the leading American minority case of Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240, upon which the respondents rely, there are to be found both a malicious motive, positive tortious acts, and positive injury which an action on a contract against the contracting party could hardly

have reached. The cases, indeed, are generally cases where the solicitation was by an entire outsider, and were accompanied by fraud or intimidation. It is also true that there is a line of cases where laborers were induced to break their contracts of employment, and which also hold to a contrary rule. See Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Walker v. Cronin, 107 Mass. 555; Mapstrick v. Ramge, 9 Neb. 390, 31 Am. Rep. 415, 2 N. W. 739. These cases, however, belong to a class of their own, and they are historically grounded in the deep-rooted policy of the old English, and even early colonial American law, which almost gave to the employer a property right in his employee, which was evidenced by statutes of laborers, of Elizabeth, and of Edward VI., and which tied the laborer to the land and dictated and controlled his contracts of employment. See 1 Addison, Torts, p. 7; Chambers v. Baldwin, 91 Ky. 121, 11 L.R.A. 545, 34 Am. St. Rep. 165, 15 S. W. 57, 58; 1 Jaggard, Torts, p. 636.

The rule, indeed, has, except where direct fraud or coercion has been used, or where no adequate action upon the contract would lie against the guilty parties, rarely been extended to the breach of contracts generally. The whole question is so thoroughly and adequately discussed n the case of Chambers v. Baldwin, supra, and under a very similar state of facts, that we will refrain from lengthening this opinion; and, without necessarily affirming all that is in that opinion contained, we will refer to it for a discussion of the law. The rule, as we see it, is substantially this: That "an action cannot in general be maintained for inducing a third person to break his contract with the plaintiff; the consequence after all being only a broken contract for which the party to the contract may have his remedy by suing upon it." Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559; Brentman v. Note (City Ct. N. Y.) 24 N. Y. S. R. 281, 3 N. Y. Supp. 420; Boyson v. Thorn, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492; Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340.

It is true that the Wisconsin case of Martens v. Reilly, 109 Wis. 464, 84 N. W. 840, seems to support the position of the appellant; but this case is not only contrary to the weight of American authority (see Jaggard, Torts, p. 696), but, as we will hereafter see, was decided under a peculiar local statute. The same is true of the cases of White v. White,

132 Wis. 121, 111 N. W. 1117, and Randall v. Lonstorf, 126 Wis. 147, 3 L.R.A.(N.S.) 470, 105 N. W. 663, 5 Ann. Cas. 371. In the latter case, also, something greater than a breach of contract was involved, namely, a breach and annulment of the marriage relationship, in which the state as well as the individual is concerned. Anyway, all of the Wisconsin cases are decided under a statute in regard to conspiracy which is radically different from our own. To use the language of the admirable note to the case of Randall v. Lonstorf, supra, which is to be found in 5 Ann. Cas. 375: "The reported case cannot be said to conflict with the rule which is generally recognized. The case turned on the construction of the Wisconsin statute defining conspiracy, and it was merely held that the allegations of the complaint brought the case within that portion of the statute which makes it unlawful for any two or more persons to combine or agree together 'for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act.'" The court held, in the Wisconsin case, that the conspiracies or agreements were for the purpose of "preventing a lawful act," *i. e.*, the fulfilment of the contracts. Our statutes (§ 8768, Rev. Codes 1905) only makes the prevention of the doing of a lawful act unlawful when that prevention is brought about "by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use of employment thereof."

We hold, therefore, that the trial court did not err in excluding all the evidence as to the alleged conspiracy, and if this were the only count we would affirm the judgment. We are, however, as we have before said, equally satisfied that an action, in contract is sufficiently pleaded in the complaint as against the defendants Baker & Brace, in so far, at least, as to render it invulnerable to a motion on the trial to exclude all of the testimony, and to a motion to dismiss the action after such testimony was excluded, which merely specify basic faults in substance, and do not call attention to misjoinder or lack of form.

The judgment of the trial court is reversed, and the case is remanded for a new trial. The costs will be taxed against the respondents.

Goss, J., being disqualified, did not participate. Honorable CHARLES A. POLLOCK, Judge of the Third Judicial District, sat in his place.

WIDMAN v. KELLOGG et al.

(39 L.R.A.(N.S.) 563, 133 N. W. 1020.)

Banks — insolvency — taking money for draft.

1. This appeal is before this court on the judgment roll alone. The findings, among other things, are to the effect that appellant was required, as a local agent of the Great Northern Railway Company and another, to transmit his receipts each day to his principals in St. Paul, and that it was his custom to go to the bank and deposit such receipts, and receive therefor, from the bank, drafts payable to the order of his principals, and forthwith to transmit the same. It was also found that on four days named he followed this custom, and that the drafts so procured and forwarded to St. Paul were dishonored because no funds were on deposit with the correspondent of the local bank with which to pay them; that the officers of the bank knew of his employment and the purpose for which such drafts were obtained. The record contains no findings that he kept any general account or drew any checks on the local bank. *Held* that, in view of this custom and the findings as a whole, the word "deposit" must be construed as indicating the payment into the bank of each day's receipts in exchange for the drafts; and that he stood in relation to the bank as a purchaser for cash of drafts.

Banks —insolvency —taking money for draft —trust fund.

2. Section 4660, Rev. Codes 1905, prohibits insolvent state banks from receiving any money, bank bills, notes or currency, bills or drafts; and § 4661 makes any official of an insolvent bank who receives money, etc., guilty of a felony. The defendant bank had been hopelessly insolvent for some time prior to the purchase of the drafts mentioned, and it had no funds with its correspondent bank out of which they could be paid; and such officials had no reason to anticipate their being honored. *Held*, that such money was received by the bank without consideration, and, in effect, under false pretenses or representations; that thereby a fraud was perpetrated upon appellant, the effect of which was to make the bank a trustee *ex maleficio* of such funds.

Note.—Where a bank sells a draft or check on another bank and receives the currency therefor, knowing or having reason to believe that it is insolvent and that it has not the funds in the bank drawn on to meet such check or draft, it is guilty of a fraud, as shown by a review of the authorities in a note in 10 L.R.A. (N.S.) 928. The purchaser of such draft will be allowed to rescind the purchase and recover the money paid therefor, provided that the other conditions as to following trust funds obtaining in the forum are complied with. The general question of recovery of deposit in insolvent bank is treated in notes in 34 L.R.A. 532, and 86 Am. St. Rep. 800.

Banks —taking money for draft while insolvent — rights of receiver.

3. On a receiver being appointed for such bank, in a proceeding under the statute to wind up the affairs of insolvent corporations, he had no greater rights in such funds or moneys than those possessed by the insolvent bank, and succeeded the bank as trustee.

Banks — taking money for draft while insolvent — priority of claim for.

4. The fact that the bank closed its doors within four business days after the first of the transactions described, and the next day after the last one, and that money in more than double the amount of the claim of appellant was turned over to the receiver by the bank, and other elements of the findings of the trial court, lead to the conclusion that both the money assets of the bank and those received by the receiver were enhanced by the transactions described.

Mingling trust funds with those of trustee — presumption as to subsequent payments.

5. When a trustee mingles trust funds with his own, and subsequently pays out a portion of the commingled funds, it will be presumed that he made his payments from that portion of the fund belonging to himself and retained the funds which did not belong to him; and, except in so far as he may distinguish what is his own, the whole fund will be treated as the trust property.

Banks — insolvency — trust funds — priority.

6. The trusteeship of the bank and of the receiver being established, it being conceded that the moneys of appellant were commingled with the funds of the bank, and respondents having failed to show that moneys paid out in the meantime were the original trust funds, and likewise having failed to show that appellant's money was not included in that turned over to the receiver, appellant is entitled to recover.

Banks — insolvency — trust funds — priority.

7. When such trust funds are not commingled with any of the assets of the bank, except the cash assets, the preference of appellant is limited to the cash funds of which the receiver took possession, when distinguishable from the other assets of the estate going into his hands.

Banks — insolvency — preference in assets.

8. Appellant is entitled to preference to the extent of the moneys turned over to the receiver.

Banks — insolvency — preference in assets.

9. The rights of other claimants, if any, to preference, not being before this court, appellant's rights relative to them are not determined, but it is suggested that the ends of justice would be promoted by proceeding on the part of claimants to preference, in such cases, by intervention rather than by independent action against the receiver.

Opinion filed November 18, 1911. Rehearing denied December 19, 1911.

Appeal from District Court, Nelson county; *Templeton*, J.

Action by L. C. Widman against George A. Kellogg, as receiver of the People's State Bank, and another. From a judgment for defendants, plaintiff appeals.

Reversed.

The appellant brought this suit against the defendant Kellogg as receiver of the People's State Bank, and the People's State Bank, a corporation organized under the banking laws of this state, seeking to establish and recover as a preferred claim the sum of $1,074.95. We take the facts from the findings of the trial court, omitting formal matters.

The People's State Bank referred to was between November, 1892, and January 26, 1910, engaged in the general banking business at Lakota. It became insolvent on or prior to August 1, 1909, and so continued until January 26, 1910, when it suspended business, and the state examiner took charge of its assets until March 8, 1910, when the same was turned over to the respondent Kellogg, as receiver, pursuant to an action brought by and through the attorney general, to obtain a judgment of dissolution, pursuant to the provisions of chapter 27, Rev. Codes 1905. The appellant was at all times material the agent of the Great Northern Express Company and the Great Northern Railway Company, corporations under the laws of Minnesota, at Lakota. It was his duty to receive the funds of said corporations, and promptly transmit them to his principals in St. Paul, Minnesota, and it was his custom in transmitting such funds to deposit the same in said People's State Bank and "receive therefor" drafts issued in the name of his respective principals, which he forwarded them by mail. This custom had been continued for some time and was well known to the bank and its officers, as also was his relation to such corporations. Appellant became personally responsible for the funds so remitted, and the drafts received by his principals were charged by them to him, and he is the owner thereof. He did not know, and had no reason to know or believe, prior to January 26, 1910, that said bank was insolvent, but the officers of said bank knew or in the regular performance of their duties ought to have known of its insolvency at all times subsequent to August, 1909. The amounts involved in this action are

drafts purchased by appellant as follows, omitting names of his principals, which are immaterial here:

January 21, 1910	$ 103.20
January 22, 1910	119.82
January 22, 1910	470.66
January 24, 1910	56.44
January 25, 1910	324.83
Total	$1074.95

All such drafts were drawn on the Security National Bank of Minnesota and transmitted to appellant's employers forthwith, and immediately presented for payment and protested for want of funds. At the time they were drawn and presented the People's State Bank did not have on deposit with its correspondent the funds to meet said drafts, or any of them, and the officers of the People's State Bank, and those issuing such drafts, knew, or in the performance of their duties ought to have known, that fact. The drafts have never been paid. The People's State Bank continued to carry on its business in the usual manner, paying out money on checks and otherwise, receiving deposits and making collections and issuing drafts, and receiving money therefor from the time the first above-mentioned draft was drawn until the night of January 26, 1910. It had on hand in cash on the 21st day of January, 1910, $14,436.88. At the close of business, January 26, 1910, there was on hand cash in the sum of $2,774.08. No part of this latter sum can be identified as the identical money paid by appellant to said bank, or as the proceeds thereof, or of any checks or drafts delivered by him to it, for which said drafts on the Security Bank were issued. It received deposits between the morning of the 21st and the closing of its doors, aggregating over $13,000, and paid out money on checks amounting to over $17,000. Its certificates of deposits increased about $800 during such time. At the time this action was brought the receiver had in his possession approximately $25,000 in money and other assets worth $15,000 belonging to said People's Bank. It is conceded by respondent that the funds paid for the drafts by appellant were mingled with the general fund of the bank.

Other findings show that the bank at all such times was hopelessly insolvent by reason of the embezzlement of its funds by certain of its officers, and that its true condition had been concealed by them.

Judgment was given against the appellant to the effect that his claim was not entitled to be preferred, and dismissing his action. From such judgment he appeals.

Frich & Kelly, for appellant.
Bangs & Robbins, for respondents.

SPALDING, Ch. J. (after stating the facts as above). It is claimed by counsel for respondent that the authorities applicable to the facts disclosed in this case are in hopeless conflict; that the ancient rule in equity was that property impressed with a trust, which it is claimed by respondent this is, cannot be reclaimed unless the specific property involved can be fully and specifically identified. It is admitted that several courts have modified this rule in recent years and permitted recovery for such property in certain instances. A vast number of authorities are cited on the subject and an attempt is made to trace the course of such determinations, but it is also claimed that the trend of the latest authorities has been toward the ancient rule, and that in several states which at one time departed from it the courts have overruled such decisions and returned to the old doctrine. Among such is the state of Wisconsin. We shall not follow all the holdings of these courts, nor show wherein they have disagreed, to any considerable extent, but shall pass upon this case with reference to some leading authorities which we think clearly give the better reasons. Many of the authorities cited as sustaining the decision of the trial court related to collections made by banks which became insolvent before remitting or paying them to the owner. In so far as banks in such cases are in charge of a trust fund, such cases are analogous to the case at bar, but the only authorities we find directly in point—that is to say, upon the purchase of drafts from an insolvent bank—support the contention of the appellant.

We note that the brief of appellant treats the transaction in this case as the purchase of a draft, while that of the respondent is based on the theory that it was a general deposit. The word "deposit," as

we have shown, is used in the findings. This, however, must be read in connection with the facts disclosed, and, when so read, we think it is not used to indicate that the appellant kept a deposit account with the insolvent bank. It rather means that he took his day's receipts for each of his principals to the bank and in exchange therefor procured drafts. They were deposited in the sense that they went into the bank, but not for the purpose of checking against them, or for being placed to his credit.

The findings are clearly to the effect that, when he took his day's receipts to the bank, he procured a draft for the exact amount turned over to the bank, and this draft he immediately transmitted to his principal. The transaction is, therefore, one of taking a sum of money to the bank and exchanging it for a draft, and we consider the finding to be to that effect, notwithstanding the use of the word "deposit." What we have said in explanation of our interpretation of the word "deposit," as used in the findings of the trial court, is said with a view to making our opinion clear, and to prevent its being extended to cover cases in which the facts are different.

Under § 4660, Rev. Codes 1905, every insolvent bank association is prohibited from receiving any deposit or any money or bank bills or notes or currency or other notes, bills, or drafts. And under § 4661 any official of such bank who knowingly receives or accepts, or who is accessory, or permits or connives at the receiving or accepting, any such deposits, is made guilty of a felony. It is clear that in taking the money of the appellant in exchange for drafts on the Minnesota Bank, when the insolvent bank had no funds out of which such drafts were payable, the insolvent bank and its officers represented to the appellant, in effect, that they had money on deposit with the Security Bank to meet the drafts, when in fact they had no such deposit, and, on the contrary, as shown by the findings, their account in that bank was overdrawn in a great sum. They had no reason to anticipate that their correspondent would honor such drafts. They received money without consideration, and under false pretenses or representations.

They thereby perpetrated a fraud upon appellant, and the bank acquired no title to his money, and, of course, could convey no better title than it possessed to the receiver. His rights in the premises are identically the same as those of the insolvent bank. The effect of this

is that the bank became a trustee of the funds of appellant *ex maleficio*, and the receiver succeeded the bank as such trustee. Rev. Codes 1905, § 5711; Anheuser-Busch Brewing Asso. v. Morris, 36 Neb. 31, 53 N. W. 1037; Cady v. South Omaha Nat. Bank, 49 Neb. 125, 68 N. W. 358; Pennell v. Deffell, 4 De. G. M. & G. 372, L. R. 1 Eq. 579, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499; Re Hallett, L. R. 13 Ch. Div. 719, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; Furber v. Dane, 204 Mass. 412, 27 L.R.A.(N.S.) 808, 90 N. E. 859; Richardson v. New Orleans Debenture Redemption Co. 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780; Capital Nat. Bank v. Coldwater Nat. Bank, 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 116; People v. City Bank, 96 N. Y. 32; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Stoller v. Coates, 88 Mo. 515; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499.

This places this case in the same category on principle as the numerous cases which are found in the books, where the fund was originally a trust fund, and renders it unnecessary to determine whether the fact that the funds in question were not the property of the appellant, but were held by him as agent, and so known to be held by the bank, also entitled him to a preference.

The apparent conflict of authorities arises from the ability or inability to trace these funds, and as to the extent of the priority to which the *cestui que trust* is entitled. There can be no doubt of several things; among them, that the cash assets of the insolvent bank were enhanced by the receipt of this money. Neither can there be any doubt that the money turned over to the receiver was more by the amount paid the bank than it would have been had it not been paid the bank. The bank took appellant's money, and the funds in its possession and those turned over to the receiver were to that extent increased. It gave nothing for it; hence there was no increase of liabilities. The time between the issuance of the first draft and the closing of the doors of the bank was only four business days. It is true that the funds in possession of the bank decreased during these four days by the payment of checks drawn on the bank in excess of the deposits, but there was still money on hand to an amount more than double the claim of appellant, and this

went into the hands of the receiver. From this it is clear that under both lines of authorities, those which are to the effect that the assets turned over to the receiver must be enhanced by the appellant's deposit, if it may be called a deposit, as well as those which are to the effect that the assets of the bank must be enhanced, he is entitled to recover. Stoller v. Coates, 88 Mo. 515; Richardson v. New Orleans Debenture Redemption Co. 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780.

It is claimed that the fact that moneys were paid out of the bank between the date of his purchasing the drafts, or at least between the date of the first draft and the receivership, precludes him from recovering, as such moneys may have been his moneys rather than the bank's. We are only considering this question as between this appellant and the bank, and it is established by many authorities that where a trustee mingles trust funds with funds of his own, and subsequently pays out a portion of the commingled fund, it will not be presumed that he paid out moneys which he had no right to disburse, and which did not belong to him, but that, on the contrary, it will be presumed that he made his payments from that portion of the fund belonging to him and retained the funds which did not belong to him, and, except so far as he may distinguish what is his own, the whole fund will be treated as the trust property. While there are some authorities holding that the claimant must prove that the payments were not made from his funds, we think the other rule much more equitable and supported by better weight of authority. Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21; Pennell v. Deffell, 4 De G. M. & G. 372, L. R. 1 Eq. 579, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499; Re Hallett, L. R. 13 Ch. Div. 719, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; Burnham v. Barth, 89 Wis. 362, 62 N. W. 96; State v. Bank of Commerce, 61 Neb. 181, 52 L.R.A. 858, 85 N. W. 43; State v. Bank of Commerce, 54 Neb. 725, 75 N. W. 28; Lincoln v. Morrison (Lincoln Sav. Bank & T. Co. v. Morrison) 64 Neb. 822, 57 L.R.A. 885, 90 N. W. 905; Sherwood v. Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352; Whitcomb v. Carpenter, 132 Iowa, 227, 10 L.R.A.(N.S.) 928, 111 N. W. 825; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; Fire & Water Comrs. v. Wilkinson, 110 Mich. 655, 44 L.R.A. 493, 78 N. W. 893; Hyland v. Roe, 111

Wis. 361, 87 Am. St. Rep. 873, 87 N. W. 252; Anderson v. Pacific Bank, 112 Cal. 598, 32 L.R.A. 479, 53 Am. St. Rep. 228, 44 Pac. 1063; Farmers' & T. Bank v. Kimball Mill. Co. 1 S. D. 388, 396, 36 Am. St. Rep. 729, 47 N. W. 402; Hart v. Ten Eyck, 2 Johns. Ch. 62; Davis v. Coburn, 128 Mass. 377; Marine Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785; Shute v. Hinman, 34 Or. 578, 47 L.R.A. 265, 56 Pac. 412, 58 Pac. 882.

And why, we ask, should the bank, or the receiver standing in its stead, be heard to assert as against the rightful owner of moneys that in paying creditors of the bank it paid money that belonged to appellant and which it held in a trust capacity, instead of paying its own money? To hold that the bank may take such a position and maintain it in a court of equity, seeking to do equity, would be to permit the bank to take advantage of its own wrong, to its own benefit, and to the detriment of the innocent party it has injured. One reason of great force for the trustee assuming the burden of proving that he paid out the trust funds instead of his own, and that the trust funds did not pass into the hands of the receiver, is that, in the case of money, the means of knowledge on these subjects would not be possessed by the *cestui que trust,* but that the means of proof of the facts regarding it would ordinarily be wholly within the possession of control of the trustee. This is peculiarly so in the case of a bank. The business of a banking institution is ordinarily done by confidential agents or employees behind a screen and closed doors. Its customers and the public are excluded from its banking room, and have no means of knowing from what fund money is paid or the disposition made of it under any ordinary circumstances. Such knowledge must of necessity be in the sole possession of the trustee. Several of the authorities cited in support of the respondent's position disclose facts rendering the principle materially distinguishable from those governing the case at bar. For instance, in some of them the last payments were made to the bank many months before its failure, and funds were not paid out in the meantime greatly in excess of such payments, and in excess of the receipts of the bank; and under such circumstances as to preclude the possibility of the fund belonging to the depositor having enhanced the assets of the bank or of the assets which were turned over to the receiver.

The bank and its successor, the receiver, being trustees, and it being

conceded by all parties that the moneys of appellant were commingled with the funds of the bank, and the trustees having failed to show that any moneys paid out were the trust funds, and likewise having failed to show that the funds belonging to the appellant were not included in the money turned over to the receiver, it necessarily follows that the judgment of the district court was erroneous.

The foregoing conclusion, however, does not settle the rights of the appellant fully. Much stress has been laid upon the conflict of authorities applicable to this case, and particularly the different rules adopted by the supreme court of Wisconsin and others following the lead of that court. Following the English authority, Re Hallett; L. R. 13 Ch. Div. 719, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732—the supreme court of Wisconsin held in McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214, and certain other cases immediately following that, that the *cestui que trust* might have his money out of any of the assets of the estate of the insolvent. Subsequently, in Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383, and other cases, the Evans Cases were overruled in so far as they permitted recovery from all or any of the assets.

After a careful consideration of authorities on both sides, we are satisfied that the better rule, is, in a case like the instant case, where the funds of the appellant were commingled only with the moneys in the bank, and where there is no finding that they went to enhance any part of the assets except the cash on hand, that the recovery should be limited to the cash funds turned over to the receiver. In the case at bar, they are clearly distinguishable from any of the other assets of the estate received by the receiver. This is in accordance with the Nonotuck Silk Company Case and many other authorities, and seems to be the later rule adopted by most of the courts. It may not be applicable in all cases, because the line between the fund into which the money of the *cestui que trust* went and the other assets may not be clearly distinguished, but it is so in this case. In the Nonotuck Silk Company Case the plaintiff was not permitted to recover principally because no money went into the hands of the assignee, except a few pennies and a $2.50 gold piece. In the case at bar more than twice as much money went into the hands of the receiver as belonged to the appellant, and this occurred only the day after the last payment by appellant to the bank,

and within four banking days after the first payment. Northern Dakota Elevator Co. v. Clark & Smart, 3 N. D. 26, 32, 53 N. W. 175, is relied on as holding that appellant should not recover. We do not so consider it. There is a vital distinction between the facts in the two cases. In that case no part of the proceedings of a draft which was involved ever went into the possession of the bank. It was drawn payable to the order of an individual member of the firm comprising the bank, and placed to his credit in another bank. The plaintiff was in fact indebted to the defendants, instead of being a creditor, so there were no funds in any form in the hands of the banker belonging to the plaintiff, and, of course, no question of trust funds could be involved. The additional fact is also disclosed that only $3.96 of cash was turned over to the assignee of the defendant bankers. What is said therein with reference to the English and Wisconsin authorities is totally irrelevant to the issues before this court at that time, and lastly, in relation to such case, we find that the question now before us was not determined.

Lastly, with reference to this subject we may say that many authorities cited by respondent are where it is shown that the trust fund has been dissipated altogether, leaving nothing to be the subject of the trust. It was held in Pennell v. Deffell, 4 De G. M. & G. 372, L. R. 1 Eq. 579, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499, that if a man mingles trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own. This holding was followed in Re Hallett, supra, and approved. In Burnham v. Barth, 89 Wis. 367, 62 N. W. 96, it is said that where a trustee mingles trust money with his own, any money drawn from the common fund will be deemed to be drawn by the trustee from his own, instead of the trust fund, And in Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537, it was held that the rule that one who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property, unless it has come to the possession of a bona fide holder, is well settled; and that permitting plaintiff to make a deposit when the bank was known by its officers to be insolvent, in reliance upon the supposed solvency of the bank, was a gross fraud upon the plaintiff, and that the latter was entitled to reclaim such deposit or its proceeds, and that such right was not precluded by provisions of the

statute forbidding all preferential payments or transfers by an insolvent bank, and providing for a ratable distribution of its assets, for the reason that the plaintiff did not claim under a transfer from the bank but under his original title; that his relation as creditor ceased when he elected to rescind the contract of deposit; and that neither the creditors nor receiver of the bank had any equity to have the plaintiff's property applied in payment of the obligations of the bank. That was an action brought to recover the proceeds of certain drafts deposited by the plaintiff with a bank in Buffalo.

In Stoller v. Coates, 88 Mo. 515, it is held that where a bank received a draft on deposit to the credit of the depositors, who thereupon drew their check on the bank with the request that it should place the proceeds to the credit of one E., in another bank, its correspondent, and upon doing so the second bank refused to accept it and charge it to the account of the first bank, that the fund remained in the first-named bank, impressed with a trust, and that the relation of general creditor was not created between the depositors and that bank, and that it may be impossible to follow into its diverted use, it is always possible to make it a charge on the estates or assets to the increase or benefit of which it had been appropriated away. In Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693, the Supreme Court of the United States passed upon this question and reviewed a large number of authorities, and held that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own. And it is held that these are established doctrines of equity, and that they apply in every case of a trust relation, and to moneys deposited in a bank account, and the debt thereby created. And the court reviewed and followed Re Hallett, supra.

In Richardson v. New Orleans Debenture Redemption Co. 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780, the circuit court of appeals of the fifth circuit held that a deposit obtained by fraud when a bank is hopelessly insolvent created a trust in favor of the depositor, and can be recovered from a receiver of the company, even if the identical money deposited does not pass into his hands, where the funds received by him are in any event increased by the amount of his deposit. In State v. Bank of Commerce, 61 Neb. 181, 52 L.R.A. 858, 85 N. W. 43, it was

held that trust funds do not become a part of the assets of the bank, and, if a bank becomes insolvent and a receiver is appointed, the owner of the trust funds is made a preferred creditor, and that the beneficiary is entitled to the funds, or the proceeds thereof, so long as he can definitely trace them, until they reach the hands of an innocent holder; and that, when such funds have been wrongfully commingled and payments made by the trustee from the common fund, it will be presumed that such payments were made out of his own money, and not from the trust money; and that the claim of a beneficiary for trust money may be preferred to the extent of the cash found among the assets of the insolvent trustee at the time of his failure. And several other decisions of that court are cited in the opinion, to the same effect.

And in State v. Bank of Commerce, 54 Neb. 725, 75 N. W. 28, it was held that, when such funds are wrongfully commingled with those of the bank and payments made from the common fund, it will be presumed that such payments were made out of the trustee's own money, and not the trust money, and that the cash assets on hand when the trustee failed were part of the trust money; but that, if it is shown that the funds were actually dissipated, the beneficiary cannot have his claim allowed as a preferred one. And the claim in that case was allowed to the extent of the cash on hand at the time of the failure. In St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390, it was held that the accepting of a deposit of trust by a bank irretrievably insolvent constitutes such a fraud as entitled the depositor to reclaim his trusts or their proceeds. And the court cites with approval Cragie v. Hadley, supra, and numerous other authorities. To the same effect, see Officer v. Officer, 127 Iowa, 347, 101 N. W. 484, and Sherwood v. Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352.

In Iowa many authorities sustain the right of the appellant to recover. The latest to which our attention has been called is Whitcomb v. Carpenter, 134 Iowa, 227, 10 L.R.A.(N.S.) 928, 111 N. W. 825, in which the facts are identical with those in the case at bar. It was held that the purchaser of a draft on the insolvency of the banker was entitled to a preference for the amount of his claim, and that the maker of a note, who had paid money to the bank on the note made payable to the banker, who had failed to make a proper indorsement but still held

the note, or failed to turn the payment over to the person holding it, and mingled the money with the funds of his bank, was a trustee; and that the maker was entitled, on the insolvency of the banker, to a preference for the amount paid; and that the fact that the assets which passed into hands of the assignee were less than those which the banker had on hand when he wrongfully obtained the money and mingled it with his own funds did not overcome the presumption that the money passed into the hands of the assignee. See also Hanson v. Roush, 139 Iowa, 58, 116 N. W. 1061. Anheuser-Busch Brewing Asso. v. Morris, 36 Neb. 31, 53 N. W. 1037, holds that where a bank collects money for another, it holds it as a trustee of the owner, and that on the making of an assignment the trust character still adheres to the fund in the hands of the assignee, and the owner is still entitled to a preference. In Fire & Water Comrs. v. Wilkinson, 119 Mich. 655, 44 L.R.A. 493, 78 N. W. 893, it is held that when money on hand at the time the bank closed its doors was greater than the amount received in a certain fund, in the absence of proof to the contrary, it will be presumed that the amount of cash on hand, to the amount deposited in cash from such fund, was the trust fund. See also Hyland v. Roe, 111 Wis. 361, 87 Am. St. Rep. 873, 87 N. W. 252, holding that where a deposit was received by an insolvent bank, receipt of which is a penal offense, it does not have to be identified to enable the depositor to recover the fund. In Anderson v. Pacific Bank, 112 Cal. 598, 32 L.R.A. 479, 53 Am. St. Rep. 228, 44 Pac. 1063, it was held that money deposited in a bank to secure it from loss for furnishing bail, and commingled with the general funds of the bank, could be recovered; and that the depositor on the insolvency of the bank was not limited to the general rights of a creditor, but could recover the entire amount deposited out of the assets of the bank. In People v. City Bank, 96 N. Y. 32, we find a case where the bank had discounted notes for a firm, a depositor. Such firm wished to anticipate payment, and gave to the bank checks for the amount of the notes. These checks were charged in the firm account and entries made in the bank books that the notes were paid. The firm when giving these checks supposed that the bank held the notes, but they had been previously sold by it. Before the notes fell due, the bank failed, and a receiver was duly appointed of its assets. It was held that the transaction between the bank and the firm was not in their relation of debtor and creditor, nor of

bank and depositor, but that a trust was created, the violation of which constituted a fraud by which the bank could not profit; and that an order requiring the receiver to pay the notes out of funds in his hands was proper. See also Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21, as directly in point: and First Nat. Bank v. Hummel, 14 Colo. 259, 8 L.R.A. 788, 20 Am. St. Rep. 257, 23 Pac. 986.

The judgment of the trial court was erroneous, and we hold that the appellant in this case is entitled to preference, as indicated, and, if necessary, may participate with general creditors in the general assets. See Kimmel v. Dickson, 5 S. D. 221, 25 L.R.A. 309, 49 Am. St. Rep. 869, 58 N. W. 561; Eureka v. Farmers' Bank, 88 Iowa, 194, 55 N. W. 342; also Plano Mfg. Co. v. Auld, supra.

The rights of other claimants to preference are not before us, hence appellant's rights relative to them are not determined. Although the procedure in this case is not questioned, we deem it proper to add that this court is satisfied that the ends of justice would be promoted in matters of this nature by an intervention by the claimant in the main action. In such case the rights of all parties as to each other could be determined and much litigation avoided.

BRUCE, J., did not participate.

RUSSELL v. OLSON.

(37 L.R.A.(N.S.) 1217, 133 N. W. 1030.)

Appeal — review of facts — necessity of motion for new trial.

1. Questions of fact cannot be reviewed on appeal from a judgment in any action tried by a jury, unless a motion for a new trial was made before the trial court.

Note.—A note to this case in 37 L.R.A.(N.S.) 1217, on the question of eviction of tenant by failure to furnish heat, deduces from the authorities there reviewed the broad general rule that the failure of a landlord to furnish heat when he has expressly or impliedly assumed that obligations constitutes eviction of the tenant where the tenant elects to consider it such and surrenders the premises because

Trial — sufficiency of exceptions to instructions.

2. Exceptions to a charge of the court must point out some definite or specific defect, Counsel should by his objection, lay his finger on the precise point, or alleged error of the court.

Appeal — review of facts — necessity of motion for new trial.

3. In the absence of a motion for a new trial, the finding of the jury upon a controverted question of fact, where competent evidence was given pro and con, must be taken as final.

Appeal — errors of law in admitting testimony — necessity of motion for new trial.

4. Errors of law occurring at the trial, by way of admitting testimony, properly objected to, or otherwise, with exception saved, and which are brought on to the record through a statement of the case, will be considered by the court without a motion for a new trial.

Landlord and tenant — failure to furnish heat — eviction.

5. A landlord who agrees in his contract with his tenant, during the continuance of the lease, to furnish heat for the proper heating of the building leased, and fails to keep his contract, after having been given notice of the defect and allowed a reasonable time in which to remedy the same, commits acts which in law will be regarded a constructive eviction of the tenant from the premises.

Landlord and tenant — eviction of tenant — measure of damages.

6. The contract being silent upon the measure of damages, the statutory rule prevails. The damages, therefore, in this case, should be such as may fairly and reasonably be considered either arising naturally or as according to the usual course of things from such breach of contract itself, or such as will reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. While profits may be considered in proper cases in estimating damages, proof of them must be of a high character, and not such that the jury are left to speculate or guess what, in fact, they are or would be.

Damages — alleging and proving special damages.

7. The jury awarded $593.75 special damages. Special damages must be alleged and proven. No testimony in this action appeared warranting such a finding; hence it was error for the court to submit that question to the jury.

Opinion filed June 22, 1911. Rehearing denied December 21, 1911.

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thereof; but there are so many elements entering into the decisions that each case must necessarily be determined on its own particular facts.

The general question of the duty and liability of a landlord of apartments as to heating is considered in a note in 37 L.R.A.(N.S.) 1213.

As to what constitutes eviction of tenant generally, see note in 38 Am. St. Rep. 485.

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

Action by T. F. Russell against Olaf Olson. From a judgment for plaintiff, defendant appeals.

Reversed, and new trial ordered.

L. J. Palda, Jr., John E. Greene, and *C. D. Baker,* for appellant.

F. B. Lambert, for respondent.

POLLOCK, Special Judge. The defendant rented to plaintiff a certain hotel in the city of Minot. One of the clauses in the contract reads as follows: "The party of the first part (Olson) agrees, during the continuance of this lease, to furnish the heat for the proper heating of the same, from the 1st day of October to the succeeding 1st day of May during each year, from the date hereof." The action is for damages for violation of this condition of the lease. Plaintiff alleges that under the lease he entered upon said premises October 1, 1905, and remained there until October 30, 1906, when he was evicted by reason of the failure of the defendant to furnish heat for said premises. The written lease made by the parties was for and during the terms of five years from October 1, 1905. The damages claimed were: First, for $100 per month from October 1, 1905, to May 1, 1906, $700 in all; second, $1,000 per year from October 30, 1906, for the remaining four years' term of the lease, total $4,000; third, because he had bought certain furniture especially fitted for the building, and paid therefor $2,000, and which, when moved from the said building, had no value in excess of $500, and on that cause of action claims $1,000 damages. Defendant entered a general denial, except that he admitted making the lease as alleged by plaintiff, and then set forth a counterclaim for damages: First, for putting in partitions and injuring the floors, $100; second, abandoning the place without cause, damage $4,800, being the rental of said premises for the unexpired term; third, taking away the keys of the building, $50; fourth, leaving the premises in a dirty and filthy condition, $75,—making a total of $5,025. A general denial to the counterclaim was set forth in the reply. The cause was tried before the court and a jury, and during the time of the trial plaintiff was permitted to amend his complaint by adding thereto the following: "That said furniture and fixtures were especially adapted to said building and rooms and especially useful therein; that upon plaintiff's eviction from said building as

above alleged there was no other building or rooms in which to place said furniture, and the same were of no value in excess of the sum of $500, and the said plaintiff has sustained loss on said furniture and fixtures by reason of the foregoing in the sum of $1,000." At the close of the case, defendant, moved for a directed verdict, which not only leveled at plaintiff's right to a verdict, but also asked for a verdict in favor of the defendant for $135. This motion was overruled and the ruling properly excepted to. The jury returned a verdict in favor of the plaintiff for $865.75, and the verdict shows that the same was arrived at as follows: Damages to plaintiff on hotel claim, $350; damages to plaintiff on furniture claim, $593.75. As against which the defendant was allowed: For loss of keys, $10, and for dirty condition of the premises when left, $68. Thereafter, certain exceptions were filed to the charge, in the following language only: "Comes now the defendant in the above-entitled action and excepts to the following provisions of the charge of the court, given to the jury in the above-entitled action, covering pages 7 to 16, inclusive, and reading as follows, to wit: . . . " Then follows the paragraphs of the charge excepted to. No grounds for the exception were mentioned. Judgment was thereafter entered in favor of the plaintiff for the sum of $865.75. From the judgment defendant appeals. In the statement of the case are found sixty-seven specifications of error, mostly with reference to the admission of testimony, and directly attacking its character as a proper mode of proving the damages claimed. No motion for a new trial was made, so that the matter comes before this court only to review the errors of law occurring at the trial.

1. Questions of fact cannot be reviewed by this court on appeal from a judgment in any action tried by a jury, unless a motion for a new trial was made in the court below. Rev. Codes 1905, § 7226; McNab v. Northern P. R. Co. 12 N. D. 568, 98 N. W. 353.

In justice to the learned judge who tried this case, it is only fair to suggest that if counsel had made a motion for a new trial, and thus given the court below a chance to review the entire record, it is safe to say that the expense of an appeal would have been saved. The writer hereof, through long experience as a trial court, well knows the difficulties attendant upon a trial, where, as shown by the record herein, more care should have been given to the preparation of the pleadings

and the elimination of all those items, on both sides, which serious reflection would have shown could not have been allowed. While constant demand upon a busy practitioner's time will often excuse lack of the most careful preparation for the actual trial of a case, it will not justify the trouble and expense incident to an appeal, without first calling upon the court below to correct any errors which occurred at the trial.

2. The exceptions taken to the charge in this case cannot be considered. They should have pointed out some definite or specific defect in the character of the instructions given. Counsel should, by his objection, lay his finger on the precise point, or upon the precise request refused, or alleged error of the court. St. Croix Lumber Co. v. Pennington (1882) 2 Dak. 467, 11 N. W. 497.

3. There was competent evidence given both pro and con upon the question of whether the defendant had violated his contract with reference to the heat; and we cannot, in the absence of a motion for a new trial, pass upon the sufficiency of this evidence to warrant the finding that the defendant had failed to comply with the full terms of the contract in relation thereto, and must proceed, therefore, in the further examination of the case, assuming that the defendant had violated his contract.

4. Certain questions were asked, during the time of the trial, by counsel for the plaintiff, by which he sought to establish the amount of damages alleged to have been sustained during the time that he remained in the hotel; likewise questions attempting to prove the damages of the furniture as alleged in the amended paragraph of the complaint. To most all of these questions the defendant interposed the objection that the same were incompetent, irrelevant, and immaterial, not constituting a proper measure of damages, and, in many cases, that the plaintiff was not competent to answer the question asked. Defendant further claims that an error was committed in refusing to grant the motion of defendant for a verdict. These alleged errors of law occurring at the trial are properly before us in the statement of the case, and must receive consideration at our hands.

5. Did the failure of defendant to furnish the heat according to his contract constitute in law a constructive eviction of plaintiff from the premises? Assuming, as we must in this case, that defendant was

at fault in failing to furnish the heat contemplated in the contract, plaintiff was clearly within his rights, under subparagraph 1, § 5523, Rev. Codes 1905, in terminating the same. "The hirer of a thing may terminate the hiring before the end of the term agreed upon: 1. When the latter does not, within a reasonable time after a request, fulfil his obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired, or putting it into a good condition, or repairing." There was competent evidence that the plaintiff requested the defendant to furnish a proper amount of heat; that the same was not so furnished within a reasonable time. The jury having passed upon the sufficiency of such evidence, that question is settled against the defendant.

In view of the fact that the selling of heat has become an important industry under modern methods, the rights of parties growing out of contracts to furnish heat take an unusual importance. The plaintiff in this instance had no more control over the source of supply than as though the heat was to come from a central plant, blocks away, and not, as it did, from the cellar beneath the rented building. We are not dealing with a question of repairs. There is no intimation that there were neither proper pipes nor a lack of radiation. It was simply a failure on the part of defendant, who was in sole control of the heating plant, to use fuel and keep present a sufficient amount of steam to warm the rooms.

An apartment house contract was under discussion in the case of O'Gorman v. Harby, 18 Misc. 228, 41 N. Y. Supp. 521, where a landlord failed to supply a sufficient amount of heat. The court says: "The facts of the case do warrant us, however, in saying that in matters of repairing and remedying defects, as between the landlord and the lessee of rooms in an apartment house, a reasonable rule prevails. If, after notice, the landlord proceeds with proper diligence to do what is necessary, he is allowed a reasonable time to remedy the defect. If the tenant waits a reasonable time for him to do the work, and it is not done, he may remove from the premises if he has been and is deprived of the beneficial use and enjoyment of them. . . . The tenant attempted to keep warm by the use of lamps and gas logs in his apartment; but it cannot be held that he was bound to do this during a protracted discontinuance of the steam heat which his lease calls

for. In case of a prompt compliance with a notification of defect in the heating apparatus, temporary inconvenience must be suffered by the tenant, under a reasonable construction of the relations between the parties. But in this case the facts established that an unreasonable infliction was imposed upon him, and his abandonment of the premises was justified."

Again, the supreme court of New York, in Siebold v. Heyman, 120 N. Y. Supp. 105, says: "There can be no doubt that the failure of a landlord to supply sufficient heat to an apartment used as a dwelling and fitted with apparatus for that purpose, over which the landlord has control, constitutes a constructive eviction if the tenant so elects and moves out. Butler v. Newhouse, 85 N. Y. Supp. 373. It is only by removal that the tenant can make his election."

Our sister state, South Dakota, in Edmison v. Lowry, 3 S. D. at page 85, 17 L.R.A. 275, 44 Am. St. Rep. 774, 52 N. W. 585, uses the following language: "In a case like the present, the technical rule which requires the element either of absolute expulsion from the property by the landlord, or abandonment by the tenant, to be included in the act of eviction, does not and ought not to be applied. A party should be held evicted when the act of the landlord is of such a character as to deprive the tenant, or has the effect of depriving him, of the beneficial use and enjoyment of the whole or any part of the demised property to the extent he is thus deprived."

In Hoeveler v. Fleming, 91 Pa. 322, the supreme court of Pennsylvania says: "The modern doctrine as to what constitutes an eviction is that actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the demised premises will amount to an eviction in law."

An exhaustive note collating the authorities from different states may be found in the case of Wade v. Herndl, 127 Wis. 544, 5 L.R.A. (N.S.) 855, 107 N. W. 4, as printed in volume 7 Ann. Cas. 594. See 2 Underhill, Land. & T. 1909 ed. 1143, and cases cited.

Based upon our statute and these authorities, which might be multiplied, it clearly appears that the acts of defendant worked a constructive eviction of plaintiff. It would follow, therefore, that defendant broke his contract, and would not be entitled to any damages for the abandonment of the premises. The amount of damages as asked by

defendant in his motion would appear to indicate that he had withdrawn his claim for $4,800 damages by reason of plaintiff having abandoned the premises; but, because the record does not show this point clearly, we deem it important to express our views upon the rule which must obtain in a situation of this kind. Nor was there evidence sufficient upon which the court could have properly granted a motion in favor of the defendant for the $135 claimed; and our further inquiry, therefore, must be based upon that part of the motion which asks for a directed verdict because the plaintiff had wholly failed to establish any cause of action himself.

6. To determine this question, we are led to inquire: What is the measure of plaintiff's damages, and was there any sufficient evidence offered upon which a verdict for the plaintiff could be predicated? An examination of the contract between the parties shows it to be silent upon the question of the measure of damages. The parties to this action might have fixed in their contract a rule, if they had desired so to do, provided it was lawful; but they did not. They are therefore relegated to the measure of damages prescribed by statute. The leading case upon this subject in our state is Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250. This was an action growing out of a claim that the court below had adopted the wrong rule for the measurement of damages. At page 207 of 13 N. D., Judge Young, speaking for the court, discusses the entire subject of damages for the violation or breach of contract. The statutory rule (Rev. Codes 1905, § 6563) neither restricts nor enlarges the actual rule which has been recognized and applied both in England and this country, and in substance quoting from the opinion: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Adair v. Bogle, 20 Iowa, 238, is a leading case upon this subject. Judge Dillon, at page 243, discussing the subject, says: "It is also settled that in such an action against the landlord for damages, the

general rule for the measure thereof is the difference between the rent reserved and the value of the premises for the term. If the value of the premises for the term is no greater than the rent which the tenant has agreed to pay, then the latter is not substantially injured, and can, *in general,* recover only nominal damages, though the landlord, without just cause, refuses to give possession. But if the value of the premises is greater than the rent to be paid, the lessee is entitled to the benefit of his contract, and this will ordinarily consist of the difference between the two amounts. . . . Indeed courts and juries are often perplexed in determining questions relating to the measure of damages, and, notwithstanding general rules may and should be laid down to the jury, much must still be left to their sound judgment and sense of justice and right. Two principles should, in cases like the present, be impressed upon juries: 1st. The plaintiff should recover only such damages as have directly and necessarily been occasioned by the defendant's wrongful act or default; and, 2d, that if the plaintiff, by reasonable exertions or care on his part, could have prevented such damages, he is bound to do so, and, so far as he could have thus prevented them, he cannot recover therefor. . . . The injured party is entitled to recover only such sum as will make him whole. This he is entitled to recover, so far as his injury has been the direct or natural result of the wrongful act of the other party. . . . We have said above that *in general,* or *ordinarily,* the plaintiff, in such an action as the present, recovers the difference between the value of the use of the premises and the rent reserved. But he is not in all cases confined to this, as where, in addition, he has sustained a particular loss. If other damages have resulted as the direct and necessary or natural consequence of the defendant's breach of the contract, these are recoverable, certainly where, as in this case, they are specially set forth."

We find the general rule stated in 3 Sutherland, Damages, 3d ed. 2578, as follows: "On this general proposition the authorities agree. In such cases the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term is considered the natural and proximate damages."

Upon the first cause of action the jury awarded to the plaintiff the sum of $350. The defendant says, by virtue of his motion, as a matter of law, there was no competent proof in the record which would sustain

any such finding. The following, taken from the record, is believed to contain all the testimony in the case upon that question: "I have been in the hotel business in different towns for about twelve years and know what the profits are in the hotel business. Minot is a good hotel town. I have been in the hotel business in Minot since I left this building. Took possession of Morrill's Hotel, May 1, 1907. I was able to keep filled, from October 1, 1905, to May 1, 1906, under the conditions expressed as to heat, on the average, twenty-five rooms, which would leave seven empty during the winter. Have been a hotel man both before and after the making of this lease, since I have left the place. I know something about the hotel business, so far as seasons are concerned, and know Minot particularly. I think a rooming proposition, when a building is heated by steam, is better in winter than in summer, if it is properly heated. When not properly heated during the winter season the effect is that it naturally makes it harder to get people back once they leave a house, and will interfere to quite an extent with summer business. I used the building in the summer of 1906, kept the rooms full in the summer time, and I might add a little to that; perhaps would not be the condition of affairs later on, because when you drive people away you can't get them back, and the consequences are, if I stayed there long enough, I wouldn't have any roomers. I rented these rooms at $3.50 to $5 a week. I took possession of the building October 1, 1905, and remained there one year and one month, leaving the building on the 31st day of October, 1906. I left it because it was too cold. In the month of October, 1906, a number of roomers moved out on account of its being too cold. When I left I had about half the rooms in the house occupied. I tried in good faith to keep it occupied and keep people there. During the summer time the profits per month in my business, over and above my expenses, were $150. In the winter time I lost some money in the winter business, a small amount, $50 a month. In leasing this building, I was to pay $200 a month to run a year; consider this a fair rental value. I do not consider the rental value between the 1st of October to the 1st of May, with the amount of heat Mr. Olson furnished, as worth anything. I made no profits operating these rooms from the 1st of October, 1905, to the 1st of May, 1906. I lost money, $50 a month. I operated the same in the summer time at a profit of about $150 a month. The rooms were managed and

kept clean, beds changed, and everything like that the same in the winter as in the summer."

Assuming the foregoing to be all competent, it clearly appears from an anaylsis thereof that there is no sufficient evidence to warrant the jury in finding the verdict which they did. It must be remembered that the plaintiff had been in the hotel but a short time. The most definite statement, and that was a conclusion of fact, was that in the summer his net profit was $150, and in the winter he lost $50 a month. There is no evidence in any way showing the basis upon which this finding was made. The jury was not given any information upon which they could draw such a conclusion, and they were left simply to speculate and guess at a possible loss. As was stated by the court in St. John v. New York, 13 How. Pr. at page 532: "It is not denied that loss of custom is the proper ground of recovery. To prove this was the object and direct tendency of the evidence; the plaintiff showed the actual receipts of his hotel for a year or more previous to the obstruction complained of, the actual daily receipts during the continuance of the obstruction, and again the actual daily receipts for some months after the obstruction was removed. This furnished the means of computation, and of satisfactorily ascertaining the diminution of receipts. He also showed that the expenses were in the same, or about the same, ratio to the receipts during the whole period." No such proofs were offered in this case.

As counsel for the appellant properly suggests in his brief: "The most natural way to make such proofs would be by comparing the profits for corresponding periods of time through any prior or succeeding years, and under the condition of proper heating of the building. This could readily be done by showing gross earnings, actual expenses of the business during such period, if the circumstances of the case made such proof possible. There were no expenses of prior or succeeding years in this case, and therefore such proof was impossible; but that does not compel the court to accept improper evidence. Plaintiff's damages must be such as are susceptible of legal proof; otherwise he is without remedy."

It is clear from the pleadings, if not from the verdict, that the plaintiff desires damages for the remainder of the term. Assume that the plaintiff ought to be awarded such damages, how shall that be meas-

ured? Clearly, he ought to receive the full benefit of his bargain, if that benefit can be ascertained. If the bargain would have produced more than the rental value, such excess would represent the loss sustained and consequent damage. To ascertain the extent of such damages, without entering the field of speculation, is in all cases difficult, and in some entirely impossible. The innocent person must suffer in all cases where, from any cause, he is unable to furnish adequate proof of his damage. In the case at bar, plaintiff had been in occupation only a short time. No previous years of occupancy existed by which comparisons could be instituted; nor were the premises thereafter used under like conditions, which can throw light upon the situation. To raise the question of probable profits in this case would require the jury to enter a labyrinth of speculation, from which they could not hope to be extricated. It is evident, therefore, that upon the record before the court there is no evidence that for the remainder of the term the bargain would have exceeded in value the amount of rent to be paid for the term. Consequently no error was committed in failing to find damages upon that account, and we hold, as was held by the trial court, that there was not sufficient evidence, even considering it all to be competent, upon which the jury could have found a verdict for the amount claimed or for any amount.

7. Can the special damages of $593.75, allowed by the jury on account of the second cause of action, be sustained? The plaintiff claims that he is entitled to this damage resulting from the purchase of the furniture.

The court erred in submitting that question to the jury. Again referring to the rule laid down by the court in Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250, we do not believe that the testimony in support of this cause of action shows that the damages claimed may be reasonably supposed to have been in the contemplation of both parties, at the time when they made the contract, as the probable result of the breach of it. In so far as the failure to furnish the heat was a cause contributing to the loss on the furniture, it was remote, and not a proximate, consequence thereof. It was held in the case just cited that "if the contract in question . . . was in fact made under such special and exceptional circumstances that it could reasonably be concluded that the parties in making it contemplated that a loss by storm would follow its

breach, it was necessary both to allege and prove the facts in order to thus characterize the contract and establish the plaintiff's liability for such loss. This was not done."

As was stated by the court in Serfling v. Andrews, 106 Wis. 80, 81 N. W. 991: "Damages for the breach of a contract are limited to such as may be reasonably considered to have been in contemplation by the parties at the time of the making of such contract as the probable result of a breach of it. . . . Upon the facts stated in the complaint, the true rule of damages would have been the difference between the actual rental value of the premises for the term and the rent reserved in the lease. . . . If plaintiff desired to recover special damages, such as loss of prospective profits, it was his duty to allege the facts and circumstances and knowledge of the situation brought home to the defendant at the time the lease was made."

Judge Dillon, as quoted above, in Adair v. Bogle, affirms this same rule.

Under the rule, therefore, as laid down by our own, as well as other, courts, in order to have maintained any recovery of damages whatsoever growing out of the second cause of action, it would have been necessary for the plaintiff to have alleged and proved that the question of the furniture and its possible depreciation in value in case of a breaking of the lease was considered by both parties and contemplated as a factor in helping to make up the amount of damages, should any in their view occur. There is danger likewise of entering into the realm of speculation at this point; something not permitted by the statute. If it may be claimed that the statute is sufficiently broad to cover cases of this kind, what would be the result had the plaintiff put into these rooms mahogany furniture, marble-topped tables, the finest and most expensive kind of rugs, and then, being compelled to leave the premises, could find no sale for such property? Could it be urged that he could have the difference between the cost of the furniture, less the value of the reasonable wear and tear, and less the amount for which he could find sale for it? The necessities of the rule as laid down by the authorities grew out of the very nature of the case. If the parties had desired such a rule of damages to be applied, they should have so indicated in their written contract. Failure to do this leaves them to the rule laid down in the statute. That rule has been fully adjudicated by the courts.

We find, therefore, that there are neither sufficient allegations or proofs upon which any finding could be based growing out of the second cause of action. It will be unnecessary to discuss any further alleged errors.

The decision of the lower court is reversed, the judgment vacated and set aside, and a new trial is ordered.

MORGAN, Ch. J., not participating, and GOSS, J., disqualified, took no part in the decision; Honorable CHAS. A. POLLOCK, Judge of the Third Judicial District, sitting in his stead by request.

GRAHAM v. MUTUAL REALTY COMPANY.

(134 N. W. 43.)

Taxes — verification of assessor's return.

1. The verification of the assessor's return provided for in § 1525, Rev. Codes 1905, before the city auditor, instead of the county auditor, as prescribed in said section, will not, in itself, invalidate the assessment.

Taxes — agreement to stifle competition at tax sale.

2. An agreement to stifle and eliminate competition at a tax sale must, in order to render such sale void as to any particular tract of land, relate to and affect such tract.

Taxes — notice to redeem from tax sale.

3. *Held*, that a notice to redeem from a tax sale, to the effect that, "You are hereby notified that on the 5th day of December, 1905," etc., a specifically described tract of land "was sold for taxes due and delinquent thereon for the year 1905, as provided by law, that the amount for which the same was sold was $25.68, that the subsequent taxes levied thereon for the years 1905, 1906, 1———, were paid by the purchaser, amounting to $67.11, that the time for redemption from said sale allowed by law will expire ninety days after the service of this notice, that the amount required to redeem said real property from said sale of 1904 taxes is $139.51," etc., was sufficient even though the year "1907" was not written therein in full; it being shown that the taxes for the year 1907 were included in the total sums of $67.11 and $139.51, specified in said notice.

Opinion filed December 21, 1911.

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

Action by Samuel S. Graham against the Mutual Realty Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Facts: Action to quiet title to lot 15, block 7, in Kenney & Devitt's addition to the city of Fargo, and to have declared void defendant's claim under a tax certificate of sale for unpaid taxes for the year 1904, and a tax deed issued thereon in November, 1909, and for the taxes for the years 1905, 1906, and 1907, subsequently paid. Judgment for the defendant, and appeal under the Newman law. The reasons assigned by the plaintiff and appellant for holding defendant's interest to be void are: (1) That the assessors failed to properly verify their assessments for the years 1904, 1905, 1906, and 1907, the several assessments having been sworn to before the auditor of the city of Fargo, instead of before the county auditor, as prescribed by § 1525, Rev. Codes 1905 (chapter 28, Laws of 1901); (2) that the tax sale was void because of an unlawful arrangement between the bidders, whereby competitive bidding was stifled and eliminated; and (3) that no notice of redemption was given to the defendant by the county auditor prior to the issuing of the tax deed.

Pollock & Pollock, for appellant.

Barnett & Richardson, for respondent.

Bruce, J. (after stating the facts as above). The first point made by appellant, that the returns made by the city assessor of the city of Fargo were verified before the city auditor, instead of by the county auditor, was passed upon adversely to the appellant in the case of State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112, and though that case was decided by a divided court, and to all intents and purposes overruled and reversed the prior decision of Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188, we feel constrained to follow its holdings.

The next point is a much more difficult one to decide. There can be no question that competition was particularly stifled and eliminated at the tax sale of 1904. Out of 1917 sales, 856 were made at 24 per

cent and 5 per cent penalty. Only 61 sales were made at less than 24 per cent and the penalty. Averaging the sales among the purchasers, there would practically be one purchase for each bidder below the full maximum. Fifty-nine different firms and persons were interested in the sale, so that there must have been some demand for the investments. The witness Twitchell testifies, for the plaintiff, that "there was a meeting of most of the bidders immediately preceding the sale, trying to make some arrangements to get 24 per cent and 5 per cent penalty. Nearly everyone there agreed to it before the sale. They carried out such arrangement at the sale. The arrangement was to bid in rotation, and it was carried out. The exceptions to the arrangement as to rotation were as to mortgages and previous certificates held by purchasers, and as to some small descriptions, which many bidders did not want, and also with respect to the special taxes offered; it being understood that the one who had the general tax should have preference as to the special tax. If he did not want the special tax, somebody else took it, and he did not lose his turn. Mr. Wooledge, the purchaser of the lot in question at the sale, was an active participant in the bidding in rotation." The witness also testified that he was himself a party to the arrangement, and a bidder at the sale. Another witness testified that he purchased certificates for different parties, had other bidders to assist him, participated in the regular order, and took certificates that came in regular rotation; that there was an agreement among the bidders that it would be proper for each bidder only to secure the amount that came to him in his regular order.

On the other hand, J. D. Wooledge, who secured the certificate in question, and who afterwards sold it to the defendant, the Mutual Realty Company, denies that he entered, at any time prior to or during the sale, into an understanding or agreement limiting or restraining his right to bid, or the amount which he should bid, or the manner or time in which he should bid, with anybody, and states that he was not present at any talk or understanding among the respective bidders at which any such agreement was made. He, however, on cross-examination, admitted that he made the announcement at the sale, on behalf of his company, the Red River Valley Mortgage Company, as to prior mortgages and prior certificates, if such company or himself had any, and admits that it was the practice of others to make the same an-

nouncements, from time to time, during the sale, so that there would be no competitive bids, and also admits that for a considerable portion of the time during the sale the bidding was going on around the room in rotation as to bidders, but he would not say that this program continued throughout the entire sale.

Another bidder, Mr. H. J. Rusch, denied that he himself entered into any agreement for eliminating competition, but admitted that there was an attempt to make an arrangement, which, he said, he thought was not carried out. "They kicked over the traces occasionally." He said that such agreement had been attempted at every sale that he had been to. His testimony is to the effect that there was rotation in the sales in regard to farm lands, but not as to city property. He said that there was a lot of competition for the size of the crowd, "though, as a rule, there was possibly only one bid for the maximum interest and penalty." He also admits that a great many bidders, from time to time, called out, "Prior certificates!" also, "Mortgages!" His explanation was this: "For instance, I bought a certificate this year, and paid subsequent taxes in March. I would let that run to another sale, in order to get the penalty, and the bidders around the room would recognize that right. I don't know as I had any right; but they would recognize that right, if any gentleman in the room said he had a prior right or mortgage, and the others would not bid against it." On being asked, "You don't remember that he bid in at less than 24 per cent, and 5 per cent penalty?" He answered: "I would not say, unless the records show. I think the next year we started to. I was supposed to be the outlaw next year, because, I think, I was the one that started the cut, because I thought they were getting a good investment, and I went in there with the understanding that I was to get what I wanted, and as much as I wanted."

The county auditor also testified that he had no knowledge of the arrangement or agreement as to bidding in rotation; that, except as to some individuals, bids were made in rotation, but he could not say that was true as to the majority of the bidders at the sale, and could not say that it was not. "There were certain individuals that would release their—They would not bid against others; but there were some there that were in competition at all times."

Mr. J. A. Glassford testifies that he was present at the sale to bid

for the defendant, the Mutual Realty Company (which afterwards purchased the certificates in question from Wooledge); that whether he had bid in his own name or for the company was simply a matter of convenience, and that, if he made purchases in his own name, the certificates were immediately assigned to the defendant company; that there was no arrangement between the bidders, or collusion among them, so far as he knew; that all bidding was free and open at all times; that the property in question was sold, while he was present, to Mr. Wooledge. This witness, however, was not cross-examined, owing to some misunderstanding.

Mr. Twitchell, the principal witness for the appellants, also admitted that there may have been some time in the morning when the deal did not exist; that "the Red River Valley Mortgage Company, represented by Mr. Wooledge, broke away from the agreement very largely, and got more than their share. Competition was not very strong."

We have, then, a case where, if an agreement to eliminate competition was made, the original purchaser broke away from it, and was not controlled by it, and where the defendant in the case is an innocent and bona fide purchaser. The case is one, also, where there is no doubt that there was an attempt to eliminate competition, which was carried out to a large extent, though there were bidders who were not controlled by it. The evidence, of course, is not entirely clear. Out of 917 sales, only 61 were for less than 24 per cent, and the penalty; that is to say, 6½ per cent of the sales. Many of the sales, however, were at a low rate of interest, and the fact that mortgagees were allowed to bid in the property in which they were interested is not, in itself, any proof of fraud. As was well said, indeed, by the trial judge in his memorandum opinion; "A mortgagee or lien holder stands about in the same position as would the owner of the property in reference to paying the taxes thereon. A mortgagee purchasing at a sale cannot secure any rights under the sale as against the mortgagor. He would simply, as between him and the mortgagor, be considered as having paid the taxes. Suppose that several owners of the land had been present at the sale, and, by outstanding agreement, these owners were allowed to bid in their own land, could it be said that there was an unlawful combination among the bidders? I see no difference between this situation and the one where the rights were extended to the mortgagees to bid

in such property, so that this evidence with reference to mortgagees and lien holders hardly amounts to the position where it creates even an inference as against the regularity of the sale." From the proof it is evident that quite a number of the sales were made to such mortgagees.

As far as the authorities are concerned, every presumption is in favor of the sale. Beeson v. Johns, 59 Iowa, 166, 13 N. W. 97. And in none of the authorities cited by appellant was there any competition at all. In all of the cases cited by counsel, indeed, there was an illegal combination among all of the bidders at the tax sale, including the person who bid in the land. See Youker v. Hobart, 17 N. D. 296, 115 N. W. 839; Frank v. Arnold, 73 Iowa, 370, 35 N. W. 453; Johns v. Thomas, 47 Iowa, 441; Slater v. Maxwell, 6 Wall. 268, 18 L. ed. 796; Singer Mfg. Co. v. Yarger, 2 McCrary, 583, 12 Fed. 487. Neither are all of the authorities cited by counsel for respondent entirely in point. All that is decided in Beeson v. Johns, 59 Iowa, 166, 13 N. W. 97; Davis v. Harrington, 35 Kan. 196, 10 Pac. 532, and Gallaher v. Head, 108 Iowa, 588, 79 N. W. 387, for instance, is that a fraudulent combination cannot be inferred from a failure to compete, alone, or very little competition. It seems to be the undoubted rule, however, that, in order to avoid a sale as against a bona fide grantee for value—and such the defendant appears to be in this case—the agreement to eliminate competition must have had reference to the particular tract in controversy, and a mere arrangement "in reference to many pieces of land will not be extended to any particular one without proof." Eldridge v. Kuehl, 27 Iowa, 160. even where there is a complete absence of competition says Judge Cooley, the invalidity of the sale "is not absolute, as in case of a sale without jurisdiction; it is rather a cause for avoiding the sale than a cause which, *ipso facto,* defeats it; and if, before the proper remedy is sought, the land comes to the hands of a bona fide purchaser who was ignorant of the fraud, he will be protected in his title." "Perhaps, also," the author continues, "the purchaser at the sale should be protected if he did not participate in the fraud, and was unaware of it." Cooley, Tax. 2d ed. p. 491; Sibley v. Bullis, 40 Iowa, 429; Watson v. Phelps, 40 Iowa, 482; Huston v. Markley, 49 Iowa, 162; Martin v. Ragsdale, 49 Iowa, 589; Case v. Dean, 16 Mich. 12; Martin v. Cole, 38 Iowa, 141; Van Shaack v. Robbins, 36 Iowa, 201.

The fact that the witness Glassford was an officer of the defendant, and was present at the sale, does not change the situation or make the Mutual Realty Company any the less an innocent purchaser. Even if the knowledge of such agent could be imputed to his principal, there is no proof in the record that Glassford had any knowledge of any illegal combination, or was in any way a party to such. His testimony, indeed (and his is the only testimony upon this point), is absolutely to the contrary. As far as the proof in this case, therefore, is concerned, the Mutual Realty Company is an innocent purchaser, and, at the time of the purchase of the tax deed from Wooledge, had no knowledge of any fraud committed at the sale; nor is the proof by any means conclusive that even the witness Wooledge, who made the purchase at the tax sale, was a party to any illegal combination. All that the witness Twitchell says is that "there was a meeting in the room where the sale was to be held just before the sale started, but nothing was done, except that we talked about the sale. About all there was there were trying to get the land at 24 per cent; that is, were trying to get the taxes sold at the maximum. We tried to enter into some kind of a deal and bid in rotation, and thus take the lands at the maximum. Nearly every one there agreed to it. They carried out this arrangement. . . . There may have been some time in the morning when the deal did not exist. My recollection is that Mr. Wooledge was a party to the arrangement. I remember Mr. Wooledge got quite a number of descriptions there; and I remember distinctly his calling these certificates and mortgages, and getting tracts in that way, without any competition. The Red River Valley Mortgage Company, represented by J. D. Wooledge, broke away from the agreement very largely, and got more than their share," —while the testimony of Mr. Wooledge is to the effect that he had no understanding with the other bidders, and was not present at the meeting of the bidders. The proof does not show such an absence of competition, connected with the land in controversy and the defendant, as would justify the court in setting the sale aside.

Nor do we believe that the defects in the notice to redeem would justify us in doing so. The plaintiff, by such notice, was fully acquainted with the amount of money which he was called upon to pay, and with the time within which he was required to redeem. He was informed of the tax sale for the taxes of 1904, and of the payment of

subsequent taxes of 1905 and 1906. His attention was also called, by the figure "1," followed by a dash, to the fact that some other year was, or probably had been, partially written in. Being the owner of the land, he must have known that the taxes for the year 1907 were not paid. The purpose of the notice was fully subserved. To overcome the presumption of regularity, it is not enough to show facts from which an inference of irregularity may be drawn, if they were not inconsistent with the existence of other facts which would establish the correctness of the proceedings. Case v. Dean, 16 Mich. 12.

The judgment of the District Court is affirmed.

MORRISSEY v. BLASKY, Justice of the Peace.

(134 N. W. 319.)

Justice of the peace — review of judgment by certiorari — discretion of reviewing court.

1. The district court, on a proper application and showing, issued its writ of certiorari in due form to review the judgment and proceedings of a justice of the peace. On the return day, the justice made due return to such writ, and the merits were duly presented to the district court; but such court thereafter quashed the writ, upon the ground that plaintiff had a plain, speedy, and adequate remedy at law. *Held* error. While the district court was, at the time of the application for the writ, vested with a sound judicial discretion to either grant or refuse the same, such discretion was exercised when the writ was issued, and after the case had been brought before it by the issuance of such writ and the return thereto the matter should have been adjudicated upon its merits. After proceeding thus far, no good purpose would be subserved by requiring the plaintiff to resort to some other remedy, even though another adequate remedy may have existed.

Justice of the peace — unauthorized continuance of case.

2. The record discloses that the justice lost jurisdiction by an unauthorized continuance of the case on an insufficient showing therefor by plaintiff. The failure to comply with §§ 8373 and 8374 R. C., operated to oust the justice of jurisdiction.

Opinion filed January 4, 1912.

Appeal from District Court, Eddy county; *J. A. Coffey*, J.

Certiorari by George W. Morrissey to review a judgment of A. W. Blasky, as Justice of the Peace in and for Paradise Township, Eddy county. From a judgment quashing the writ of certiorari, plaintiff appeals. Reversed, with directions.

Maddux & Rinker, for appellant.

George H. Stillman and *C. E. Scott,* for respondent.

FISK, J. This is an appeal from an order and judgment of the district court of Eddy county, quashing a writ of certiorari theretofore issued by that court to review the judgment rendered by respondent, as justice of the peace. Respondent made due return to the writ in the court below by certifying to the district court all its proceedings in the cause, including a certified copy of his judgment docket, together with an affidavit for continuance and certain other documents, not necessary to mention. Following is a copy of the docket entry aforesaid:

Be it remembered, that on the 26th day of September, 1910, a summons was duly issued in the above-entitled action, and made returnable before this court on the 10th day of October, 1910, at the hour of 10 o'clock A. M. Summons was given to F. C. Davies, sheriff of Eddy county, North Dakota, for service, which summons was duly returned into this court on the 10th day of October, 1910, showing due and legal service thereof, and same was filed in this office. On the 10th day of October, 1910, at the hour of 10:30 A. M. plaintiff appeared by its attorney, C. E. Scott, and moved the court for a continuance for thirty days, and presents affidavit for such continuance, showing that he cannot get his witness here at this time. Plaintiff's motion for continuance is granted and case continued for thirty days and case set for November 10th, 1910, at 10 o'clock A. M. On this 10th day of November, 1910, at the hour of 10 o'clock, plaintiff appears by its attorney, C. E. Scott, and asks for a further continuance of five days, which is granted and case set for November 15, 1910, at 10 o'clock A. M. On this 15th day of November, 1910, at the hour of 10 o'clock, plaintiff does appear by D. S. Rainey, representing said plaintiff, as manager, and by its attorney, C. E. Scott, and defendant does not appear, either in person or by attorney or otherwise, and after waiting one full hour and there being no appearance made on the part of the defendant as

hereinbefore mentioned, plaintiff, by its attorney, moves this court for order for judgment in favor of the plaintiff, the Callender-Vanderhoof Company, a corporation, and against the defendant, Geo. W. Morrissey, for the sum of one hundred fifty-six dollars and seventy cents ($156.70), with interest at the rate of 7 per cent per annum from and since the 26th day of December, 1908, and for the costs of this action. Now, therefore, on motion of C. E. Scott, attorney for the plaintiff, and upon the proof given, it is ordered and adjudged that the plaintiff, the Callender-Vanderhoof Company, a corporation, do have and recover of and from the defendant, Geo. W. Morrissey, the sum of one hundred seventy-seven dollars and seventeen cents ($177.17) debt and interest, and the further sum of eight dollars and ninety-five cents justice fees ($8.95), and the further sum of two dollars and sixty-five cents ($2.65) officers' fees and the further sum of seventeen dollars and seventy-two cents ($17.72) attorneys' fees, making in all the sum of two hundred six dollars and forty-nine cents ($206.49) debt and costs.

Given under my hand this 15th day of November, 1910.

A. W. Blasky,

Justice of the Peace in and for Eddy County, North Dakota.

And the following is the affidavit on which the justice continued the cause from October 10 to November 10:

State of North Dakota }
County of Eddy } ss.

C. E. Scott, being first duly sworn, deposes and says: That he is attorney for the plaintiff in the above action. That he has used all reasonable diligence to get the necessary witnesses, but has been unable to do so because of the fact that Mr. Dan Rainey, his witness for the plaintiff in chief, has been in the East and is at present in Minneapolis, Minnesota, and will be unable to be present for ten days. That if he is forced to trial to-day he will be unable to prove the plaintiff's case because of the absence of Mr. Dan Rainey: Wherefore he prays a continuance may be granted of thirty days to enable him to get Mr. Rainey.

C. E. Scott.

Subscribed and sworn to before me this 10th day of October, 1910.

A. W. Blasky,

Justice of the Peace in and for Eddy County, North Dakota.

On the return of the writ, the district court, instead of entertaining jurisdiction and adjudicating the cause on its merits, quashed the writ, on the ground that the plaintiff has a plain, speedy, and adequate remedy at law. In this we think the court committed error. While it is true that the district court was vested with a sound judicial discretion to grant or deny the writ when applied for, such discretion was exercised when the writ was issued, and after the case had been brought before it by the issuance of such writ and the return thereto the matter should have been adjudicated upon its merits, as disclosed by the transcript and record from the justice's court. After proceeding thus far, no good purpose would be subserved by requiring plaintiff to resort to some other remedy, even though another adequate remedy may have existed. In this connection, we might say that it appears that a remedy by appeal was not available to plaintiff, for the reason that he did not acquire knowledge of the entry of judgment in the justice's court until after the time for appealing had expired, and the only remedy which plaintiff had, aside from the remedy invoked by him, was an action in equity to enjoin the execution of the judgment; and it does not appear that this was a speedy and adequate remedy. In support of our conclusion that the district court exercised its discretion to grant or refuse the writ at the time the same was issued, see Independent Pub. Co. v. American Press Asso. 102 Ala. 494, 15 So. 947; also People ex rel. Second Ave. R. Co. v. Public Park Comrs. 66 How. Pr. 293, from which we quote as follows: "On the hearing of this case, a motion was made to quash the writ and to dismiss the proceeding upon several grounds, which were fully presented by counsel for the respondents. Some of these grounds may be well taken, but we think the case should be disposed of upon the merits, inasmuch as quashing the writ would simply remit the parties to another proceeding, and would necessarily result in greater delay."

In view of the fact that the record of the justice is before us on this appeal, this court will direct the entry by the district court of such judgment as it should have rendered.

It is perfectly apparent from the respondent's return that he lost jurisdiction by the first continuance. Such continuance was not made by consent of the parties, but the same was applied for under the provisions of § 8373, Rev. Codes. This statute, among other things, pro-

vides as follows: "The trial may be postponed upon the application of either party for a period not exceeding sixty days. 1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material and that he has used due diligence to procure it and has been unable to do so."

The next section provides that "no postponement shall be granted, as prescribed in the preceding section, for more than five days, unless the party applying for the postponement files an undertaking executed by a sufficient surety approved by the justice, to the effect that he will pay to the adverse party all costs which he shall recover in the action."

Neither of these sections were complied with, and we think it reasonably well settled that a failure to substantially comply therewith operated to oust the justice of jurisdiction. As said by Mr. Justice Wallin, in Benoit v. Revoir, 8 N. D. 229, 77 N. W. 606: "The rule sustained by the decided weight of authority is that a justice of the peace has no lawful right to grant continuances, other than that conferred by the statute. This is especially true in a state where, as in this state, the matter is fully covered by statutory provisions. See 4 Enc. Pl. & Pr. p. 892, and cases in the notes; also Rev. Codes, §§ 8367–8374. Nor is such error a mere irregularity, or error without prejudice. On the contrary, it is a jurisdictional error. See State v. Gust, 70 Wis. 631, 35 N. W. 559; Scullen v. George, 65 Mich. 215, 31 N. W. 841; Whaley v. King, 92 Cal. 431, 28 Pac. 579; School Dist. No. 7 v. Thompson, 5 Minn. 280, Gil. 221; Washington County v. McCoy, 1 Minn. 100, Gil. 78; Vicksburg v. Briggs, 85 Mich. 502, 48 N. W. 625; Redford v. Snow, 46 Hun, 370. These cases assert a rule which seems to be both sound and logical in holding that an unauthorized adjournment by a justice of the peace operates to discontinue the case and oust the jurisdiction."

The views of this distinguished jurist above quoted meet with our full approval. Applying such rule to the facts in the case at bar compels us to hold that the justice, by postponing the case for thirty days without the consent of the defendant, and without a sufficient affidavit showing the facts required by the statute to authorize such continuance, and without exacting an undertaking for costs, operated to oust the

court of jurisdiction. This being true, it is unnecessary to notice the other defects claimed by appellant to exist on the face of the docket entries.

The judgment appealed from is reversed, and the District Court directed to enter a judgment in appellant's favor, annulling the judgment of the Justice's court.

BURKE, J., not participating. Honorable S. L. NUCHOLS, of the Twelfth Judicial District, sitting in his place by request.

BAUER v. UNION CENTRAL LIFE INSURANCE COMPANY.

(133 N. W. 988.)

Corporations—service of summons on "managing agent."

Held, under the facts, that the purported agent upon whom service of summons was made, in an attempt to make service thereby upon the appellant, was not a "managing agent" of defendant insurance company, and such attempted service was void, and judgment ordered thereon vacated.

Opinion filed December 11, 1911. Rehearing denied January 6, 1912.

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

Action by Albert R. Bauer against the Union Central Life Insurance company. Judgment for plaintiff, and defendant appeals.

Reversed, and action dismissed.

Murphy & Duggan, for appellant.

W. M. Anderson, for respondent.

Goss, J. This is an appeal by the defendant from an order denying its motion to vacate a default judgment, procured after service of summons upon one M. F. Murphy, as its managing agent. No substantial conflict appears in the facts offered in support of the motion to

Note.—The general question of service of process on managing agent of foreign corporation is considered in a note in 23 L.R.A. 496. And the question who is a managing agent of a foreign corporation for purposes of service of process is the subject of a note in 4 L.R.A.(N.S.) 460.

vacate. The question to be determined is whether Murphy, at the time of service, was a managing agent of the insurance company (defendant), within the contemplation of our statute.

The motion was made upon the grounds that the service of summons was not made upon any officer or agent of defendant company upon whom, under the law, service of summons could be made. The affidavits and exhibits presented on this question disclosed the actual relationship between Murphy and the company. Murphy is a resident of Grand Forks, engaged in the real estate and loan business. Defendant company is a foreign corporation, created to carry on the life insurance business. It has appointed the insurance commissioner of this state, as provided by law, its agent for the service of process upon it in the state of North Dakota. It makes investments in real estate loans in portions of this state and in Minnesota, and for its convenience in doing so has a contract with Murphy. This establishes the scope of the agency existing between them. It consists of an agreement whereby the defendant, on May, 1909, appointed Murphy as its "financial correspondent to solicit and procure applications for loans" exclusively for it, upon certain terms, whereby the loans were limited, security described, and particular requirements provided for as to terms of the loans, privilege of payments, rates of interest to be exacted, the obtaining of insurance policies and abstracts of title, limiting special privileges to be granted to borrowers, the supplies to be furnished by the company, and the territory designated from which loans would be accepted; that security upon which loans were made should be examined and approved by Murphy; that he should draft all mortgages, notes, and other papers upon forms provided him by defendant, have them properly executed, recorded, and abstracts continued; and that Murphy should disburse the proceeds of the loans under authority to be obtained of mortgagors. Murphy was to collect all delinquent interest and taxes, and "to render such personal service upon the general business of party of the first part [defendant] without compensation as may be reasonably requested." He also agreed "to accept said appointment as financial correspondent, and faithfully perform, to the best of his ability, all and singular the obligations imposed upon him by this contract." Defendant reserved the right to suspend or abrogate the provisions of the agreement at any time Murphy's conduct of its affairs

were not satisfactory to it, but, unless abrogated, the contract continued in force for one year. It further stipulated that the ownership of all books, correspondence, checks, drafts, papers, and documents held by Murphy in connection with the business was the property of the company, to be delivered upon demand, and that Murphy should incur no expense in the making of loans, except his commissions provided under the contract; and that he should have "no authority to waive obligations, alter forms or blanks in any respect, or represent the party of the first part in any particular, except as herein set forth. The loan rates to be taken and the commissions to Murphy are provided for in detail as to each county in which loan operations were to be had, and as "additional expense" it was agreed that Murphy should be paid, "upon his request, $400 per month as expenses, provided not less than $480,000 of loans are closed during the year; the proportionate amount of this advance to be returned to the parties of the first part [defendant] by the party of of the second part [Murphy] if less than $480,000 loans are closed during the year."

Accompanying this contract exhibited is the affidavit of the treasurer of defendant company, reciting that the business of the corporation is writing life insurance, and that the investment of its accumulations in mortgages is but an incident of its principal business; that Murphy is not the president, secretary, cashier, treasurer, director, managing agent, or officer of said corporation, but that he is "a financial correspondent of said company, and in such capacity is authorized to submit to said corporation applications for loans to be secured by first mortgages upon real estate in certain counties of North Dakota; that if said applications are approved, said Murphy makes said loans with his own funds and upon his own credit, and said corporation agrees, after said loans have been made, to purchase them at some future time" with the surplus funds as they accumulate and need investment; "that Murphy is not authorized to, and does not in fact, solicit insurance for said corporation, and he is not authorized in any way to bind said corporation, or to transact its business for it in its behalf; that his only connection with said corporation is in the capacity of financial correspondent," as heretofore stated.

From the stationery upon which there is correspondence in evidence touching this matter, in which Murphy questions the sufficiency of the

service made upon him in a letter to plaintiff's attorney, there appears, as the letter head, the names of the treasurer and assistant treasurer and president of the company, and the words: "Financial Department, the Union Central Life Insurance Company. Office of M. F. Murphy, Financial Secretary, Grand Forks, N. D."

The foregoing constitutes the facts upon which the sufficiency of the service made is to be determined as a matter of law. The service was had under the following provision of statute: Service of summons may be had by delivering a copy thereof "if the defendant is a foreign corporation, joint stock company, or association, to the secretary of state, unless the defendant is an insurance company, in which case to the commissioner of insurance, or to the president, secretary, cashier, treasurer, a director or *managing agent thereof, if within the state, doing business for the defendant.*"

The decisions on this question are many. Most states have a similar statute; some, however, as Minnesota, omit the word "managing;" and others, as California, supplement it by the words "or business agent;" others, as New York, have a counterpart of our statute. The tendency of recent decisions is toward sustaining service, and recent decisions sustain, where early ones hold against, the sufficiency of service. It would seem that the nature of the business is also considered in determining service questions; the courts going to greater extremes to uphold service made upon a foreign corporation necessarily having a fixed situs or channel of business within the state, and from its nature necessarily in charge of and controlled by some agent who must necessarily manage, to a greater or less extent, such business. Of this the railroad business is an illustration, regarding which service may be had under the same statute by serving (as held in Brown v. Chicago, M. & St. P. R. Co. 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153), the summons upon any regular station agent within the state; such agent being held, from the necessity arising from the nature of the business transacted by him, to be a managing agent, within the meaning of this statute. In other instances, it depends upon the actual relationship existing between the agent and the principal, in determining whether the agent in each instance is a managing agent. The cases agree that an ordinary employee or servant is not a managing agent.

The contract between the appellant and Murphy, its financial cor-

respondent, very carefully limits the company's liability and responsibilities in every particular. The discretion delegated to Murphy pertains only to such matters as it would be impossible for the appellant otherwise to supervise or direct, such as examining and approving security. No discretion is granted him in the making of loans in terms, rates, or privileges, other than this approval of the land upon which they are to be placed; and the manner of performance is carefully outlined, and he held to that specified in the contract, with a broad reservation of authority and stipulation against his ability to bind the company. It further appears that after Murphy's approval of securities appellant's approval is necessary, and thereafter Murphy advances his own money, closes the loans, continues the abstracts, and, in fact, is the real owner of the mortgages subsequently negotiated until appellant accepts them and pays for them according to its previous approval had. It is true a great volume of business is contemplated by the contract, but this cannot change the stipulated method of its performance, any more than the nature of the business done, nor enlarge the scope of the agency as between the agent and principal, Murphy and appellant. Nor does the provision in the contract that Murphy shall "render such personal service upon the general business of the party of the first part without compensation as may be reasonably requested," in view of the fact that it is part only of a contract so definite in terms, and in which Murphy's powers are so limited, to any extent affect the situation. Construed with the entire contract, it would do violence to the intent of the parties, as it would to the rules for construction of contracts, to say that under this provision any appreciable addition of authority was conferred upon Murphy. It is noticeable that, whatever such personal service shall be, it is only as such as "may be reasonably requested," so that again the defendant company makes its request as a condition precedent to any extension of authority on Murphy's part.

"The term [managing agent] is evidently intended to include only such an agent as has charge and management of the ordinary business of the corporation within the particular locality, and who is vested with general powers, involving the exercise of judgment and discretion, in the management of the ordinary business transacted, at least within that locality." 32 Cyc. 551. One of the leading and well-considered cases (Federal Betterment Co. v. Reeves, 73 Kan. 107, 4 L.R.A.(N.S.)

460, 84 Pac. 560), following with approval Reddington v. Mariposa Land & Min. Co. 19 Hun, 405, says: "It is quite clear that the legislature attached importance to the term 'managing agent,' and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employee who acts in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of the work and the manner of executing the same. The distinction thus attempted to be drawn we deem reasonable and in harmony with the obvious purpose of the statute in regard to the service of process upon a foreign corporation." Not that it is necessary, in order to bind the company, that Murphy should have been an agent for general purposes, or agent to handle the general business of the company. Russell v. Washington L. Ins. Co. 62 Misc. 403, 115 N. Y. Supp. 950, from which we quote: "The statute does not mean that the whole business of the corporation shall be in charge of the agent to constitute him a managing agent. 'Every object of the service is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made."

Is this agency such as would, under these rules, reasonably warrant the conclusion that Murphy is a managing agent for the defendant? Can we say, in the light of the facts of this case, that a reasonable certainty exists that, in an action brought against defendant company to recover on a life insurance policy, with service made therein upon this agent, the agency is of such "sufficient character and rank to make it reasonably certain that the defendant will be apprised of such service?" Where is the evidence of any duty, express or implied, of this agent to inform his principal of this suit brought? Does the limited agency shown to exist measure up to what we can reasonably infer the legislature meant by the term "managing agent?" Not every agency answers thereto, or the word "managing" would not have been used in defining the relationship required. And could an agency exist with much less discretion left in the agent than that here shown? His duties are also, like his discretion, limited to and defined by his contract. Aside from the volume of business contemplated (whether performed or not does not appear), this agency rises but little above an employment. If this service be sustained as answering the statutory requirement, as be-

ing made upon a managing agent of a foreign corporation, every limited agency will suffice. Due process of law contemplates legal service prior to judgment. While unreasonable obstacles should not, by strained construction of the statute, be placed in the way of obtaining jurisdiction of foreign corporations, the reasonable safeguard of their business affairs required that the agent served have sufficient interest in the corporate affairs to owe it a duty of acquainting it of suit so brought against it. To require less might result in confiscation of property under guise of law. Recognizing this, legislative wisdom has defined the degree of agency required to bind the principal by service, and exacted that such agent be a "managing agent," or service be made upon the commissioner of insurance. See authorities cited in 12 Century Dig. § 2611; 5 Decen. Dig., under Corporations, § 507; 32 Cyc. 551, 552, notes and annotations; notes in 4 L.R.A.(N.S.) 460, and 23 L.R.A.(N.S.) 496.

We are constrained to hold that Murphy was not the managing agent of the defendant. It is ordered that the judgment of the District Court be reversed, and the same is vacated and annulled, and this action dismissed for want of jurisdiction of the defendant company.

ANDERSON MERCANTILE COMPANY v. ANDERSON et al.

(134 N. W. 36.)

Contracts — action on — plea of general denial.

1. Under the plea of general denial to an action upon the contract, the defendant may show that the contract between him and the plaintiff was a different one than that set out in the complaint, or that no contract at all was made.

Corporations —action by corporation against stockholders — condition.

2. *Held*, that where a managing agent of a general store stated an account with stockholders of the company, and allowed such persons to take out goods from the store for the purpose of trading out a balance found due and owing to them on such account, but that the allowance of part of such account was improper and unauthorized, being based on dividends in the company, which had not been declared by the directors of the corporation, the corporation could not afterwards sue for the value of such goods without first having repudiated the contract and demanded a return of the same.

Opinion filed December 9, 1911. Rehearing denied January 8, 1912.

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

Action by the Anderson Mercantile Company against Oscar R. Anderson and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action by appellant "for goods and merchandise sold and delivered during the year 1909, of the agreed worth and value of $240.39," to which the respondents filed an answer which denied "each and every allegation, and each and every part of each and every allegation in said complaint contained, except as hereinafter admitted, qualified, or explained," and alleged that "on or about the 13th day of January, 1909, an account in writing was stated between the plaintiff and the defendants, and upon such statement a balance of $237.82 was found due from plaintiff and agreed to be paid; that thereafter it was agreed by the plaintiff and the defendants that said balance due the defendants was to be traded out of the store of the plaintiff, and in accordance with said agreement defendants obtained the goods referred to in plaintiff's cause of action; that thereafter the plaintiff sold a trunk belonging to the defendants, for which it was agreed to pay said defendants the sum of $8.50; that by reason of the foregoing premises there is due the defendants the sum of $8.50, together with interest on $237.82 from January 13, 1909, at the rate of 7 per cent." The prayer did not ask for an affirmative judgment, but "for dismissal of this action, together, with their costs and disbursements herein." There appears in the answer no qualification of the general denial, in so far as the clause of the complaint is concerned, which alleges that the goods and merchandise of the agreed worth and value of $240.39 were sold to the defendants, and that the payment thereof had been demanded and refused. A verdict was rendered for the defendants, and the plaintiff has appealed to this court from the order of the trial judge overruling the motion for a new trial and rendering judgment against him.

Error was assigned on account of the action of the court in charging the jury that the burden of proof was upon the plaintiff, and not upon the defendants; in allowing the cross-examination to go beyond the examination in chief; in allowing evidence in regard to the account stated, which was alleged to be inadmissible since the managing agent of the store, who was alleged to have made the same and allowed credit

on account of dividends in the plaintiff corporation, had no power to assign them, such power being in the directors of the corporation alone; and generally because the evidence was claimed to be insufficient to support the verdict, there being no evidence that the dividends had ever been legally declared. There were also assignments of error based on the exclusion of evidence and alleged prejudicial statements of the court made in the presence of the jury, and for the giving and refusing of instructions in accordance with the theory of the court.

The facts of the case, which were found by the jury, and which are therefore binding on this court, were substantially: That the defendants went into the store of the plaintiff, of which Strand was general manager, and demanded, in cash, some $237.82, which they claimed to be due to them in dividends (what occurred is related by John T. Anderson, one of the defendants, and by Strand, the general manager). That John T. Anderson said that he and his brother had worked for the company for some time, and had credits coming from wages. That they owed something to the store for goods. That upon the 18th of January, 1908, he and his brother had a settlement with the company through its managing agent, Strand. That the different items were gone into between them. That concessions were made on his part, and that, after the different items were figured over, there was a balance of $237.82 agreed to be due to himself and his brother, and that he said to Strand: "Well, what will you do about this? Do you want to give us a note for that?" And that Strand said: "No, he did not like to give a note." "'Well,' I says, 'suppose we take that in trade. We will want a lot of barbed wire on the farm this summer, and a lot of stuff, and we will take it out in trade. How will that be? And he says, 'That will be all right.'" The witness Strand states the conversation somewhat differently, but the jury evidently believed Anderson. Strand testified that there was such a conversation, that he wrote the account stated, and his testimony merely differs from that of Anderson in that he claims that the settlement was conditioned upon the approval by the board of directors of the allowance of the dividends.

Middaugh & Cuthbert, for appellant.
W. M. Anderson, for respondents.

BRUCE, J. (after stating the facts as above). The answer of the defendant in this case is, to all intents and purposes, a general denial. What was said therein in regard to the account stated was surplusage, and that it was not necessary that it should have been pleaded. Under the general denial of the Code, the defendant may show that the contract between him and the plaintiff was a different one than that set out in the complaint, or that no contract at all was in fact made. 1 Enc. Pl. & Pr. p. 818; Starratt v. Mullen, 148 Mass. 570, 2 L.R.A. 697, 20 N. E. 178. See discussion in Vallancey v. Hunt, 20 N. D. 579, 34 L.R.A.(N.S.) 473, 129 N. W. 455–459.

The defense in this case was not a defense of payment or set-off or counterclaim, but merely that the defendants never agreed to pay for the goods at all, and that they took them in payment of an account stated and of a credit due and owing to them from the plaintiff. This was merely showing that the actual contract between the parties was a different one than that set forth in the complaint, and, as they asked for no affirmative relief, it was nothing more than a general denial. Whatever may be said as to the authority of the agent, Strand, to state the account and allow this credit, the jury, by their verdict, found that it was stated, and that it was unconditional if unauthorized, the plaintiff corporation should have repudiated it and demanded a return of the goods and if they were not returned they could have sued for their value. There is, in this case, no evidence of such repudiation. The agreement of the agent, Strand, was essentially a trade agreement, and the account contained many things besides the allowance of dividends. There was a give and take on both sides. The burden of proof was therefore upon the plaintiff to prove his cause of action; that is to say, to prove that the defendant agreed to pay for the goods at all. It is true that there is in the answer a claim for $8.50 for a trunk, which is separate from the account stated, and which, if pleaded affirmatively, might be looked upon as a set-off. But no affirmative judgment is asked, and both parties agree that the amount claimed was due and owing. The question of the burden of proof on this item, therefore, is immaterial.

These considerations not only dispose of the alleged errors in regard to the admission of evidence and the remarks and instructions of the court in regard to the burden of proof, but the assignments for the alleged errors in allowing the cross-examination to extend beyond the

limits of the examination in chief. The examination in chief was for the purpose of showing an agreement on the part of the defendants to pay for the goods in controversy. The burden was upon the plaintiff to prove the contract of sale and purchase, and the examination in chief was for the purpose of meeting this requirement. Anything that would disprove the agreement was proper cross-examination, and it was for this purpose only that the examination was extended. So, too, the errors of the court in striking out portions of the answers, if errors they were, can hardly be looked upon as grounds for reversal. They were chiefly to be found in connection with questions as to the authority of the manager to declare dividends, and under our theory of the case such evidence was immaterial. Even if it could be considered material, the errors could easily have been cured by cross-examination, as the principal reasons given for the exclusion of the portions of the answer were that they were not responsive to the questions.

The judgment of the District Court is affirmed.

McKENZIE v. GUSSNER et al.

(37 L.R.A.(N.S.) 918, 134 N. W. 33.)

Cloud on title — parties to suit to remove.

1. It is not ground for nonsuit that persons having equitable interests, other than ownership, in real property, title to which is sought to be quieted, are not made parties plaintiff, when such persons participate in the action, through the plaintiff, to an extent that the decree will bind them equally with the parties to the action, when the action is maintained by the record owner as the real party in interest.

Note.—In harmony with the decision in McKENZIE v. GUSSNER, it is held in Williamson v. Jones, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19, that one making permanent improvements on land as if his own, at a time when there was reason to believe his title good, is to be allowed their value so far as they enhance the value of the land, but that if, when making them, he has notice, actual or constructive, of the superior right of another, he cannot be allowed them.

As to what is color of title which will support a claim for improvements, see note in 81 Am. St. Rep. 171.

Improvements on real estate — compensation for — color of title.

2. A claim for betterments to realty by permanent improvements made thereon is not established by proof of the placing of permanent improvements on the real property of another under no claim, right, or title thereto; nor can the purchase, several years thereafter, of a void but purported title, under which to claim color of title to such realty, permit the allowance of such a claim for betterments, under the provisions of § 7526 of the Code. The good-faith claim of title to realty must precede the making of such improvements; otherwise the claimant for betterments is not holding realty under color of title, and adversely to the plaintiff, from whom he seeks recovery for such improvements made.

Opinion filed December 11, 1911. Rehearing denied January 13, 1912.

Appeal from District Court, Morton county; *Crawford,* J.

Action by Alexander McKenzie against Steven Gussner and others. From a judgment for plaintiff, defendants appeal.

Modified, and affirmed.

M. A. Hildreth, for appellants.

W. H. Stutsman and *Geo. P. Flannery,* for respondents.

Goss, J. Plaintiff brings this action to determine adverse claims and quiet title to several hundred lots in additions to Mandan. Defendants Gussner assert an interest to certain lots, and counterclaim, under § 7526, Revised Codes 1905, for permanent improvements placed thereon by them. The trial court allowed defendants a recovery, aggregating $1,637.99, consisting of taxes paid and $500 for a stone foundation on lots 7 and 8, $450 for the value of a dwelling house on lots 14 and 15, and $400 for a barn upon lots 1 and 2, of the tracts in dispute. The amount of recovery was adjudged a lien upon the premises, and, subject thereto, title was quieted in plaintiff, conditioned upon the payment within a limited time of such allowance for betterments. From this judgment, defendants appeal, demanding a retrial of all issues of law and fact, and assigning as error "that portion of the third finding of fact, wherein the value of dwelling house on lots 14 and 15 is fixed at $450, and the value of the barns and fences on lots 1 and 2 is fixed at the value of $400." To this respondent contends that nothing should be allowed for the stone foundation in question, nor for the improvements on lots 1 and 2, nor for taxes. We are satisfied, however, that these allowances as to foundation and taxes were proper and not excessive,

and eliminate them from further consideration. The inquiry remaining concerns improvements, consisting of a barn on lots 1 and 2 and a dwelling house and appurtenances on lots 14 and 15, with an additional question of law involved in the court's refusal to dismiss the action, on motion made at the close of the case, for nonjoinder of parties plaintiff.

We will first consider this last question. Plaintiff deraigns title from the patentee, and has had record title since 1882 to an undivided two-thirds interest in said property. Prior to the commencement of this action, through various channels, the remaining undivided one-third interest was vested by deed of record in plaintiff. Charles McDonald and William Simpson have a joint unrecorded interest with plaintiff in all this property, by reason of advancements for taxes paid and expenses incurred and work done by them, aggregating $2,500 or $3,000. Plaintiff, McDonald, and Simpson have an understanding, whereby, at the termination of these proceedings, and dependent on final judgment, a division of the property or adjustment of interests therein will be had. And to evidence the same, and to secure the advancements made, McKenzie executed and delivered an instrument, in form a deed of a one-third interest in the property, to Simpson, prior to the commencement of this action, and that pending trial said deed was returned for correction, and another such deed to Simpson and McDonald, in lieu thereof, issued by a land company, in whose hands McKenzie had placed these property matters, but such deed is subject to correction after adjustment of expenses of the litigation and final determination is had of the property recovered. Simpson, in behalf of himself and McDonald has actively participated in the prosecution of this action, talking with plaintiff about it, procuring witnesses and evidence, and he and McDonald, pursuant to an understanding had, intend to pay their share of the expenses of this litigation, including attorney's fees. Simpson testifies to these matters and to his interest to the above extent in the outcome of the suit.

The action is brought in the name of the record owner, the plaintiff. Under any phase of the testimony, he is the real owner thereof, and any deed to an undivided portion thereof is but security against loss for advancements made plaintiff, and for a future adjustment of equities. The deed evidences a security transaction, and is but a mortgage. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; O'Toole v.

Omlie, 8 N. D. 444, 79 N. W. 849; Wells v. Geyer, 12 N. D. 316, 96 N. W. 289; Merchants' State Bank v. Tufts, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; Smith v. Jensen, 16 N. D. 408, 114 N. W. 306; Miller v. Smith, 20 N. D. 96, 126 N. W. 499. And the interests of Simpson and McDonald under the record are bound by the judgment rendered herein, and are as fully litigated as though they were parties to this action. Boyd v. Wallace, 10 N. D. 78, 84 N. W. 760; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Hart v. Wyndmere, 21 N. D. 383, 131 N. W. 271, at page 277, and authorities there cited. We quote from the opinion in Boyd v. Wallace: "One who is not a party defendant on the record in an action, but who participates in the defense, and has an interest in the matter in controversy in the action, and participates in the defense for the protection of such interest, . . . and where it is known to the plaintiff that such party so participates for the protection of his own interest, is bound by the decree rendered in the action." The converse of the proposition is equally true, and a party so acting through another as plaintiff is, under the same circumstances, himself bound by the judgment. Plaintiff's interest makes him a proper and necessary party plaintiff. Simpson's and McDonald's equitable interests appearing, they were proper parties to the action, had they been made such; but no application therefor was made, and they not being necessary parties, and being bound by the judgment rendered under the record, neither the interests of plaintiff nor defendants are prejudiced by their omission as parties to the action. The motion to dismiss for failure to join Simpson and McDonald as parties plaintiff, and because the action is not brought in the names of the real parties in interest, is without merit.

Defendants counterclaim for improvements under § 7526 of the Code, providing: "In such case he may also set forth a counterclaim and recover from plaintiff or a codefendant for permanent improvements made by him or those under whom he claims holding under color of title in good faith adversely to the plaintiff or codefendant against whom he seeks a recovery." Based on this statute, defendant claims to recover the value of the dwelling house on lots 14 and 15, fixed by the trial court at $450, and claimed by appellant to be worth $1,800. An examination of the record discloses a purchase of lots 14 and 15 in 1906 for $800, with the lots of the value of $500. From other testimony,

including a description of the house at the time of suit, we are satisfied with the trial court's findings as to this item. And the evidence sustains the findings as to the right of defendants' recovery; defendants claiming title to lots 14 and 15 based upon a deed, it a part of a purported chain of title reaching back many years; color of title having its inception in a void tax deed, issued in 1891.

But as to defendants' claim for betterments for the barn placed upon lots 1 and 2, a different question is presented. This barn is claimed to be owned jointly by Steven and George Gussner. It was placed upon these lots in 1903 and 1904, having been built elsewhere and moved thereon. In May, 1908, before the commencement of this action in September of that year, the original owner of the land, who, years before had transferred by warranty deed his interest therein to plaintiff and others, quitclaimed to Steven Gussner, for an alleged consideration of $800, lots 1 and 2, and other lots. Steven Gussner transferred in the same month part of said lots to his wife, and lots 1 and 2, with other tracts, for a consideration of $500, to George Gussner. This deed to Steven Gussner constitutes defendants' first color of title to lots 1 and 2, and it appears to be the first time defendants ever asserted ownership to these two lots.

Steven Gussner's testimony on this is as follows:

Q. You knew at the time [1904] you didn't own anything down there except lot 21?

A. That's the first lot I bought.

Q. And these other lots belonged to ———.

A. I understand they belong to Helmsworth.

Q. Then you, in 1904, paid $48.95 taxes for 1903 on all these lots, didn't you?

A. Yes.

Q. At that time you had absolutely no claim to these lots at all?

A. No.

Q. How did you come to pay these taxes?

A. I was up to the courthouse and listening, and there was a lot of lots for sale, and I went to work and bought some tax title to it.

Q. You mean, in 1904, you bought these lots at a tax sale?

A. Yes.

Q. Got certificates for them?

A. Yes, sir.

Q. Now you were using these lots at that time, weren't you?

A. I never used them.

Q. You had fences around them?

A. I put a fence around to keep the cattle out.

Q. You put a big barn on them?

A. Yes, sir; I put a big barn on.

Q. That was six or seven years ago?

A. Yes.

Q. That was put on the time you paid the taxes?

A. Paid the taxes before.

Q. You have been using these lots all these years?

A. They was always laying idle most of the time; the barn is on there now.

Q. Now, when you paid these taxes for 1904, you simply paid it to get the use of the lots?

A. No; I came up there; I had to pay some taxes anyway, and I bought them.

Q. Now in 1907 you bought in these lots for the 1906 taxes, and paid $17.46 at the tax sale, didn't you?

A. Yes, sir.

Q. Now, what was your idea in doing that, to get title of your lots?

A. Well, I got a fence down there, and so I kept the fence around there.

Q. You wanted to keep other people from moving on these lots?

A. Yes, sir.

The reason for the defendants' failure to claim ownership until the obtaining of the quitclaim deed in 1908 is further shown by the uncontradicted testimony of William Simpson, who testifies to a conversation had with Steven Gussner on or about the 3d day of December, 1907, two or three days after the tax sale that year, in which the witness told Gussner that McKenzie was going to redeem from the tax sales, and that if he, (Steven) intended to get a tax deed he would never get it; Steven replying: "I am not; I only want to use the lots. I am paying those taxes in order to get the use of the lots." And nowhere in the record

do the defendants claim ownership prior to the obtaining of the quit-claim deed in 1908. And the only claim in the answer of defendants as to the improvements to lots 1 and 2 is: "That on or about the 1st day of July, 1908, the said defendant George Gussner, together with defendant Steven Gussner, placed on said lots 1 and 2 a large frame barn, the reasonable value of which is $1,500, in good faith, and in the belief that the defendants George Gussner and Steven Gussner had good title to said lots 1 and 2; and the defendant George Gussner claims a lien on said lots 1 and 2 for the sum of $1,500, with legal interest thereon from the 1st day of July, 1908."

It is plain that neither in the pleadings nor the proof is there any pretense or claim whatever of ownership of these lots 1 and 2, until five or six years after the barn in question was moved thereon. At the time the improvements were made, therefore, they could assert no claim whatever to lots 1 and 2. Defendants knowingly affixed these permanent improvements upon the property of others without leave or license or semblance of title. They were mere trespassers, and as such it is elementary that they are not entitled to compensation for improvements made thereon under the circumstances. See Nesbitt v. Walters, 38 Tex. 576; Stille v. Shull, 41 La. Ann. 816, 6 So. 634; New Orleans & S. R. & Immigration Asso. v. Jones, 68 Ala. 48; Stamper v. Bradley, 21 Ky. L. Rep. 806, 53 S. W. 16; Carpentier v. Mitchell, 29 Cal. 330; Fischer v. Johnson, 106 Iowa, 181, 76 N. W. 658; Hawke v. Deffebach, 4 Dak. 20, 22 N. W. 480; Wood v. Conrad, 2 S. D. 334, 50 N. W. 95; Seymour v. Cleveland, 9 S. D. 94, 68 N. W. 171; Skelly v. Warren, 17 S. D. 25, 94 N. W. 40; 22 Cyc. 16, under note 72; 27 Century Dig. Improvements, § 7. "A mere trespasser who makes no claim of right or title, and merely hopes some day to purchase the land, cannot burden it with charges for improvements." 16 Am. & Eng. Enc. Law, 86.

The claim of the defendants Gussner for compensation for these improvements under the statute (§ 7526) cannot be allowed, and the contention of the respondent as to this item is sustained. The $400 allowed by the trial court for the improvements of lots 1 and 2 was erroneous, and the judgment appealed from is modified by a reduction in said amount ($400) as of the date of entry of judgment, and as so modified the judgment of the trial court is affirmed. Neither party is to recover costs of this court on this appeal.

INVESTORS' SYNDICATE v. LETTS et al. (BEYER, Intervener.)

(134 N. W. 317.)

Assignment of mortgage — suit for rescission — judgment as res judicata.

1. B., the intervener, assigned the mortgage involved in this suit to a corporation. Believing himself defrauded, he brought suit in the United States courts for a rescission, but was defeated. The corporation sold the mortgage to the plaintiff, who brought this suit in foreclosure. B. intervened, alleging the same fraud and rescission, and asks this court to declare him the owner of the mortgage. *Held*, that the decision of the United States court is *res judicata*.

Intervention — by minority stockholder in action to foreclose mortgage — right to have corporation annulled.

2. Even if the intervener might, as a minority stockholder in the corporation, defeat the transfer of the mortgage to the plaintiff, in a proper suit, and compel the return of the mortgage to the corporation, yet this will not support intervener's allegation that he, personally, owns the mortgage. This court cannot wind up the affairs of a foreign corporation, even when a party to the suit. In a foreclosure suit, an intervener must take the suit as he finds it, and cannot change to an action to annul a corporation. Plaintiff has proved his case, and is entitled to judgment.

Opinion filed December 9, 1911. On application for rehearing January 25, 1912.

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

Action by the Investors' Syndicate against J. S. Letts and others, in which J. F. Beyer intervenes. Judgment for defendants, and plaintiff brings error.

Reversed.

Bangs, Hamilton, & Cooley, and *Savage & Purdy*, for appellant.

M. A. Hildreth, for respondent.

BURKE, J. In the year A. D. 1888, the defendants Letts, being the owners of a quarter section of land in Stark county, North Dakota, gave thereon the $500 mortgage involved in this suit. The indebtedness matured five years later, but has never been paid. In the year 1895, some two years after the said mortgage had matured, one Williams, a pro-

moter, met the Lettses, and together they decided to organize a corporation to develop a lignite coal mine upon the land in question and adjoining lands. A charter was obtained, but such corporation never exercised its powers, principally because none of the incorporators had any actual money. Later in the year Williams decided to take in somebody with money, and Beyer, the intervener, was selected. A new corporation was organized, known as the "North America Coal & Mining Company." Its capital stock was $50,000. The Lettses were to contribute their equity in the quarter section already mentioned and another tract of land, and were to receive therefor $10,000 in stock of the new corporation. Beyer was to buy up the various mortgages against the land, pay the back taxes, etc., and turn them in, together with cash enough to make up the total sum of $3,440, and was to receive $10,000 in stock. Williams was to turn in a quarter section of land and his services as promoter for the remaining $30,000 stock. His share of the stock was taken in the name of himself, his wife, and his brother-in-law. Beyer thus came to buy up the $500 mortgage and assign it to the North America Coal & Mining Company. Said corporation, later on, assigned it to the plaintiff herein.

After the organization of the new corporation, Beyer acted as a director and as treasurer until 1898, when he resigned both offices. This corporation did nothing towards developing the mines, because it had no money. Beyer seemed to think Williams should develop the mines, and Williams insisted that such duty should be borne by the corporation, and tried to find some person who would loan money to it. Finally, about 1899, the plaintiff, as they claim, advanced some money to the corporation, and took over the $500 mortgage, as already mentioned. Needless to mention, this money was not used to develop the mines, but was used to pay Williams' back salary, whereupon Beyer became very wrathy, and began an action to rescind the entire transaction, alleging fraud, and asking that the assignment of the mortgage in question be set aside, as having been obtained from him by deceit. This action was brought, first, in the state and later in the United States courts. The Lettses joined with Beyer in bringing the suit, while Williams, his wife, brother-in-law, the two corporations organized by him, and the plaintiff herein were made defendants. After a trial upon the merits, a decision was rendered, dismissing plaintiff's bill upon the merits. The opinion of

the United States district judge is quoted below in part. This is very important, as the plaintiff contends that such decision is *res judicata* of the issue raised by the intervener herein. The United States court recites the above facts, and says: "As to Mr. Beyer's position in the matter, I am unable to find in any of the statements that were made any false or fraudulent representations. We will assume that Mr. Williams stated to him that there were veins of coal in that land. There is no evidence that there are not veins of coal in the land. There is no evidence that Williams stated to him that the mine had been opened and developed, so that the real character and quality and extent of those veins could be ascertained. . . . Mr. Beyer writes, before he ever had turned over any of these mortgages, that he had ascertained that the property was worth only $3,200. . . . I do not think there were any representations that would entitle Mr. Beyer to rescind his transactions. . . . I do not see how there is any course for me to adopt at this time, but to dismiss the bill upon the merits."

Had the decree closed here we think there would be no contention that it was not an adjudication of the issues involved in the case at bar. However, the said United States court continued its decree or opinion with what seems to us to be clear *dictum,* as follows: "As to the advancements of money by the Investors' Syndicate, there are some suspicious circumstances there. . . . I think the evidence would justify the belief that Tappen (secretary of plaintiff) and Williams had a full understanding in regard to it; . . . that the transaction that has been disclosed here was developed for the purpose of putting the Investors' Syndicate in a better position in respect to those loans by a mortgage on the property. I do not find it necessary, however, to pass a decree upon that subject." The court then goes on with some advice to the plaintiff, as follows: "What ought to be done would be to wind up this corporation. . . . This court has no authority to do it. . . . An application in Minnesota, if it has been made there, to wind up these corporations and impound their property for the benefit of those who actually contributed it, would, I suppose, meet with the approval of the courts of that state."

It seems very clear to us that the effect of the above decision is that, in the inception of the North America Coal & Mining Company, and in the assignment to it of the $500 mortgage, there was no fraud practised

upon Beyer that would entitle him to a rescission of the transactions; and the said court expressly declines to say whether there was fraud in the next transfer of the mortgage from the North America Coal & Mining Company to the Investors' Syndicate. It appears from the record that Beyer did actually bring a proceeding in the Minnesota courts, under a special statute of that state, asking that the North America Coal & Mining Company be dissolved and the assets distributed, but the Minnesota court dismissed such proceedings, because not brought in conformity with the statute (99 Minn. 475, 109 N. W. 1116).

After the two decisions above mentioned, the Investors' Syndicate read its title to the mortgage clear, and began the action at bar to foreclose it. Beyer intervened in the foreclosure action, alleging that the assignment of the mortgage was obtained from him by fraud, offering to return the $10,000 stock received by him, and asking as relief that he (Beyer) be declared to be the owner of the mortgage, and that the Investors' Syndicate have no title therein. To the allowance of this complaint in intervention, the Investors' Syndicate raises several objections. They insist that if it be considered an attempt to rescind, as is clearly indicated by the offer to return the stock, that the decree of the United States court is a bar; and that, if it be considered an attempt to have this court wind up the corporation and disburse its assets on account of the misconduct of Williams in conducting the affairs of the North America Coal & Mining Company, he is superseding the foreclosure action entirely, and substituting in its stead an action between the North America Coal & Mining Company (which is not even a party to this suit) and the Investors' Syndicate, upon the motion of Beyer, who is only a minority stockholder, and who has in his pleading repudiated such stock and tendered it back to the corporation. Many other strong objections are made to the right of the intervener to recover the title to the mortgage, but we think the above are sufficient.

(1) From the relief demanded in the intervener's complaint, it is clear that he treated the application as a rescission of his dealings with the North America Coal & Mining Company, and as such it is barred completely by the decree of the United States courts. Beyer has made one attempt to maintain just exactly the same claim he makes in this complaint, and he was then defeated. He cannot ask us to try that issue again. The United States court has decided that Beyer legally parted

with his title to this mortgage. He has not since regained such title. Therefore he must fail in this action.

(2) At the time of the oral argument in this court, Beyer, ignoring the fact that his complaint in intervention alleged a rescission of the contract, whereby he obtained the stock in the North America Coal & Mining Company, and his offer to return such stock to the company, said: "The proposition resolves itself into this: Can a minority stockholder defeat a party who is seeking to control or to get control of the assets of the corporation fraudulently?" We do not think the point material. Conceding that Beyer is a minority stockholder (notwithstanding his pleading that he is not), and further conceding that he might, in a proper action, defeat an effort of Williams and the plaintiff to rob the North America Coal & Mining Company of this mortgage, and further conceding that he might win in such a suit, yet the net effect of such a chain of suppositions would be to place the title to the mortgage in the North America Coal & Mining Company, where the United States court's decision will stop the chain of return towards Beyer. This state of affairs will not support the allegation in Beyer's complaint in intervention that he (Beyer) is the owner of the mortgage. He cannot ask us to wind up the affairs of the North America Coal & Mining Company, and upon impounding its assets give to him the mortgage, for two reasons at least: First, it is a Minnesota corporation, not under our jurisdiction, and not even a party to this suit; and, second, this is a foreclosure action, and intervener cannot change its nature to one to wind up the affairs of a corporation. Beyer must therefore fail in this action.

The plaintiff has proved each of the allegations of its complaint; the Lettses made no defense; Beyer made no defense for them. His claim was that he owned the mortgage, and that the mortgage should be foreclosed. Therefore it follows that the plaintiff is entitled to judgment of foreclosure as prayed for in its complaint. The trial court will so order.

On Application for Rehearing.

After the statement of the case had been settled by the trial court, the respondent claimed that there had been omitted therefrom two exhibits offered by him at the time of the trial below. He moved this court

for a dismissal of the appeal, upon the grounds that the full record was not before this court. This court thereupon made an order that the record be returned to the lower court, to be there corrected and returned to us. Appellant, upon notice, obtained from the trial court an order correcting the statement, so as to include the two exhibits formerly omitted. When the case was reached for argument here, respondent objected to the jurisdiction of this court, upon the ground that the statement of case should have been resettled by giving the same notice provided in original settlements. This is wrong. The case was sent back by us for correction merely. The particulars were set forth in our order, and the trial court had nothing to do but to comply therewith. This was done and so certified. This court therefore has full jurisdiction of the case.

There is no merit in the other matters set forth in petition for rehearing, and such application is denied.

STATE EX REL. POOLE v. PEAKE, Adjutant General.

(40 L.R.A.(N.S.) 354, 135 N. W. 197.)

Relator, Thos. H. Poole, as brigadier general (retired) of the National Guard of this state, was tried and convicted by a general court-martial of certain alleged felonies claimed to have been committed by him in violation of the Articles of War of the United States. The judgment and sentence of such court-martial, which dismissed him from the National Guard, were approved by the governor and commander-in-chief of the Militia, by the issuance of an order accordingly. Relator sued out a writ of certiorari in the district court of Burleigh county for the purpose of obtaining a review of such judgment and order. This appeal is from the judgment of that court, holding the judgment and order aforesaid null and void as being without and in excess of jurisdiction. *Held:*

Court-martial — certiorari to review.

1. That certiorari is a proper remedy to review the proceeding of a court-martial for the purpose of determining whether it exceeded its jurisdiction.

Note. — The question whether state Militias are subject to the Articles of War of the United States in times of peace has been passed upon in but few cases, as shown by a review thereof in a note appended to the report of above case in 40 L.R.A.(N.S.) 354. Such authority as there is, however, supports the rule adhered to in this case.

Articles of War of United States — effect on state Militia in times of peace.

2. The Articles of War of the United States do not govern the Militia or National Guard of this state in times of peace, and consequently relator was not amenable to general court-martial for the alleged violations of such Articles of War. Hence, the district court properly held that the judgment and sentence of such court-martial, and the order of the governor and commander-in-chief approving the same, were null and void because in excess of jurisdiction.

Opinion filed January 6, 1912. Rehearing denied March 23, 1912.

Appeal from district court, Burleigh county; *W. H. Winchester,* J.

Certiorari to review the proceedings of a general court-martial. From a judgment in relator's favor, defendant appeals.

Affirmed.

Andrew Miller, Attorney General, *Melvin A. Hildreth,* Brigadier General National Guard (retired) Judge Advocate, for appellant.

Engerud, Holt, & Frame, for respondent.

Fisk, J. While fully realizing that we are in no manner responsible either for the facts or the law which must control in disposing of this appeal, the duty which has been assigned the writer of giving expression to the view of the court is not a pleasant one, owing to the nature of the litigation, and more especially in view of the fact that our conclusion does not coincide with the views entertained by the chief executive of the state, as well as by prominent officers of the National Guard who were instrumental in instituting and prosecuting the proceeding before the general court-martial, hereafter mentioned, out of which proceeding this litigation arose. Although the views of these high officials of a co-ordinate branch of the state government are entitled in case of doubt to much respect and weight relative to the extent of the powers delegated to them by the Constitution and statutes, yet such views, when clearly erroneous, must be declared so by the courts, and the acts of such officials, when manifestly in excess of jurisdiction, must be adjudged null and void whenever their legality is properly challenged in court, for otherwise the court would not be discharging its constitutional duty.

The facts necessary to a full understanding of the questions involved

are correctly stated in appellant's brief, and in substance are as follows:

This cause comes to this court on appeal from a judgment of the district court of the sixth judicial district, entered on the 8th day of January, 1911, which in effect vacates and annuls the findings and sentence of a general court-martial which found the respondent, Thomas H. Poole, guilty of having violated the Military Code of this state, and dismissing him from the service of the National Guard of the state.

"The respondent was tried before a general court-martial on the 12th day of January, 1909. He was found guilty of having violated both the 21st and the 61st Articles of War, and sentenced by the court "to be dismissed from the service of the National Guard of the state of North Dakota." This sentence was approved by the governor of the state. On the 7th day of August, 1909, on application of respondent a writ of certiorari was issued, directed to Amasa P. Peake, as adjutant General of the state, requiring him to certify and transmit to the district court of the sixth judicial district a true and full record of all the proceedings of said general court-martial and the orders of the governor, and praying that all the said proceedings be declared null and void, and that the respondent be restored to his rank of a brigadier general (retired) in the North Dakota National Guard. The court made findings and an order for judgment, which adjudged and determined that "the order made and issued by Honorable John Burke, as governor and commander-in-chief of the National Guard of the state of North Dakota, on the 12th day of January, 1909, directing and ordering that a general court-martial be convened to hear and try certain charges and specifications against the relator, Thomas H. Poole, be and the same is hereby held to be null and void and without jurisdiction. And said court-martial convened and held pursuant to said order, and all its proceedings and acts, sentence, and judgment are hereby set aside and annulled; and it is further adjudged, determined, and decreed that the order of the Honorable John Burke, as governor and commander-in-chief, made March 1, 1909, approving the proceedings, findings, sentence, and judgment of said court-martial, and purporting to remove and discharge said Thomas H. Poole from the organized militia of this state, and depriving him of his rank as brigadier general on the retired list, is hereby declared null and void, and of no effect."

The assignments of error challenge the jurisdiction of the court below to inquire into the validity of the proceedings before the general court-martial or to enter the judgment appealed from. Notwithstanding the statement to the contrary in appellant's additional memorandum brief filed herein, no question was raised in that court that certiorari is not an appropriate remedy, but appellant's contention there was merely as above stated. In such additional brief, counsel assert that such question was squarely raised in the court below on the motion to quash the writ. In this, they are clearly in error. In the first place such motion and the ruling thereon are not properly before us, as no statement of the case was settled. Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50.

In the second place, conceding for the sake of argument, that they are properly before us, such motion to quash did not raise such question. The grounds of the motion are in substance as follows:

1. It appears on the face of said writ that the general court-martial complained of was legally assembled, organized, and constituted.

2. That said Thomas H. Poole was at the time a member of the National Guard of the state of North Dakota.

3. That said court-martial had jurisdiction over the person of Thomas H. Poole.

4. That said court-martial had jurisdiction over the subject-matter.

5. That said court-martial, acting within its jurisdiction, rendered judgment finding the defendant guilty as charged in the specifications.

6. That his excellency, the governor, as commander-in-chief of the National Guard, approved said judgment, and

7. That this court is without jurisdiction to inquire into, review, or question the proceedings of said court-martial or the orders of the governor and commander-in-chief in relation thereto.

It is therefore clearly apparent from the above that no question as to the correctness of the remedy invoked was made in the court below, as each ground of the motion went to the merits, and consequently appellant is not in a position to raise such question for the first time in this court. But if we could brush aside these well-settled rules of practice we would nevertheless be obliged to overrule appellant's contention, for it is entirely clear that certiorari is an appropriate writ to review the proceedings of such court-martial for the purpose of de-

termining whether it exceeds its jurisdiction. While it is no doubt true that it was not a court within the meaning of §§ 85 and 86 of our state Constitution, nor within the meaning of § 7810, Rev. Codes, it was a tribunal within the meaning of the statute aforesaid; and its acts may be inquired into through the use of such writ, not for the purpose of correcting any mere errors which may have been committed by it, but solely for the purpose of determining whether such tribunal exceeded its jurisdiction. It would be strange, indeed, if this could not be done, for otherwise great injustice might be inflicted on a person by such a tribunal while acting wholly without jurisdiction, and yet such aggrieved person might have absolutely no redress. Our attention has been called by counsel to no authority sustaining appellant's contention. The case of State ex rel. Poole v. Nuchols, 18 N. D. 237, 20 L.R.A.(N.S.) 413, 119, N. W. 632, cited by appellant, is not in point. In that case we held, it is true, that a court-martial is not an inferior court within the meaning of § 86 of the Constitution, as it belongs to the executive, and not to the judicial, department of the state; but we also there said: "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." See, in this connection, the valuable note to said case as reported in 20 L.R.A.(N.S.) 413, wherein the authorities are reviewed at length, and they will be found to support our views as above expressed. One of the leading cases is that of People ex rel. Smith v. Hoffman, 166 N. Y. 462, 54 L.R.A. 597, 60 N. E. 187, wherein that great court, speaking through Judge Vann, most thoroughly considered this point which was the sole question before it, and reached the conclusion that certiorari will lie. The appellant's contention in the case at bar is there most effectually answered, and the reasoning and conclusion of the court meet with our full approval.

This brings us to the merits, which involve the question whether the general court-martial had any jurisdiction to try the relator for the alleged offenses charged against him, and render its judgment and sentence dismissing him from the National Guard. If this question must be answered in the negative, it, of course, necessarily follows that such judgment, as well as the order made March 1, 1909, by the Gov-

ernor as commander-in-chief, approving the findings and judgment of such general court-martial, and purporting to dismiss relator as an officer in the National Guard, are nullities, and he would still retain his rank in the Guard as before.

We will now notice some of the principal contentions of the respective parties. They are widely and radically at variance and involve numerous propositions of law, but we shall consider only those which we deem controlling and decisive of the appeal. Relator's chief contention is that he was not amenable to a court-martial at all, because he was not a militiaman in active service, and there was no war or public danger. In other words he plants himself squarely on the constitutional guaranty found in § 8 of the state Constitution, and also in the 5th Amendment to the Federal Constitution. Section 8 reads: "Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. . . ." He asserts that said sections clearly forbid prosecutions of militiamen for felonies by court-martial, except when such militiamen are in actual service in time of war or public danger, and that the charge on which he was thus convicted are felonies. Also that at the time of such trial and conviction there was no law in this state authorizing a court-martial for the trial of a person charged with any crime; that the Articles of War do not govern the militiamen except while in actual service.

It is needless to detail appellant's contentions. They are squarely opposed to those of the relator. We are compelled to uphold relator's contentions, and will proceed to point out what we deem to be the basic fallacy in appellant's argument. His counsel apparently wholly ignore the radical and fundamental distinctions between the militia of the state and the regular Army and Navy of the United States, and the laws governing each. Such distinction is perfectly clear, and is recognized in both the Federal and state Constitutions as well as in the statutes. Neither of such Constitutions forbid prosecutions for felonies otherwise than by presentment or indictment in cases arising in the land and naval forces (Army and Navy) even in times of peace; but they each clearly forbid such prosecutions in cases arising in the mitilia,

except when such militia is in actual service, in time of war or public danger. The regular Army is at all times governed by the Articles of of War, and its officers and soldiers are amenable to courts-martial for any violations thereof, as well in times of peace as in times of war. Not so, however, with the state Militia. The latter is governed thereby only while in actual service in time of war or public danger, or when expressly so provided by local state law. A moment's reflection will serve to demonstrate the wisdom of such distinction. As said by Judge Vann in People ex rel. Smith v. Hoffman, supra: "There is a wide distinction between the regular Army of the nation and the Militia of a state when not in the service of the nation, for discipline which is ample for the latter will not answer for the former. A member of the state Militia belongs to civil life, has a civil avocation, and only occasionally engages in the exercise of arms. A member of the United States Army, on the other hand, has no employment except that of a soldier, and arms constitute the business of his life. Hence, more rigid rules and a higher state of discipline are required in the one case than in the other. Moreover, the state Militia is organized by statutes of the state; and the legislature, under the limitations of the Constitution, has power to regulate the entire subject, to invest boards of examination with such authority, and to give the civil courts such power to review as it sees fit."

As we understand the position of appellant's counsel, it is that the Articles of War govern and control our state Militia in times of peace the same as they govern and control the regular Army. The charges against the relator on which he was convicted by the court-martial are based on alleged violations of the Articles of War. It is perfectly manifest to our minds that such proceedings were a nullity for the obvious reason that our legislature had not, in its wisdom, seen fit to thus ordain. The Military Code in force in this state at the time relator was tried and convicted, being chapter 21, Political Code 1905, expressly provided that "the Militia while in active service shall be governed by the military law of the state, and the rules and Articles of War of the United States" (§ 1717), but such Code will be searched in vain for any provision adopting the Articles of War for its government when not in active service, or, in other words, in time of peace; and such statute nowhere defines any military offenses punishable by court-

martial or otherwise in time of peace. But appellant's counsel quote § 1752 of the Code, which pertains to the drill, discipline, and uniform of the National Guard, and say: "By what military code are the powers and duties to be measured of an officer in the National Guard of this state? The respondent concedes that there are no military regulations of the state. The legislature, having adopted the rules and articles that govern the Armies of the United States, have therefore said in the most solemn manner that the National Guard of this state shall be governed by the same rules and regulations. Therefore if the commanding officer of the company, whether in command or not, should commit a misdemeanor or a felony, he certainly could be tried by general court-martial under the laws of this state." Right here is, in our opinion, the basic fallacy in appellant's contention. Counsel wholly misinterpret said statute. It deals merely with matters relating to drill, discipline, and uniforms, and it merely adopts the regulations of the Army, Articles of War, and acts of Congress as authority, and to govern in such matters in cases not provided by the laws of the state, etc. The word "discipline," as there used, means "system of drill," "systematic training," "training to act in accordance with established rules; accustoming to systematic and regular action." See Webster's New International Dictionary, and also 27 Cyc. 496. This is apparent, for if § 1752 be given the broad meaning contended for by appellant, it would conflict with or at least render superfluous § 1717, which provides that the Militia while in active service shall be governed by the rules and Articles of War of the United States. Furthermore, to attribute to the legislature such an intent would be absurd. No state in the Union has ever enacted such a law to our knowledge, nor could it be done in this state as to felonies without an amendment to the state Constitution, and we apprehend that the suggestion of such a thing as subjecting members of our state Militia to trial by court-martial for felonies in time of peace would shock our citizens. But counsel for appellant earnestly argue that if this court should hold that it cannot be done "the National Guard ought to disband and pile their uniforms and equipment in the public streets and set fire to them, because there would be no power whatsoever to control either officers or men, and there would be greater danger from men who could not be controlled in time of peace than there would be from men in time of war." We fear

counsel are unduly alarmed. This is, so far as we are aware, the first and only time in the entire history of this state that a resort to a court-martial was deemed necessary or advisable. Furthermore, the remedy, if one is needed, lies with the legislature, and no doubt will be furnished if applied for. In 1909 the legislature of this state enacted a new and very comprehensive Military Code (Laws 1909, chap. 165), but it did not see fit, in its wisdom, to confer on a court-martial the power to try a militiaman for a felony in time of peace. It is, however, provided by such Military Code that certain by-laws, rules, and regulations may be adopted by associations therein authorized to be formed, also rules may be adopted by the governor as commander-in-chief, and that for violations thereof enlisted men may be tried by court-martial and also expelled from the organization. Section 12 of such new Code expressly provides when the Articles of War shall be in force as governing the Militia; and it is a significant fact that such new statute limits the times in which they shall apply, to the occasions when such Militia is on duty pursuant to the orders of the governor, or when ordered to assemble for duty in time of war, insurrection, invasion, public danger, or to aid the civil authorities.

In many of the states the legislatures have seen fit to provide for the enforcement of discipline in the organized Militia by fine and imprisonment imposed by courts-martial for infractions of rules and regulations, even in times of peace. The right so to do is undoubted, but it was not exercised in this state until the new Military Code of 1909 was adopted. See in this connection 27 Cyc. 496, from which we quote: "The laws of nearly all the states have been revised with a view of conforming the organization and discipline of the organized Militia to that of the regular Army, and violations of military laws or regulations are now generally dealt with by military courts within the scope of their jurisdiction as defined by the state laws." Citing State ex rel. Madigan v. Wagener, 74 Minn. 518, 42 L.R.A. 749, 73 Am. St. Rep. 369, 77 N. W. 424. The case of State ex rel. Madigan v. Wagener, supra, seems to be a leading authority, and we commend the opinion of Judge Mitchell as a clear and sound statement of the law. The opinion recognizes the right of the state legislature, within constitutional restrictions, to provide certain rules and regulations for the government of the organized Militia, and, as disciplinary measures, to au-

thorize courts-martial to impose fines and imprisonment for violations thereof, and it is therein stated that in many, if not most, of the states, this has been done.

It goes without saying that courts-martial are courts of special and limited jurisdiction, and that they possess no powers not expressly conferred on them. 27 Cyc. 498; 22 Ops. Atty. Gen. 137; Dynes v. Hoover, 20 How. 65, 15 L. ed. 838; Deming v. McClaughry, 51 C. C. A. 349, 113 Fed. 639.

That the terms "actual service" and "active service," as used in the Constitution and Military Code, mean service in time of war or public danger, etc., is clear. It is likewise clear that the words "when in actual service in time of war or public danger," in § 8 of our Constitution, apply to the Militia only. Johnson v. Sayre, 158 U S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773. That the words "actual service" and "active service" are used in such restrictive sense in our Military Code is entirely clear from a reading of §§ 1716, 1761, 1762, 1774. See also State v. Josephson, 120 La. 433, 45 So. 381, and Bryant v. Brown, 98 Ky. 211, 32 S. W. 741. It must necessarily follow, therefore, that, being in time of peace, the Articles of War in no manner governed the militiamen, and consequently Brigadier General Poole (retired) could not be tried for alleged violations thereof.

Entertaining the above views, it becomes unnecessary to notice the other points in controversy. We conclude, therefore, that the judgment appealed from, in so far as it adjudges that the orders therein enumerated, as well as the acts and judgment of such court-martial, are null and void, must be affirmed.

SPALDING, Ch. J. I concur fully in the opinion of my associate covered by paragraph 1 of the syllabus; and while I concur in the opinion that the court-martial in question was without jurisdiction, I reach my conclusion by a method differing from that pursued by my associates, and cannot concur in all that is said in the majority opinion.

I prefer to confine my conclusions as to the jurisdiction of the court-martial to the case before us, *viz.*, its jurisdiction over a retired officer not on duty of any kind. The relator has been retired by operation of law, under provisions of the Code of this state. A retired officer of our Militia bears a relation to the organized Militia differing ma-

terially from that borne by a retired Army officer to the regular Army. The latter is made, by statute, subject to trial by court-martial. U. S. Rev. Stat. § 1256, U. S. Comp. Stat. 1901, p. 888. A retired militiaman is not made subject to trial by such court, and the character of his position as fixed by our Code renders it inappropriate that he should be subject to court-martial, at least when not on detail by order of the governor.

Relator was not on any kind of duty, and the decision need go no farther than to cover the case of such an officer. I rest my concurrence on the ground that an officer retired by operation of law is not subject to be tried by court-martial when not on duty under detail by order of the governor. I express no opinion farther than this.

On Petition for Rehearing.

FISK, J. We have carefully considered the petition for a rehearing filed by appellant, and find nothing therein to cause us to change our views as above expressed.

In denying such petition we deem it advisable to briefly notice some of the principal contentions made in such petition. It is manifest that appellant's counsel are laboring under a misapprehension regarding the court's holding, for they start the petition with the following assertion: "The decision of the court proceeds upon the theory that the Militia of a state can only be subject to trial by court-martial when they are in the actual service of state or nation." This is very far from the fact, for the exact contrary is true. We held that the Articles of War do not govern the state Militia in times of peace, for the legislature has not thus ordained, and consequently the officers and members of such Militia are not subject to court-martial in time of peace for alleged violations of such Articles of War. But we distinctly said that the power of the legislature to provide for the enforcement of discipline in the organized Militia by fine and imprisonment imposed by courts-martial for infractions of rules and regulations, even in times of peace, is undoubted.

Counsel in their petition again call our attention to §§ 188 to 193 of our state Constitution, and insist that we have overlooked the same. In this they are again mistaken. There is no room for doubt that

"all able-bodied male persons residing in the state, between the ages of eighteen and forty five years," with certain exceptions, constitute the Militia of the state; nor is there any room for doubt that the organized Militia or National Guard constitutes the "Active Militia." But the terms "Active Militia," and "the Militia when in actual service in time of war or public danger," are entirely distinct and of different meaning, and the basic fallacy in counsel's contention apparent is their failure to distinguish the difference between these terms. Section 8 of our Constitution, which provides that no person shall for a felony be proceeded against criminally otherwise than by indictment, does not except from its provisions the active Militia in time of peace, but it excepts "the Militia when in actual service in time of war or public danger." No doubt the framers of the Constitution contemplated that the legislature would prescribe rules and regulations for the government of the organized or active Militia in time of peace as well as when called into active service for the state in time of public danger, etc., for § 192 clearly contemplates that there may be trials by courts-martial, but it is perfectly manifest that until such time as the legislature has made provisions therefor no such trials could be had. Our attention is called to § 1753, Rev. Codes, which makes certain acts a misdemeanor, and concludes with the statement, "And upon conviction shall be fined in a sum not less than $50 nor more than $100, or may be cashiered." This section is somewhat vague, but conceding all that is claimed for it by appellant's counsel, the most that can be said is that in cases falling within the provisions of said section, members of the Militia may be court-martialed; but this does not aid appellant in this case, for respondent is not charged with a violation of said section, but is, as we have seen, charged with a violation of the 21st and 61st Articles of War.

Our attention is called in the petition to the fact that in three instances during statehood, prosecutions by court-martial have taken place in this state; but this fact is in no manner controlling, nor does it operate in the least to change our views of the law as above expressed.

Counsel evidently do not understand the decision in State ex rel. Poole v. Nuchols, for they criticize the special concurring opinion of the chief justice in the case at bar, and assert that it is contrary to the holding in that case. In this counsel are grievously in error. We did not

hold in the Nuchols Case that the court-martial had jurisdiction, but we held merely that no power has been conferred by the Constitution on the supreme court to issue the writ of prohibition in a case like that, and that the relators therein should seek relief, if at all, in the proper court. See opinion in 18 N. D. 233, 20 L.R.A.(N.S.) 413, 119 N. W. 632.

The petition is denied.

STYLES v. THEO. P. SCOTLAND & CO.

(134 N. W. 708.)

Certainty as to Christian name in record of mortgage.

1. "Charlie" is a corruption of "Charles," and the fact that a mortgage is signed "Charlie," instead of "Charles," will not take it out of the chain of title so that a record thereof will not be notice to a subsequent purchaser.

Homestead — what constitutes.

2. An intention to devote, and an actual devotion to the use of a home are prerequisites to an estate of homestead. The homestead must be "a home place."

Mortgage — alteration of date after execution.

3. An alteration in the date of a mortgage which is made after its execution, but in order to carry out the intention of the parties, will not necessarily invalidate the instrument.

Note.—The general rule as to certainty and accuracy necessary in respect to Christian names or initials in a record or index relied on as imparting constructive notice as deduced from the authorities on the subject which are reviewed in a note in 7 L.R.A.(N.S.) 415, seems to be that the record is sufficient if it contains enough to lead the inquirer to the information designed to be imparted by it, and that for this purpose the inquirer's extraneous knowledge, and every fact which inquiry suggested by the record would have led up to, are to be taken into consideration. Later cases on this subject are found in a supplemental note in 25 L.R.A.(N.S.) 1211.

As to what is necessary to constitute a homestead, see note in 102 Am. St. Rep. 389.

As to effect of alteration in date of note to render it invalid, see note in 32 L.R.A. (N.S.) 515.

And the necessity of consideration to sustain ratification of an unauthorized alteration of an instrument is considered in a note in 39 L.R.A.(N.S.) 131.

Mortgage — alteration of date — ratification.

4. A subsequent delivery and acknowledgment of such a mortgage, after such alteration, will amount to a satisfaction of the alteration when the fact of such alteration is apparent upon the face of the instrument.

Opinion filed January 6, 1912. Rehearing denied February 16, 1912.

Appeal from district court of Pierce county; *Burr*, J.

Action to determine adverse claims to land. Judgment for the defendant. Plaintiff appeals.

Affirmed.

Styles & Koffel, for appellant.

Paul Campbell, for the respondent.

Facts.

This appeal comes to us for a trial *de novo* under the so-called Newman law. The form of the action is that of one to determine adverse claims to real estate, and its particular purpose is to have declared void and set aside a certain mortgage made by one Charlie Goodsman to the defendant, Theo. P. Scotland & Co., dated November 24, 1903, and recorded October 22, 1904, for the reasons: "That the said land was, at the date of said instrument, the homestead of said Goodsman, and that his said wife never joined in the execution of said alleged mortgage, and never signed or acknowledged the same, and furthermore, that the said purported mortgage was never signed, delivered, executed, or acknowledged by Charles W. Goodsman at all, and that if the same was given by any person it was without any consideration therefor, and that the same, moreover, was never properly acknowledged so as to entitle it to record; that the plaintiff purchased said land for value, and in good faith, on March 17, 1906, without any knowledge whatever of such alleged and pretended mortgage, and that the plaintiff's grantor, the First State Bank of Maddock, North Dakota, purchased said land in good faith and for value from Charles W. Goodsman and wife before the date said mortgage was recorded (October 22, 1904), and that the plaintiff's said grantor had then and there no notice or knowledge of said pretended mortgage, and that said mortgage is not

within the record chain of title of said land, and was not notice to said bank or to the plaintiff, and is, in fact, a forgery." The answer denies the averments of the complaint as to the homestead, and asserts the genuineness of the mortgage and its priority and proper recording, and prays "that the court find that the defendant has a valid and subsisting lien, to wit, a real estate mortgage upon all of the real estate described in the plaintiff's complaint to secure the payment of $700 and interest, and that said lien is prior to any right, title, or interest in and to said real estate belonging to the plaintiff." The trial court found, among other things, that on or about August 21, 1903, the defendant (Theo. P. Scotland & Co.) sold and delivered to said Charles W. Goodsman a certain threshing machine and other goods, wares, and merchandise, and that, in consideration thereof, said Charles W. Goodsman, by and in the name and style of Charlie Goodsman, executed and delivered to the defendant five promissory notes, dated August 21, 1903, due October 31, 1903, bearing interest at 12 per cent before and after maturity, and amounting in all to $700; "that on August 21, 1903, in consideration of the sale and delivery of the aforesaid goods, wares, and merchandise to him by the said defendant, it was understood and agreed between the said defendant and Charles W. Goodsman that, as security for the purchase price thereof and to secure the payment of the notes given therefor, the said Charles W. Goodsman would execute and cause to be executed and delivered by himself and wife a mortgage upon the premises hereinbefore described (the real estate in controversy); and the said mortgage was, at said time, filled out and drawn, and the date thereof inserted therein August 21, 1903, but that said mortgage was not signed or delivered on August 21, 1903; that thereafter, and on . . . the said Charles W. Goodsman, in the name and style of Charlie Goodsman, signed said mortgage in the presence of two witnesses, and in the presence of Theo. P. Scotland, an officer, and secretary and treasurer of the defendant corporation, and at the time of so signing the said mortgage it was understood and agreed between the parties thereto that the said Charles W. Goodsman should procure said mortgage to be signed, executed, and delivered by Amanda Goodsman, his wife, and that said mortgage was held by the defendant for the purpose of procuring the completion thereof by the execution and delivery thereof by the said Amanda Goodsman, wife of said Charles W. Goodsman; that

the said wife of the said Charles W. Goodsman never signed or executed the said mortgage, and the said Charles W. Goodsman never procured her to sign said mortgage as understood and agreed, or at all, and that thereafter, on October 5, 1904, in consideration of the aforesaid understanding and agreement, and for a further and additional consideration of Theo. P. Scotland, as secretary and treasurer of said defendant, Theo. P. Scotland & Co., executing as surety a certain undertaking and bond for the purpose of foreclosing a thresher's lien in favor of said Goodsman and against one Michael Leier, said Charles W. Goodsman acknowledged the said mortgage and delivered the same to Scotland, such acknowledgment being acknowledged and taken before Theo. P. Scotland, secretary and treasurer of the said defendant corporation, a notary public in and for Pierce county, North Dakota. . . . That no part of the notes described in and secured by said mortgage have been paid; that on or about the 18th day of October, 1904, the said Charles W. Goodsman executed and delivered to the First State Bank of Maddock, a corporation, a warranty deed of the premises herein, and that the same was by him duly acknowledged before a notary public and certified for record on said day, and thereafter, on October 22, 1904, at Marinette, Wisconsin, Amanda Goodsman, his wife, joined in the execution of said deed, and then and there signed the same, and on said day duly acknowledged the same, and it was certified for record before a notary public; and that thereafter, on the 27th day of October, 1904, at 9 o'clock A. M., said warranty deed was filed for record in the office of the register of deeds of Pierce county, North Dakota. . . . That thereafter, and on or about the 17th day of March, 1906, the First State Bank of Maddock executed and delivered to the plaintiff, Asa J. Styles, herein, a warranty deed, and thereby conveyed, granted, bargained, and sold to the plaintiff the said premises in fee simple, which warranty deed was recorded on May 29, 1906; that prior to the fall of 1902, neither Charles W. Goodsman nor his wife had taken up their residence upon the premises therein described, or had resided on the same, and that there was no habitable structure thereon, but the same was a part of the public domain of the United States of America; that some time in the fall of 1902, Charles W. Goodsman filed on said land under and by virtue of the laws of the United States, as a homestead, and, pursuant to such filing and alone, took possession and went

upon the said premises and commenced building a dwelling house thereon, which was completed in April, 1903; that prior to July 7, 1903, the wife and family of the said Goodsman had at no time been upon or resided upon the said premises, but that the said wife and family remained and resided at Marinette, Wisconsin, with their parents, that being the home and residence of Charles W. Goodsman and family prior to and at the time he entered upon and filed upon the premises herein, and that the wife and family so remained at Marinette, Wisconsin, under the permission of the land department of the United States, and that if said wife and family were ever upon said premises and actually resided thereon with the said Charles W. Goodsman, it was only for a short period commencing on or about the 7th day of July, 1903, and was only for the purpose of complying with the requirements of the laws of the United States regulating the disposal of public lands by commutation and homestead entries thereon, and not with the intent to make and establish a permanent residence thereon, and to make the same their permanent home; that the said Charles W. Goodsman and his wife and family remained in possession and resided upon the premises respectively from the time of going upon said premises as hereinbefore set forth up to and until the making of final proof and issuance of receiver's receipt to the said Goodsman therefor, on November 4, 1903, at which time they removed therefrom and removed their residence therefrom with the intent to locate, not to return, but to remove to and locate and take up their residence and make their home in the West, and out of the state of North Dakota, the wife and family of the said Goodsman (a child having been born to Mrs. Goodsman during her residence in Wisconsin and during the period of controversy) returning to Marinette, Wisconsin, the prior residence and home of said Goodsman and his family, with their parents and family, where she was on November 18, 1903, and where she remained until the sale of the premises herein to the First State Bank of Maddock, in the fall of 1904, and until she joined the said Goodsman and took up her permanent residence and home at St. John, Oregon, at which point they now reside and have their home; that the said Goodsman, after making final proof and issuance of receiver's receipt to him of the said premises, remained in the state of North Dakota a few days for the purpose of disposing of his personal property, household furnishings, furniture,

etc., some of which he did at that time sell and dispose of; that thereafter and some time during the month of November, 1903, said Goodsman, himself, went West into the states of Oregon and Washington, with the intent to locate and find a home and residence there, and some time thereafter took up his residence at St. John, Oregon, where his wife and family joined him, and where he now has a permanent home and residence; that neither the said Goodsman nor any member of his family, after leaving the state of North Dakota as aforesaid, and after moving their residence from the said premises, returned or took up their residence upon the said premises, except that the said Goodsman some time in the fall of 1904 returned to Pierce county, North Dakota, for the purpose of operating a threshing rig which he did operate, and for that purpose only; that at the time of removing, as aforesaid, it was the intent of the said Goodsman and his wife, Amanda Goodsman, and their family, not to return to or longer reside upon the premises herein, or to make the same their home, but to remove therefrom permanently, and to secure and take up their permanent home and residence elsewhere, and with the intent to dispose and sell the premises herein as soon as a purchaser could be found therefor; . . . That the property herein described was encumbered on April 5, 1904, and prior to the taking effect of § 5054 of the Revised Codes of North Dakota, and of § 5053 of said Codes, and that no declaration of homestead has ever been made or filed or recorded, and that this action was not commenced prior to January 1, 1906, and that this action was not commenced within two years after the execution of the defendant's mortgage, and that the said Charles W. Goodsman, mortgagor and homestead claimant, was not in actual possession of the premises herein described at the commencement of this action." The court also found, as a conclusion of law, and among other things, that the premises in question were at no time the homestead of the said Charles W. Goodsman; that the defense of homestead was barred by § 5054 of the Revised Codes of 1905, and "that the mortgage to the defendant by the said Goodsman is a valid and subsisting lien upon the premises, prior and paramount to any right, interest, or title of the plaintiff," and further adjudged and declared that the plaintiff take nothing by his complaint, and that said complaint be in all things dismissed, and "that the defendant has a lien upon the real property herein set forth and described to secure

the payment of the sum of $700, with interest thereon at the rate of 12 per cent from and after the 21st day of August, 1903, no part of which has been paid, and that the said mortgage is a prior, paramount, valid, and subsisting lien." From this judgment the plaintiff has appealed.

BRUCE, J. (after stating the facts as above). The findings of the trial court as to the question of the homestead and the homestead rights, if any, of the witness Goodsman, are abundantly sustained by the evidence. It is quite clear to us that the defense of homestead is, in this case, barred by the statute of limitations. Rev. Codes 1905, §§ 5053, 5054. See Justice v. Souder, 19 N. D. 613, 125 N. W. 1029. Even if not barred by the statute, the proof falls far short of showing any homestead right or interest. The prerequisites to an estate of homestead are in intention to devote, and an actual devotion, to the use of a home. The homestead must be "a home place." Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684; Brokken v. Baumann, 10 N. D. 455, 88 N. W. 84; McCanna v. Anderson, 6 N. D. 482, 71 N. W. 769; Hoitt v. Webb, 36 N. H. 166. The mere occupancy for the purpose of proving up and getting title to the land is not sufficient, and no conclusive presumption is raised by the acceptance of final proof, by the United States Land Department. Brokken v. Baumann, 10 N. D. 455, 88 N. W. 84. All that the plaintiff's witnesses testified to is that Goodsman filed on the land in 1902, moved onto it in April, 1903, broke and put 20 acres into flax in 1903, and at that time owned no other land. The proofs show that the house and land were practically unoccupied in 1904, and that no crop was put in in 1904. It shows that at the time Goodsman moved onto the land his wife was in poor health, and that they received permission from the land office for her to remain off the land until her health would permit her to move; that she gave birth to a child at the home of her parents, in Wisconsin, on June 15, 1903, and moved onto the land as soon as she recovered from her illness, on July 6, 1903; but it does not show that even after such removal she remained or intended to remain there permanently She herself testifies that she lived there with her husband a short time between then and October 18, 1904, "but was sick a good deal of the time, and spent considerable time with her mother and sister in Wis-

consin." It shows that in August, 1903, Goodsman bought the threshing machine in question, but that he gave it back the next year; that he got his final receiver's receipt for commuted proof on November 4, 1903; that he sold the land to the First State Bank of Maddock on October 18, 1904; that while on the land he built a two-room frame dwelling and stable, and had a spring partly dug out as a well, but that his only furniture was an old lamp, a borrowed stove, an old iron bedstead, some utensils and a dresser, which latter article he sold soon after his final proof was made, for two and a half dollars; that he left North Dakota for Oregon somewhere about November 18, 1903, and did not return until January, 1904, when he went to Wisconsin, where his wife was, and, in the fall, came back to thresh (not for himself, but for others, having no crop himself), and sold the land to the bank in October, 1904; that no declaration of homestead was ever made or recorded. Indeed, although both Mr. and Mrs. Goodsman testified that they looked upon the land as their homestead, it is doubtful whether they distinguished between a homestead under the laws of the United States and a homestead under the laws of North Dakota, and their acts fell far short of proving their intention. See Brokken v. Baumann, 10 N. D. 455, 88 N. W. 84; Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684; McCanna v. Anderson, 6 N. D. 482, 71 N. W. 769; Kuhnert v. Conrad, 6 N. D. 215, 69 N. W. 185; Justice v. Souder, 19 N. D. 613, 125 N. W. 1029. The signature of the wife therefore was not necessary to the validity of the mortgage.

But was there a valid execution of the mortgage in controversy by Charles W. Goodsman, and was the same properly acknowledged so as to be capable of record, and of charging the plaintiff with constructive notice of its existence? The testimony of all of the witnesses, with the exception of the positive denial of execution made by Charles W. Goodsman himself, fully bear out the findings of the trial court. It is true that the date of the mortgage seems to have been changed, and that the date of November 24th seems to have been written over some other date. We are inclined to think that such change was made after the first execution and delivery which, in our opinion, was some time in November, 1903, and prior to November 24th. This change, however, was in accordance with the original agreement which is stated by the witness Scotland, and which, though denied by Charles W. Goodsman,

is abundantly borne out by the other facts and probabilities of the case. The threshing machine, according to the undisputed evidence, was sold on August 21, 1903, and to secure the payment of the notes for the same, Goodsman executed a chattel mortgage. He also, according to Theodore P. Scotland, agreed to execute a real estate mortgage upon the premises in question. That he, at some time, signed that mortgage, there can be no question, for there can be no doubt of the genuineness of his signature. Theo. P. Scotland testifies that at the time the mortgage was agreed to be given, he made it out, but that he did not have the same signed by Goodsman until the 24th day of November, 1903, the execution and delivery of the mortgage being postponed on account of the fact that he was about to make a loan on his land from the Union Central Life Insurance Company, and that neither party desired to interfere with this loan. It was, in fact, agreed, that the mortgage should be a second mortgage. The loan from the Union Central Life Insurance Company was obtained, and was dated November 10, 1903, and filed for record on November 23, 1903. The dating of the mortgage, then, on the 24th day of November, 1903, is certainly in accordance with this original intention, and the facts seem to bear out the testimony of the witness Scotland, though we cannot help but believe that the mortgage was actually executed and delivered prior to November 24th. The testimony of Scotland as to the execution and delivery is corroborated by that of the two witnesses to the mortgage. One of these witnesses was, it is true, the wife of Theo. P. Scotland, but her testimony has every appearance of being honest. She identifies her signature, and testifies that she signed in the presence of Goodsman, but does not remember the exact date. The witness Burkhartsmeier positively identifies his signature, remembers that the mortgage was filled out when he signed it, has no positive means of telling the exact date, says that Goodsman was fixing up a threshing machine at the time and was working around with the threshing machine at the time; that it was in the fall of the year. The testimony is clear that Goodsman was in the vicinity of Rugby between August and November 18, 1903. He testifies, in fact, that he left Devils Lake, North Dakota, about the 18th day of November, 1903, and came straight through to Spokane, Washington, and was in Baker city, Oregon, on the 23d and 24th of November, and did not return to North Dakota until Jan-

uary, 1904. From all of the testimony we cannot but come to the conclusion that the mortgage was properly executed and delivered by Goodsman to the defendant some time in the fall of 1903, and probably in the month of November, 1903, but prior to November 24th; that when originally executed it bore the date of the original agreement and of the notes, namely, August 21, 1903; but that subsequently, and on account of the prior agreement that said mortgage should be subsequent and not prior to the mortgage to the insurance company, the said Theo. P. Scotland, after the signing and witnessing of said mortgage, changed its date to November 24, 1903. This alteration we do not hold to be so material as to invalidate the instrument. No prejudice can be argued. The change was made in order to carry out the agreement of the parties. The mortgage was security merely, and the case is a very different one than it would have been if the dates of the notes themselves had been changed. No change in the real contract of the parties was made. In fact, the change was made in order to make the mortgage conform to the contract. The time of payment and of foreclosure, and of the running of the statute of limitations, was not affected. Elliott, Ev. § 1499; Union Bank v. Cook, 2 Cranch, C. C. 218, Fed. Cas. No. 14,349. But even if the change were material, the subsequent acknowledgment of the mortgage on October 5, 1904, amounted to a re-execution and redelivery of the instrument, and to a ratification of any changes which were made therein. It is true that, after a material alteration, attention must be brought to the same in order that a ratification may be presumed, but in this case the change was so apparent that no one could have read the instrument without seeing it, and the ratification bore the solemn form of an acknowledgment. It is also true that on this question of acknowledgment and redelivery there is a conflict of testimony, and that the witness Goodsman denies that he ever acknowledged the instrument. Scotland, however, who took the acknowledgment, testifies that it was acknowledged and delivered, and that the consideration (for which there was no necessity, see Pelton v. Prescott, 13 Iowa, 567) was the agreement before made, and the additional fact that Scotland should sign Goodsman's bond for the purpose of enabling him to take out a thresher's lien. There is no dispute as to the signing of this bond. There is no doubt that Goodsman was in the neighborhood of Rugby on the date

in question. The notary's certificate, too, should have some weight. On the whole we do not feel justified in overruling the findings of the trial court that the mortgage was redelivered on October 5, 1904, and that it was properly acknowledged so as to entitle it to record.

We cannot see any force in the contention of appellant in regard to the size of the seal. We believe, from the evidence and the exhibit, that the seal substantially met the requirements of the statute in regard to size, and was substantially 1⅝ inches in diameter. The doctrine of *de minimis non curat lex* would seem to apply to physical facts as well as to money values.

Nor do we think there is any force in the contention that on account of the fact that the mortgage was signed Charlie, and not Charles W., it was taken out of the chain of title, and that the recording of it was not legal notice to the respondent. There can be no doubt, from the evidence, that Charles W. Goodsman was both known as Charlie and as Charles. The notes to the commission mortgages which were given to Wesley Styles, an officer of the First State Bank of Maddock at the time the mortgage to the Union Central Life Insurance Company was made, were signed Charlie Goodsman, and the same is true of the chattel mortgage upon the threshing machine, in evidence. In the case of Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623, a mortgage signed Harry S., when the title was in Henry S., was held sufficient. Harry was held to be a corruption of Henry. There can be no doubt that Charlie is a corruption of Charles.

Neither did the court err in finding that the mortgage was unpaid and the amount due under it. This is a statutory action to determine adverse claims. It was certainly proper to ascertain the amount and the nature of the lien. Not only did the plaintiff, in his complaint, ask to have the nature of the adverse claims fully disclosed, but the defendant, in his answer, specifically prayed that his rights under the mortgage might be adjudicated.

The judgment of the District Court is affirmed.

IN RE PETERSON'S ESTATE.

DAVIDSON v. UNKNOWN HEIRS OF PETERSON et al.

(134 N. W. 751.)

Appeal — defective undertaking — jurisdiction to permit filing of new undertaking.

1. After an appeal from county to district court has within time been perfected by the service of a notice of appeal upon some of the parties litigant, and where a fatally defective undertaking on appeal has seasonably been filed in a good-faith endeavor to perfect such appeal, the county court, under § 7969, Rev. Codes 1905, has jurisdiction of an application based on an affidavit showing such good faith and explaining the default to permit appellant to file a new and sufficient undertaking in lieu of the defective one.

Appeal — defective undertaking — remanding for purpose of filing new undertaking.

2. Where the record on such an appeal has been transmitted to the district court and a motion is there made to dismiss the appeal for want of a legal undertaking, it is held that the requirement of a valid undertaking to be served and filed as a step in the appeal proceedings is primarily for the purpose of security, and as such the filing of an insufficient or void appeal bond with the notice of appeal vests the district court with jurisdiction to order the record to be remanded to the county court that a sufficient bond on appeal may be here approved and filed and the record retransmitted to district court.

Appeal — trial de novo — evidence.

3. Where such notice of appeal demands a trial *de novo* and the retrial involves issues of both law and fact, as the determination of the existence of a foreign common-law marriage necessarily to be determined from evidence, it is triable on evidence to be offered anew and not on the record or transcript of testimony and proceedings certified from county court; and the last part of § 7985, is not to be construed as denying or limiting the manner of trial *de novo* in such cases to a review of the record of the lower court.

Appeal — trial de novo — procedure.

4. Such an issue is one triable in district court as an equitable action where a jury trial is not had.

Note.—The holding in this case that entries of births, deaths, and matters of family history in a family Bible are admissible in evidence is in harmony with the general rule, as shown by a review of the authorities in a note in 41 L.R.A. 449, in which the whole subject of entries in family Bible or other religious book as evidence is treated.

Appeal — trial de novo — procedure — legal or equitable.

5. Where so tried to the court, the record and the proceedings on appeal from the district to the supreme court are governed by the statutes as to appeals in equitable actions. Where a jury is had in the district court, the appeal therefrom is governed by appeals from jury trials, following Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276.

Appeal — trial de novo — probate matters — constitutionality of statute as to.

6. The statute vesting in the district court jurisdiction to try *de novo* probate matters appealed from county court is not unconstitutional as violating § 111 of the Constitution, granting exclusive original jurisdiction to the probate court of such class of actions, as the trial *de novo* on appeal is but the exercise by the district court of the appellate jurisdiction conferred by statute and permitted by § 103 of the Constitution.

Appeal — statement of case.

7. The settled statement of the case on appeal from district to this court from the determination of an equitable issue as in this action should include only the proceedings had in the district court trial.

Common-law marriage — sufficiency of proof.

8. The evidence offered in district court on behalf of respondents Miesen is reviewed and held to negative the existence of any common-law marriage of Dorothea Harnau to Peterson. Neither she nor Herman Miesen, alleged son of deceased, are entitled to inherit his estate. They are without interest in these proceedings, and their petition that his estate be decreed to them on final distribution thereof is denied and judgment below in their favor is ordered vacated.

Evidence — entry in family Bible.

9. Entries of births, deaths, and matters of family history in a family Bible, though hearsay, are admissible as past declarations of matters of family history concerning events as to which the family is presumed to have accurate knowledge, when the entries were made by a member of the family since deceased, or at a time when there could exist no motive to deceive.

Evidence — certified copies of parish records from foreign country.

10. Certified copies of parish records from Norway of recorded births, deaths, and marriages, tending to establish respondents Ladehol et al. to be heirs of deceased, held inadmissible for want of proof as a foundation for their admission of the foreign law requiring such registration as an official duty. A foreign law relied upon as the basis for such testimony must be proven as a fact, and when the foreign law exists as a statute or in writing, oral testimony thereof is inadmissible under both the common law and our statute, § 7291. The foreign unwritten or common law may be established by oral testimony, but where such oral testimony does not establish the foreign law to exist as unwritten or common law and negative the existence of a written statute, the

proof of the foreign law is insufficient to admit certified copies of the foreign official but nonjudicial records.

Evidence — certified copies of parish records from foreign country — authentication.

11. Such certified copies purported to be certified by the pastors as keepers of the records, authenticated under seal by district judges as to genuineness of the pastors' signatures and that the records were kept pursuant to requirements of law, and reauthenticated by higher church officials, and all certified under seal of office as to verity of signatures, faith, and credit to be given and as made under lawful authority in turn by the American consul resident in Christiania, Norway, held insufficient to warrant the reception in evidence of such documents so certified without further proof that the foreign law was not in writing.

Evidence — documentary — authentication — foreign nonjudicial records.

12. The Federal, state, and common-law rules of authentication of documentary evidence as between the states and territories discriminated, the common-law rule as to proof necessary to admit foreign official, but nonjudicial records not applying thereto.

Appeal — remanding for retrial.

13. The proof of heirship being insufficient as to the right of Ladehol et al., alleged foreign heirs, respondents, to inherit, but it appearing that on retrial further testimony might be offered and that further opportunity should be given them to submit proof of their relationship to deceased, this action is remanded to the district court for retrial on that issue, and the state, to whom in case of want of heirs the estate escheats, will appear by the state's attorney of Benson county or the attorney general. Judgment in the county court to be entered on order of district court.

Opinion filed January 11, 1912. Rehearing denied February 19, 1912.

Appeal from the District Court of Benson county; *Cowan,* J.
Reversed and remanded.
Scott Rex, T. H. Burke, and *C. L. Lindstrom,* for appellants.
Buttz & Sinness and *O. D. Comstock,* for respondents.

Goss, J. This action arises over the estate of Anton Emil Peterson, deceased. The appellants, Ladehol et al., claim to be blood relatives of Peterson through his mother, deceased having been an illegitimate son. Appellants all reside in Norway, and rely wholly on documentary proof of the antecedents of the deceased and of their relation to him.

Deceased died intestate, unmarried, and at his death was, and for twenty years prior thereto had been, a resident of Benson county. His estate, awaiting final decree of distribution, after payment of all debts and expenses of administration, has been reduced to money and amounts to over $6,000, in the hands of the administrator, respondent, and subject to further order of court. The respondents Dorothea Miesen and Herman Miesen claim to be the common-law wife and son respectively of deceased. They reside in Michigan, in which state they aver such marriage occurred in 1876 or 1877. She claims to have been deserted by deceased in 1878, since which time she and Peterson have never met. She remarried in 1879 to Miesen, her present husband, to whom she has since born five children. On the presentation to the county court of Benson county of the administrator's petition for final distribution of the proceeds of the estate to the legal heirs of the deceased, joinder of issue was had between the administrator, the state acting by the state's attorney of Benson county, respondents Miesen (alleged common-law wife and son of deceased), and Ladehol and nineteen other foreign heirs appearing by guardian and attorneys in these proceedings. In the county court hearing was had on depositions; so also in district court except oral testimony as to a few matters regarding which resident witnesses could testify. The decision of the county court was adverse to these appellants, who served and filed within time the proper notice of appeal therefrom to the district court, and seasonably served and filed a bond fatally defective in parties, amount, and conditions. In the face of a motion made in district court to dismiss the appeal and affirm the judgment of the county court for want of jurisdiction of the district court because of such defective undertaking on appeal, on application of appellants the record was transmitted to the county court, with directions to permit appellants to file such new undertaking as should meet with the approval of the county court, conditioned on its return within a limited time duly certified back to the district court. Complying therewith, appellants filed a new bond on appeal, regular in all particulars and approved by the county judge and transmitted by him to the district court, where jurisdiction was assumed over objection; and trial *de novo* was then had, no jury having been demanded. The cause was heard as triable in equity and the record made accordingly with no testimony excluded. At the close of

the case the court made its findings and conclusions, in favor of respondents Miesen for judgment dividing the estate equally between them. From this judgment appellants appeal to this court again demanding a trial *de novo*.

The settled statement of the case for the purposes of this appeal contains certified copies or originals of all proceedings had in the county and district courts in the litigation involved in the issue here presented. We are confronted with a motion to strike made by each party, leveled at a portion of the matter embraced in the statement as settled; that of respondents Miesen going to the question contended for by them that the trial in the district court, while a trial *de novo*, should have been limited to a review of the transcripted and certified record of proceedings had in the trial in the county court; the sustaining of which motion would eliminate the cross-examination of the respondents and their various witnesses from the consideration of this court on this appeal; appellants contend that the appeal on trial *de novo* from the county to the district court permits a retrial of the action, the resubmission of testimony, with the district court acting as a trial, instead of an appellate, tribunal.

Respondents Miesen further predicate as error the action of the district court in permitting the filing after time of the undertaking on appeal from county court, and attack the jurisdiction of this court to consider the merits of the case; urging that this court should now do what they contend the district court on appeal should have done, summarily affirm the judgment for want of the proper appeal bond on the intermediate appeal.

We will therefore first consider whether the district court acquired jurisdiction. The statute, § 7966, provides: "To effect an appeal the appellant must cause a notice of the appeal to be served on each of the other parties, and file such notice with the proofs of service, and an undertaking for appeal in the county court within thirty days from and after the date of the order or decree." Section 7968 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." Two of the appellants appear by guardian.

Sec. 7969 provides: "When the appellant seasonably and in good faith serves a notice of appeal on some of the parties, but through mistake or excusable neglect fails to obtain service on all, or in like manner omits to do any other act necessary to perfect the appeal or effect a stay, the county court upon proof of the facts by affidavit may, in its discretion, extend the time for perfecting the service or other act, and permit an amendment accordingly upon such terms as justice requires." Other sections of the statute regulate stay proceedings and the amount and obligations of the undertaking on appeal, and attempt to define some procedure applicable to an appeal from any of the various and peculiar matters necessary of determination in probate proceedings. In this case the district court in remanding to the county court acted upon affidavit filed, making proof of seasonable and good faith action, and prima facie excusing the neglect or mistake in filing the fatally deficient undertaking on appeal, provided the statute, § 7969, can be held to apply in such a case and permit such practice. It is noticeable that these statutes on probate appeals in no instance make the service and filing of a valid bond a condition precedent to the attaching of jurisdiction on appeal. We here find no provision similar to § 8502 governing appeals from justice court, that "to render an appeal effectual for any cause an undertaking must be executed on the part of the appellant," with certain conditions required by a statute manifestly mandatory. It is also noticeable that appeals in other matters than from the county court are more easy of classification, making it a more simple matter to define the conditions to be necessarily required in such appeal bonds than in the bonds that may be necessary in the various appeals granted under art. 9 of our Probate Code. The issues in probate court are many and varying. Probate procedure deals with matters of estates in which justice more imperatively demands that technicality shall not stand in the way of the descent and distribution of the estates of deceased persons, nor interfere in many other kindred matters, all within the jurisdiction of the county court. The statutes on probate appeals are many and are to be construed broadly, that they may cover the full scope of such matters embraced. Sections 7964 to 7989 constitute an endeavor on the part of the legis-

lature to attempt to provide generally for such appeals to the end that some portion of the statute will apply to any appeal that may be taken. From the statute it is obvious that the jurisdictional requisite to an appeal is the service and filing of the notice of appeal as required, the undertaking on appeal being intended as security only, and not as a jurisdictional prerequisite. This may seem at first blush an unusual interpretation of undertakings on appeal. But such is the plain purpose of this statute. Section 7969, coming into existence as § 6259, Revised Codes of 1905, is purposely broader than the parent enactment found in § 5978 of Compiled Laws. The condition precedent to the permission of performance of other acts necessary to be done, including an amendment to the notice of appeal or filing or a new or amended undertaking, permitted under § 7969, is the seasonable and good faith service of a notice of appeal on some of the parties to the proceedings. The order under which permission was granted to file this new undertaking, based upon affidavit, finds this appeal to have been taken in good faith. If the statute be of any force, then it is to be applied to just such cases as the one before us, to prevent a defective bond from depriving a party of a trial anew on the merits where the appeal was in good faith attempted. We already have precedent for this holding. See Re Lemery, 15 N. D. 312, 107 N. W. 365, wherein an amended notice of appeal was permitted to be served and filed with a new undertaking with different parties petitioners, where certain petitioners for probate were omitted as parties to the original undertaking on appeal; and this, too, where the parties thus joined were conceded to be technically necessary parties to the appeal. The trial court properly permitted the service and filing of the amended appeal bond.

As the motion to strike involves the determination of whether the district court on trial *de novo* was limited to the transcripted record from the county court, prescribed in § 7979, construed with §§ 7984–5–6–9, decision of this question is next in order. These provisions are very similar to §§ 5975–6 of the Compiled Laws. The appeal taken is from all issues of law and fact with a retrial in the district court remanded. It is true specifications of error were served with the notice of appeal and undertaking on appeal, evidently under a misapprehension by appellants of their rights, but the notice of appeal invokes

the jurisdiction of the district court and demands a trial *de novo,* a right granted by statute, § 7971, which provides: "Every appeal must be held to have been taken upon the facts and matter in law generally, unless the notice clearly indicates an intention to appeal on questions of law alone." This is supplemented with § 7985, which provides: "When an appeal is taken generally, all the issues must be tried and determined anew in the district court, and the court must hear the allegations and proofs of the parties, and determine all questions of law and fact arising thereon according to the mode of trying similar issues originating in that court, except that an issue involved in the probate of a will and issues arising upon a petition for the allowance of a claim or demand for money only must be tried according to the mode of trying issues to a jury if a jury is demanded." These general provisions grant the right of trial *de novo* on such an appeal, and the clause at the end of § 7985, whereby where the record below was an issue submitted on affidavits or otherwise of record the issue on appeal must be determined from the certified transcript of such record, has no application to a trial *de novo* in the instant case. We cannot sustain respondents' contention that the right granted to a trial *de novo* is thus limited to a mere review in the district court of this record upon which the county court acted. Prior to statehood the right existed to a retrial on questions of both law and fact. See § 5976, Compiled Laws. Such has since continued. See § 6275, Revised Codes of 1895. And where a jury is demanded and had, the procedure is governed by that in vogue in equity cases as distinguished from jury trials. Section 5976 of Compiled Laws provides for trial *de novo* "as in suits in chancery" where no jury is had, and the same procedure is continued under later provisions cited. And this case is here as an appeal from an action triable in equity with this appeal governed by the provisions of § 7229, Code of 1905. We might state, however, that had a jury been demanded, and jury trial been had in district court, the record and appeal thereon would have been covered by the provisions governing appeals from issues triable to a jury. See Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276; Auld v. Cathro, 20 N. D. 461, 32 L.R.A.(N.S.) 71, 128 N. W. 1025. As to appellants' contention that but a review in district court on the record made in county court is provided under §§ 7979 et seq. cited, we can-

not assent. The statute is not susceptible of any such construction when the scope of proceedings attempted to be covered by art. 9 of the Probate Code is considered. We must construe these sections in the light of the subject-matter thereby made appealable, and also the object sought to be covered by the trial *de novo* granted. To say that the trial *de novo* provisions are limited to such a trial on the transcript in practice abrogates the right of trial anew and nullifies the broad provision that "the court must hear the allegations and proofs of the parties according to the mode of trying similar issues originating in district court," as to do so on a certified record would be impossible of performance. Then, too, the right granted by the court to permit amendments to pleadings or permit new bonds to be filed or amendment to the issues to be so tried in district court, granted by § 7985, is hardly in harmony with the idea of a trial on a transcripted certified record as contended for by respondents. We conclude that the closing part of § 7985, reading: "But in other respects when the proofs on which the county court acted were submitted in the form of affidavits, or otherwise appear of record, the appeal must be determined upon the certified transcript," defines the procedure only where the proof was by affidavit or otherwise of record in the county court, and where a full determination thereof could necessarily be made by a review of such affidavits and certified transcripted record. Many instances in probate practice occur where such would answer fully all the objects for which the appeal was taken. For instance, where affidavits or testimony required to prove the uncontested probate of a will under § 8006, and under that section required to be made of record in the county court, could be so reviewed where only the legal question of the sufficiency of such proofs to admit to probate was in issue on such appeal, and where no trial *de novo* was demanded. Or likewise, a district court review of county court action may be had on the record of the presentation of a claim to an administrator or executor where the sufficiency of the proof of claim required under § 8100 alone is in issue, or in determining whether such a claim has been presented in time. Or again, in review of proceedings had on a real estate sale under county court decree when it may be accomplished by an appeal taken on law only and on the record fully determined under this provision as to appeals. Illustrations of its use might be

multiplied. It is to such matters where adequate relief may in such manner be had that the provision in question governs. It does not apply to a trial *de novo* where the issue of fact is, as in the instant case, the determination of the existence of a foreign common-law marriage. See Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276, wherein an Indian marriage was asserted to defeat the probate of a will, a proceeding very similar to the issue before us, excepting that a jury trial below was demanded, instead of waived, a matter not in itself affecting the right to a trial *de novo,* which must exist in both instances alike if in either.

Respondents urge that under § 111 of the Constitution the district court had no jurisdiction to try this action *de novo,* except upon the record, and that to do so would be assuming original jurisdiction in violation of the constitutional mandate. Section 111 provides that county courts shall have "exclusive original jurisdiction" of this class of actions. Section 103 of the Constitution grants district courts general original jurisdiction except where otherwise provided in the Constitution, and "such appellate jurisdiction as may be conferred by law." Section 7985 provides of what such appellate jurisdiction shall consist, and that the district court may try the action *de novo* on appeal. It is by virtue of the right of appeal and the statute granting it, that such trial anew is had, and this is not the exercise by the district court of original jurisdiction. See Prante v. Lompe, 77 Neb. 377, 109 N. W. 496; Ribble v. Furmin, 69 Neb. 38, 94 N. W. 967, 968. Christianson v. Farmers' Warehouse Asso. 5 N. D. 438, at pages 446, 447, 32 L.R.A. 730, 67 N. W. 300; Cavanaugh v. Wright, 2 Nev. 166. In the absence of constitutional prohibition, the legislature has the right to regulate appeals and prescribe the mode of exercise of review by the appellate court. 2 Cyc. 507. This contention is without merit. The decision of these practice questions also determines adversely to the contention of the respondents Miesen their motion to strike from the statement all matters excepting those appearing on the certified record from the county court filed in district court on the intermediate appeal.

The next question is whether proof has been made of a common-law marriage under the laws of Michigan, at which place it is alleged deceased and respondent Dorothea Miesen, formerly Dorothea Harnau,

were married. On this alleged marriage depends the interest of respondents Dorothea Miesen and her son, Herman Miesen, they claiming to be the wife and son respectively of Anton Emil Peterson, this deceased. No ceremonial marriage is claimed. Proof is offered of a common-law marriage. It appears that in 1875 Dorothea Harnau, then seventeen years old, met deceased, then twenty-three years of age, in Muskegon, Michigan. She was working as a domestic at a boarding house where Peterson was boarding. Emil became attentive to Dorothea, resulting, as she claims, in their becoming married. Describing this occurrence, she uses the following language: "We had no marriage ceremony. We took a solemn oath unto each other to be as husband and wife and to be true to each other and ever after conduct ourselves as husband and wife, and he should recognize me as his wife, and I him as my husband." Throughout cross-examination she adheres scrupulously to the language of this comprehensive "oath." She is wholly unable, however, to fix the date, at first not knowing whether it was in 1876 or 1877; nor could she fix the month or any period that she would assert was within six months of the actual occurrence of this most important event. When confronted with the question of this being a red-letter day in her period of existence prior to that time, she then attempted to fix it as "the first part of '77; it must have been in either April or March." and again in response to the question, "Was it after January, 1877, or before?" replies: "I cannot remember exactly. We went together; I cannot give a definite answer." And to the question, "You cannot tell whether it was in 1876 or 1877?" answers, "I worked to Bails two summers, and I do not remember whether it was the first summer I worked there or the second summer."

This marriage was kept secret from her mother and likewise from his stepfather. The former objected to the young Norwegian, and the latter asserted the marriage of a Norwegian and a Dutch girl was not the proper kind of an alliance. So she kept on working as a domestic. Emil visiting her every week or every other week, ostensibly as her beau. She says they "cohabited together as husband and wife at every opportunity," and explains her understanding of cohabit as indulging in sexual intercourse. To her sister-in-law and a few relatives and acquaintances she asserts he introduced her as his wife, and at one place lived with her as such for a short time with the family at whose place

they were stopping. Proof is made of a few purported statements of Emil to the effect that "he had married Dorothea" or that she "was his wife;" but they never resided together as such or "kept house." Nor was she generally known as Mrs. Peterson, but instead her employers at the various places where she worked understood she was a single woman, though some of them knew Peterson was more or less attentive, and to them Dorothea had stated that "they expected to be married;" and this up to a few months before the denouement occasioned by the birth of the child Herman to Dorothea on Independence Day morning in 1878. Until after the birth of her child, Dorothea had never told her mother of her purported secret marriage to Emil. During the winter of her pregnancy Emil had, as Dorothea and the community generally believed, "gone to the woods" to work, but in reality, as appears from testimony offered by respondents, was employed on a railroad, carefully concealing his whereabouts from Dorothea, though she says she heard from him once or twice during the winter, the letters being addressed to her as Mrs. Peterson. But Emil returned in June, 1878, and for a time there worked in a mill, if the testimony of respondents' witnesses be true. During this period he made varying statements that he "was not married, but was going to get married," or that "he and Dorothea were married," and acknowledging that he was the party at fault for her pregnancy. She last saw him on July 3, 1878. On this date he was arrested on a charge of bastardy, but succeeded in playing a ruse on the officer, and, eluding recapture, became a fugitive from justice. The testimony of one party who made suggestions to Peterson as to the best way for him to get out of that country is offered by the respondents themselves. From this it appears that, after hiding for several weeks, he left for the West, and three months thereafter was heard from by this witness by letter from Peterson, then in Dakota, where he remained continuously until his death in 1905, excepting one trip back in 1879 to deed a 40-acre tract of land to his stepfather, evidently to prevent recovery for the support of the child in question.

Petitioner Davidson testifies to knowing deceased for twenty years. That he was told by him of his child back in Michigan; that he did not want his whereabouts known; that deceased got mail from Michigan by having it addressed to petitioner, to keep his actual whereabouts a secret, and that he got mail in that manner for four or five years.

That he never mentioned having been married, but stated that he had some trouble in Michigan that he did not want known.

The testimony discloses that the birth of Herman occasioned considerable surprise, at least among some of the witnesses who have testified, and that the people inclined to discuss such things, "all said she wasn't married." Dorothea admits that she felt "ashamed" and "did not go out in society much," and that "circumstances were such that I could not go out." The boy Herman remained unnamed until her marriage in 1870 to her present husband, when the source of her former trouble became known as Herman Miesen, and evidently lived in blissful ignorance of early circumstances and the identity of his own father, according to his mother's testimony, until about the time of or after his father's death. This singularly about coincides in point of time with the date of a letter by respondents' present counsel to a witness in the case, resident at Dalton, Michigan, stating that "Anton E. Peterson (Amel E. Peterson) recently died in this state, leaving considerable property, but he leaves no heirs that we know of. We find some letters written by you about twenty-five years ago to Peterson, which indicate that you knew him and his family," and inquiring for relatives. And very soon thereafter these respondents, Dorothea Miesen and Herman Miesen, are claimants for the $6,200, ready to be distributed to the heirs at law of the deceased.

The circumstance of the early marriage of Dorothea Harnau in her maiden name as a single woman to Miesen, the year following Emil's unceremonious departure, is explained by the testimony of Dorothea Miesen, that she had read in some newspaper that one Anton E. Peterson, whom she assumed was her common-law husband Emil Peterson, had died in Duluth, leaving her a widow. She is uncertain as to the date or year she saw this newspaper account, but knows it was before she married Miesen. In any event without divorce she remarried. The marriage record in evidence proves she married representing herself as a single woman, and under her maiden name of Dorothea Harnau, at Muskegon, Michigan, on October 29, 1879, by a ceremonial marriage. Her explanation as to why she used her maiden name is significant. Her testimony places her own interpretation on her asserted marriage, and her own uncertainty as to how she regarded her status at the time she married Miesen condemns her other testimony as to the existence of

any marriage with Peterson. She was asked, "Now why was it, Mrs. Miesen, you gave your name as Harnau when you married Miesen?" To which she replied: "I don't know why I did; of course we just took the oath and had no ceremony performed." When counsel asks, "You did not consider it a marriage?" she replies; "I considered it a marriage at the time." When counsel further inquires, "But later on you did not consider it as a marriage?" she made the following evasive reply, "I did not know whether other people considered it as a marriage." And counsel, pursuing the inquiry further, asked: "You say that you did not know what other people thought about it. Had you thought of what other people would say about it?" She answers, "No, I had not." To which counsel interrogates: "But you were of the opinion that other people might think that it was not a regular marriage?" To which she answers: "I do not know whether it was or not. I simply took my name Dorothea Harnau because he had gone and did not come back, and my mother said to keep my name."

When she married Miesen she was twenty-one years of age. She since has lived with him continuously over thirty years and has borne him five children. She now asserts in her endeavor to obtain this inheritance, her prior marriage to a man with whom admittedly she has never resided as a wife, and a man whose every act, though indefensible from every standpoint, has been contrary to the probability of any such marriage ever in fact having taken place. There are no equities in her claim. To establish it she must confess herself a bigamist as well as bastardize her own five children, and overturn a consistent course of living of thirty years' duration, for her paltry share, by inheritance, from a man whose decease demands that we refrain from characterizing his conduct in the matter.

Proof has been offered of the construction by the courts of Michigan of their statutes and the right of marriage as bearing upon the validity of this alleged common-law marriage in that state. A common-law marriage is there valid. But giving the widest possible scope to the proof with the benefit of every doubt to respondent Dorothea Miesen, and including all her own testimony, much of which is objectionable on the ground of incompetency, her claim of marriage cannot be sustained. It is true she recites what she terms as an oath probably sufficient in itself to constitute a contract of marriage *in præsenti*, and

she testifies it was followed by sexual intercourse the same evening between them; but that does not constitute sufficient proof of a marriage at common law in the face of the facts disclosed by this record. There was really no cohabiting as husband and wife, evidencing by repute the consummation of the marriage contract. On this the Michigan court in Lorimer v. Lorimer, 124 Mich. 631, 83 N. W. 609, says: "Our courts have gone a good way to sustain the validity of a marriage where an agreement to live and cohabit together as husband and wife has been made and acted upon. But at no time has it been said that, in the absence of a valid marriage ceremony, a simple agreement to live together, even though the parties intended to carry out the agreement, is sufficient to constitute a valid marriage, unless acted upon by living together and cohabiting as husband and wife." And again in the same case the court, quoting from an opinion of Justice Cooley in Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164, approved the following: "But had the supposed marriage taken place in this state, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and co-operation of the parties, would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they were not. Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations." It is apparent that, though sometimes ignored, it is necessary that an assumption of marriage relations be had to constitute a common-law marriage. 1 Bishop, Marr. Div. & Sep. § 380; Campbell v. Campbell, L. R. 1 H. L. S. E. App. Cas. 182, 211; Bishop v. Brittain Invest. Co. 229 Mo. 699, at page 728, 129 S. W. 668, at page 677, Ann. Cas. 1912, A, 868, from which we quote: "Cohabitation as husband and wife is a manifestation of the parties having consented to contract that relation *inter se*. It is a holding forth to the world by the manner of daily life, by conduct, demeanor, and habit that the man and woman who live together have agreed to

take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation. The parties are holden and reputed to be husband and wife." To which Bishop adds: "The cohabitation must be matrimonial. The repute to have its fullest effect should be uniform. It then casts upon the party denying the marriage the burden of proving that it did not take place." The supreme court of Missouri, in Bishop v. Brittain Invest. Co. cited, in applying the law to an alleged common-law marriage with facts much stronger tending to establish the marriage than those before us, but in which the element of secrecy appeared on the question of the recognition of plaintiff as a wife, says of secret repute of the marriage relation, the following: "Such repute does not meet the stringent requirements of the law. . . . If the language, 'he recognized her as his wife,' refers to a general or full recognition from and after [the date of the alleged marriage], it is not sustained by the proof. . . . If it refers to a recognition now and then, sporadic, furtive, incidental, and not a continued public recognition 'a holding forth to the world by the manner of daily life, by conduct, demeanor, and habit,' etc., then it does not meet the high standard set in Campbell v. Campbell." And again from the same case: "As to the second clause [referring to presumption of marriage from cohabitation], it leaves out the element of general repute among the neighbors, friends, and acquaintances, arising from acts and continued conduct in holding themselves forth as husband and wife." See same in Cargile v. Wood, 63 Mo. 513: "Cohabitation and reputation are at best only presumptive proofs, and when one of these foundations is withdrawn what remains is too weak to build a presumption on. There is good sense in the Scotch law by which cohabitation alone is considered insufficient, and which requires in addition habit and repute, because it is said the parties may eat, live, sleep together as mistress and keeper without any intention of entering into marriage. Cohabitation is simply the first step, and when that is accompanied by an acknowledgment of the matrimonial relations and treating each other as a man and wife, and holding one another out to the world as such, there may reasonably be a presumption

founded upon all these facts that the intercourse is lawful, instead of meretricious." See also Topper v. Perry, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203, where facts stronger than these before us were held insufficient to constitute a common-law marriage, the court saying: "Certainly there was no such assumption of the marriage status after that night for over four months that would indicate that these parties regarded themselves as man and wife from and after that night. There was no such open and continued cohabitation and holding themselves out to the world as man and wife as usually characterizes the marriage relation."

What we have said assumes the truth of the testimony of Mrs. Miesen as well as its admissibility. As all witnesses tending to establish the alleged marriage testified by deposition, no advantage was given the trial court in determining the credence to be given the testimony over what can be gained from the transcript. We have weighed all evidence offered on behalf of respondents Miesen with great care, but are unable to concur in the findings of the lower court. Respondents have the burden of proving the marriage, and have not met that burden. After making allowances for the fact that they are testifying to matters occurring half a lifetime before, and that after such lapse of time uncertainty of recollection as well as difficulty in obtaining proof is but to be expected, yet we cannot conclude otherwise than that the proof shows no marriage, rather than the existence of one. The presumption naturally arising from certain established cardinal facts negatives absolutely the existence of a marriage. Both parties have irrevocably so construed their relation by their own actions, and in this indeed do actions speak louder than words. Time does not efface the fact nor obliterate the reason nor alter natural presumptions to be drawn from the secrecy in which the relations of these parties were shrouded. His flight from the country and subsequent life under a cloud strongly indicates an intent to avoid the consequences of meretricious relations with this girl, and evinces his continued determination to remain a fugitive from justice, as he early chose to do, rather than to marry her. His breaking from arrest and subsequent flight would be admissible in the prosecution against him for bastardy, to avoid the results of which he fled. It would be strange reasoning indeed to say that, such being the case, it did not refute the idea of a previous marriage as well

as evidence well nigh conclusively his intent not to marry. It certainly could not be considered as the natural act of a married man accused of unlawfully begetting his own child, when all he had to do to disprove guilt was to establish his past marriage or then assume the marriage relation. Then, too, the subsequent life of Dorothea Miesen has been equally inconsistent with her present claim. As much so was her conduct during pregnancy as we have it described from her own lips. It would seem that naturally her first impulse would have been, had such marriage existed, to claim its benefits and absolve herself from shame and ignominy necessarily attendant upon her under those conditions. Strange indeed her actions in not informing her own mother of her secret marriage before surprising her with the birth of an apparent bastard child. Such secrecy is not what would be expected under those circumstances from a woman nineteen or twenty years of age, when all that was necessary to relieve herself from blame, restore her to respectability in the community, and give her own child a name, was to assert the existence of the previous fact of marriage, conceding it so to be, instead of by needless secrecy living a lie and enduring needless disgrace. The fact from her own lips that for thirty years she never informed Herman that Peterson was his father is damning to her testimony, and it stands as strong proof of his illegitimacy. And when after such a period of time, apparently about contemporaneous with the death of her unmarried friend of thirty years before, the plundering of his estate furnishes a notice for the assertion of such a claim, we must view it with askance, the motive for the claim so clearly appearing. Her claim of marriage is conclusively disproven. For a Michigan parallel holding that the acts of parties are controlling, see Cross v. Cross, 55 Mich. 280, 21 N. W. 309–313; see also Sharon v. Sharon, 79 Cal. 633–669, 22 Pac. 26–36, 131. The fact that no claimants other than aliens resident in a foreign country can inherit if the Miesens do not, cannot alter the situation, as the laws governing inheritance are not modified by public policy.

On the merits respondents Dorothea Miesen and Herman Miesen are without interest in these proceedings. Dorothea Harnau was never married to Anton Emil Peterson, deceased, and Herman Miesen, though he be their illegitimate son, cannot inherit from Peterson, his father; there being no pleadings nor proof upon which can be made a

claim of adoption by the father of such illegitimate son, under § 4118, Rev. Codes 905, construed in Eddie v. Eddie, 8 N. D. 376, 73 Am. St. Rep. 765, 79 N. W. 856.

Because in passing upon the merits of this case it was unnecessary to determine the competency of the testimony of the alleged wife, wherein she testified to the alleged marriage, her testimony having for the purpose of this suit been considered without excluding any part thereof, we do not mean to determine that such testimony is admissible under our statute, § 7253. It is unnecessary to determine the question of its admissibility, and therefore we do not pass upon that question raised.

We now turn to the evidence touching the relationship of the appellants to Anton Emil Peterson, the deceased, all of which was offered under objection on the part of respondents Miesen. The elimination of these two respondents from this action does not obviate the necessity that full proof of relationship and right in law to inherit exist as the basis for an order of final distribution. Besides, the state is interested, as, in the event of a failure of heirs, the estate of the deceased, under the statute, must escheat to the state.

Proof is offered along two lines: First, evidence tending to establish heirship under the rules applying to admissibility of matters of family history, including entries in a family Bible; and second, documentary proof offered consisting of copies of various church records from Norway, certified as such by the keepers thereof whose official capacities are variously authenticated; which nonjudicial records are offered to establish the pedigree and family tree of the deceased; as supplemental proof of heirship to that contained in the family Bible tending to identify respondents as the heirs now entitled to receive their distributive shares of this estate. On the declarations as to family history we have testimony of one Nord, taken on deposition. From this it is established that one Hans Peterson Mortkjarnet was the stepfather of the deceased and resident for years near Muskegon, Michigan. He died in 1888. He was there when deceased fled that country. He died possessed of a Bible containing entries as to births, deaths, marriages, and family *data*. He had stated to the witness that this Bible once belonged to Anton Emil Peterson, deceased, having been given him by his stepfather Hans, remaining, however, in the possession of

the old man, from whose house at his death the Bible was taken by the witness, who has since retained its custody. This Norwegian Bible was obtained from the old country, and contains a page of records of births, deaths, and marriages, showing the marriage of the stepfather to the mother of deceased, Peterson, and the death of the mother in 1864. Other relatives are also named. Therein is contained the statement: "This belongs to me, Hans Peterson Mortkjarnet," and the later indorsement, "Now this book belongs to Anton Emil Anderson Mortkjarnet," meaning Peterson, deceased. The witness testifies to certain of these entries being in the handwriting of the deceased Peterson. When counsel for the Miesens was endeavoring to ascertain the heirs of the deceased, they wrote the witness, Nord, who still had the family Bible in his possession, and he tore out the leaf containing the above entries and sent it to them. Counsels' letters are in evidence, acknowledging its receipt. Thereafter on request of witness Hobe, resident in St. Paul, and Norwegian consul for this territory, the Bible leaf in question was mailed him, together with a letter written by counsel for the Miesens, explaining part of such entries. Hobe admits its receipt, but testifies to its having been returned to the counsel from whom he obtained it, but who deny its return. It is plain that both Hobe and counsel are in good faith in this matter, and that this leaf from the family Bible has been lost or unintentionally mislaid. However, a sworn translation of it was preserved by Hobe, and is offered in evidence in lieu of the original. The letters in question are in evidence. We deem the foundation for the receipt of the exhibit sufficient, and the objection to the competency of this exhibit itself and the Bible also offered not to be well taken. The proof establishes the Bible to have been the family Bible of deceased Peterson and his stepfather, and that the entries therein made accordingly are in the nature of declarations of the deceased and family as to matters of their family history, and as such are admissible as matters of family history deriving testimonial qualification, thus entitling them to admission from the fact of their having been made by members now deceased of the family in question concerning matters of family history as to which the family is presumed to have accurate knowledge, and all made at a time long prior to the arising of this controversy and when there could exist no motive to deceive. Under all the authorities the family Bible

and these statements therein contained were admissible. See Wigmore, Ev. §§ 1482–1496; 16 Cyc. 1122–1132, 1223–1241; 20 Century Dig. cols. 1602–1617; 2 Decen. Dig. pp. 958 et seq.

This takes us to the second inquiry as to whether the church records can be received over objections as to want of foundation laid and incompetency. They are intended to supplement the Bible entries as proof of identity of the appellants as the heirs of deceased Peterson. These church records consist of seven different purported transcripts of that number of church records of births, deaths, marriages, and matters of family history tending to connect the various appellants in blood relationship to the deceased Peterson. Each transcript is under oath certified by a person describing himself as the parson of such particular church and the keeper of such church records, and that the transcript made by him is a true and correct copy of the original records of such church parish, kept by him or his predecessors under duty imposed by law; and affixed to each certificate, and authenticating both the certificate and the official signature of such parson in each instance, is the certificate of the district judge under the seal of the court of the district in which such church is situated, certifying to the official character of such judge and of such parson, and that such parson is the authorized and legally required keeper of the church records of the church in question.

Further, that such church records are those established by the laws of Norway, and are receivable in evidence as proof in any court in Norway, and that the originals cannot be removed from the district. Accompanying such certified copies in Norwegian are translations thereof in English, duly certified by "the official translator to certified translations," together with a statement of his official character and to the correctness of the translation and the genuineness of the signature of the attesting judges. There is also attached to each of the seven certified copies the certificate under seal of the chief of the ecclesiastical ministry of Norway, stating the law and certifying to the signatures of the pastors. Accompanying these certified records is the certificate of the consul general of the United States, resident in Christiania, Norway, certifying under his official seal the genuineness of the signatures of the attesting district judges and other officials, and that the several certificates were executed by lawful authority and

entitled to full faith and credit as such. Proof is offered on the trial, explanatory of these church records identifying the deceased with the line of descent thus attempted to be proven. If such proof is admissible it establishes the respondents' claim to this inheritance.

Our statutes do not prescribe the foundation necessary to admit such proof. Hence resort to the common law. Such may consist of proof of facts by deposition sufficient to constitute a foundation for the evidences offered, or by the more convenient mode where permissible of the use of certificates to authenticate documents, which authentication operates as a testimonial guaranty sufficient for their admission. In any event before these copies of foreign nonjudicial official records are admissible, it must appear that the originals are there official records of such foreign country. To establish this fact, proof of the foreign law making them official records and imposing the duty of their keeping must be made in the same manner as the proof of any other fact in issue. See extensive note to State v. Behrman, 25 L.R.A. 449. In the absence of statute regulating the class of proof required to establish the foreign law, the written law can be proven only by the foreign written statutes or properly exemplified copies thereof. But as to the unwritten law of the foreign country, proof is made by the testimony of those familiar therewith competent to testify, and after sufficient foundation is laid to satisfy the court that the witness testifying is qualified to testify on the subject. Our statute, § 7291, makes the same distinction in kind of proof required. Admitting the qualification of Hobe, consul for Norway, to testify as an expert, the fact does not appear that the laws of Norway under which the purported documents are required to be kept are in writing, or whether they exist as unwritten law, either common or civil. Of the fact we cannot take judicial notice. Hence the proof necessary to admit these documents is wanting so far as oral testimony offered as a foundation is concerned.

But are the documents themselves sufficient to establish their admissibility? We will take judicial notice of the official signature, seal of office, and genuineness of the certificate of the United States consul accompanying these records. Granting full force to such certificate, it but establishes the signatures of the district judges as genuine and that full faith and credit may be given to their statements. They in turn certify the parsons as the keepers of these records, and

that the same are official and such as are obliged by the laws of Norway to be kept. Can we accept as evidence their certified declarations as to the law? We think not. What Hobe could not testify to because of it being a matter required by statute and common law to be proven by written statute if in existence in Norway, we cannot accept as established in such manner equally indefinite in the same particulars. Then, too, this class of official records is not provable by certified copies alone without other foundation for their admission under our statute, §§ 7300–1. If these statements were certified by the King or his immediate subordinate, attested by the great seal of state, by force thereof they would be admissible. Rev. Codes, § 7300, subd. 4. And such is the common law. Wigmore, Evidence, § 1679, p. 2112; 1 Greenl. Ev. §§ 486–489. But under § 7300 it is only the acts of the foreign executive or foreign legislature that can under these sections be received. But proof of the kind offered is barred. Notice that § 7300 in the last three subdivisions thereof provides for the reception of certified copies of this class of documents when coming from sister states or Federal departments of government, and there stops short. And by common law similar documents from foreign countries are not admissible without proof of the official character of the originals and of the law requiring their keeping as official records. Under § 1633 of Wigmore on Evidence, quoted with approval in Miller v. Northern P. Ry. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215, although passing on a different statute and as to evidence offered from a sister state, this testimony by certified copies would be admissible though made by a foreign officer, when once there is established the foundation for its admission by full proof of the official character of the original if accompanied by the certificate proof here presented. See also note in 25 L.R.A. 449, and Wilcox v. Bergman, 96 Minn. 219, 104 N. W. 955, same case with valuable note in 5 L.R.A.(N.S.) 938.

We might remark that the rules stated as to the foundation necessary to admit certified copies of these foreign nonjudicial, but official records, has no application to any similar proof offered when coming from any state or territory a part of the United States, being fully covered by our own statutes, §§ 7291 to 7301, inclusive; all of which statutory regulations must be construed as subordinate to and to be harmonized with art. 4, § 1, of the Constitution of the United States, pro-

viding that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof;" pursuant to which Congress has enacted U. S. Rev. Stat. §§ 905, 906, U. S. Comp. Stat. 1901, p. 677, providing thereby a uniform method of proof and authentication to which state legislatures cannot add more onerous burdens as to proof arising from other states, but which burdens they may by statute lessen. In addition to both rules we have the common-law rule, more inconvenient, and with higher requirements than those required by the Federal or state rules. In the instant case the requirements under common-law proof have not been met, and the instruments offered are inadmissible on the foundation laid.

From the declarations of matters of family history proven by Bible entries, there is insufficient evidence upon which a decree of final distribution herein can be granted. But it appears that proof may on retrial be made of the right of some of appellants to share in this estate. Accordingly we order that the judgment of the district court be reversed and vacated and the petition of respondents Miesen be dismissed for want of merit, and we remand this action to the district court of Benson county for further proceedings as to the claims of the appellants, directing that the action be there retained for trial on the right of these appellants to inherit this estate, and in the event of a determination adverse to them judgment will be entered that the estate of Peterson, deceased, escheat to the state of North Dakota. The district court is directed to grant appellants such reasonable time, and in any event not less than four months if desired, within which to submit proof of heirship. And the appellants will take all further proceedings herein only on notice thereof to the state's attorney of Benson county and the attorney general of the state of North Dakota, either of whom may appear and participate in behalf of the state. The final judgment of the district court will direct the judgment to be entered in county court.

Appellants will recover costs and disbursements taxable in the coun-

ty, district, and supreme courts, against Dorothea Miesen and Herman Miesen.

BURKE and BRUCE, JJ., being disqualified, Honorable W. H. WINCHESTER, Judge of the Sixth Judicial District, sat by request.

On Petition for Rehearing.

Goss, J. In a petition for rehearing counsel have questioned in many particulars the opinion filed. We adhere to our decision. Counsel vigorously attack the constitutionality of the trial *de novo* provisions of § 7985, authorizing a retrial in district court on the matters involved in the distribution of the proceeds of the estate, concerning which the existence of a common-law marriage constituted the main issue. While the matter is but incidental to the exercise of probate jurisdiction, yet as § 7985 confers on appeal on the district court the duty of trying *de novo* probate matters mentioned in such section, its constitutionality is challenged, and if such statutory right of appeal is invalid the judgment of the county court would be conclusive and should be affirmed, as jurisdiction to try *de novo* would not be conferred by the appeal upon the district court, because of the unconstitutionality of the appeal statute. If the statute is unconstitutional the district court trial as had was a nullity. The constitutional provisions are recited in the main opinion. Do the provisions of § 111 of the Constitution, granting to the county court "exclusive original jurisdiction in probate and testamentary matters (enumerated), and such other probate jurisdiction as may be conferred by law," prohibit retrial in district court on new evidence,—a trial *de novo* in all particulars? We answer emphatically that it does not. A trial *de novo* is but the exercise of the appellate jurisdiction conferred by law and authorized under § 103 of the constitution, defined in practice by § 7985. The legislature has thereby seen fit to declare the manner of exercise of the appellate jurisdiction with which the district court on appeal is clothed to be that of trying the cause anew, instead of limiting the appeal to a review of a record already made. Such appellate court at the conclusion of such trial enters its judgment under § 7986, directing the form and substance of the judgment to be entered in the county court, the court of ex-

clusive original jurisdiction, and in so doing but exercises its appellate jurisdiction in the manner prescribed by law.

Counsel cite as against the constitutionality of the statute mentioned a decision of this court on the Newman law, Christianson v. Farmers' Warehouse Asso. 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300. This case cannot be construed as authority for counsel's position. It fully supports our holding. We quote therefrom the following; found on pages 446, 447, of the opinion: "We find no definition of appellate jurisdiction so limited that it will not permit the appellate court to review the facts as well as the law if the legislature so required. As we have seen the supreme court of the territory of Dakota at the time of and prior to the adoption of our constitution was expressly required to review facts in certain cases under § 5237 of Compiled Laws. We have no authority for saying that the constitutional convention intended to curtail that jurisdiction. Nor have we any warrant for saying that such convention used the words 'appellate jurisdiction' in § 86 of the Constitution in any other or different sense from that given to the same words in § 103, defining the jurisdiction of the district courts. And when in the latter section it is declared that the district courts shall have 'such appellate jurisdiction as may be conferred by law,' it is not meant that the legislature may define appellate jurisdiction and make it mean one thing in one case and a different thing in another case. It is only meant that it shall have appellate jurisdiction in such cases as the law may declare. It is undisputed that the appellate jurisdiction in such courts may be exercised by a strict trial *de novo* upon new pleadings and entirely new evidence, but it is entirely competent—and it is almost universally done—for the legislature to declare that in certain cases involving only small amounts the appellate jurisdiction of those courts shall be exercised only in the correction of errors, and such provisions do not affect the question of appellate jurisdiction, but of appellate procedure. In Story on the Constitution § 1761, that learned authority in discussing the appellate jurisdiction of the Federal Supreme Court, says: 'In the first place it may not be without use to ascertain what is here meant by appellate jurisdiction and what is the mode in which it may be exercised. The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to

judicial tribunals and appellate jurisdiction therefore necessarily implies that the subject-matter has been already instituted in and acted upon by some other court whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and indeed, in any form which the legislature may choose to prescribe; but still the substance must exist before the form can be applied to it.' We know of no clearer statement of the points under discussion than is contained in Judge Story's language. Appellate jurisdiction cannot create a cause; it must be first created and adjudicated by another judicial tribunal. Those facts existing, the appellate court may exercise its jurisdiction in any form the legislature may prescribe. The legislature may require the appellate court to review the facts and render final judgment. If in so doing it exercise some of the functions of a court of original jurisdiction, we answer that there is neither constitutional nor legal reason why it should not."

The celebrated and pioneer case on the Federal Constitution is that of Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 160. It was there sought to compel the issuance of an office commission by mandamus commenced as an original proceeding in the Supreme Court, based upon the authority of a statute assuming to so grant to the Supreme Court original jurisdiction. The Federal Constitution, while not in express terms denying the Supreme Court original jurisdiction in such matters, did expressly declare the original and appellate jurisdiction of that tribunal; and by inference denying it original jurisdiction excepting when granted by the Federal Constitution in express terms. This implied negative against original jurisdiction was given force and held controlling and as rendering the statute granting such excess of original jurisdiction unconstitutional. The following language of Chief Justice Marshall is instructive: "When an instrument organizing fundamentally a judicial system divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers and proceeds so far to distribute them as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. . . . To enable this

court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, *or to be necessary to enable them to exercise appellate jurisdiction.* It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. *This is true, yet the jurisdiction must be appellate, not original.* It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause *already instituted, and does not create that cause.* Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. *Neither is it necessary* in such a case as this, *to enable the court to exercise its appellate jurisdiction.*"

From the foregoing portions which we have italicized it is plain that the legislative right to prescribe the manner of exercise of the appellate jurisdiction is there recognized; and the distinction drawn not on the manner of its exercise, the appellate procedure used, but rather in denial of the right of an appellate court to be used as a court wherein causes of action may be originally litigated. This case is consonant with the opinion of our court in Christianson v. Farmers' Warehouse Asso.; and also Cavanaugh v. Wright, 2 Nev. 166, a case on all fours with the one at bar. We quote therefrom: " 'appellate jurisdiction' in its most limited and technical sense means jurisdiction to retry and determine something that has already been tried in some other tribunal. If we were to give the phrase its most technical and limited meaning, we might rather hold that the framers of the Constitution intended thereby to require that all appeals from justices should be tried *de novo,* than that none should be so tried. But we are not disposed to give it so narrow and technical a construction. We think as used in the Constitution the phrase 'appellate jurisdiction' was intended to be used in a broad and comprehensive sense. It was intended to confer jurisdiction upon the district courts to hear cases on appeal either in the strictest sense, which would require a trial *de novo,* or to review them as law cases are reviewed at common law. We think the language quoted from the eighth section clearly confers on the legislature the power to regulate the manner of appeals to the district court. It might require in one class of

cases that upon appeal the trial should be *de novo* and in other cases a simple review of the proceedings of the court below. The legislature has required the trial in the district court to be *de novo* in all cases, and we think it had the right to do so. The law is not in conflict with any constitutional provision. We see nothing in the fourth section of article 6 of the Constitution which confers appellate jurisdiction on this court [district court], which militates against the views we have herein expressed." The case of State ex rel. Pleasure v. McClellan, 25 Fla. 88, 5 So. 600, may be considered as contrary to our conclusion unless the exception mentioned in the last paragraph thereof be borne in mind. That court, after holding that the purpose and effect of a trial *de novo* on appeal was the invoking and use of original as distinguished from appellate jurisdiction, shows the opinion to have been written more with reference to appellate procedure than to jurisdiction. We quote from the concluding paragraph: "The jurisdiction to try a proceeding relating to the forcible entry or unlawful detainer of lands is a law jurisdiction; and at law, barring the legislation as to trials *de novo,* such a thing as the introduction of new evidence has not been permitted on either a writ of error, or on our law appeal. The same is true of appeals in equity. State courts have no admiralty jurisdiction, and the peculiar practice in that branch of jurisprudence cannot be invoked as in point." It is also evident that this holding is influenced by the peculiar phraseology of the Florida Constitution in defining jurisdiction, original and appellate, of its various courts. See State ex rel. Wallace v. Baker, 19 Fla. 19, decided prior to State ex rel. Pleasure v. McClellan, in which the court uses the following language: "In many of the states where the jurisdiction of the courts is not so sharply defined, it is provided that a new trial may be had in the circuit court on appeal from judgments of inferior courts. It was so in this state under the former Constitution, which gave circuit courts original jurisdiction of matters without regard to the amount involved; and, having such original jurisdiction, it could try *de novo* causes brought before it by means of the statutory appeals from justice's courts, in the same manner as causes commenced by summons. But as the present Constitution forbids the circuit courts to take original jurisdiction of matters at law involving less than $100 in value or amount, the legislature cannot confer such jurisdiction by indirect means." The same may be said of State ex rel.

Chestnut v. King, 20 Fla. 399. That trial *de novo* may be considered essential to an exercise of appellate jurisdiction, see Dodds v. Duncan, 12 Lea, 731. Idaho, under constitutional provisions interpreted by its supreme court as classifying jurisdiction in the probate and district courts identically as is done under the constitutional provisions of our state under consideration, has fully adjudicated the very question before us, as will be found in Re McVay, 14 Idaho, 56, 93 Pac. 28; Christensen's Estate, 15 Idaho, 692, 99 Pac. 829; Re Sharp, 15 Idaho, 120, 18 L.R.A.(N.S.) 886–898, 96 Pac. 563; Idaho Trust Co. v. Miller, 16 Idaho, 308, 102 Pac. 360; and McGregor v. Jensen, 18 Idaho, 320, 109 Pac. 729. The first two cases are on all fours with the case at bar, and contain lengthy discussions of appellate and original jurisdiction, the opinion in the McVay Case being written after rehearing had on this identical question. We quote therefrom: "An examination of §§ 20 and 21 of art. 5 of the Constitution discloses at once the fact that the framers of that instrument saw fit to classify 'matters of probate, settlement of estates of deceased persons, and appointment of guardians', as separate, distinct; and aside from 'cases at law and in equity' over which they gave the district court 'original jurisdiction.' It will also be seen from § 20 that 'in all cases, both at law and in equity,' from which they have clearly distinguished 'matters of probate, settlement of estates of deceased persons, and appointment of guardians,' the district court has 'original jurisdiction,' and that in all other matters which the legislature might provide for being heard in district courts the jurisdiction should be solely 'appellate.' The words 'original jurisdiction' and 'appellate jurisdiction,' as employed in § 20, are used in the clearest and most unequivocal contradistinction to each other. By § 21 the probate courts are given the sole and exclusive 'original jurisdiction' in all matters of probate. . . . Under § 20, art. 5, of the Constitution, the legislature is the sole and exclusive judge as to the extent and scope of the 'appellate jurisdiction' that they will confer upon district courts. . . . It must be assumed that the legislature, when it passed the act . . . providing for a trial *de novo* in the district court on appeal from the probate court in probate matters, was acting within the purview of the Constitution, and did not intend to go any further than to provide for the exercise of the 'appellate jurisdiction' of the district court." This act granting such appeal reads: "The

appeal may be taken either upon questions of [law] or both law and fact. If taken upon questions of law alone the district court may review any such questions which sufficiently appear upon the face of the record or proceeding without the aid of a bill of exception, but no bill of exception shall be allowed or granted in probate court in probate matters. If the appeal be upon questions of both law and fact the trial in the district court shall be *de novo.*" Commenting thereon that court says: "If, however, the cause is not reversed on questions of law, then the same questions of fact as were tried in the probate court will be retried in the district court as other trials in said court are conducted. Witnesses may be called and may testify the same as in the trial of any other cause. In other words, this statute under the Constitution grants to the district court appellate jurisdiction to retry only the same issues of law and fact as were heard and determined by the probate court. Whatever judgment may be entered in the district court is to be certified back to the probate court for execution in accordance therewith." The appeal statute quoted grants more limited appellate powers than ours, but is given full force according to its terms, including the trial *de novo* feature thereof. But it may be contended that this construction would grant a right of appeal and trial *de novo* in district court after issue joined in probate court, where either no testimony was taken in probate court or merely a perfunctory trial had, and would result in the probate court being used similarly as a justice court is often used where the parties intend to try the issue finally in the district court; and that would be in effect permitting the exercise by the district court of original jurisdiction in probate matters. This was precisely the argument advanced in the case of Christensen's Estate, 15 Idaho, 692, 99 Pac. 829, the syllabus of which reads: "Upon the hearing in the district court the case must be retried upon the same issues presented to the probate court, and witnesses may be called and testify the same as in the trial of any other cause. The fact that either party failed to present evidence in support of the issues made in the probate court is not a ground or reason for dismissing the appeal to the district court, and the proof offered or a showing that no proof was offered in the probate court cannot be presented to the district court by affidavit in support of a motion to dismiss the appeal, as the cause in the district court is to be tried *de novo* upon the issues made in the pro-

bate court. . . . When an appeal to the district court in a probate matter is completed the case is transferred to the district court to be tried *de novo,* and the fact as to the offering of proof or the failure to offer proof in the probate court is of no consequence whatever." And quoting further from the opinion: "A party to a probate matter upon appeal to the district court cannot present the proof taken in the probate court or show the absence of proof by affidavit, as the district court is required under the statute to proceed to a trial *de novo;* and whether either party made or failed to make a case in the probate court does not concern or govern the district court in considering the issues presented to it for trial. . . . The statute does not limit the right to appeal in a probate matter to cases where the appellant offered proof in support of the issue before the probate court."

Bearing in mind the construction of the supreme court of Idaho on their constitutional provisions, to be that the probate court there possesses sole, exclusive original jurisdiction, as granted ours under § 111 of our Constitution, the case from that court of Re Sharp, 18 L.R.A. (N.S.) 886, is in point. We quote from page 897: "The matter of appeals from probate courts is within the legislative will, and the law-making power may regulate it, extend it, or limit it, as it sees fit."

The case of St. Louis County v. Sparks, 11 Mo. 202, is apparently an authority supporting respondent's contention, but in reality is a decision denying a trial *de novo* in the absence of a statute prescribing the right thereto in appeals from county court, as is explained in Lacy v. Williams, 27 Mo. 281, where it is said "a trial *de novo* in the circuit court would not strictly be the exercise of appellate jurisdiction (St. Louis County v. Sparks). It is clearly competent for the general assembly to confer such a jurisdiction, but, until it is expressly done, we do not consider that the bestowal of mere appellate power would authorize the courts to try causes *de novo.*" Many similar holdings may be found. See 3 Century Dig. cols. 1369–1379. And many cases favor a trial *de novo* when granted by statute, but are decisions where the statute is not challenged on the ground of alleged unconstitutionality. As illustrative cases, see Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276; Levy v. Moody, — Tex. Civ. App. —, 87 S. W. 205; Fitts v. Probate Ct. 26 R. I. 256, 58 Atl. 801; Decker v. Cahill, 10 Okla. 251, 61 Pac. 1101; Norway Plains Sav. Bank v. Young, 68 N. H. 13,

36 Atl. 550; Mills v. Bradley, 1 Blackf. 541; Harris v. Foster, 5 Ark. 717. Many states, like California, by Constitution confer upon the legislature power to regulate and define probate and kindred jurisdiction, and therefore their decisions are inapplicable. The case of Prante v. Lompe, 77 Neb. 377, 109 N. W. 496, cited in the main opinion, it is true, is under a Constitution where in concurrent jurisdiction of matters of guardianship is conferred upon the county and district courts; but the decision there made is not based thereon, but instead, is a holding that a trial *de novo* is not an exercise of original jurisdiction.

But respondent may argue that this interpretation of our constitutional provisions permits the legislature, by a process styled by it as an appeal, to abrogate the constitutional provision that probate courts shall have exclusive original jurisdiction in probate matters, and in effect confers original jurisdiction upon the district court; and, further, that if this conclusion is sound, the same consequences will result with reference to trial matters generally, either probate as to the probate court, or as to law and equity in the district court, whereby the supreme court may in a similar manner, by legislative caprice, be made in practical effect a trial court concerning appeals from either district or probate courts. And we may be asked why, under our holding in this case, such may not inevitably follow, and if so, what constitutional barrier remains to define the jurisdiction of the several courts or keep separate their jurisdictions from confusion or intermingling at the will of the legislature. This is effectually answered by the determination of the meaning of the terms "original jurisdiction" and "appellate jurisdiction," as in force at the time of the adoption of the Constitution: when considered with the phraseology of §§ 86, 103, 111, defining the jurisdiction of the supreme, district, and county courts respectively. With this it must be remembered that as to the probate court, § 111 of the Constitution is a grant of power; while as to the supreme and district courts the constitutional provisions are not wholly a definition of jurisdiction, but rather a limitation of powers already possessed. The district courts were courts of general jurisdiction in law and equity, the general common-law trial court; while the supreme court succeeds to the powers of the court of King's bench through which appellate jurisdiction was exercised by the use of writs of error as to errors of law and writs of certiorari as to jurisdictional matters arising on the records

of the lower courts, with additional original jurisdiction to exercise a general superintending power over the inferior courts and a similar original jurisdiction to be exercised by prerogative writs, the latter in enforcement of sovereign rights. Hence § 86, reading: The supreme court shall have appellate jurisdiction only, and shall have a general superintending control over all inferior courts, read in connection with § 87 thereof, but declares the general conception under the common law of the powers so vested and inherent in that court, and constituting it the supreme appellate tribunal of the state.

But as to the district court its jurisdiction was equally well understood and defined at statehood at a time when it was exercising, under the right of appeal to it from inferior courts, the power to try *de novo* matters of fact as well as law; when the term "appeal" so used meant more than the common-law process under writ of error; and when an appeal taken on both law and fact must have meant what it now means, the trial *de novo* in that court, wherein evidence was offered and the trial had without reference to the manner or the record of the trial in the court below. See Constitutional Debates, 293–317, & 570–571, concerning these constitutional provisions. With such a practice then prevailing, can we conclude that these constitutional provisions were drafted and adopted with reference thereto and with reference instead to the ancient notions prevailing in the early history of this country, under which an appeal, if existing, meant but a review of a record, instead of a trial *de novo?* In the words of Justice Bartholomew in 5 N. D. 446: "We have no warrant for saying that the constitutional convention intended to curtail that jurisdiction," as then existing in such courts. And we have no better light in which to determine the intent of the Constitution and its framers than such contemporaneous history; remembering also that, as is said in Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97, the Constitution unavoidably deals in general language." And again, in M'Culloch v. Maryland, 4 Wheat. 407, 4 L. ed. 601: "A Constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind." See also Ex parte Henderson, 6 Fla. 279.

And in reality the terms "appellate jurisdiction" and "original juris-

diction" are relative terms, and, like the basic term "jurisdiction," dependent upon the manner of use, the context, and the understanding had of the term in the light of its application. Jurisdiction to a state is in Sanders v. St. Louis & N. O. Anchor Line, 97 Mo. 26, 3 L.R.A. 390, 10 S. W. 595, held coextensive with its sovereignty, and conveys a different meaning than its use applied to courts. In one court, as in Cavanaugh v. Wright, 2 Nev. 166, is held when strictly construed to mean jurisdiction to retry and therefore to require trial *de novo;* while in another, as in Re McVay, 14 Idaho, 56, 93 Pac. 28, to require a trial of exactly the same issues as tried below, on the theory that to try *de novo* is to try anew, to strictly comply with which no new issues must be retried above. While still in ancient Florida cases, with an idea in mind of early procedure by writ of error, the appeal and trial *de novo* thereon is held to be the equivalent of only a review of the record (State ex rel. Pleasure v. McClellan, 25 Fla. 88, 5 So. 600; State ex rel. Chestnut v. King, 20 Fla. 399); and similar constitutional jurisdictional provisions to ours were accordingly interpreted so narrow that to so interpret them would convict the members of our constitutional convention of ignorance of prevailing procedure, and also require the thwarting of legislative will expressed in § 7985, in declaring it to be unconstitutional. This would be as unnecessary as it would be contrary to the present weight of authority.

We conclude, then, the statute assailed as unconstitutional is a valid exercise of legislative power, in that the right of a trial *de novo* in district court on an appeal in probate matters from the county court is but a regulation of the manner of exercise of the appellate jurisdiction conferred upon the district court by an appeal on law and fact.

In the original opinion the costs were taxed against respondent. In so doing we erred, and the order should be modified to the end that the right to tax costs be denied to both parties, appellants and respondents. It is, as respondents urge, that neither party prevailed on the appeal and appellants in fact may never establish their right to share in the estate, or may never appear further in this action; in which event, in failing to recover on the merits, they would be no more entitled to recover judgment for costs of respondents than respondents are entitled under present conditions to recover costs of them. To such extent the

original opinion as filed is hereby modified. Neither appellants nor respondents shall be allowed to tax costs or disbursements herein.

The petition for rehearing is denied.

STYLES et al. v. DICKEY et al.

(134 N. W. 702.)

Appeal — statement of case — motion to strike out.

1. Under the record, respondents' motion to strike out the settled statement of the case is denied.

Mortgage foreclosure — redemption — computation of time for.

2. Where the last day of the year from the day of sale on mortgage foreclosure had falls on Sunday, a holiday under the statute, redemption on the Monday following is permitted under § 6736, Rev. Codes 1905.

Mortgage foreclosure — redemption — computation of time for.

3. The day of sale in determining the period within which redemption may be made is excluded.

Mortgage — redemption.

4. The owner is entitled to redeem by the payment to the certificate holder of the purchase price with 12 per cent interest thereon where no taxes or assessments have been paid by such purchaser.

Mortgage — redemption — payment of liens.

5. Such purchaser cannot compel payment by the owner effecting redemption of any other liens, either prior or subsequent, owned by the purchaser at the time of redemption from the sale.

Mortgage — redemption — filing of notice.

6. The owner to effect redemption need not file with the register of deeds nor serve upon the sheriff any written notice of redemption, as must be done where redemption is made by a redemptioner as distinguished from a mortgagor or owner of the equity of redemption.

Note.—The question as to how a period of time is to be computed when the last day thereof falls on Sunday or a holiday is treated in a note in 14 L.R.A. 120. Many of the states now have statutes providing that if the first or last day on which an act is done falls on Sunday or a holiday, that day is to be excluded in the computation of time, and the cases which have construed such statutory provisions are reviewed in a note in 49 L.R.A. 204, as part of an elaborate note on the broader question of rule as to first and last days in computation of time.

Mortgage — redemption — action to determine adverse claims — scope of relief.

7. The parties by their pleadings having both sought an adjudication of all liens and interpleaded the same in this action, brought as an action to determine adverse claims and so tried below, this court will administer full equitable relief within the scope of the pleadings and the proof, and it is held: (a) The certificate of redemption was properly issued and canceled the certificate of sale. (b) An accounting is had for payments made by collection of collateral security by mortgagees, and the same is applied in payment on a mortgage involved in the pleadings and proof and held by respondents. (c) The excess of money in the sheriff's hands over the certificate of sale, tendered in full of other claims, pursuant to a statement of amount necessary to redeem, filed by the certificate holder, is ordered applied in payment of said liens, with taxable costs then to be deducted.

Mortgage — redemption — under quitclaim deed given for contingent consideration.

8. The quitclaim deed under which redemption was had, though given for a contingent consideration, is valid under the facts of the case and entitles the successor in interest of the mortgagor to redeem.

Opinion filed January 12, 1912. Rehearing denied February 19, 1912.

This opinion is after rehearing had.

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

Action by Asa J. Styles and another, partners as Styles & Koffel, against George H. Dickey and another. From a judgment for plaintiffs, defendants appeal.

Reversed and judgment ordered for appellants.

A. E. Coger and *T. A. Toner,* for appellants.

Styles & Koffel, for respondents.

Goss, J. The first question presented is on a motion to strike out the statement of the case and appellants' abstract, because the settled statement of the case did not have embodied therein the proposed amendments thereto claimed by respondents to have been served upon appellants in time. Service of them was made by mailing on the twenty-first day after service of appellants' proposed statement, the twentieth day falling on Sunday. Owing to the delay in the mails, they did not reach appellant's counsel until the twenty-third day after he had served his proposed statement; and previously, on the twenty-second day, he had

procured the proposed statement to be settled as by default. The amendments were promptly returned with a notice that settlement had been had. Appeal was perfected without delay and appellants' brief and abstract, containing altogether three hundred printed pages, promptly filed. Thereafter and six months after the statement had been settled, during which time no effort was had by respondents to cause their proposed amendments to be made a part of the statement, appellants are met by this motion to strike. The good faith of the appellants cannot be questioned, it being plainly apparent from their speedy appeal and their being fully prepared to present their case on the merits as was done at the time of the hearing of the motion. They have incurred several hundred dollars' expense during the time respondents have been inactive, and when on short notice respondents could have obtained a review of their proposed amendments by the trial court and its determination of whether any of them should have been incorporated as a part of the statement as settled. Besides, the statement was settled without notice of any proposed amendments, and is presumed to have been carefully done so as to truly represent the proceedings had in the lower court. We cannot presume the amendments would have been allowed. No motion is made to remand the record that application may be made to permit such amendments. For all purposes the statement as settled is here controlling. Respondents cannot at this late date expect the court to virtually decide the case regardless of its merits by the granting of the motion after their own acquiescence in the state of the record has placed the appellants in their present predicament. Thompson v. Missouri P. R. Co. 50 Neb. 330, 70 N. W. 385; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; Blessett v. Turcotte, 20 N. D. 151, 127 N. W. 505.

The one-year period for redemption from the mortgage foreclosure sale expired on Sunday. On the Monday following, the redemption money was paid the sheriff, who issued a certificate of redemption from the sale. This money respondents refused to receive, claiming:

(1) That no redemption could be made after the expiration of the period of one year from the sale, and that § 6736, Rev. Codes 1905, did not permit the redemption on the Monday following.

(2) That if redemption was had in time an insufficient amount to redeem was paid the sheriff.

As to the first contention: The redemption was had under §§ 7139 et seq., Rev. Codes 1905, § 7140 providing: "The judgment debtor or redemptioner may redeem the property from the purchaser *within one year after the sale* on paying the purchaser the amount of his purchase with 12 per cent interest thereon." Was the redemption in time? Sec. 6736 reads: "Computation of time. The time in which *any act provided by law* is to be done is computed by excluding the first day and including the last, *unless the last is a holiday, and then it is also excluded.*" (Italics are ours.) And under § 6710 every Sunday is a holiday. Both these provisions have been in force since territorial days. See § 4749, Compiled Laws, declaring every Sunday a holiday, and § 4805, Compiled Laws, identical with § 6736, Rev. Codes 1905. Both were re-enacted in the 1895 Rev. Codes as §§ 5124 and 5150 thereof, respectively.

From the authorities it appears that at common law the Sunday of a period not measured in days is included, and performance on the following Monday not permitted. See Haley v. Young, 134 Mass. 365, and People ex rel. Pugsley v. Luther, 1 Wend. 43, both on all fours with the case at bar if it were not for § 6736. The contrary is the rule as to performance where limited by contract; and where the last day is Sunday under contract obligations it would be excluded and performance permitted the following day in the absence of a statute regulating such computation of time. In court practice, both under rules of court and statutes regulating procedure, where the last day for performance falls on Sunday, where the time within which the act is to be done is measured by days, generally performance can be made on the Monday following, but this rule does not apply to statutes construed as mandatory as to time provisions. See Pemberton v. Duryea, 5 Ariz. 8, 43 Pac. 220; Morgan v. Perkins, 94 Ga. 353, 21 S. E. 574; Close v. Twibell, 47 Ind. App. 290, 92 N. E. 377; Kinney v. Heuring, 42 Ind. App. 263, 85 N. E. 369; Conklin v. Marshalltown, 66 Iowa, 122, 23 N. W. 294; Webb v. Strobach, 143 Mo. App. 459, 127 S. W. 680, applying to a ten-day ordinance provision; Keys v. Keys, 217 Mo. 48, 116 S. W. 537, applying to filing of claims against an estate; Schnepel v. Mellen, 3 Mont. 118; Cock v. Bunn, 6 Johns. 326, extending a twenty-day habeas corpus limit over Sunday; Broome v. Wellington, 1 Sandf. 664; Conway v. Smith Mercantile Co. 6 Wyo. 327, 49 L.R.A. 201, 44 Pac. 940;

Allen v. Elliott, 67 Ala. 432; Edmundson v. Wragg, 104 Pa. 500, 49 Am. Rep. 590; Barnes v. Eddy, 12 R. I. 25; Thayer v. Felt, 4 Pick. 354; and Salter v. Burt, 20 Wend. 205, 32 Am. Dec. 530.

The rule must give way to the intent of the statute prescribing the time limit, where the intention is obvious that the limit shall be as fixed by such statute. Taylor v. Brown, 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549, affirming a Dakota territorial decision in 5 Dak. 335, 40 N. W. 525.

By the very wording of § 6736, it applies only to acts provided by law to be done. The statute is plain and unambiguous. With the holiday exception omitted therefrom, it would be committing an assault and battery on the statute to hold it not to be a general rule applicable according to its terms, to the end that "the time in which any act provided by law is to be done is computed by excluding the first day and including the last." English language is incapable of prescribing a rule more plain and definite. We cannot see where the addition thereto of the words "unless the last is a holiday, and then it is also excluded," leaves the meaning of the statute open to question or renders the statute in any degree ambiguous. The statute prescribes its application in general words; *viz.* to "the time in which any act provided by law is to be done." So, unless this general rule announced by § 6736 is inapplicable because of a contrary intent appearing from the statutes governing redemption, it must apply and extend the period therefor where the last day for performance falls on Sunday. In order to apply the statute at all, such must be the result. It applies unless the redemption statute as a later provision is exempted by its terms from the rule as to computation of time expressed in § 6736. Our statute permitting redemption from real estate sales existed in territorial days in the main as it now stands. It is impossible to come to the conclusion therefrom that any of the statutes on redemption exclude the operation of the statutory rule for computation of time any more than does any general time limit statutory provision. And if all such provisions are to be construed as governing according to their terms, independent of the statutory rule of computation of time, to what can § 6736 ever be applicable? It must be construed according to its terms under any principle of interpretation of statutes. We cannot disregard it as not a statute of general application. To do so is to violate the statute in words and intent.

But let us consult legislation of other states. Many of the states have a rule similar to ours in this respect. Some of them provide, as do Wisconsin and New York, in express terms, that for the statute to be operative the time limit must be expressed in days. See Williams v. Lane, 87 Wis. 152, 58 N. W. 77; Ryer v. Prudential Ins. Co. 185 N. Y. 6, 77 N. E. 727, reversing 110 App. Div. 897, 95 N. Y. Supp. 1158, and following the leading New York case of Aultman & T. Co. v. Syme, 163 N. Y. 54, 79 Am. St. Rep. 565, 57 N. E. 168; Benoit v. New York C. & H. R. R. Co. 94 App. Div. 24, 87 N. Y. Supp. 951. Alabama, California, Missouri, Indiana, Minnesota, Washington, Nebraska, Nevada, and Pennsylvania have our statute, § 6736; and a statute identical in substance exists in Illinois. See Burns's Anno. Stat. (Ind.) § 1304; Mo. Rev. Stat. 1899, § 4160; Wash. Stat. 1899, § 794, formerly § 743; Ill. Rev. Stat. 1874, chap. 100, § 6. See statute cited with holdings thereon in Bovey-DeLaittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038; Spencer v. Haug, 45 Minn. 231, 47 N. W. 794; McCafferty v. Flinn, 32 Nev. 269, 107 Pac. 225; Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077; Kinney v. Heuring, 42 Ind. App. 263, 85 N. E. 369; also Jordan v. Chicago & A. R. Co. 92 Mo. App. 84, following Evans v. Chicago & A. R. Co. 76 Mo. App. 468, both cases expressly overruling the two former Missouri contrary constructions of statute as construed in Miner v. Tilley, 54 Mo. App. 627, and Patrick v. Faulke, 45 Mo. 312, which last-mentioned case has been followed in California in Hibernia Sav. & L. Soc. v. O'Grady, 47 Cal. 580, that state having adopted the rule in the Patrick v. Faulke Case from Missouri, subsequently repudiated in Missouri. There is one case in Alabama contrary to our holding, but with reasoning as unsatisfactory as the Patrick v. Faulke Case. See Allen v. Elliott, 67 Ala. 432. The leading case on this subject construing the Nebraska statute identical with ours is Johnston v. New Omaha Thomson-Houston Electric Light Co. 86 Neb. 165, 125 N. W. 153, 20 Ann. Cas. 1314, citing numerous authorities, among them Cooley v. Cook, 125 Mass. 406, a construction of a similar rule in bankruptcy proceedings under U. S. Rev. Stat. § 5013. For similar holdings permitting tax redemption on Monday following Sunday, see English v. Williamson, 34 Kan. 212, 8 Pac. 214; Cable v. Coates, 36 Kan. 191, 12 Pac. 931; Hicks v. Nelson, 45 Kan. 51, 25 Pac. 565; Gage v. Davis, 129 Ill. 236, 16 Am. St. Rep. 260, 21

N. E. 788; Brophy v. Harding, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253; Picket v. Allen, 10 Conn. 146; and Cressey v. Parks, 75 Me. 387, 46 Am. Rep. 406. Consult, also notes to 14 L.R.A. 120, and 49 L.R.A. 193, and Decen. Dig. under "Sunday." As the New York and Wisconsin statutes are different from our § 6736, their holdings are not applicable. We follow the Minnesota court in Spencer v. Haug, construing a section identical with the one under consideration of our statutes declaring that "inasmuch as the certainty of a rule is of more importance than the reason of it, we think the legislature intended . . . to put an end to all this confusion and uncertainty by adopting a uniform rule for the computation of time alike applicable to matters of mere practice and to the construction of statutes."

But respondents insist that inasmuch as redemption was possible after the sale, but on the day of sale, that such date of sale should be included in the count, which would prevent redemption on the date of the yearly anniversary of the sale, and compel redemption within one year from the date of sale, including that day in the count; and cite § 7140, Codes of 1905, and Taylor v. Brown, 5 Dak. 335, 40 N. W. 525, as supporting this contention. In so doing appellants ignore the provisions from § 7141, declaring "but all persons entitled to redeem shall in all cases have the entire period of one year from the day of sale in which to redeem." Then again § 7144 provides that no more shall be required to redeem than the purchase price with 12 per cent interest "from the day of sale," with taxes and assessments. These matters cannot be construed to prevent redemption at any time within one year from, but including the day of sale; and consequently Taylor v. Brown cannot be considered as authority for appellants' construction urged. The owner of the land had the right to redeem on Monday, May 7, 1906, from the mortgage sale had on May 6, 1905, as May 6, 1906, was Sunday and § 6736 permitted redemption on Monday following.

The sufficiency of the redemption and incidental questions of law and fact involved therein are next in order. Respondents became the owners by purchase of the certificate of sale amounting to $172.10, issued on foreclosure had May 6, 1905; which certificate was assigned in writing to them the September following. Respondents had prior to the sale procured an assignment of an outstanding subsequent mortgage on the same land for $150 and interest from January 2, 1904, at 12 per

cent, past due and unpaid. They had also purchased and had assigned to them a second subsequent mortgage of $335, with interest at 12 per cent from its date, January 7, 1904, and due October 1, 1904, executed to the First State Bank of Maddox as mortgagee, which indebtedness evidenced thereby had been ever since its inception further secured by collateral notes of one K. Ripplinger to the mortgagor, who had indorsed the same to said bank. This collateral mortgage consisted of two notes secured by chattel mortgage for the aggregate sum of $265, both dated September 15, 1903, one for $135, due October 15, 1904, the other for $130, due October 15, 1905, both bearing interest before maturity at 10 per cent and after maturity at 12 per cent. It is regarding the payment of these two collateral notes and the application of the proceeds that the real cause for this lawsuit arose. Respondents on December 1, 1905, also paid $40.25, the interest payment falling due on a prior mortgage to the one foreclosed. After having recorded the assignments of these various mortgages, respondents served upon the sheriff and filed with the register of deeds duplicates of a notice of the amount claimed as necessary to redeem from the foreclosure certificate. In this notice respondents demanded the mortgagor should pay the full amount of the liens purchased by them in addition to the amount of the certificate on foreclosure, amounting in the aggregate to $819.55. The Ripplinger notes had, subsequent to the foreclosure sale and in October, 1905, been paid in full to respondents, to whom the bank assigned this collateral along with the $335 mortgage, both securing the same assigned debt. These Ripplinger notes had been sent by the bank to respondents for collection. They knew these notes were such collateral security to the $335 mortgage debt. Respondents forced collection and obtained thereon the following payments: $15, paid October 19, 1905; $290, paid October 20, 1905; $16.65, paid October 28, 1904. On January 21, 1904, a few days after the execution of the $335 mortgage note, the sum of $28.90 was paid thereon, being the proceeds remaining from a first mortgage on said premises. So that the collateral Ripplinger notes had been paid in full, respondents receiving therefrom $321.65; and the $335 mortgage note had been reduced after its execution by $28.90 paid the bank who then owned it, making a total payment on this $335 mortgage note and interest of $350.55. Respondents had in effect taken the $305 received by them in the fall of 1905 from the Ripplinger collateral, and

therewith purchased from the bank the principal note of $335, paying a small difference. This principal indebtedness carried with it the collection from the collateral; and in the notice of amount necessary to redeem respondents again demand the payment in full of this $335 note. They have never accounted to Swanson or Dickey for the collection on the collateral paper, nor have they applied the $28.90 payment on the principal note.

All the foregoing mortgages were given by the same mortgagor and owner of the land, Swanson, who a short time before the expiration of the year of redemption conveyed by quitclaim deed to appellant Dickey his interest in the quarter section of land mortgaged. Dickey demanded an accounting and application by respondents of these payments, and, being unable to obtain it, paid the sheriff $550, claiming the same as a sufficient payment to redeem from the foreclosure and satisfy all liens on the land held by respondents, who refused to receive the money. The sheriff executed his certificate of redemption from the sale. Thereafter plaintiffs and respondents bring this action to compel cancelation of such redemption certificate and the issuance to them of a sheriff's deed on the foreclosure, and that their title be quieted. To this defendants join issue, pleading that an excessive amount is demanded as the amount required to redeem, and reciting wherein respondents have as above stated failed to account, and ask that the redemption be confirmed and title be quieted in Dickey, defendant, and that all liens purporting to be held by respondents be determined in amount and be adjudged paid, and that the money in the sheriff's hands be ordered applied to such full payment. The evidence fully justifies the conclusions hereinbefore recited and the prayer for relief of the defendant Dickey. Respondents deny that the bank held the notes as collateral, but that claim has no basis in the proof; the bank cashier, Wesley Styles, testifying repeatedly and positively to the notes being received and held as collateral and as additional security to the mortgage indebtedness, and that the collateral notes that had previously been collected were transferred with the mortgage indebtedness on payment of the face of the mortgage indebtedness. And the testimony of respondents themselves admit the collection, and that the fund so obtained was a part of the money with which the assignment of the real estate mortgage and debt was secured. Asa J. Styles was vice president of the bank which

owned this paper, and Wesley Styles was its cashier. Besides imputed notice, actual knowledge of the entire transaction is shown in both respondents. One Swanson was the owner of the land, and as mortgagor executed all the mortgages and collateralled these notes to the bank. He never has received any of the money paid on these collateral notes. The evidence does develop the real cause underlying this controversy. Shortly after respondents realized on the collateral notes trouble arose between them and the bank, resulting in their withdrawing their interests therein and accepting in settlement this $335 mortgage with other commercial paper. If these respondents by refusing to account succeeded in compelling payment to them of the full amount of their claim, with no deductions for moneys received from collateral security collected by them, they not only realize that much more in practically obtaining this $335 mortgage for nothing, but besides, under claim of having accounted to the bank, leave it responsible to Swanson for the amount of the collateral for which such bank must account. The land may have been mortgaged for more than its full value prior to said foreclosure, but because of subsequent increase in value the equity of redemption has become valuable. In explanation further of respondents' position taken, they contend that, in the absence of a specific agreement whereby the bank was employed to apply the collateral collections on the principal or mortgage debt, under a custom of the bank to hold such collections on deposit subject to the further order of the mortgage debtor, it was not applied and never has been; and that accordingly their collection does not preclude them from realizing the full amount of the $335 mortgage debt. But in the first place, they have wholly failed to prove any custom or agreement to withhold the application of the collateral on the collection to the principal debt. In the second place, the law under a general collateral agreement makes the application and discharges the debt *pro tanto*. See §§ 5241 & 5243, Rev. Codes 1905; 30 Cyc. 1220. This collateral agreement was but the ordinary business transaction understood by the indorsing and delivery of promissory notes by the debtor to his creditor, and that such notes might be held by the creditor as collateral security to the main obligation. It is elementary that the creditor in such a case, on collection of collateral, has the right to, and under the implied contract arising must, apply collections from the collateral as received on the principal debt.

The situation was identical to what it would have been had the debtor in person paid the money, instead of its having been paid by his debtor to his creditor. When this mortgage note was received by respondents from the bank, such indebtedness had been paid to the amount of $350.-55, and but a small part of the mortgage debt remained unextinguished.

Lest this opinion be misleading under the judgment hereinafter ordered, we will state that it was not necessary that Dickey, in order to effect redemption, pay more than the amount of the certificate of foreclosure, with statutory interest thereon from the day of sale. Respondents contend he was obliged in order to redeem to pay in addition to the amount of their certificate of sale the amount of all subsequent mortgage liens held by them. Such is not the statutory requirement where the owner redeems from a mortgage foreclosure whether redeeming from the purchaser or a subsequent redemptioner. See § 7144, Rev. Codes 1905. As our early statutes were identical with those of California and South Dakota, their cases are interesting reading on this question. Consult Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 43 Pac. 843; Leet v. Armbruster, 143 Cal. 663, 77 Pac. 653; Spackman v. Gross, 25 S. D. 244, 126 N. W. 389. From our own court consult State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692, the rule announced in which probably caused the enacting of the present § 7141, Rev. Codes 1905. See also Franklin v. Wohler, 15 N. D. 613, 109 N. W. 56, and North Datoka Horse & Cattle Co. v. Serumguard, 17 N. D. 466, 117 N. W. 453, 29 L.R.A.(N.S.) 508, and note, 138 Am. St. Rep. 717. The respondents contend that because Dickey recorded, instead of filed, a written notice of redemption given by him under § 7142, Rev. Codes 1905, his redemption is invalid. We do not determine the effect of such an omission, as no necessity existed for any written notice of redemption to have been given under the section cited. It was not necessary that Dickey file or record any notice or redemption whatever, as the tender to the sheriff of the amount necessary to redeem from said sale effected redemption and restored Dickey to his full estate in the land under the foregoing authorities, and particularly, see Spackman v. Gross, 25 S. D. 244, 126 N. W. 389, at page 393. And respondents, having paid no taxes or assessments upon this land, were under no obligation to serve upon the sheriff or file with the register of deeds a statement of the amount necessary to redeem so far as the debtor

was concerned. However, the filing of such a statement was a proper business precaution to protect the rights of respondents, as to other liens held by them, as against a redemption to be made by mortgagees or lienors subsequent to the liens held by respondents. But Dickey stands in the shoes of the mortgagor as a successor in interest. See Phillips v. Hagart. As the amount paid the sheriff was in excess of that necessary to redeem, the certificate of redemption was properly issued and is valid.

Respondents have challenged the right of Dickey to redeem, and have offered in evidence a letter tending to show that the consideration for the deed is a promise of Dickey to pay $100 in the event of his ability to effect redemption from this sale. The deed, being a written instrument, is presumptive evidence of having been executed and delivered for a consideration. § 5325, Rev. Codes 1905. But such a conditional promise to pay is a valid and sufficient consideration. 2 Tiffany, Real Prop. 876. And, as respondents' rights to recover the money owing them are in no wise prejudiced by this transfer, it makes no difference to them in fact whether Swanson or Dickey owns the land, so long as their lien indebtedness is paid. The following from Anthes v. Schroeder, 3 Neb. (Unof.) 604, 92 N. W. 196, is therefore applicable: "A creditor has no standing in a court of equity to question a conveyance by his debtor which does not impair the security of his debt or delay him in the collection thereof. Equity will not aid avarice in purloining property."

The sole question left is the relief to be granted. The respondents as plaintiffs brought this action to determine adverse claims. Under the issues and the evidence, judgment must be awarded for the defendants. Both parties have asked for complete equitable relief and the determination of their respective claims regarding this tract of land, the subject-matter of the controversy. The court therefore considers itself clothed in equity, with authority to grant as full relief as is sought by the pleadings and within the scope of the proof. Accordingly the $550 in the hands of the sheriff will be applied as follows: $192.75, the amount due May 7, 1906, on the $172.10 certificate, fully pays and cancels the certificate of sale, and restores Dickey to his estate in the land, wholly relieved from the mortgage so foreclosed upon; $42.33 on said date due on the mortgage coupon of the prior mortgage, which

coupon is plead as a part of the cause of action by plaintiff in this suit, is decreed paid and satisfied, as is also the mortgage for $150 and interest held by respondents and obtained from Grant Youmans, and which amounted on May 7, 1906, to $192.15. And the sum of $80.35 remaining unpaid on the $335 mortgage obtained by respondents from the First State Bank of Maddox, after the application thereon of $350.55, is to be deducted in full payment of said mortgage and indebtedness thereby secured. And the balance, $42.42, necessary to make up the $550 tender on the foreclosure to the sheriff, is to be returned to the defendant Dickey. That the district court will enter judgment accordingly, fully satisfying all the foregoing liens and secured indebtedness. The appellants will recover of respondents judgment for their costs and disbursements, allowed in that behalf by law, in the district court and in this court, and such allowance will be taxed by the district court and entered as a judgment against plaintiffs, and any balance remaining over the amount of all of said liens satisfied by this judgment will, on demand, be paid respondents. The sheriff will forthwith deposit the $550 in his hands with the clerk of the district court, who will retain the same subject to the judgment of that court to be entered in conformity with this opinion. The judgment appealed from is ordered vacated and ordered entered as above directed.

SPALDING, Ch. J. While I concur in this opinion, I desire to say that, as to the time when the period of redemption expires, I do so because it would be of no avail to do otherwise, and it is more important that the rule be definitely established, one way or the other, than it is how it is established.

The construction placed upon the law by this decision will not deprive parties seeking to redeem of any supposed right on which they may have relied; and it is in the interest of debtors, although I am satisfied that the bar of the state has generally acted upon the supposition that the time expired at the end of the calendar year, regardless of the last day being Sunday.

THOMPSON v. TWETO.

(134 N. W. 743.)

Conversion — motion for directed verdict — error in instructions.

An action brought, based on the alleged conversion by defendant of personal property. Evidence examined and defendant's motion for directed verdict *held* properly denied. Error assigned on instructions *held* untenable. The verdict decided the only issue involved, that of title to such property.

Opinion filed January 23, 1912.

Appeal from the District Court of Richmond county; *Allen*, J.
Affirmed.
Purcell & Divet, for appellant.
Wolfe & Schneller, for respondent.

Goss, J. This is an action brought for defendant's conversion of a team alleged to belong to the plaintiff. Its decision depends upon which of the parties litigant owned the team. The time involved is from October, 1907, to the following August. For some years previous to the first date mentioned, plaintiff had been in possession as owner of a half section of land, until the issuance to defendant, in July, 1907, of a sheriff's deed on foreclosure; plaintiff, however, continued in possession until the end of the crop season of 1908. In October, 1907, plaintiff and defendant discussed a purchase of the land by plaintiff. The land was then owned by a bank of which defendant was a managing officer, and which bank formerly owned the mortgage foreclosed. The terms of the contemplated sale were partially agreed upon. Plaintiff was to pay a certain amount, $4,500 of which was to be obtained by a mortgage loan on the premises, the proceeds thereof to be turned in as a part payment to the owner of the land. According to plaintiff, defendant was to accept this team as a further $300 payment on the land, and, in addition thereto, accept plaintiff's second mortgage on the premises, securing the balance of the purchase price; defendant claims $1,000 was to be paid of the balance remaining of the purchase price, including therein $300 as the agreed value of the team in question. No cash

payment was ever made on the land, and no deed or contract in writing was executed. Naturally the first step in the sale was to float the loan. To do this plaintiff executed two applications to different loan agencies, leaving them with defendant, who was to procure the loan. Both parties throughout the winter and following spring endeavored to place the proposed loan with various money loaners, but they were unable to do so, and no mortgage was ever executed. About harvest time in July or August, 1908, defendant had arranged to obtain the money in this manner, when plaintiff abandoned the transaction and the land. He had meanwhile received the benefit of the 1908 crop, already harvested, and taken by his mortgagee, a third party bank. Plaintiff throughout the course of these proceedings had remained in possession of and cropped the land, under the belief that the arrangement which had been entered into in October, 1907, would be carried out. In 1909, the bank sold this land to a third party, and no effort has ever been made to treat the transaction other than as abandoned; except that defendant claims that the horses were turned over on the deal as a part payment for the land, as the result of which title to the horses would pass to defendant and defeat recovery in this conversion suit.

The foregoing furnish the setting for the more important facts directly concerning the title to the team. The possession of the team was taken by defendant in October, 1907, soon after this proposed arrangement was had. Concerning the immediate taking, the facts are in dispute, excepting that defendant procured possession of the team from a third party in whose possession plaintiff had temporarily placed it. Plaintiff avers the taking was unauthorized, and that the horses were not to be turned over at that or any subsequent time, until the sale of the farm was actually closed by the procurement of the loan, the deeding of the farm, and the completion of the contemplated land sale agreement, and that plaintiff suffered the team to remain with defendant because of his expectation that the farm deal would be closed in the near future. After defendant refused to deliver the horses to plaintiff, having sold one of them in July or August, 1908, this action for conversion was brought. Defendant, on the contrary, testifies to a delivery of the team on the contract for the sale of the farm that plaintiff told him where the horses were and to go and get them; in pursuance of which he took possession of them as a payment on the land deal and as property so

sold the bank; he denies any subsequent request by plaintiff for the return of the team. In short, defendant claims that the bank became the owner of the horses under the terms of the land agreement when he procured possession of them, and that his obtaining possession constituted a delivery to him by plaintiff under a sale of the horses to the bank. He admits the subsequent sale of one of the horses by the bank. He claims to have notified plaintiff that in all this dealing he was acting only as the representative of the bank, and not individually. Plaintiff denies that the team was turned over to the bank or that the bank was interested in any way in it.

The issue, as litigated, was one of title. If ownership of the team after defendant procured its possession remained in plaintiff, this action will lie. Conversely, if defendant obtained possession as a delivery thereof under a sale, title passed, and this action should be dismissed. The court so instructed the jury, and on this dispute, on conflicting testimony, the jury found for the plaintiff on all the issues involved. It thereby found in accord with plaintiff's version, that the property had remained plaintiff's property and never had been sold. If no reversible error appears, this finding of fact by the jury must settle the controversy.

An examination of the instructions discloses that the jury were instructed on the issue of passing of the title to the property in question. The court, in substance, informed the jury that if the plaintiff parted with title to the horses to defendant, or the bank, they should find for the defendant. While the instructions are not as specific in this particular as to the bank as they are to the defendant, we are satisfied that the necessary inference to be drawn from the instructions is as above stated; and in the absence of any request for more definite instructions, counsel for appellant is, on that score, in no position to complain.

Appellant assigns error on the court's denial of his motions for directed verdict, based on the contention that the evidence affirmatively, and without substantial contradiction, established that the transfer of possession of the horses was a transfer of the then right of possession thereof, and that the act of plaintiff in leaving the possession of the horses in defendant constituted an election of remedies, to the effect that the horses became a part of the consideration for the oral contract of sale of the lands; and that if any right of recovery exists in favor of plaintiff therefor, it is not for the conversion of the horses,

but for a specific performance of the oral contract of sale as partly performed or damages arising from the failure of the defendant to carry out said contract. That by plaintiff's acts of election and recognition of said executory land contract after possession of the horses by defendant, plaintiff waived any right to recover said horses, either in replevin or conversion.

Defendant's motion assumes, notwithstanding conflicting testimony thereon, that the possession of the horses was actually obtained under the agreement, and that the horses constituted a payment at the time upon an otherwise wholly executory oral contract of sale of land, and were delivered, accordingly, as a partial performance of such contract. On this proposition the finding of the jury on the question of title is a finding of fact adversely to such assumed facts, inasmuch as the jury could not find as a fact title to have remained in the plaintiff, and there exist a parting of title to defendant as a part performance under the contract. On the facts, then, the title to the team never having passed, it cannot be asserted any sale was made or that the transfer of possession was any part performance of the land contract, the parties agreeing without conflict that it was only when the title to this team passed that $300 was to be considered as paid upon the land. As title never passed, no payment was ever made, and the team transaction in no wise could constitute a partial performance of this land contract. And as to defendant or bank keeping possession, we fail to see how it effects the issue in the case. Likewise, any benefits plaintiff may have received under the land transaction resulting from the crop raised thereon or otherwise may be a matter for a separate action; but inasmuch as it cannot affect the title to the property here involved, the team, title to which by the verdict is established as a fact to have been in plaintiff, we cannot see how plaintiff, by permitting the team to remain with defendant, waived his title or right of possession thereof based upon title, or its equivalent,—an action in conversion for the value of such property. In other words, it matters not whether the land deal is or ever was enforcible as such, the jury having found, on conflicting testimony, that title to this property in suit never passed from plaintiff. Further than this, if title to the horses did not pass on delivery, and the jury found it did not, the evidence amply explains why the possession of the horses remained as it did with defendant. Both parties dealt

with the idea of a future consummation of the land sale, which remained wholly unexecuted, and regarding which it is in fact doubtful if the minds of the parties ever fully met as to the particulars necessary to consummate such transaction.

An examination of the assignments urged as error in the admission or exclusion of testimony shows the record to be free from reversible error in this respect. Many of the alleged errors assigned were subsequently cured by the later admission of such excluded testimony. The matter in the record most prejudicial to the defendant, and to which exception was taken, was the remarks of counsel for plaintiff to the jury in his argument of the case; but these are not assigned nor argued in the brief, and are therefore treated as waived. The judgment of the trial court is ordered affirmed.

WALTON v. MATTSON et al.

(135 N. W. 176.)

Appeal — reversible error.

1. Where the trial court, on motion made, could have directed a verdict for the amount of the jury's verdict as returned, omitting all matters to which error can be assigned, defendants have nothing upon which to predicate error on appeal.

Conversion — appeal from judgment on verdict — affirmance.

2. Defendants converted $1,720 worth of crop belonging to plaintiff, and, after allowing them in full for all claims thereon, the verdict is for less than the balance remaining, and, the record being free from prejudicial error, the judgment is affirmed.

Opinion filed January 23, 1912. Rehearing denied March 5, 1912.

Appeal from the District Court of Eddy county; *E. T. Burke*, J.

Action by Joseph Walton against M. Mattson, Jr., and another, copartners as Mattson & Ofstedahl. From a judgment for plaintiff, defendants appeal.

Affirmed.

Maddux & Rinker, for appellants.

J. A. Manly and *John Knauf*, for respondent.

Goss, J. This is an appeal from a judgment entered on verdict in an action for conversion of grain. Plaintiff Walton was the owner of a farm leased to one Warner for a series of five years, by written lease in usual form, providing that the title to all grain grown thereunder each year should remain in the plaintiff until after final division to be made in accordance with the terms of the lease. This action concerns the crop for the year 1908. On leasing the land in 1906, Walton sold horses to Warner, taking a chattel mortgage thereon to secure the selling price, $1,140. About half of this indebtedness remained due and unpaid. As additional security to the mortgage, a provision was made in the lease, further securing its payment out of the crop to be grown thereunder.

No division of grain was had in 1908, the tenant selling all of it to the defendants. This crop consisted of 1,307 bushels of wheat and 202 bushels of barley, the highest market value of which between the time of the conversion thereof and the verdict was established at $1,720. Defendants purchased this grain with full knowledge of plaintiff's rights therein. They attempt to defend by setting up their ownership of four liens; *viz.*, a thresher's lien for $195, a seed lien for $297, a woman's labor lien for $120 earned during her employment at house work as a domestic, and a farm laborer's lien for $78, making a total lien claim of $690, by virtue of which special property interest they defend in part against plaintiff's recovery. Also, it is admitted that $254 of the proceeds of this grain was rightfully paid by them to other parties, making it thus possible for appellants to account to the extent of $944 for $1,720 worth of grain received and retained by them, conceding the validity of these liens. The debt owing by Warner to plaintiff, including plaintiff's share of the crop so confiscated, was determined by the jury in their verdict, at $776, exactly the difference between $1,720, the value of the grain, and $944, the highest possible claim of interest defendants could make thereto. It is apparent, therefore, that inasmuch as the jury have allowed defendants for every dollar to which they could lay claim, they are in no position, under the undisputed evidence, to say that the verdict was excessive; and under Lowe v. Abrahamson, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355, the labor lien claim for the woman's employment, to the amount of $120, must be held invalid. To this extent, at

least, appellants are escaping the payment of a claim for which they might otherwise have been liable to plaintiff, had not the jury, by its verdict foreclosed plaintiff therefrom by refusing to allow him the full amount that may have been due him.

We have carefully examined the record and all assignments made, and find no error resulting to the prejudice of the defendants. In fact, the motion of the plaintiff, made at the close of the trial, for a directed verdict under the uncontroverted evidence, could have been granted to an amount much in excess of the verdict returned by the jury. The trial court, however, left to a verdict the amount of plaintiff's recovery. Defendants ought to have been very well satisfied therewith.

The judgment appealed from is ordered affirmed, with costs.

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

CUMMINGS v. DUNCAN.

(134 N. W. 712.)

Judgment — lien — on equitable estate or interest.

Section 7082, Rev. Codes 1905, which provides that a judgment when docketed "shall be a lien on all the real property, except the homestead, in the county where the same is so docketed of every person against whom any such judgment shall be rendered, which he may have at the time of the docketing thereof in the county in which such real property is situated," etc., construed, and *held*, that the docketing of a judgment creates no lien on the mere equitable estate or interest of the judgment debtor in real property.

Opinion filed January 25, 1912.

Note.—While at common law and under the law as it now exists in many states a judgment does not become a lien upon an equitable title or interest in real estate, the rule in a number of jurisdictions is that the lien of a judgment attaches to the equitable as well as the legal estate of the judgment debtor. Notes in 117 Am. St. Rep. 780 and 93 Am. Dec. 348. But in some cases it has been held, as in CUMMINGS v. DUNCAN, that some steps other than the mere docketing of the judgment must be taken in order to subject an equitable interest to the lien of a judgment. Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 354; Baldwin v. Thompson, 15 Iowa, 508.

Appeal from District Court, Steele county; *Chas. A. Pollock,* J.

From an order sustaining a demurrer to the answer, defendant appeals.

Affirmed.

Buttz & Sinness, for appellant.

W. J. Courtney, for respondent.

Fisk, J. This is an action to quiet title to a quarter section of real property in Steele county, as against a certain judgment held by defendant against one Henry J. Torkelson and claimed by the former to be a valid lien on such property. At the time such judgment was docketed and a transcript thereof filed in Steele county, Torkelson held an assignment of a certain executory contract for the sale and purchase of such premises theretofore entered into between the Dwight Farm and Land Company and one Amund Berg, by the terms of which the Land Company agreed to sell and Berg agreed to purchase such property. Subsequently Torkelson assigned his rights under such contract to one Taisey, who later and before the commencement of this action sold and assigned his interest to plaintiff. The above facts are substantially set forth in the answer, and defendant prays that such judgment be adjudged to be a lien on said land superior to plaintiff's rights therein. Plaintiff demurred to such answer on the ground that it fails to allege facts sufficient to constitute a defense, which demurrer was sustained in the court below and defendant electing to stand on his answer, judgment was entered in plaintiff's favor. The appeal is from the order sustaining the demurrer. While perhaps not very material, it is proper to state that such answer nowhere alleges that any payments were ever made under such contract for deed by either Torkelson or his assignor, Berg, nor that either of them ever performed any of the stipulations in such contract to be kept and performed by the vendee thereunder. Neither does such answer allege any fact showing or tending to show that the land company surrendered possession of such land to its vendee, Berg, or that such contract entitled him or his assignee or successor in interest to the possession prior to full payment of the purchase price. Nor does the answer disclose that such contract was ever recorded.

The sole question presented for our determination on this appeal

is whether, under these facts, the docketing of defendant's judgment created a lien in his favor on such land to the extent of Torkelson's interest therein. If so, then we understand it to be in effect conceded that plaintiff took whatever interest he subsequently acquired subject to such judgment lien. It must be conceded at the outset that Torkelson's interest in the land prior to full performance of the contract, and no such performance is alleged, was at the most a mere equitable estate, even though he was entitled to the possession. It has repeatedly been so held by this court, and appellant moreover does not question that such is the fact. His contention, in brief, is that the mere docketing of a judgment creates a lien on the equitable estate of the judgment debtor within the county under § 7082, Rev. Codes 1905. This statute, in substance, provides that a judgment directing the payment of money when docketed "shall be a lien on all the real property, except the homestead, in the county where the same is docketed, of every person against whom any such judgment shall be rendered." Appellant's contention, if sound, necessitates a holding therefore that at the date this judgment was docketed or subsequent thereto this land was the real property of the judgment debtor, Torkelson. Numerous authorities are cited by appellant's counsel in support of their contention, but we find none of them in point under a statute like ours. Among others they cite Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856; Clapp v. Tower, 11 N. D. 556, 93 N. W. 862, and Salzer Lumber Co. v. Claflin, 16 N. D. 601, 113 N. W. 1036. But these cases merely announce the equitable relationship to the realty of the vendor and vendee under such contracts, and they furnish no light on the question here involved. This is clearly apparent from the opinions in those cases. In Miller v. Shelburn, 15 N. D. 182, 107 N. W. 51, this court clearly distinguishes the equitable from the legal relationship of the parties to such contracts, in the following language:

"The main reliance of the respondents in support of the demurrer is that there was no rescission of the contract. It is contended that the plaintiff became vested with an equitable interest or ownership in the land upon the execution of the contract, and that there could be no complete rescission until he had conveyed such interest back to the defendants. Equity does so regard the effect of such contracts. Under certain circumstances the vendor becomes the trustee of the title for the

benefit of the vendee, and the vendee becomes the trustee of the purchase money for the benefit of the vendor. But this doctrine applies only in equity. Speaking of the effect of such contracts in law, it is said in Pomeroy on Equity Jurisprudence, § 367: 'It is wholly in every particular executory, and produces no effect upon the respective estates and titles of the parties, and creates no interest in nor lien or charge upon the land itself. The vendor remains to all intents the owner of the land; he can convey it to a third person free from any legal claim or encumbrance; . . . In short, the vendee obtains at law no real property nor interest in real property. The relations between the two contracting parties are wholly personal.' See also Davis v. Williams, 130 Ala. 530, 54 L.R.A. 749, 89 Am. St. Rep. 55, 30 So. 488; Chappell v. McKnight, 108 Ill. 570; Warvelle, Vend. & P. (2d ed.) § 176."

Counsel assert that the supreme court of our sister state, South Dakota, in Brooke v. Eastman, 17 S. D. 339, 96 N. W. 699, squarely held in support of their contention, but in this they are clearly mistaken. That case merely announces the unquestioned rule that equitable interests or estates in property may be reached under execution and subjected to the payment of a judgment through a judicial sale, and such is the effect of the holdings in the other cases cited, with the exception of those decided in jurisdictions having statutes differing from the statute in this state. It would serve no good purpose to review the authorities in detail, and we shall not do so. Suffice it to say that we deem it entirely clear that the defendant, by the mere docketing of the judgment, acquired no lien on Torkelson's equitable interest in such real estate. If he desired to reach such equitable interest he should have levied thereon under an execution. Section 7082, Rev. Codes, above mentioned, has no application to mere equitable interests in real property, but it confers and was intended to confer a lien only on the legal title held by the judgment debtor.

In addition to the case of Miller v. Shelburn, supra, see in support of our views, 17 Am. & Eng. Enc. Law, 778, 23 Cyc. 1370, and cases cited in note 17; Nessler v. Neher, 18 Neb. 649, 26 N. W. 471, and cases cited; Davis v. Williams, 130 Ala. 530, 54 L.R.A. 749, 89 Am. St. Rep. 55, 30 So. 488; Smith v. Ingles, 2 Or. 43; Bloomfield v. Humason, 11 Or. 229, 4 Pac. 332. The Oregon statute relating to the

lien of judgments is substantially, if not literally, the same as § 7082, supra; and in Smith v. Ingles the Oregon court, among other things, said: "The statute . . . provides in substance 'that a judgment shall be a lien on real property of the judgment debtor, not exempt from execution, owned by him in the county at the time of docketing the judgment; or that which he may afterwards acquire. The statute intended to make a judgment a lien on the legal title of real property, and not on some hidden equitable title, which could only be brought to light and made available by the extraordinary powers and proceedings of a court of equity."

The order appealed from is accordingly affirmed.

MILLER et al. v. BANK OF HARVEY.

(134 N. W. 745.)

Judgment — non obstante veredicto.

1. Although, generally speaking, a motion for judgment *non obstante veredicto* and for a dismissal of the action should not be granted, unless the record shows not only that the verdict is not sustained by the evidence, but also that there is no reasonable probability that the defects in the proof or pleadings can be remedied on a new trial, the rule does not apply in a case of a total failure of proof on the one vital issue in the case, which is caused by the plaintiff admitting, on his cross-examination, the facts establishing the defense, and entirely admitting away his case, and where the only effect of granting a new trial will be to give the plaintiff a chance to change his testimony upon that trial.

Mortgage — usury — demanding settlement of distinct claim as condition to extension of mortgage.

2. The collection of another and distinct claim at the time of extending a mortgage, and demand of the payment or settlement of such as a condition subsequent to extending such mortgage, does not constitute usury, even though the collection is brought about by the demand of and receipt from the debtor of another note, which is secured by the new mortgage, which is given as an extension of the former one, and though the original mortgage debt, which is also secured by said mortgage, draws the highest rate of interest that may be legally contracted for.

Opinion filed January 26, 1912.

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

Action by Joseph and Marianna Miller against the Bank of Harvey. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Otto Grethen, for appellants.

John O. Hanchett and Bessesen & Berry, for respondent.

BRUCE, J. This is an action to recover under the usury laws (§ 5513, Rev. Codes 1905) double the amount of all the interest paid. It comes to this court on an appeal from an order of the district court, setting aside a verdict for the plaintiffs, and entering judgment *non obstante veredicto* in favor of the defendant.

It is undisputed that on March 2, 1908, plaintiffs (appellants herein) gave three notes, aggregating $3,000, to the defendant, which notes bore interest at the rate of 12 per cent, and which were afterwards paid by the plaintiffs. It is also undisputed that at the time these notes were given (one of them being for $1,494, one for $906, and one for $600) that plaintiffs only owed $2,400 on the prior mortgage notes, which were taken up at the time of the giving of the notes in question; and that if the $600 note was given as a bonus and received as a bonus for the loan evidenced by the other notes, or as additional interest therefor, and as claimed by the plaintiffs and appellants, that the transaction was usurious. It is also equally clear that if this additional note was given in payment for commissions on a separate and distinct land transaction, or in settlement of a claim for commissions under such transaction, and not as additional interest or bonus on or for the acceptance of the other two notes, as claimed by the defendant, that the transaction was not usurious. It is to be remembered in this case that the action is brought under the statute to recover double the interest paid, and is not one to recover the money paid on said $600 note, or to cancel the same. The controversy hinges entirely upon the question as to whether the $600 note in question was bonus, which the bank compelled plaintiffs to give and pay for renewing the two former notes, amounting to $2,400, and which were past due at the time of the transaction, or whether it was given in settlement of a land deal which the president and cashier of the bank had negotiated for plaintiffs, and which the plaintiffs refused to "go through with," whereby said presi-

dent and cashier, who were carrying on their land business separate and distinct from the business of the bank, and under the name of Renfrew & Blanch Land Company, claimed to have lost a commission or profit of $3,000.

The appellants allege that the court erred in setting aside the verdict, and that, even if it was justified in doing so, it had no right to enter judgment in favor of the defendant and against plaintiffs, and to dismiss the action in spite of the verdict, but should have granted a new trial. They claim, and rightly, that "a motion for judgment notwithstanding the verdict should not be granted, unless the record shows, not only that the verdict is not sustained by the evidence, but also that there is no reasonable probability that defects in proof or pleadings can be remedied on a new trial." Houghton Implement Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024; Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183; Welch v. Northern P. R. Co. 14 N. D. 19, 103 N. W. 396; Ætna Indemnity Co. v. Schroeder, 12 N. D. 120, 95 N. W. 436. The defendant, on the other hand, claims, and rightly, also, that the rule propounded by the plaintiffs, and expressed in the authorities mentioned, can have no application in a case where it is not a question of the plaintiff's failing to offer testimony on some branch of the case, or sufficient testimony, but a case of a total failure of proof on the one vital issue in the case, caused by the plaintiff's admitting, on his cross-examination, the facts establishing the defense, and entirely admitting away his case. It does not apply, it insists, and also correctly, where the only effect of granting a new trial will be to give the plaintiff a chance to change his testimony upon another trial.

The testimony of the witnesses J. L. Blanch and S. S. Renfrew, the cashier and president of the defendant bank, and the members of the Renfrew & Blanch Land Company, is clear upon the proposition that the $600 note was received and demanded in settlement of a controversy over a real estate transaction in which the defendant bank had no interest or connection, and was not taken as a bonus for the loan, or as a device to evade the statute, or to cover up a usurious transaction. The testimony of these witnesses is abundantly borne out by the documentary evidence, and the entries in the books of the bank and of the Renfrew & Blanch Land Company. The total sum of all of the notes, it is true, was secured by one mortgage, and that was made to the bank, and

all of the notes in question were made payable to the bank, also. It is clear, however, that this was done merely for convenience, and that the notes might share equally in the security; and it is undisputed that $906 of the indebtedness was owing to the Winniesheik County State Bank, of Decorah, Iowa, held by the Bank of Harvey for collection; that $1,494 was owing to the Bank of Harvey; that after the notes were taken the $1,494 note was entered in the discount register, or "bills receivable" book of the bank, and a record of the $906 note was made in a book containing an account of the business of the Winniesheik County State Bank, of Decorah, and that the $600 note was entered in a private book of the Renfrew & Blanch Land Company, kept by Blanch, and also by Renfrew, in a private book of his own; that neither the $600 note nor the $906 note were ever entered in the bills receivable book, or any book or record of the bank, as a part of the assets of the bank; and that when the notes were paid credits were made, respectively, to the bank of Harvey, to the Winniesheik County State Bank, of Decorah, Iowa, and to the Renfrew & Blanch Land Company. It also appears that in making its statements to the bank examiner, as provided by law, the bank did not include the $600 note as a part of its assets. In regard to these matters, there is no contradiction in the testimony.

We have, then, only one question to consider, and that is: Did the testimony of the plaintiffs in any way prove the proposition that the note was given as a bonus and as a means to evade the usury laws, and not in settlement of the controversy over the land transaction? For that there was a land transaction and a controversy over the same there can be no question; and it is not disputed. The testimony of plaintiff Joseph Miller, and his is the only testimony upon the subject (his wife not testifying as to the exact transaction), was that "they were scared to give the money up, and I owed $2,400; and I come and wanted to settle with them, and they would not settle that before I paid them some money anyway; so I did not get any money at all, and I was there three or four times, and so I didn't settle at all. Mr. Blanch, the cashier of the Bank of Harvey, would not settle. He said he would settle when you give me so much commission. When he spoke about giving the commission, he told me I had to, or else we would make you lots of trouble on the note of $2,400; and I told him it was pretty hard

to give up this money, and he told me I could not do anything without the money, or else you will have to give us a note for that much." And, in answer to a leading question put by his counsel, and objected to by the defendant, "As a commission to make a new loan?" he answered: "Yes. Yes; they take up the commission. It was that way, that commission for the $2,400. That is what they proposed." On cross-examination, however, he admitted that he had a talk with Renfrew & Blanch about selling his land; and that he listed the land with them for the sale (though he claimed that the agreement was not as they stated, and that there were conditions to the listing); and that he knew that they were figuring on selling the land for him. When pinned down as to what matter it was that had been settled by giving the $600 note, he said: "Yes; the land business is the matter he referred to that had to be settled up. They wasn't mad, except when I come to settle they was mad; and they said, 'We can make money on your land,' and I said, 'I know.' As to their wanting $1,000 for me to settle, they wanted that to settle the $2,500 note. I don't want to argue. It might be they wanted those thousand dollars to settle for this trouble about the land." He also testifies that he could have got the money with which to take up the former notes of $2,400, for an extension of which the new notes of $1,494 and $906 were given from other sources; and that there were many people engaged in the loan business at Harvey; and that they all wanted to loan money. That "Ed Schultz went in there with the idea of fixing up the deal, so that he could make me a loan and take up this deal. That is what he went in there for. If I get the money from another man, he told me I could get the money I want to pay Renfrew off. He offered to get me the money to pay off Mr. Renfrew. There was one man so anxious to furnish me the money that he volunteered to furnish it, and that was Ed Schultz." In another place he stated that "after this time, when I had this talk with Morris in April, about a month after giving the $600 note, I was there in the store, and we talked all this thing over, and I said, 'What do you think about what the bank done with me?' and he said, 'What?' and I said: 'Now they take $600, too, because of this thing I don't sell the land to them; and I don't get the Bob Lisle land, and they don't get my land anyway, and I don't give it to them,' and I told Morris they take $600 off me."

One of the main contentions of the plaintiff indeed is not that he did not give the $600 note in settlement of the land transaction, but that he had merely given to Mr. Renfrew and Mr. Blanch a conditional right to sell the land; and that he should not have been charged with commissions on the land matter at all. But we are not here called upon to pass upon this point. Whether he should have been required to pay $600 in settlement of the claim for commissions in the land transaction is one thing. Whether the $600 was received as a bonus for making the new loans, and in order to evade the usury laws, is another. Even if we should find that the cashier of the bank absolutely refused to extend the loan, and threatened to foreclose the same, unless the plaintiff made a settlement for the commissions upon the land transaction, which were claimed by the real estate firm, the finding would not make the transaction usurious, or entitle the plaintiff to recover double the amount of all the interest paid. In order that a transaction may be usurious, so as to come within the statute, usurious interest must have been knowingly and intentionally paid by the borrower, and received by the lender. Mahoney v. Mackubin, 54 Md. 268; Fellows v. Longyor, 91 N. Y. 324; Waldner v. Bowden State Bank, 13 N. D. 604, 102 N. W. 169, 3 Ann. Cas. 847. A collection of another claim at the time of extending a mortgage is not necessarily usurious. Marsh v. Howe, 36 Barb. 649; Swanstrom v. Balstad, 51 Minn. 276, 53 N. W. 648. It seems to us perfectly clear that the testimony of the plaintiffs not only fails to prove a usurious transaction, but conclusively proves the opposite; and that to grant a new trial under such circumstances would merely give to the plaintiffs an opportunity to change their testimony.

The judgment of the District Court is affirmed.

Goss, J., being disqualified, did not participate in the hearing of the above-entitled action.

McCAFFERY v. NORTHERN PACIFIC RAILWAY COMPANY.

(134 N. W. 749.)

Pleading — motion to strike for variance — time for.

1. A motion to strike out a portion of the complaint was properly denied when made on the ground of variance between the complaint and the allegations of the justice court summons, where the complaint was filed and trial had thereon in justice court, and when the motion was made for the first time in the district court.

Evidence — testimony of owner of land as to its value.

2. The owner of land may testify to its value, even though, if he was not such owner, his ignorance of its value would exclude his testimony.

Negligence — submitting question of, to jury — sufficiency of evidence to sustain verdict.

3. *Held*, that the court properly submitted to the jury the question of negligence, which remained an issue of fact, and that the evidence is sufficient to sustain the verdict rendered.

Opinion filed January 29, 1912. Rehearing denied February 16, 1912.

Appeal from the District Court, Morton county; *Crawford, J.*
Affirmed.
Ball, Watson, Young, & Lawrence and *E. T. Conmy*, for appellant.
W. H. Stutsman and *J. E. Campbell*, for respondent.

Goss, J. The facts in this case are simple and the law plain. Action is brought for damage to real property caused by a fire set by an engine of defendant company. The origin of the fire and its course, the property destroyed thereby and its ownership in plaintiff, are uncontro-

Note.—The question of the measure of damages for injury to, or destruction of, trees or shrubs not valuable for their timber or firewood, is the subject of a note in 28 L.R.A.(N.S.) 757, appended to the case of Cleveland School Dist. v. Great Northern R. Co. 20 N. D. 124, 126 N. W. 955, which is referred to in the opinion of McCaffery v. Northern P. R. Co. as laying down the correct measure of damages applicable in the latter case. And the earlier cases on this subject are collated in a note in 11 L.R.A.(N.S.) 930.

For presumption of negligence in case of railway fire, see note in 15 L.R.A. 40. And as to effect of presumption from fact that fire was set by locomotive to carry question of negligence to the jury, see note in 5 L.R.A.(N.S.) 99.

verted and beyond question. All the error assigned may be included under four general subdivisions as hereinafter considered.

We will first discuss the motion of defendant made in district court to strike out a portion of the complaint wherein the negligence complained of is specifically pleaded, which motion was made "on the ground that there is a fatal variance between the allegations of the complaint and the summons in justice court." The summons in substance required the defendant to answer the complaint of the plaintiff, "who claims to recover of you the sum of $200 for damages done by you by a fire set by one of your engineers on your right of way at or near Lyons, on or about the 18th day of April, 1908," with a notification that in default of answer judgment would be taken against defendant. On the trial in justice court a written complaint was filed, pleading the negligence complained of to have been that of the company, and alleging wherein defendant was negligent and the resulting damages occasioned plaintiff. The jurisdiction of the justice because of any insufficiency of the summons was not attacked, nor is it here questioned. The district court in its discretion could have permitted the filing of the written complaint had trial been had in the lower court on the summons without written pleadings. It could have permitted any amendment to any complaint necessary and within the cause of action sued upon. Such power or right cannot be seriously questioned. The summons had fulfilled its function—it had brought the defendant into court on an issue of damages claimed because of a fire alleged to have been set through defendant's negligence. On defendant's appeal taken generally with demand for new trial in district court, such court with jurisdiction so conferred and unquestioned could, within its discretion, have allowed new pleadings to have been filed formulating issues in furtherance of justice and within the cause of action sued upon. So long as such complaint stated but the cause of action, the nature of which defendant was by the justice's summons apprised in general terms, defendant cannot be heard to complain. Besides, this motion, based on the ground of variance between the summons and this complaint, could not be successfully urged for the first time in district court. Of such a variance the law will take no cognizance. If the complaint filed in district court contains other matter than properly within the cause of action sued upon, relief is had without reference to

or dependent upon the averments of the justice court summons, except as it may furnish evidence of what the cause of action is. This motion could not be made for the first time in the district court after trial in justice court on said complaint had been had without objection. The motion was properly denied.

The plaintiff was owner of the land burned over. After counsel for defendant had, on examination of the plaintiff, confused him as to how he would apportion any damage suffered between the injury to the trees and other alleged damage sustained, and demonstrated plaintiff to have been somewhat ignorant as to the actual value of his own farm and property injured, plaintiff was permitted, over objection as to foundation and incompetency, to testify to value of the land, both before and after the fire, as proof of damages sustained. This ruling is assigned as error, defendant contending that "the presumption that an owner can testify as to the value of his own property is overcome by his positive testimony of ignorance of value." The fallacy of this is that it is based upon a mistaken assumption in law, that the right of an owner of property to testify depends upon some presumption of fact arising from the ownership, qualifying him as an expert to testify; whereas his qualification to testify does not depend upon presumption, but upon the principle, that an owner is in law qualified to testify, and his testimony is, because of his relationship as owner, competent and admissible on the question of value of his property. His ownership, regardless of his knowledge, qualifies him to testify. Its weight may, in fact be naught, but he may testify to his estimate of the value of his property. See 17 Cyc. 112: "In most instances an owner is deemed qualified by that relationship to testify to the value of common classes of property, although experience will enhance the weight of his estimate. The primary qualification of other witnesses is adequate acquaintance with that class of property, whether personal or real." To the same effect, see 1 Wigmore on Evidence, § 716, reading: "The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury; and courts have usually made no objections to this policy." See also § 714, and 13 Enc. Ev. 560. A distinction as to qualification to testify is thus drawn between owners and nonowners. We think suf-

ficient foundation was laid to admit the testimony of neighbors concerning value of the premises before and after the fire, to the admission of which error is assigned. There was ample testimony of actual damage suffered by plaintiff.

Since trial herein was had the measure of damages applicable has been determined by this court in Cleveland School Dist. v. Great Northern R. Co. 20 N. D. 124, 28 L.R.A.(N.S.) 757, 126 N. W. 955. That measure of damages was applied in the admission of evidence and the instructions given, in substance, that the damages consist of the difference between the value of the land before and its value after the fire.

Defendant contends, further, that the testimony offered by it, that its engine and fixtures were in good repair, was, because of physical facts shown in the testimony, sufficient to overcome any testimony to the contrary, and particularly to disprove plaintiff's evidence that other fires were set the same day by the same engine. The testimony offered by plaintiff was that this particular engine set two fires shortly before the one causing the damage in suit, and that all three fires were set while the engine was running a distance of about 5 miles. Defendant admits the evidence of its setting of these other fires was admissible as bearing upon the question of negligence in the setting of the fire occasioning the damage; but contends negligence is wholly negatived by defendant's proof that the engine in question did not pass by the territory adjacent to where the fire started until after the time plaintiff's testimony shows the fires must have been set; and accordingly that the same engine could not have set all three fires. Defendant urges that thereby plaintiff's proof of negligence in equipment of machinery or its operation strongly appearing from its starting of these several fires in such a short distance and within a short period of time, is totally overcome as a matter of law. The fault with defendant's proposition so urged is that it is assumed, in the first place, that there is testimony of physical facts, and, in the second place, that such proof negatives the possibility of the truth of the evidence offered by plaintiff; and in neither instance is the assumption warranted. There is no proof of what may be properly termed physical facts. The train record as to when this particular train left Mandan does not fall within such category. Besides, such train record is dependent, for its

identity and application, to the case upon oral testimony of the engine's road number. And again, as to the exact time of the fire, the jury might in reason have concluded that plaintiff's witnesses were simply mistaken, and that, granting defendant's record proof of the time of its leaving Mandan and the time necessary for it to run the 8 miles therefrom (during which time plaintiff's proof shows it set three fires), that the proof of plaintiff of the time of fire would coincide in time with the proof offered by plaintiff of the time of the engine's trip in question, thus harmonizing all testimony, instead of establishing the physical impossibility of the truth of plaintiff's theory based upon the same engine setting all three fires.

Defendant assigns error on proposed instructions refused. To have given them would have been but the repetition of instructions elsewhere given in the charge. The instructions of the court fully covered both sides of the case and all issues therein within the pleadings and the proof offered, and are above criticism.

No error was committed in admitting or excluding testimony, and the evidence was sufficient to warrant the submission to the jury of the issues involved of negligence and amount of damages; concerning all of which the jury were properly instructed. The judgment entered on the verdict rendered is accordingly ordered affirmed.

BALKE-REAMER-BALKE COMPANY v. NICHOLL

(134 N. W. 1134.)

Opinion filed January 29, 1912.

Noble, Blood, and *Adamson,* for defendant and appellant.
Bowen & Adams, for plaintiff and respondent.

PER CURIAM. This case was tried in the county court with increased jurisdiction of Bottineau county, and resulted in a verdict and judgment in favor of the plaintiff. From such judgment the defendant appealed to the district court of Bottineau county, wherein a verdict and judgment were rendered against him and in favor of the

plaintiff. From such judgment the defendant has appealed to this court.

The respondent has served and filed an offer to accept, in full settlement of the amount claimed, the amount of the judgment rendered in county court. The defendant and appellant appears in open court and states that he makes no objection to such disposition of this case.

It is accordingly ordered that the appeal be dismissed, and the District Court of Bottineau county is directed to enter judgment in conformity with the judgment of the County Court of that county, from which the appeal was originally taken.

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

BRUSH-McWILLIAMS COMPANY v. GLUDT.

(134 N. W. 741.)

Real estate brokers — commission — right to, where contract terms as to payment are not complied with.

The court will not set aside a verdict for the defendant, in an action to recover commissions in a real estate transaction, where there is evidence tending to show that the original contract was for the sale of the land for cash, and the sale or offer to purchase was on time, and the only evidence of an acceptance of a modification of said contract by the owner of the land was to be derived from the fact that the agent went to his farm in an automobile, told him that he had sold the land on time and not for cash, and, after some minutes conversation, made out and handed to the owner his personal check for a cash payment of $1,000, saying that the balance would come the 1st of March, and then, within three minutes thereafter, drove away; the evidence further showing that the defendant, after talking the matter over with his wife, and on the same evening, returned the check to the agent with a letter, in which he refused to accept any modifications of his original contract.

Opinion filed January 30, 1912.

Note.—It seems to be pretty well established, as shown by a review of the authorities in a note in 21 L.R.A.(N.S.) 935, that the rule that a real estate broker, in order to be entitled to his commission, must find a purchaser able, ready, and willing to purchase on the terms prescribed in the contract between the principal and the agent, will bar the agent's right to his commission where the contract terms are not complied with, although the only deviation from those terms is as to payment in cash or the length of time given to make the various payments.

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

Action by the Brush-McWilliams Company against Amil P. Gludt. Judgment for defendant, and plaintiff appeals.

Affirmed.

Thompson & Schull, for appellant.

Palda, Aaker, Greene, & Kelso, for respondent.

BRUCE, J. This is an action to recover commissions on a real estate transaction. It is conceded by both sides that on or about the 10th day of October, 1909, the defendant agreed to and with one Mitchell to sell certain lands for cash; and that whatever the said Mitchell could get above the sum of $8,000 should be kept by him as commissions. The controversy is entirely over the question as to whether the defendant afterwards agreed to a modification of such contract, and agreed to accept a check for $1,000 and a promise to pay the balance in the spring. Although, too, the original contract was with one Mitchell, and no principal was disclosed, the claim is now made and the suit brought by the Brush-McWilliams Land Company, as the undisclosed principal of said Mitchell. The jury in the trial court found for the defendant, and that no such modified contract was made, and an appeal is taken by the plaintiff to this court.

The defendant, Gludt, testifies that on Sunday, the 10th day of October, 1909, Mitchell came to his place, and asked him if he wanted to sell his farm, and that he said that he had thought that he would sell the place if he got his price,—that is, cash price, "$8,000 spot cash,"—and that Mitchell said, "All right;" that the next time he saw Mr. Mitchell was on the 14th day of October, 1909, at his place, and that there were, with Mr. Mitchell, Mr. Mott and Mr. Ramsey; that he was working at the time in the potato patch; that while walking from the potato patch to the house Mr. Mitchell told him that he thought he had a purchaser for his place, but that the man did not have enough money to pay cash, and that he said, "Mr. Mitchell, you know that I would not sell this farm any other way than for cash, and I will never go into a deal on time;" that he then showed the party through the house, and that they left all together; that the next time he met Mr. Mitchell was on the 15th day of October, at about 9 or 10 o'clock in the morning; that Mitchell and Mott were in an automobile; that Mitchell

stated he thought he had a purchaser for the farm; that Mitchell wrote him out a check for $1,000, which he took; that Mitchell did not say who was going to be the purchaser, but said that Ramsey thought he would take the place; that he thought the check was on the purchase price, but supposed they were going to give him all cash immediately,—as quick as he gave them a deed; that they did not ask him to come into town; that Mitchell mentioned about the check being a cash payment, and that the balance would be given the 1st of March, and wanted to know if he would go into that kind of a deal, and that he said, "No;" that Mr. Mott argued with him, but that he told him he would not do it; that he had the check in his possession when Mitchell and Mott left his place; that he thought he would call them back, but they were gone; that he returned the check immediately, that evening, with a letter, saying that after due consideration he could not enter into the contract; that on October 25th Mr. Bates was at the house and said that Ramsey could not furnish the money, and offered him Mr. Ramsey's note and the Brush and McWilliams paper, which the defendant absolutely refused to take, that he told Mr. Bates that if he could not give him the cash the deal would have to be called off. This testimony is more or less corroborated by that of his wife.

Mitchell testifies to practically the same facts as to October 10th, and that he did not think that there was anything said at that time as to his representing the Brush-McWilliams Company; that on October 14th he and Mott and Ramsey and Batcher drove out in an automobile, and found the defendant, Gludt, in the yard, digging potatoes; that he told Gludt that he had a customer; that Gludt took Ramsey into the house; that nothing was said at that time as to the price of the land or the terms of the sale; that that night he and Mott and Ramsey and Bates closed up a contract, partly oral and partly in writing; that the next day he, together with Mott and Batcher, the driver of the automobile, went out to Gludt's place and had an interview with Gludt alongside of the automobile; that he said, "Good morning, Amil; you haven't any farm this morning more than a jack rabbit;" that the defendant said, "That is good;" that he said: "'I have sold it to Mr. Ramsey, and he can pay you $1,000 to-day, and give you the other $7,000 the 1st of March.' 'Well,' he (defendant) says, 'I don't like that.' 'Well,' I told him, 'it was a pretty good sale.' 'Well,' he says,

'Where is Ramsey?' I says, 'He is gone home.' He says: 'I have posts and wire and things here; why didn't he wait and see me?' I told him he was in a hurry to get home. He said that he had a day or two more plowing to do, and he didn't know whether to stop or to keep on." The witness also testified that during this conversation he stepped over to the hood of the automobile and wrote out a check in favor of the defendant for the sum of $1,000, and handed it to him, and turned around and faced Mr. Mott and Mr. Batcher, and stated, "Now, then, here is $1,000, and your other $7,000 comes the 1st of March;" that defendant said that he didn't like that, but didn't know that it was best; that defendant spoke of the possibility of Mr. Ramsey not being able to come through, and that Mr. Mott spoke up and said that the sale was absolutely good, because the Brush-McWilliams Company would stand behind it; and the witness then said to the defendant, "Amil, you had better jump into the rig and go to town, and we will draw up a contract of those terms;" that the defendant said, "No, I cannot do it to-day, because I have got to help my neighbor thresh; but I will be in to-morrow;" that the witness then got up and left, together with Mr. Mott; that they were probably at Mr. Gludt's place two or three minutes after giving the check, and that Mr. Gludt made no offer to put the check back into his hands; that on October 25th he was again at Gludt's place; and that Gludt said: "Well, if we can get the woman to agree to it, I am willing, and she is in the house there."

The testimony of the plaintiff's other witnesses, Ramsey, Bates, and Mott, is mainly to the same effect, and none of these witnesses make out a stronger case for the plaintiff than does the witness Mitchell. On these facts the jury found for the defendant, and that the plaintiff had failed to prove an agreement by the defendant to sell his farm on time, and to pay commissions therefor. The verdict is certainly in accordance with the testimony of the defendant, Gludt, and the jury was at liberty to believe him, if it saw fit. We would be loathe to oppose our opinion to that of the jury in such a matter. In fact, we have no right to do so. We are, indeed, further of the opinion that the testimony of the plaintiff's witnesses themselves would not justify a verdict in the plaintiff's favor. We can see in their testimony no clear evidence of a contract, no meeting of the minds. To

hold otherwise, indeed, would open the door to all kinds of lawsuits, to all kinds of business laxity, and to all kinds of hardship. The only real evidence of an acceptance of the contract is the fact that the defendant retained the check in his hands for two or three minutes. He could not return it after that time, as the party had left. He took it into the house, talked the matter over with his wife, and sent it back the same evening. To hold that in a case of sale or supposed contract to sell to a man (Ramsey) for cash, the acceptance of a check and the holding it in one's hands for three minutes, which check even is not made out by Ramsey, but by one's own selling agent (Mitchell), is an acceptance of that check and a consent to a modification of the terms of the original agreement, especially in a case where the property is a homestead, and the wife should be consulted, and the officer is one's own selling agent, and not a hostile party, is too opposed to a sound public policy for us to entertain the proposition for a moment. On this theory of the case, it is immaterial whether instructions asked for by plaintiff as to the credibility of the witnesses should have been given or not. The plaintiff's own witnesses fail to prove the plaintiff's case. The judgment of the District Court is affirmed.

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

BAILEY v. BAILEY.

(134 N. W. 747.)

Divorce — temporary alimony — suit money — notice.

1. Under § 4071 of the Civil Code, providing that "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," the court has power to order the payment of any reasonable sum for such purposes; but such allowance should be made only upon due notice to the husband, giving him a reasonable opportunity to resist the application therefor.

Divorce — suit money.

2. The object of § 4071 is to enable the wife to properly present her cause

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Note.—As to power to grant alimony in a divorce proceeding without personal service of process, see note in 9 L.R.A.(N.S.) 593.

of action or defense to the court; and if she has ample means of her own to enable her to do this it should be an abuse of discretion to require the husband to make such allowance.

Divorce — suit money — notice of application for.

3. Where the wife, who is plaintiff, is a resident of this state and the husband a resident of Nebraska, and an order to show cause why defendant should not furnish the plaintiff suit money, and attorneys' fees is made returnable in two days after the service thereof on defendant's local attorney in this state, *held* that a reasonable opportunity was not afforded defendant to appear and resist such application; and it was an abuse of discretion to deny defendant's motion for a continuance of the hearing, under such order, to show cause.

Divorce — suit money — ordering payment to attorney.

4. The order of the court, requiring defendant to pay to the plaintiff the sum of $150 suit money and $100 as attorneys' fees, was erroneous, as the court has no power to require the payment of such sums to the attorney. Such allowances are for the benefit of the wife, to enable her to prosecute or defend the action, and should be made payable to her.

Opinion filed January 30, 1912.

Appeal from District Court, Ramsey county; *E. B. Goss,* J.

Action by Jane Bailey against Samuel D. Bailey for divorce. From an order awarding suit money and attorneys' fees to be paid to the plaintiff, defendant appeals.

Reversed.

W. E. Gantt and *L. J. Wehe,* for appellant.

P. J. McClory, for respondent.

Fisk, J. This is an appeal from an interlocutory order, made by the district court of Ramsey county in a divorce action, requiring appellant to pay the plaintiff's attorney the sum of $150 suit money, and the further sum of $100 as attorneys' fees.

Appellant alleges twenty assignments of error, but they are all predicated upon the grounds: First, that defendant was not afforded a reasonable opportunity, or any opportunity, of a hearing on the application for the allowance on such suit money and attorneys' fees; second, that it was error to require the payment of such suit money and attorney's fees directly to plaintiff's attorney, instead of to the plain-

tiff; and, third, under the showing, it was error to grant any allowance for such purpose, for the alleged reason that the evidence shows that the plaintiff was not entitled to such allowance. We shall notice the first two grounds only.

The plaintiff is a resident of Devils Lake, and her cause of action is alleged extreme cruelty and nonsupport. The defendant, a resident of the state of Nebraska, answered, denying the alleged cruelty and nonsupport, and by way of cross-bill prays for a divorce from the plaintiff upon the ground of desertion on plaintiff's part; and he alleges that he is possessed of no property, except a home in New Castle, in Nebraska, worth $2,000, and an undivided half interest in lots 1 and 2, block 2, of Ruger's addition to Devils Lake, worth about $1,000; and that the plaintiff owns the other undivided one-half interest in such lots, and is occupying the same as her home. He also alleges that the plaintiff, in addition to her interest in such lots, is the owner of 300 acres of land near Devils Lake, worth and of the value of at least $10,000 over and above all encumbrances, which answer is duly verified by the defendant personally.

The record discloses that on September 29, 1910, defendant's counsel served notice upon counsel for plaintiff of the taking of the depositions of divers and sundry witnesses at New Castle, Nebraska, on October 10th, and at Sioux City, Iowa, on October 14th. Thereafter, and on October 3d, plaintiff made application, supported by her affidavit, for an order to show cause why defendant should not pay to plaintiff a reasonable sum as attorneys' fees and suit money, and an order to show cause was accordingly issued, returnable on October 6th. Such order was not served on defendant's local attorney, L. J. Wehe, until October 4th. On the return day of such order to show cause, defendant's said attorney appeared and moved for a continuance of the hearing on such order to show cause for reasonable time to enable defendant to furnish proof in resistance of such application. Such motion for continuance was supported by the affidavit of said attorney, alleging that, owing to the fact that defendant was in Nebraska, it was utterly impossible for him to appear on such hearing or to furnish any rebuttal proof, and that two days was wholly insufficient time allowed to him for such purpose, and he asked for a continuance for a week or ten days. His motion for

such continuance was denied and an exception allowed, and thereupon the order complained of was made.

We are reluctant to disturb orders of this kind; but we are compelled to do so in this instance, for the obvious reason that we deem the action of the trial court a clear abuse of discretion under the facts. Defendant, having been cited to show cause, was entitled to a hearing on such application, and manifestly no sufficient opportunity was afforded him. Counsel for plaintiff give as a reason for this short order to show cause that it was necessary, in order to permit plaintiff to be represented at the taking of said depositions; and he states in his printed brief and on oral argument that the court offered to grant the continuance asked for, on condition that defendant's counsel would agree to abandon the taking of said depositions until a later date. If the record disclosed that such an offer was made, we would be confronted with an entirely different situation. The record, however, is silent on this point, and we are bound by the record presented to us. If authorities are needed in support of defendant's rights to a hearing on such application, see 14 Cyc. 756 & 761, and cases cited. In Mudd v. Mudd, 98 Cal. 320, 33 Pac. 114, it is true that it was held, under a statute identically the same as our § 4071, Rev. Codes 1905, that the court has power to grant such allowances on an *ex parte* application, and that the giving of notice to the husband is a favor granted him by the court, and consequently that the notice may be of such length as the court may choose to fix. It is also therein stated that in practice in that state such applications are usually made *ex parte*. In North Dakota the usual practice has been to give notice; and we certainly think this the better practice and more consistent with sound principles. Why should the husband's property be taken from him, even for such purposes, without giving him his day in court? He should have an opportunity to show, if he can, that the wife is abundantly able to support herself, and to prosecute or defend the action out of her own separate estate; and he should likewise be given a reasonable opportunity of showing the nature and extent of his property. The rule might be otherwise if, as formerly, the wife could own no separate estate.

The books are full of cases holding that temporary alimony, suit money, and counsel fees will be granted the wife almost as a matter of course; but this rule had its origin at a time when the wife was not

permitted to own any separate estate. It is the rule of the ecclesiastical courts of England, and it ought not to have any application under our present statute. The reason for the rule having ceased, the rule itself should cease. The wife is now on an equality with her husband, so far as the right to own and control property is concerned; and where she has ample means of her own it would ordinarily be an abuse of discretion to require her husband to furnish her with temporary suit money and attorneys' fees in a divorce action, for all she is entitled to is to be placed on an equality with her husband, so far as the ability to prosecute or defend the action is concerned. Under the provisions of § 4071, Rev. Codes, which authorizes the allowance to the wife from the husband of temporary alimony and suit money, the trial court is not given unlimited discretion in the matter. It has authority to award such allowances, if, in the exercise of a sound discretion, it deems the wife entitled to such relief. This statute clearly supersedes the rule of the ecclesiastical courts of England, which allowed the wife suit money almost as a matter of course.

The second ground urged for a reversal of the order is that the allowance was made payable to the plaintiff's attorney, instead of to her. There seems to be some conflict in the adjudications upon this question; but we think the great weight of authority, as well as reason, supports appellant's contention that the order should require the allowance to be paid to the wife, and not to her attorney. Section 4071, *supra*, provides that such allowances are "to enable the wife to support herself or her children, or to prosecute or defend the action." While some courts have held that an order which makes such allowance payable directly to the attorney is merely irregular, and not void, the weight of authority, and, we think, the better and sounder rule of practice, is to the contrary. Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Lynch v. Lynch, 99 Ill. App. 454; Callies v. Callies, 91 Ill. App. 305; Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877; Kellogg v. Stoddard, 89 App. Div. 137, 84 N. Y. Supp. 1015; 14 Cyc. 766, and cases cited.

For the foregoing reasons, the order appealed from must be reversed, and it is so ordered.

Goss, J., being disqualified, took no part in the decision.

MEYER LUMBER COMPANY v. TRYGSTAD.

(134 N. W. 714.)

Mechanics' liens — single lien against separate buildings on separate lots.

Evidence examined and shows that the defendants Frank and Tompkins were the owners of adjoining lots in the city of Minot, North Dakota; that in August, 1907, F. decided to build a three-story brick building upon his lot, and advertised for bids and let the contract for the same. Sometime thereafter T. decided to build upon his lot, and consulted the contractor and architect employed by F., and entered into a contract with the contractor to build a three-story building upon his lot; such building, however, to be only one-third the size of F.'s building in other respects. The contractor bought the material for both buildings from plaintiff, but there is evidence of separate estimates so that plaintiff could have kept separate bills. Plaintiff gave a notice by registered letter, as required by § 6237, Rev. Codes 1905, to each lot owner, to the effect that his building and lot would be held for the material therein used. Later plaintiff filed a joint lien against both lots and buildings. *Held* that the contracts were separate and distinct, and that the joint lien filed against both premises is void.

Opinion filed January 30, 1912.

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

Action by the Meyer Lumber Company against Peter Trygstad and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Thompson & Schull and *Engerud, Holt, & Frame*, for appellant.

Note.—While in most states a single lien on several separate buildings is allowed where the buildings are erected under a single contract, the decision in MEYER LUMBER CO. v. TRYGSTAD, that a single lien cannot be filed against separate buildings erected under separate contracts, seems to be in harmony with the other authorities which have considered this question, as shown by the cases collected in a note in 17 L.R.A. 314.

The question as to when separate structures and their appurtenances intended for a united use will be treated as a unit in relation to liens is considered in a note in 65 Am. St. Rep. 168.

And the right to a joint lien where a single building covers adjoining lots held in severalty is the subject of a note in 30 L.R.A.(N.S.) 1219.

As to extent of land to which a mechanics' lien will attach, see note in 26 L.R.A.(N.S.) 831.

D. C. Greenleaf, E. R. Sinkler, and *Johnson & Nestos,* for respondents.

BURKE, J. Plaintiff is a subcontractor who furnished material for the buildings hereinafter mentioned. Trygstad is the contractor, and the defendants Frank and Tompkins were the several owners of the lots and the buildings thereon erected,—Frank owning lots 13 and 14, and Tompkins owning lot 15 adjoining.

The testimony is very long,—the printed abstract containing 1,120 pages, not counting the index,—and prompts us to remind attorneys that the "law's delays" are not always chargeable to the courts. For instance, we might also suggest that such matters as newspaper interviews with business men, if material, should be proven by the testimony, under oath, of the person making the interview, rather than by the introduction of photographs of the newspaper containing the resulting write-up. If this court is to keep up its work and mete out the prompt justice to which the people of this state are entitled, the attorneys must practice more self-restraint while trying cases under the Newman act. As we said, the testimony is long; but from a careful reading thereof we think the following stated facts are rather conclusively established: The defendants Frank and Tompkins had owned their lots for some time and had probably often talked of building thereon and of using a party wall for both buildings. During the summer of 1907 Tompkins was in California when Franks obtained a long-term lease with the government for the Minot Postoffice and immediately decided to build. To this end he advertised for bids for a three-story brick building 50 by 140 feet in size, and including a party wall half upon his lots and half upon Tompkins lot. The bids were to be opened August 24, 1907. Upon the tenth of said month Tompkins returned from California, but had not decided to build; however, he told Frank that he would pay for half of the party wall, and for Frank to go ahead. This Frank did, letting the contract August 27, 1907, to Trygstad for the building, including the party wall. This building, when completed, would have stood a complete structure all upon Frank's lot excepting half of the party wall. It did not need the Tompkins building to support or adorn it. The price Frank was to pay for his building was determined, and plaintiff had furnished an estimate to Trygstad for this single structure,

showing that they might have filed a separate lien against this building, so far as a separation of accounts was concerned.

Some time between the 27th of August and September 10, 1907, Tompkins decided to erect a building upon his lot, and entered into negotiations with the same contractor and architect who had already been employed by Frank, for the erection of a three-story brick building 25 by 70 feet, using the party wall for one wall of his building. Both Frank and Tompkins testify they had nothing to do with each other during these negotiations, excepting to make a party-wall agreement. The architect suggested that the front of the building should be made uniform so as to present the appearance from the front of being one building, and that the stairway leading to the second floor be placed in the party wall between the two buildings. These changes were agreed to by the owners, and a large stone name plate was placed over each building containing the name of the owner. Excepting for the stairway just mentioned, there was no break in the party wall, and the two buildings were as much separated as any two buildings could be using a party wall. The roof was securely joined at the same height to prevent leakage, and the front wall was of uniform height, with a simple cornice running along the entire 75 feet. The Frank Building is some 40 feet deeper than the Tompkins Building. Tompkins let his contract for his building some time in September, for a building 70 feet deep, but changed it again later, and a new contract was made for a building 100 feet deep, the Frank Building being some 40 feet deeper. Having both contracts, Trygstad began work first upon the Frank Building, but shortly thereafter upon the Tompkins Building, and seems to have worked at both buildings at the same time. However his builder, Bergrum, testified that they had two separate plans and specifications for each building, and that he thought the building material had been furnished for the Frank Building all at one time on one contract. Probably the building material was commingled by the workers, owing to the proximity of the two jobs. This was done, however, through no fault of Frank or Tompkins. There is also, incidently, evidence that the contractor built other buildings with the lumber bought of plaintiff at this time, which might have a strong bearing upon the validity of the lien, were we to reach the question. The above is a brief *résumé* of the facts which we think are supported by the overwhelming weight of

the evidence, and we agree with the trial court in its conclusion that there were two buildings erected under two distinct contracts. In fact the plaintiff seems to have taken this view of the matter at the time of serving his notice by registered letter upon these defendants, as he sent separate notices to each, notifying Frank that he would be held for the material used in the erection of the building upon lots 13 and 14, and informing Tompkins that he would be likewise held for the material used in the building upon lot 15. When the time came to file the lien, however, plaintiff changed his mind and filed one lien against both buildings and against both lots, evidently construing § 6238 as authority for so doing; said section of the Revised Codes 1905 reading, "If labor is done or materials furnished under a single contract for several buildings . . . the person furnishing the same shall be entitled to a lien therefor as follows: . . . if such buildings . . . are upon separate . . . lots upon all such buildings . . . and the . . . lots upon which the same are situated, but upon the foreclosure of such lien the court may . . . apportion the amount of the claim among the several . . . lots in proportion to the enhanced value of the same . . . if . . . necessary to protect the rights of third persons." Section 6237 of the same chapter provided: "No person who furnishes any materials . . . for a contractor . . . shall be entitled to file such lien unless he notify the owner of the land by registered letter previous to the completion of said contract, that he has furnished such materials."

The first-quoted section was evidently enacted to protect the subcontractor in those cases where two or more owners of buildings, or one owner of two or more buildings, united the contract under which the building was done, so as to form one joint venture and thereby prevent the subcontractor from obtaining a lien upon each building separately. The theory being that the owners had so joined their contracts that it was almost, if not quite, impossible to trace the materials into the separate buildings. It is founded upon the plainest principles of equity. If, however, the lienor can conveniently trace his materials or labor into one of several buildings, and thus perfect a lien thereon, it seems equally equitable that he should be limited to a lien thereon, and that the owner of the adjacent building should not be subjected to the burden of another's debt. Our § 6238 proceeds upon the assumption

that where the contract is single the subcontractor has the right to furnish materials without making an effort to trace them into the separate buildings. Plaintiff relies upon the case of Stoltze v. Hurd, 20 N. D. 412, 30 L.R.A.(N.S.) 1219, 128 N. W. 115, Ann. Cas. 1912, C. 871, which holds that where two adjoining landowners make a joint contract for the erection of a building thereon, and a subcontractor furnishes material to be used in such building, he is entitled to a lien upon the entire premises, but not to a separate lien against one lot and the part of the building standing thereon. It being the contention of plaintiff that, if the subcontractor cannot have a lien upon one lot, it necessarily follows that he must have a lien upon both lots. The case of Stoltze v. Hurd, supra, must be read with care, or it will mislead. See valuable note thereto in the L.R.A. supra. The real reason for denying the subcontractor the single lien in cases like Stoltze v. Hurd is the fact that the joint contract makes it a physical impossibility to obtain single liens, and the joint lien is given, by the statute, in its stead.

In the case at bar the contracts were separate and distinct. The lumber company furnished separate and distinct estimates for the jobs. There does not appear any reason why separate liens might not have been filed. Why, then, ought Frank to be burdened with the lien upon Tompkins' building and Tompkins burdened with Frank's lien? As the lien is purely a statutory right, the failure to comply with the statute avoids the lien. As the plaintiff has not filed the liens to which he was entitled, and has filed a purported lien to which he was not entitled, he is without remedy. We might also say that even were the contract a single one, as claimed by plaintiff, his lien must fall because of the fact of no sufficient notice by registered letter as required by § 6237. The notices given are to the effect that each will be held for the material used in his building upon his separate lot. This will not supply the necessity for notice to both of the owners, that both of the lots and buildings will be held for the entire debt.

From what we have said it follows that plaintiff has no lien, and the judgment of the trial court is affirmed.

Mr. Justice Goss, being disqualified, did not participate.

SWANSON v. SCHMIDT-GULACK ELEVATOR COMPANY.

(135 N. W. 207.)

Independent contractors — who are.

1. Contract of employment between defendant and a third party construed with the evidence of performance of the work covered thereby and *held* not to constitute such third party an independent contractor.

Note.—All phases of the question as to what persons are deemed to be independent contractors within the meaning of the rule relieving the employer from liability are discussed, with a full review of the authorities, in a note in 65 L.R.A. 445, including the question of the effect of the employer's reservation of full or limited power of control over the work.

As to liability of employer for acts of independent contractor where the work is done according to plans or methods prescribed by the employer, see note in 65 L.R.A. 755.

And as to employer's liability where his own active interference with the work is the proximate cause of the injury, see note in 66 L.R.A. 950.

For the question of vice principalship considered with reference to the rank of a superior servant, see note in 51 L.R.A. 513. And for vice principalship determined with reference to the character of the act causing the injury, see note in 54 L.R.A. 37.

As to when scaffold builders are vice principals, see note in 75 Am. St. Rep. 631. And for the question of duty of master as to condition of scaffold constructed by employees, to employee not a member of the gang for whose use the scaffold was primarily constructed, see note in 22 L.R.A.(N.S.) 952.

As to the general question of master's duty to furnish safe appliances as affected by the fact that defective appliances are prepared by fellow servants, see note in 4 L.R.A.(N.S.) 220.

On the question of servant's assumption of risk from changing condition of working place during the progress of the work, see note in 19 L.R.A.(N.S.) 340.

A case very similar in principle to SWANSON v. SCHMIDT-GULACK ELEVATOR CO. is that of Hoveland v. National Blower Works, 134 Wis. 342, 14 L.R.A.(N.S.) 1254, 114 N. W. 795, where it is held that a master does not comply with his duty to furnish suitable materials for a scaffold to be erected by his servants for their own use, so as to relieve him from liability for injury to a servant by its fall, where he directs the selection to be made from piles of rotten, second-hand lumber, some of the pieces of which contain auger holes, and forbids the use therefor of new lumber which is at hand.

And another case in which the master was held liable because he furnished to the servants improper materials for the construction of a scaffold is that of Donahue v. Buck, 197 Mass. 550, 18 L.R.A.(N.S.) 476, 83 N. E. 1090.

Master and servant — existence of relation — independent contractors.

2. Evidence held sufficient to establish relation of master and servant to exist as between defendant and plaintiff.

Master and servant — fall of scaffold — construction under direction of vice principal.

3. Where defendant's managing officer assumed to direct the method and scheme of construction of supports to a scaffold or platform necessarily to be used in the work, and forbade the use of another kind of support about to be used for such scaffold, supplanting thereby the judgment of servants by his own in such respect, he is bound to know that the platform is supported in a reasonably safe manner for employees working thereon; and the negligence of such officer, a vice principal of defendant, is the negligence of the defendant for which it is liable in damages.

Master and servant — fall of scaffold — defective design selected by master.

4. Where a design of scaffolding is thus by the master imposed upon employees for their use, the same duty rests upon the master to know that the design is a safe one as rests upon the master to furnish suitable and not defective material for the employees' use.

Appeal — assignments of error.

5. Assignments of error as to admission of expert testimony and court's instructions to jury examined.

Opinion filed January 30, 1912. Rehearing denied March 5, 1912.

Appeal from the District Court of McHenry county; *Burr*, J. Affirmed.

Palda, Aaker, & Greene, for appellant.

F. B. Lambert, for respondent.

Goss, J. Recovery is sought of the defendant company for damages alleged as resulting to plaintiff from injuries received by him while an alleged employee of defendant, engaged on July 15, 1907, in the construction of an elevator at Ruso, in Ward county. The injuries were caused by a platform giving way and precipitating him from the top of the elevator 45 feet downward, inflicting upon him serious and probably permanent injuries, for which a jury has awarded plaintiff damages in the sum of $8,000.

(1) In whose employ was plaintiff?

Defendant company had a contract with one Clark under which it

claims Clark was constructing the elevator as an independent contractor. Plaintiff contends the insufficiency of the contract to constitute Clark an independent contractor, and that under the evidence, though the plaintiff was employed by Clark, he was at all times an employee of the defendant company; that whatever Clark did was subject to the order and approval of one Abline, on the job, the vice president of and alleged managing officer in this construction work of the defendant. This issue of fact was submitted to the jury, who found adversely to the defendant.

(2) Of what does the negligence consist?

The charge of negligence is founded upon the theory that the defendant by its officer Abline directed the manner of erection of the platform used upon which the workmen were suspended while building the walls of the elevator and the six bins into which it was partitioned, and that such platform was faulty in design in that it was inherently unsafe for such use; that Abline, as an officer of the company, directed and dictated its use, and refused to permit, because of added expense, the use of a different platform being constructed by Clark for use, which was supplanted by the unsafe one so used at the order of and under the immediate supervision of said vice president of the defendant company as its supervising and directing construction representative on work. The testimony under this claim will be reviewed.

We will first discuss the testimony as to the employment of Clark, and determine defendant's responsibility or want thereof for any negligence imputable to it. The contract between the elevator company and Clark, coupled with the acts of its vice president apparent from the evidence, fix the legal relationship of the parties as to the question of employment. The contract in question reads as follows:

"This agreement, made and entered into this 21 day of June, A. D. 1907, by and between Schmidt-Gulack Elevator Company, a corporation of Anamoose, McHenry county, party of the first part, and A. J. Clark of Minneapolis, Minnesota, Contractor, party of the second part,

"Witnesseth, that the said party of the second part agrees to furnish all heavy tools such as cross-cut saws, picks, shovels, hoisting rope, together with plans and specifications and men, and to superintend in person the construction of a grain elevator for Schmidt-Gulack Elevator

Company at Ruso, McLean County, North Dakota, as per plans and specifications hereto attached.

"The party of the first part agrees to furnish all the material and pay for the same, together with amounts equal to freight on same, and satisfy all labor bills. Said party of the first part agrees to order all material at once, and to ship and rush same to point of building.

"The party of the first part further agrees to pay to A. J. Clark, party of the second part, in consideration of his services as aforesaid, the sum of two hundred dollars ($200) lawful money of the United States, upon the completion of the aforesaid elevator.

"It is understood that the said A. J. Clark shall not be held responsible for any loss or delay on account of strikes or unavoidable accidents, or by such occurrences as are usually termed acts of God."

It will be noticed that this contract is vague and indefinite as to the payment of labor bills. Clark does not agree to build the elevator, but instead to furnish the necessary tools, plans, specifications, and men, and to superintend the construction of the elevator for a consideration of $200, to be paid him upon its completion, in accordance with certain plans and specifications. He obligates himself principally to furnish the men and to superintend the job. The elevator company contracts to "furnish all the material and pay for the same, together with amounts equal to freight on same, and satisfy all labor bills; to order all material at once, and to ship and rush same to point of building," and pay Clark $200 on the completion of his work agreed upon. This is the contract. By its terms defendant company pays the freight and the wages, and produces the material on the ground. The purpose of this contract, being indefinite as to practical particulars, is explained by subsequent evidence during accomplishment of the work to be done thereunder, and which aids materially in arriving at the conclusion as to whether or not Clark occupied the position of an independent contractor in the construction of this elevator so far as the plaintiff is concerned. We recite the evidence on this matter. Plaintiff had worked before as a carpenter upon one elevator, and this during the same summer and in the employ of Clark, who caused him about the first of July to start work on this job at building a driveway and engine room and other work on the ground, while others erected the cribbing to the full height it was at

the time plaintiff received the fall. Plaintiff was directed by Clark to go up on top of the cribbing and start the rafters and roof work. Complying therewith he took the necessary tools, and, after reaching the top, jumped down about 4 feet upon the platform in question, it immediately giving way with him and occasioning his injury. After Clark had engaged him to work upon the building, and he had been working a couple of days, Abline came on the job and remained thereon bossing it. Clark did not know at first what wages plaintiff would be paid, but Abline fixed them at $3.50 per day, and Abline did the paying while plaintiff was working on the building. Besides being vice president of the company, Abline was a stockholder and running an elevator for the company at Anamoose, on a salary as grain buyer. As no grain was coming into his elevator in July, he went to Ruso in the interests of the company. Abline evidently fixed and paid all wages. He had remained there continuously the week before plaintiff was injured, at times bossing, during the course of which he had a dispute with Clark over the work, he claiming Clark was not doing the work right, Clark after that making a change in it. Some of the witnesses testify that Clark was one of the bosses and Abline the other, with Abline on the building most of the time, directing how things should be done. Several witnesses testify to hearing consultations between Abline and Clark in regard to the constructing of the elevator, Abline generally directing particularly the work as to the scaffolding or staging used for the men to stand upon as the building increased in height. The testimony of defendant's officers is that Abline was sent by the company to Ruso to see that this elevator was constructed according to plans and specifications, and that the contract was complied with, and that the company had no one at Ruso representing it in such particulars other than Abline, but denying that he was there to direct Clark how to carry out his contract. The testimony shows Abline gave Clark instructions as to the scaffolding and how it should be built, plaintiff testifying thereto as follows: "This first talk I heard between Abline and Clark arose over the cutting of some braces that I was preparing for the use of the scaffold, for supporting the scaffold. I don't know how long I was engaged at that. I sawed quite a big pile of them. I knew what they were for. I heard him tell Clark that he couldn't use that in making the scaffolding. Abline was bossing. After they had this little talk about the sawing of the timbers, or sawing of those crosspieces, Clark

agreed and followed Abline's instructions. I did not build nor have anything to do with the building of the platform that I fell from. I did not know how it was built nor how it was held up." And again plaintiff testifies: "The first controversy I heard was a couple of days after Abline went there. I was sawing up a lot of braces for staging, corner braces, and they were standing not far from me, and George Abline asked Clark what these were good for, and Clark told him 'this is corner braces for the staging;' and Abline said, 'We are not going to use them, they are too expensive to put in;' and so they were talking for a while, and Clark came over to me and told me to stop cutting them up. Clark told me to quit cutting them up right away after his talk with Abline, and I quit sawing them."

The foregoing is sufficient, in our opinion, to disprove defendant's plea of its nonliability because of its assertion that Clark occupied the position of an independent contractor. It is established that plaintiff was in fact an employee of the defendant, performing his work under and subject to the supervision and control of the defendant company acting through its duly authorized and empowered directing officer for the purpose. At least the testimony is sufficient to sustain the jury's special finding and its finding in the general verdict to that effect under the court's instructions submitting the question as a matter at issue for their determination.

The next question under the second general subdivision as heretofore outlined involves principally the determination from the evidence of the answer to the question: Was the defendant guilty of negligence as pleaded resulting to the injuries of plaintiff complained of? Its answer involves an examination of the evidence as to the negligence asserted with reference in particular to whether an issue is presented on the want of ordinary care in the furnishing of a platform necessary to the work, and whether it was so constructed or designed as to be manifestly unsafe for the purpose to which defendant's managing officer directed its use and to which thereunder it was applied, as a consequence of which plaintiff received his injury. The testimony discloses that the platform was suspended some 40 feet above the bottom of the bin or shaft solely by means of four two by fours stuck through the walls of the shaft, unfastened in the walls and projecting out into the shaft far enough to run beneath, and hold thus suspended the platform upon which the men worked with their tools and material. The

safety of the men depended solely upon these pieces of scantling not slipping through the walls or from under the platform or breaking under the weight which they necessarily bore. The evidence shows that necessarily every few feet from the ground upward the platform had been raised to a higher level as the work progressed, and placed upon such supports until this height had been reached. That it was built by other workmen. Plaintiff was ordered to go to the top, and his work necessarily caused him to depend for his safety upon the stability of the platform as constructed by others, and when he fell it was the first time he had been upon this platform. On arrival at the top of the structure he had jumped down upon the platform, preparatory to beginning the roofing of the structure. Another laborer was upon the platform at the time. He had every reason to believe it secure and safe. He did not know particularly how it was supported. Defendant's vice president had put in vogue the system or design under which it was built, and had prevented another manner of supporting the platform from being used. It was for another platform construction that the braces described by plaintiff and which he desisted from sawing and Clark refrained from using were to be applied, after the prevention of which the construction or method of supporting the platform by sticking two by fours through the surrounding walls, as above described, was adopted under Abline's orders.

When plaintiff alighted on the platform it immediately gave way because its supports broke under the platform supported. One of the witnesses testifies that, immediately after the fall, he observed one of the supporting two by fours broken off close to the wall through which it was sticking, and that it was broken off through a knot therein nearly the size of the two by four. In this connection the jury have found in the special findings submitted that whoever built the platform was not ordered specially by defendant to build it for the use of the plaintiff, and that it was built by one not a fellow servant of plaintiff. This last proposition, one of law, should have been answered to the contrary of the findings of the jury in such respect. It further appears that whoever built the platform was not allowed the free exercise of his own discretion in the manner of its construction, but instead worked under the direction of Abline; as is further shown by the testimony of witness Peter Johnson, that he worked on this elevator; that Clark was

one boss and Abline the other; that he was there when plaintiff was hurt; that the platforms used were all alike; that though he did not work in the bin in which plaintiff fell, witness testifies that Abline and Clark were talking to each other, but he didn't hear particularly what was said in regard to the construction of the elevator, and gives the following testimony:

Q. Do you know of anybody on that job directing how the elevator was to be constructed except Mr. Clark?

A. Yes, Abline was up there on the building most of the time.

Q. Was he directing how things should be done?

A. Yes.

And again witness J. B. Johnson testifies to working in the bin adjoining the one in question; and, as to the scaffolding in the bin from which plaintiff fell, gives the following testimony by question and answer:

Q. Now, did you put in any of these two by fours to hold up the scaffold?

A. I might have put in these two north ones.

Q. You were accustomed to put in the two by fours used for braces which extended into the bin in which you were working, were you?

A. Yes, as a rule I did after this fellow come to work in there, because he wasn't very fast; I generally put in his and mine. I don't know who put the braces in that platform in the bin where Oscar Swanson was at the time of the fall; I knew they were in and they were about as I have stated.

Q. Whenever you put in any of these two by fours to act as supports for this scaffolding or staging, under whose direction did you do that?

A. Under George Abline.

This, in addition to the testimony recited elsewhere in this opinion, is sufficient to carry to the jury for their determination the question of whether this platform, as constructed, was used because Abline required it in lieu of the construction and design of platform that Clark started to install, and which would have had for supports braces across the four corners of each bin, a construction shown by the evidence to be the safe kind for this class of work. Under the testimony the reasons for its abandonment given by Abline himself was that the corner

braces for the staging were too expensive to put in. So much for the evidence.

The legal principles applying to the facts then are reduced to the following proposition. If Abline was a vice principal of the defendant company and was negligent in the selection of the design and kind of construction and the supports thereto chosen by him for the use of his employees who were under his orders of supervision to work thereon, one of which was the plaintiff, who, because of such negligence of Abline and as the approximate and direct result thereof, received the injuries complained of, the company is liable in damages for such injuries so occasioned, Abline's negligence being that of the company. And under those circumstances it was immaterial whether a fellow servant, in the erecting or putting in place of the platform from which defendant fell, was guilty of negligence, as the negligence of the fellow servant, though perhaps contributing directly to the injuries, did not exonerate the master, this defendant, from liability. Had the platform erected not been dictated in design and manner of construction by Abline, but instead Clark or the servants under him been left free to follow their own discretion in its selection, it would have been otherwise. But under the evidence upon which the jury's verdict must have been based, Abline was bound to use ordinary care to ascertain that the design of construction instituted for use by him, to the exclusion of another one, was a reasonably safe platform under the circumstances and for the use to which it was so directed to be put; and a default on his part in this respect is negligence sufficient upon which to base this verdict so far as that one question is concerned. 26 Cyc. 1153, from which we quote: "If a master directs a servant to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed is the proximate cause of injury to the servant, the master is guilty of actionable negligence." And again from 26 Cyc. 1115, we quote: "Where a master furnishes or causes to be built under his direction and control a platform, scaffold, staging, or like structure for the use of his servants in the prosecution of their work, it is his duty to exercise ordinary care to see that it is reasonably safe for the purpose contemplated."

Defendant's liability can only be based upon the theory of a defective appliance having been furnished plaintiff. We have examined

the authorities under plaintiff's claim of right to recover under the principles applying to the duty of the master to furnish the employee with a safe place in which to work, and are satisfied no recovery can be sustained upon "the safe place" theory. Grant that this platform was built by others, and that it was not again to be moved to a higher level; that the elevator and bins for the erection of which it had been constructed and moved upward as the work progressed was completed; that plaintiff had no occasion to investigate its construction prior to being ordered thereon; that he ascended to said platform for the purpose of and was about to begin a different kind of carpenter work, that of roofing the structure, for the performance of which this platform upon which to work was necessary; nevertheless the fact remains that this platform was built as a part of work of constantly changing conditions as it progressed, the risks of which are ordinarily assumed by the servant unless, as is said in McCone v. Gallagher, 16 App. Div. 272, 44 N. Y. Supp. 697, at page 702, "the master assumed to construct the scaffold, and then directed the employees to use it as a constructed scaffold." See Citrone v. O'Rourke Engineering Constr. Co. 188 N. Y. 339, 19 L.R.A.(N.S.) 340, 80 N. E. 1092, and particularly the valuable L.R.A. note from pages 340 to 369, and cases therein cited; Cheatham v. Hogan, 50 Wash. 465, 97 Pac. 499, and also reported with valuable note thereon in 22 L.R.A.(N.S.) 951, and exhaustive note to 54 L.R.A. 33, on page 110.

If plaintiff can recover he must predicate it upon negligence based upon defendant by its vice principal, Abline, having dictated the use of the platform supported as he directed it, and in a manner other than it would have been built or supported but for such interference, and the further proof that its use as constructed was negligence. Lang v. Bailes, 19 N. D. 582, 125 N. W. 891; Hoveland v. National Blower Works, 134 Wis. 342, 14 L.R.A.(N.S.) 1254, 114 N. W. 795; Donahue v. Buck, 197 Mass. 550, 18 L.R.A.(N.S.) 476, 83 N. E. 1090.

But counsel for defendant undoubtedly will assert in line with his brief that Abline was not a vice principal of the defendant company. The evidence establishes his presence therein with the authority of the defendant, empowered to see that the construction of the elevator and its completion was in accordance with plans and specifications between the company and Clark. He handled the money, and was at least con-

sulted in fixing wages, was vice president of the company, and assumed to act for it throughout the work. While aware of the rule that the actual and not apparent authority given the officer is usually controlling in this case, we conclude the proof is sufficient of actual authority in Abline to represent the company as he did.

He did not act as an ordinary workman or foreman. His was the mind that controlled the manner of performance of any duty owing by defendant as master to the plaintiff as employee. And did defendant owe plaintiff any duty, and can plaintiff look beyond the so-called contractor? If defendant had trusted to such contractor, and not placed a superior over him, this question would have been answered by the determination of whether Clark was or was not an independent contractor. But since defendant has assumed direction, thereby assuming the duties of master, the question is answered and the defendant is liable for violation of the nondelegable duty assumed by it. Clearly Abline was a vice principal under Lang v. Bailes, 19 N. D. 582, 125 N. W. 891, and cases cited. Having assumed this burden, it owed the plaintiff the obligation to furnish suitable materials for the construction of a suitable scaffold or platform upon which to work. Defendant may answer that it has furnished such materials in plenty. Granting this to be the fact, we reply that we see no distinction in principle between the furnishing of improper materials for use and the furnishing of suitable materials but ordered to be used in an unsafe or dangerous manner. See Richards v. Hayes, 17 App. Div. 422, 45 N. Y. Supp. 234. We quote therefrom: "If this plaintiff and his coemployees had, without specific instruction from the master or one acting for the master, and under his authority in the performance of the duty which he owed to his employees, constructed this scaffold of improper material, it would undoubtedly be a case where the negligence was that of a fellow employee or coservant with the plaintiff, for which the master would not be liable. Where, however, there were furnished to the plaintiff and his coemployees materials with which to construct this scaffold, which were not proper for the purpose and which made the scaffold when constructed an unsafe and improper appliance for the doing of the work, then it seems . . . that if the master employed a person to act in his place to furnish such material the negligence of such person so appointed to act for the master in the discharge of the duty which he owed to his em-

ployees was the negligence of the master, for which the master was responsible. . . . The difficulty that has arisen has been in determining whether, in a particular case, the duty that the foreman or representative of the master had undertaken to perform was a duty which the master owed to his servants or employees, or a duty that the employees were to perform for the master; and so far as I know in every case where it appeared that the foreman or one appointed by the master to represent him attempted to perform a duty that the master owed to his servant, and was negligent in such performance, the master was held liable." And then again: "And I can see no reason why this act of the defendant's foreman in assuming to discharge the duty that it owed to the plaintiff was not an act for which the master was responsible, and which in an essential particular failed in the performance of the duty the master owed to the plaintiff and for which the master was responsible," that of using material to and in creating an unsafe scaffold, instead of furnishing suitable material for such use in circumstances practically parallel with the case on trial. This case recognizes the nonliability of the master for the negligence of the fellow servant, citing McCone v. Gallagher, 16 App. Div. 272, 44 N. Y. Supp. 697, where the duty of the master has been performed by the furnishing of suitable materials for the work where the details of construction are left to the servant. But where the method of construction is dictated in a certain way, instead of the furnishing of materials, the defendant is held liable. And, as before stated, we see no distinction in principle between the failure to furnish suitable materials, as a duty imposed by law, and the failure to furnish a reasonably safe appliance or scaffold when the method of its construction is dictated to the exclusion of another reasonably safe one, that would otherwise have been used. Under the evidence plaintiff had the right to rely upon the presumption that the platform so furnished by defendant was a reasonably safe instrumentality. Kehoe v. Allen, 92 Mich. 464, 31 Am. St. Rep. 608, 52 N. W. 740; Lang v. Bailes, 19 N. D. 582, 125 N. W. 891; Allison v. Stivers, 81 Kan. 713, 106 Pac. 996. The evidence was sufficient under the authorities to require the submission of this question to the jury.

Supporting proof of negligence is expert testimony to the effect that the platform so supported constituted an unsafe place upon which to work, and that a platform supported by corner-brace supports was a

safe construction. While defendant insists that the evidence is indefinite as to the kind of a construction that would have been adopted had not the one used been installed at Abline's order, the one used was designed and used under its direction. It is undisputed that a change was made as to platform supports and at Abline's order.

We conclude then, that the evidence is sufficient to sustain the finding of the jury that Abline was in command of the work pursuant to indefinite instructions from the company for whose interests he was acting; and that in his superseding the discretion of all others as to the supports for the platform in question, defendant company became thereby the master in the furnishing of this instrumentality upon which to work, one manifestly unsafe and dangerous as supported and as it existed when plaintiff, in obedience to directions he was bound to obey in the performance of his duties, went thereon to his injury.

We will now consider the error assigned in the admission of proof of these conditions and the court's instructions given the jury. In passing upon this case we have considered the exhibit A, contained in respondent's additional abstract as a part of the statement of the case, as finally settled, the same having been by inadvertence omitted from the original statement as settled, and thereafter by order of the trial court made a part of the statement proper.

The first four assignments of error are based upon an assumption that the testimony excepted to was given in reference to the wrong exhibit A. Two exhibits were so marked, one coming into the case as exhibit A attached to the deposition of the witness Johnson, and the other being an exhibit so marked on the trial; and counsel has assumed the exhibit A referred to by the witness Johnson to have been the exhibit so identified on the trial, instead of the exhibit the part of Johnson's testimony and drawn by him. This exhibit A of Johnson's testimony is brought into the record by respondent's additional abstract. When the testimony of Johnson is read in connection with the exhibit prepared by him and to which he was referring, it is clear the assignments are without merit. The assignments of error urged to the testimony offered by witnesses Farnsworth, Stromswold, and McGulpin, contractors who testified as experts on the question of safety of the platform used and from which plaintiff fell, are not above criticism. But considered as they must have been by the jury, in connection with all

their testimony and the fact that they were testifying as to the construction of grain elevators, we deem the error, if any, insufficient to warrant a reversal. Not all conditions disclosed in evidence need be embodied in the hypothetical question, and considerable latitude must be given the trial court in rulings concerning the admission of this class of testimony.

This brings us to the court's instructions, to practically all of which the defendant has assigned error. To discuss separately each assignment of the fifteen so taken would needlessly prolong this opinion. On the whole we deem them sufficient.

The jury made special findings as answers to six questions submitted them by the court, in addition to their general verdict found, and it is urged that certain of them are inconsistent with the general verdict and with each other. To this we cannot agree. Some of them concern matters not in issue and to which the court could have instructed answers as found, but that could not result to defendant's prejudice. And this decision on the merits is decisive of the error assigned on the overruling of defendant's motions for directed verdicts and judgment notwithstanding the verdict. The judgment appealed from is ordered affirmed, with costs.

BANK v. GARCEAU.

(134 N. W. 882.)

Note — conditional delivery — proof of, by circumstances surrounding transaction.

1. That the delivery of a note was conditional, or that the title of the payee was defective, may be shown by circumstances without any express words to that effect.

Insurance — note given for premium — condition that application is accepted — transfer of note to third party — notice of condition.

2. Defendant gave one S., a life insurance agent, his application for a policy on his life, subject to defendant's passing a physical examination and the insurance company accepting the application, such physical examination to be thereafter made. At the same time, and as a matter of convenience to S., defendant executed to S. as payee his negotiable promissory note, payable at a

future date, for the first year's premium, for which S. gave defendant a binding receipt showing, among other things, that in case of rejection of the application the note was to be returned to the maker. V., cashier of plaintiff bank, was present, heard all the conversation between the parties, was perfectly familiar with the method of S. and of the insurance company in such transactions, and knew the note was to be returned if the policy should not be issued. He shortly, as the executive officer of the plaintiff, discounted defendant's note for S. *Held*, that the note was not to take effect unless defendant passed the physical examination required and the application was accepted by the insurance company.

Held, also, that by reason of these facts the title of S., to the note was defective, and that his negotiation thereof before the examination of defendant was in breach of faith, and in law a fraud on the maker.

Held, further, that if the bank was charged with the knowledge of its cashier it was also charged with knowledge of the defective title and the breach of faith of S., and was not a holder in due course, and its action in taking the instrument amounted to bad faith.

Notice to cashier as notice to bank.

Held, under the circumstances of this case, that the bank was charged with knowledge of the facts of which its cashier had knowledge or notice.

Opinion filed February 1, 1912.

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

Reversed.

W. J. Mayer, for appellant.

George R. Robbins, for respondent.

SPALDING, Ch. J. The complaint in this case asks for the recovery of $73.40, with interest, on a negotiable promissory note executed by the defendant, payable and delivered to one F. C. Stevens, and by him indorsed to plaintiff.

To the complaint the defendant answered, alleging the following facts: That on July 22, 1908, at the solicitation of said Stevens, he made application to the Minnesota Mutual Life Insurance Company for a policy of life insurance upon his life, upon payment of the agreed premium of $73.40; that, at the time of such application, and in the belief that it would ultimately be accepted by said company and a policy issued, defendant signed a promissory note similar in form

to the one described in the complaint, and gave it into the possession of said Stevens, to hold the same for defendant pending his examination as a candidate for such policy, the acceptance of such risk by the company, and the issuance to him of the policy applied for; and that such note was to be delivered by said Stevens in payment of the premium of said policy when issued, and to be of validity, force, and effect only in the event of the issuance of such policy; and that such note was given into the possession of said Stevens for no other purpose; that the defendant failed to pass successfully the examination before the company's physician; that his application was rejected and no policy ever issued thereon; that such note was at all times without consideration, and void; that immediately after securing possession of the note said Stevens, without the knowledge or consent of the defendant, fraudulently negotiated the same to the plaintiff, who purchased and received the same with full knowledge and notice of all the foregoing matters, and was not a bona fide holder thereof.

The trial was to the court without a jury; the findings and judgment for the plaintiff. By the appeal we are called upon to determine whether such findings and judgment were justified by the evidence and the law. The note was payable one year after its date.

Stevens, the original payee, testified for the defendant that on July 22, 1908, he was employed soliciting life insurance for the company named; that the defendant submitted an application for a policy, and that the note in suit was taken in settlement of the premium; that at the time the application was submitted defendant had not been physically examined; that applications require acceptance by the company itself and a medical examination before a policy is issued; that in case of rejection the note was to be returned to defendant; that they did not speak about rejection, but that it was understood in all cases that "if a man is rejected for life insurance his note is always returned;" that if he did not give him a receipt he should have given him one, and that he always did so; that the application of defendant was rejected about a year thereafter; that Mr. Verry, cashier of the plaintiff, was with him at the time this application was obtained and that he took the note and gave him credit on account in the plaintiff bank, within a short time, and he thought within a couple of hours after the application was written; that he had an account at

the bank at that time and was given credit thereon for 75 per cent of the note.

On cross-examination he testified that such credit was given on that day; that returning the note did not enter his mind, for the reason that the defendant looked like a good risk and he did not think there was any possibility of his being rejected; that the cashier knew that defendant had not been examined and the application had not been accepted; that such cashier had a contract with the same company to solicit life insurance, and had been around with the witness more or less in the insurance business for a couple of years or more, and had taken parties to the doctor for him, and knew the character of applications, and was familiar with the fact that they were to be sent in and had to be passed on by the company before a policy would issue; and that the note in question would necessarily be returned to the defendant in case of rejection; that it was understood between him and the cashier that that would be the disposition of the note in such case.

The company never received any part of the proceeds of the note, or knew of there being a note. The cashier testified that he was present when the application and note were taken; that there was no conversation about the return of the note; that he had no notice that Garveau had been examined and no notice that he had been rejected; that the bank purchased the paper several days after it was taken, —within ten days; that, although he had a contract of agency for the company, knew their method of business, he had written no applications himself. He also knew that a successful medical examination was necessary before the application would be accepted, and he knew at the time the application and note of defendant were taken that if the application should be rejected the note should be or was to be returned to the defendant. His recollection was very indistinct as to when credit was given Stevens for this note. He did not ask Stevens at such time whether defendant had been examined.

The defendant is a farmer and resided in the country, and it appears from the evidence that the principal object in taking notes was to render it unnecessary for the agent to again go into the country to visit the applicant and make settlement with him, after the issuance of the policy. By taking the note, settlement was made subject to his medical examination at a convenient time.

Stevens, on being recalled, testified that the policy could not be issued before the examination of the party, and that it would have been impossible for the examination to have been made before the cashier took the paper; and that these facts were known to Verry.

The trial court found that the delivery of the note to Stevens was absolutely unconditional, and that long prior to the maturity thereof it was indorsed and delivered to said bank for value, and in good faith, and without notice or knowledge of any defect in the title of Stevens thereto.

There was no conflict in the evidence except a trifling disagreement between Stevens and Verry as to how soon after the taking of the application the note was placed to Stevens' credit on the books of the bank. This conflict is not material. Much of the briefs of the parties is devoted to a discussion of the nature of consideration or failure of consideration for the note. We, however, are of the opinion that it is not necessary to determine these questions. Several points are not discussed which might have been. For instance, it is not shown whether the credit for the note given to Stevens was ever checked out of the bank. If it was not, according to many authorities, the bank would not be a bona fide holder for value.

The trial court apparently regarded the circumstances surrounding the procurement of the note in suit as unimportant, and relied on the testimony of Stevens and Verry that nothing was actually said with reference to a return of the note. In this we think the learned trial court was mistaken. While nothing was actually said, the circumstances were such as to indicate as clearly as any affirmative words could do, what the intention of the parties was.

That the delivery of the note was conditional, or that the title of the payee was defective, may be shown by circumstances without any express words to that effect. Wilson v. Powers, 131 Mass. 539.

In this case the whole transaction rested upon the basis and supposition that the note was to be returned if Garceau failed to pass the medical examination which was necessary to an acceptance of his application by the insurer. Such was the business method of the company and of the agent. The agent, Stevens, testifies that this was the universal rule. And if nothing was said regarding the return of the note, it is clear that it was left unsaid because Garceau looked like a good

risk, and it did not enter the mind of either Stevens or Verry that he would fail to pass the physical test. The cashier, Verry, knew all the facts and circumstances of the transaction as well as the method of doing business pursued by the company and its agents, that Stevens knew; and while it does not appear what Garceau understood, we cannot assume that any fairly intelligent man would give a note under such circumstances expecting it to be collected, if he failed to receive a policy. The conclusion which we reach is that the note was not to take effect unless Garceau passed the physical examination, and the application was accepted, and that therefore the title to the note in Stevens was defective. We discover no authority on all fours with the case at bar; but Farmers' Bank v. Nichols, 25 Okla. 547, 138 Am. St. Rep. 931, 106 Pac. 834, 21 Ann. Cas. 1160, is a well-considered case in which the distinction is pointed out between facts which render the title defective and those which do not do so. In that case the language used in the contract was not that the note should be returned, but that the party would refund the note, and it was held that the word "refund" did not limit the right of the maker of the note to its return, or require of the payee a return of the note, but that it admitted of either a return of the note or a payment of the amount thereof in cash and the collection of the note.

In the case at bar, as we have indicated, the circumstances show that a return of the note only was contemplated in case of failure to pass the examination; but we are not limited to a consideration of the circumstances to which we have adverted. It appears that the company, like most life insurance companies when a premium is paid at the time the application is taken by the agent, and before it is accepted by the company, furnishes the applicant what is known as a binding receipt, acknowledging receipt of the premium, and providing that in case of acceptance of the application the policy shall take effect at once, and also providing that in case of its rejection there shall be no liability on the part of the company, and that the amount paid, as evidenced by the receipt, will be returned. This receipt is worded to fit the payment of the premium in cash rather than by note, but Stevens testified that it was his custom when a premium was paid by cash or note at the time of the execution of the application to give one of these binding receipts, and that he was sure he gave Garceau one.

Now, assuming that he gave him such receipt,—and there is no evidence to the contrary,—fitting the receipt to a note instead of cash, it contemplates the return of the note only, and does not give the company or the payee an option to pay cash and retain the note. We think this makes it more clear that the applicant could not be compelled to accept money in lieu of the note.

The title of Stevens having been defective, his negotiation of the note was a breach of faith, and, we think, under such circumstances, was in law, though there was no intent to defraud, a fraud on Garceau. Rev. Codes 1905, § 6357. And that the bank, knowing all the facts and the method of business of the company through its agents, was charged with knowledge of the defective title, and the breach of faith and fraud of Stevens in negotiating it, and was not, therefore, a holder in due course, and that its action in taking the instrument amounted to bad faith. Rev. Codes 1905, §§ 6354, 6356–6358, 6360.

But it is urged that the bank is not charged with the notice or knowledge of Verry, its cashier. The general rule is that a bank is charged with notice of the facts of which its cashier has notice or knowledge. To this rule there are certain exceptions, as in case of an official dealing with the corporation in his own interest which is adverse to that of the corporation, which he represents, or where so long a time has elapsed since the agent acquired knowledge of the transaction that when the negotiation takes place his knowledge on the subject is not fresh in his mind. Neither of these exceptions has any application in the instant case, however. It nowhere appears that Verry was interested otherwise than as an officer of the bank, and he acquired his knowledge regarding the transaction not more than ten days prior to discounting the note, and his testimony shows that at the time of the trial the facts were still fresh in his memory. The evidence eliminates from the case any actual intent on the part of Stevens and Verry to defraud Garceau, but nevertheless it does not relieve the bank from the legal effect of the acts of the parties, which was in law a fraud upon Garceau.

If any additional reason is necessary to support our conclusion, it may be found in the testimony of Stevens that it was understood by Verry that the note would be returned in case the application should be rejected, and of Verry that he knew at the time the note was taken that it was to be returned to defendant in such case.

The facts differentiate the case very materially from American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99.

The following authorities more or less strongly sustain our conclusions:

Burke v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; Graham v. Remmel, 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 167; Watkins v. Bowers, 119 Mass. 383; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057; Joyce, Defenses to Commercial Paper, § 313.

The judgment of the District Court is reversed.

STATE EX REL. MILLER, Attorney General, v. PEOPLE'S STATE BANK.

(135 N. W. 196.)

Banks — insolvency — appointment of receiver — appeal by receiver from order granting preference to one creditor.

1. A receiver of an insolvent banking corporation, appointed in an action brought by the state in accordance with chap. 27, art. 3, Rev. Codes 1905, to sequester and distribute its corporate property and dissolve the corporation, and who has no personal interest in the estate of the insolvent, is an indifferent person between the creditors, and has no right to take sides in favor of one creditor as against another, and hence, cannot maintain an appeal from an order of the court which appointed him, granting one creditor preference rights to the assets of the insolvent bank.

Receivers — appeal by — liability for costs.

2. The appeal of the receiver in this case, having been taken by permission of the district court, in good faith, on the order from which he appealed, being affirmed, costs will not be taxed against him personally, but against him as receiver.

Opinion filed February 6, 1912.

Appeal from an order of the District Court of Nelson county, first judicial district; *Templeton*, J.

Appeal dismissed.

Bangs & Robbins, for appellant.

S. G. Skulason, State's Attorney, for respondent; *Scott Rex,* of counsel.

SPALDING, Ch. J. The People's State Bank of Lakota was a banking corporation organized under chap. 23 of the Laws of 1890, engaged in the banking business at Lakota, in Nelson county, North Dakota, until January 27, 1910, when it was taken in charge by the public examiner. Thereupon an action was brought by the attorney general, under the title of "the State of North Dakota, ex rel. Andrew Miller, Attorney General of Said State, Plaintiff, v. The People's State Bank, a Corporation, Defendant," in accordance with the provisions of chap. 27, art. 3, Rev. Codes 1905. Such action was brought against the bank as an insolvent banking corporation, to sequester and distribute its corporate property, and to dissolve the corporation.

One George A. Kellogg was, by the court, duly appointed receiver thereof, and qualified and entered upon the performance of his duties. While said Kellogg was so acting, as we understand the matter, the county of Nelson presented its claims against the bank for county funds therein deposited by its treasurer, in accordance with the provisions of law relating to depositaries of public moneys, and the receiver was petitioned to allow said claims as preferred claims against the assets of said bank, and that he pay the same in the order of their priority, as provided by § 7387, Rev. Codes 1905. The receiver declined to allow the county's claim to preference, whereupon the county petitioned the district court of the first judicial district, setting forth the facts and praying that its claim be made preferred. To the petition of the county, Kellogg, as receiver, interposed an answer and contested the right of the county to a preference. Thereupon the court made an order allowing such preference in the sum of $10,158.08, in accordance with subd. 1, § 7387, Rev. Codes 1905, and the receiver was directed to pay such claims accordingly. He thereupon secured permission from the court to appeal from such order to this court.

On the appeal several errors are assigned, which we cannot consider, as we have reached the conclusion that the receiver cannot maintain this appeal. The receiver does not claim to be a creditor himself. The order involves no allowance or disallowance of compensation or expenses of the receiver as such, and relates solely to the relative rights

of the creditors of the insolvent estate. The receiver is an officer of the court and an indifferent person as between the creditors. Hoffman v. Bank of Minot, 4 N. D. 473, 61 N. W. 1031. He has no right to take sides in favor of one creditor as against another. He held the order of the court as his protection, and if the rights of any creditor were adversely affected by such order, or were likely to be so affected, that creditor could take the proper and necessary steps to enable him to prosecute an appeal therefrom. The effect of the order is neither to enhance or diminish the assets of the insolvent bank as a whole, but only goes to the relative rights of claimants in the distribution of the assets, and in this subject the receiver has no interest, and hence cannot maintain an appeal from the order of the district court. Frey v. Shrewsbury Sav. Inst. 58 Md. 151; McColgan v. McLaughlin, 58 Md. 499; Knabe v. Johnson, 107 Md. 616, 69 Atl. 420; Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Dorsey v. Sibert, 93 Ala. 312, 9 So. 288; Beer v. Their Creditors, 12 La. Ann. 774; Bosworth v. Terminal R. Asso. 26 C. C. A. 279, 53 U. S. App. 302, 80 Fed. 969; 2 Cyc. 641.

In Frey v. Shrewsbury Sav. Inst. 58 Md. 151, the Maryland court held that a conventional trustee appointed to sell property and distribute the proceeds among creditors has the right of appeal only in the following cases: First, whenever his commissions or other allowance as trustee are affected by the order of the court below; second, in all cases where the trustee is interested in the fund to be distributed, as a creditor; third, in any case where the question of the increase or diminution of the whole funds in his hands as trustee is involved, and which increase or diminution would inure to the benefit or loss of all the creditors.

And in McColgan v. McLaughlin, 58 Md. 499, the court had ordered a trustee to pay, out of funds belonging to the estate in his hands, certain judgments obtained prior to the execution of the trust deed under which he was acting. The trustee appealed, and the court said: "But it is very plain that he has no shadow of interest in the determination of that question, unless he shows himself to be a creditor of the trust estate, and a creditor to such an extent that the balance of the fund left in his hands would be inadequate to pay his claim."

And in the Knabe Case the claimant presented a claim for allowance

in preference and priority to certain other claims, and his preference was allowed. The receiver appealed on the ground that the claimant's claims were not preferred claims, and that he was only entitled to such dividends as were allowed all creditors of the corporation. The circuit court overruled his contention. He appealed on leave of the court. A motion was made to dismiss the appeal on the ground that it was not taken by a party entitled to appeal, and the court dismissed the appeal, saying: "He is appointed on behalf of all parties, and not of the plaintiff or one defendant only. His appointment is not to oust any party of his right to possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it, and when that is ascertained the receiver will be considered as his receiver."

In Bosworth v. Terminal R. Asso. 26 C. C. A. 279, 53 U. S. App. 302, 80 Fed. 969, the receiver appealed from a decree awarding a preference to one creditor. The court said: "He has the right of appeal from any decree which affects his personal right, for therein he has an interest. But he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent, and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another. . . . Such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties." The Federal court then discussed the effect of the leave granted the receiver to appeal, and held that the doctrine cannot be sanctioned that the allowance of the appeal can operate to clothe the receiver with an interest which he has not, or to impose upon an appellate court the duty of hearing and determining a moot question.

Analogous questions have been repeatedly decided by the supreme court of California. In Bates v. Ryberg, 40 Cal. 463, it was held that the executor of an estate cannot maintain an appeal from a final order of distribution, upon the grounds that the property was improperly divided between the legatees. The only matter complained of by the executor in that case was that some of the legatees were to be paid, by the order of the court, more than they ought to receive, while the others would receive less than they were entitled to, by the terms of the will. The court said: "The executor, however, does not represent any of these parties as against the others, and if they are satisfied with the dis-

tribution he cannot complain because some have received less than they are entitled to. He cannot litigate the claims of one set of legatees as against the others, at the expense of the estate."

While the foregoing are only a few of the authorities on the subject, they are sufficient to sustain our conclusion, which is that the receiver cannot maintain an appeal from the order of the district court, allowing the claims of the county a preference in the assets of the insolvent bank. Inasmuch as we are satisfied that the receiver acted in good faith in taking the appeal, and did so by leave of court, the costs will be taxed against him as a receiver, and not against him personally.

The appeal is dismissed.

PRUDEN v. LIEBLER.

(135 N. W. 186.)

Mortgage — guaranty of payment — what constitutes.

1. Defendants agreed in writing to guarantee the payment of a certain mortgage debt upon the Langdon Opera House, executed by the Dakota Amusement Company, of which defendants were stockholders. The agreement in writing, relied upon by plaintiff, followed an extensive correspondence between plaintiff and defendants, showing that all of the details of the transaction were equally known to both parties. It was the understanding of everybody interested that the proceeds of the mortgage should be used to buy the opera house and other property. Plaintiff complied with the terms of the agreement, and the defendants were present at and participated in a meeting of the stockholders of the Amusement Company which ratified the details. *Held*, upon all the facts, that the contract was one of guaranty, and not an offer of guaranty.

Guaranty — pleading in action on — negativing defense.

2. The written contract of guaranty provided that the defendant should be released when the mortgage debt was paid, or when plaintiff sold the debt without personal liability upon his part. *Held*, that defendants must take advantage of a defense of payment or termination by a sale by plaintiff without recourse, by answer, and that plaintiff need not negative these defenses in his complaint.

Note.—As to what contracts amount to contracts of guaranty, see note in 105 Am. St. Rep. 503.

Guaranty — action on — estoppel to set up defense.

3. Appellants insist that plaintiff, having advanced only a small part of the consideration for the mortgage in cash, cannot recover for such amounts as are evidenced by the transfer of the opera house. *Held*, that defendants, having full knowledge of all the facts, are estopped to set up this defense.

Opinion filed February 13, 1912. Rehearing denied March 23, 1912.

Appeal from the District Court, Cavalier county; *Kneeshaw*, J.
Affirmed.
Joseph Cleary, and *Johnson & Johnson*, for appellant.
W. A. McIntyre, for respondents.

BURKE, J. About the year 1904 the opera house hereinafter mentioned was being constructed at Langdon, North Dakota. The holders of some first liens had foreclosed, and the property was about to be sold upon the 12th of November of said year. The defendants in the case at bar were all junior lienors, and desirous to protect their interests. Upon said day, but prior to the sale, they entered into a written contract under which the St. Paul Roofing Cornice & Ornament Company was to buy in the property at the sale and hold the title as trustee for all of such junior lienors. It was agreed therein that said junior lienors should contribute towards the purchase in proportion to the amounts of their several debts, and that the property should be thereafter sold if possible, so to pay all of the claims against it. Under this agreement the property was bid in and held by the said ornament company until transferred to the Dakota Amusement Company, as hereinafter set forth. It did not seem possible to sell the property for enough to satisfy all claims, and an effort was made to float a loan upon the property, and for this purpose the Dakota Amusement Company was incorporated, the stock being held by the parties to the agreement of November 12, 1904, in proportion to their claims. This corporation was to take over the opera house and place thereon a loan, but as a matter of fact, for some time they did nothing whatever. No loan having been secured by May 15, 1906, upon that day, a letter was written by the attorneys for the ornament company to Mr. Finerty, one of the parties to the agreement, relative to some other matters regarding the opera house, wherein it is stated: "Now as to the loan, as you know

the ornament company is carrying this loan against its own line of credit, and it takes just so much money out of their business at this time of the year. There seems to be little prospect of your being able to effect a loan very soon, and Mr. A. K. Pruden, president of the ornament company, says that he believes he can negotiate this loan sooner or later, but if the mortgage was made to him with an insurance policy attached he could negotiate the same at a local bank here by guarantying it, and probably later, get someone to take it off of his hands, and this arrangement will take the matter out of the hands of the ornament company, and present indebtedness out of their line of credit at the bank, and in reality release to the corporation the amount they have advanced. If this is done Mr. Pruden will want the ornament company and other parties interested in the opera-house deal, to sign an agreement, agreeing to indemnify him against loss, by reason of the indorsement of the note, if such indorsement becomes necessary. . . . What he proposes is, that the ornament company deed the property to the Dakota Amusement Company and the Dakota Amusement Company make a mortgage upon the property for $10,000 due in five years at 8 per cent and insure for at least $10,000 (in fact the property should be insured for at least $15,000) the stockholders of the amusement company to agree to hold Mr. Pruden harmless by reason of such advances or indorsement of the note, should such indorsement become necessary to its negotiability. The ornament company can then transfer to the amusement company," etc.

In said letter was inclosed the proposed mortgage and notes for the consummation of the deal. To this letter Mr. Finerty replied May 19, 1906, returning to Mr. Pruden the notes and mortgage duly executed, and saying in part: "We return to you by this mail mortgages, coupons, and guaranty papers, all signed, and the deal is very satisfactory to us. Also the insurance papers. . . . Hope this is satisfactory to Mr. Pruden, and would ask that you would send the balance of the money, with statement to First Natl. Bank of Langdon." With this letter was the guaranty agreement mentioned, signed by all of the joint owners of the amusement company. This agreement reads as follows:

"Memorandum of agreement, entered into this 17th day of May, 1906, by and between A. K. Pruden of St. Paul, Minnesota, party of the first part, and the St. P. R. C. & O. Co., of St. Paul, Minnesota, M.

Liebler and Thomas Finerty copartners as Liebler (and others named): Witnesseth, the parties of the second part agree to and with party of the first part, in consideration of the sum of one dollar in hand paid that if the party of the first part will advance to the Dakota Amusement Company the sum of $10,000, and take in his name a mortgage from said Dakota Amusement Company due in five years upon the property known as the Opera House at Langdon, North Dakota, the parties of the second part will guarantee payment of said mortgage and interest, according to its terms to the party of the first part, and hold said party of the first part harmless and free from loss by reason of the loan so made to said Dakota Amusement Company, and when said mortgage and interest is fully paid and discharged, or if the party of the first part shall be able to negotiate a sale of said mortgage without incurring any personal liability in so doing, then this agreement to cease and determine: otherwise to be in full force and effect. All liability under this agreement is to be borne by the parties of the second part, in the following proportions, to wit: Liebler & Finerty 10–15 of the total; Mahon & Robinson 1/15; Ornamental Co. 4/15. (Duly signed.)"

The members of the Dakota Amusement Company held a meeting of that company, and the following proceedings are shown by their minute book: "Present, Thomas Finerty, John Mahon, C. B. Smith, M. Liebler, E. P. Fan, by proxy I. E. Greenman. The following resolution was presented and adopted: 'Resolved, that the company acquire the property known as the Langdon Opera House . . . and that the president be authorized to negotiate its purchase and submit to the board a proposition for its acquirement.' This resolution was agreed to; all present voting, 'yes.' Mr. Smith then offered the following resolution: 'Resolved, that in the event the opera-house property in Langdon can be purchased at a reasonable figure, the president is hereby authorized to negotiate a loan upon the property, of $10,000, principally to be used in discharging the lien of the ornament company, and the balance to be used in improving the property. This resolution was adopted, all present voting, 'Yes.' "

At a similar meeting held June 25, 1906, the following proceedings are shown by the minute book: "Present, Thomas Finerty, John Mahon, E. H. Gordon, C. H. Smith, by proxy E. H. Gordon. President Finerty reported the purchase of the property known as the Langdon Op-

era House (describing it). . . . Moved by John Mahon, seconded by E. H. Gordon, that the report of the president on the purchase of the property be adopted and his acts ratified. Motion carried, all voting, 'Yes.' President Finerty reported the negotiation of a loan of $10,000 on the opera house from ———, loan dated June 1, 1906, due June 1, 1911, bearing 8 per cent payable semiannually."

Under the above arrangement, Mr. Pruden paid to the various lien holders the amounts due to them, approximately $8,000 and had his ornament company deed the premises to the amusement company, free from all encumbrances; paid something under $400 attorneys' fees in connection with the deal, and paid to the amusement company some $1,600 in cash, thereby expending the $10,000 upon behalf of the amusement company. He did not negotiate the mortgage, but was obliged to keep it; and nothing being paid thereon, he began foreclosure in February, 1908, declaring the whole amount due and payable. At the sale the property sold for $5,000, above the expenses of sale, and was bid in by Mr. Pruden, who at the time of bringing this suit offered to transfer the certificate to these defendants. This suit is brought by Mr. Pruden under the guaranty agreement above set forth, and he asks for judgment upon the same, for the proportionate sum due from each. Liebler & Finerty and Mahon & Robinson answer, denying that Mr. Pruden furnished the $10,000 as specified in the agreement, evidently considering the payment of the debts of the old company as not amounting to cash. The ornament company being controlled by Mr. Pruden, of course made no defense. A trial was had in the district court, where the above facts were shown without dispute and other correspondence of a similar import was introduced in evidence. We have given only a part of the correspondence in this opinion. At the close of the trial, both sides moved the court for directed verdicts. The court allowed the motion of the plaintiff. This appeal is from the judgment. Error is assigned upon the refusal of the court to direct a verdict for the defendants, and for directing a verdict for plaintiff. Other errors are assigned, but are not supported in the brief, and are in fact without merit.

(1) The defendants insist that the agreement made by them was only an offer to guarantee, not binding until accepted. The rule applicable is discussed in full in Standard Sewing Mach. Co. v. Church, 11

N. D. 420, 92 N. W. 805, where it is held that the test whether the instrument is a guaranty or merely an offer to guarantee, is whether there has been a mutual assent or meeting of minds necessary to the existence of a contract. Applying the above test to the case at bar, we see that the defendants, through their intimate knowledge of the workings of the amusement company, fully assented to everything that was done; knew practically everything that Mr. Pruden did; accepted the benefits of the contract almost as soon as it was made; and knew of the acceptance of the guaranty by Mr. Pruden when they executed the mortgage and received the money. Those facts make the contract one of guaranty, and not an offer of guaranty, as claimed by appellant. See Emerson Mfg. Co. v. Tvedt, 19 N. D. 8, 120 N. W. 1094; Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686; 16 Enc. Pl. & Pr. 945; 20 Cyc. 1409.

(2) The appellants further claim that there is in the complaint no allegation that the mortgage could not be sold by Mr. Pruden without personal liability to himself. A careful reading will disclose that the agreement is positive in its terms of original liability, and contains the provision that the said liability may be terminated by either payment or by a sale of the mortgage by Mr. Pruden without personal liability. Those two ways of release are upon equal terms, and it only requires a reminder that the plea of payment would be a matter of defense to be taken advantage of by answer, to show that the other means of terminating the liability must be pleaded likewise by answer.

(3) Defendants also insist that Mr. Pruden advances only $1,600 in cash, and that therefore the guaranty never became binding, or if binding at all, only to the amount of the cash advanced. We think the correspondence given above shows clearly an understanding, not only of the amusement company, but of those individual defendants themselves, that the money should be used in the way it was used. If not, how did the amusement company imagine they paid the $8,000 for the opera house? As those defendants were present at all of the meetings of the amusement company, and in fact were practically the amusement company, and as they were fully advised of every step taken, we do not think they are in a position to urge a strict construction of the agreement against the plaintiff. See 14 Am. & Eng. Enc. Law, 2d ed. 1143; 20 Cyc. 1424.

and cases cited. In Austin v. Wheeler, 16 Vt. 95, it is said: "Acts of parties having full knowledge of facts are decisive. Intent of parties is, in all contracts and especially commercial ones, the polestar of construction, and in ascertaining that intention courts always hold parties to their own construction of their obligations." In Phœnix Mfg. Co. v. Bogardus, 231 Ill. 528, 83 N. E. 284, it is held "a guarantor may, by inducing, approving, assenting to, or participating in any course of dealings, contrary to the letter of the contract, be estopped to set up such variation as a defense." Cyc. states the rule: "The guarantor may ratify any irregularity or change in the contract which he has guaranteed, and his assent to the change or modification will bind him without any new consideration." 20 Cyc. 1445, 1446. There might have been some room for doubt regarding the $400 paid by Pruden for attorneys' fees, but as the plaintiff has accepted a verdict less such amount, the defendants cannot complain.

Under all of the facts above given, we think the verdict was properly directed; and it is affirmed.

A. K. PRUDEN v. JOHN MAHON, J. B. Robinson, et al.

(135 N. W. 188.)

Appeal from the District Court of Cavalier county; *Kneeshaw,* J. Affirmed.

Joseph Cleary, for appellant.

W. A. McIntyre, for respondent.

PER CURIAM. This case is identical with the case of Pruden v. Lieber, ante, just decided by this court, the defendants having taken separate appeals. The decision in the above-entitled case is decisive of this, and the judgment is affirmed.

NEEDHAM v. HALVERSON.

(135 N. W. 203.)

Sale of horse — breach of warranty — measure of damages.

1. In an action on the contract to recover for the breach of a warranty in a sale of glandered horses, with knowledge that such horses are to be mingled with others, damages may be recovered both for the loss of the horses originally sold and purchased and of others with which they have been mingled, and to which they have communicated the disease, and also for the reasonable expense of caring for such animals, of buying the same, and of fumigating and disinfecting the premises.

Sale of diseased horse — action of tort for damages.

2. Similar damages may also be recovered in an action of tort which is based upon the theory of a false and fraudulent sale and warranty with knowledge of the existence of the disease, and are deemed proximate.

Sale of diseased horse — breach of warranty — measure of damages.

3. Such damages may include compensation for the hire of men and the value of the use of the time of the farmer or purchaser in caring for and burying such horses and in disinfecting his premises, and the reasonable cost of medicines and drugs and veterinary attendance. They will not, however, include damages for the loss of the use of the teams which it is claimed might otherwise have been used by the men so employed in caring for the animals or for possible breaking and plowing which might possibly have been done by such farmer if he had not been so employed in caring for his horses, nor for the loss of crops which might have been grown upon land which he might have plowed and seeded if not so occupied. Such damages are neither proximate so as to be recoverable in a tort action, nor can they be deemed to have been within the contemplation of parties at the time of the making of the contract, so as to be recoverable in an action for the breach of the warranty.

Evidence — admissions by agent.

4. Where evidence tended to show that horses were sold, warranted to be free from glanders, and the vendor retained a chattel mortgage on the same, *held*, that the admission of an agent of the vendor, who was sent out to prevent the destruction of said horses by the state veterinarian, that prior to the sale

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Note.—The measure of damages recoverable for selling diseased animals is considered, with a full review of the authorities, in a note in 34 L.R.A.(N.S.) 697. And the liability of the vender of diseased live stock, in the absence of an express warranty, is the subject of a note in 29 L.R.A.(N.S.) 202.

As to what amounts to a breach of warranty of soundness of a horse, see notes in 32 L.R.A.(N.S.) 182, and 53 Am. Dec. 177.

the said horses were infected and he knew that fact, was admissible against the vendor in an action for breach of warranty and for fraudulent representations as to the freedom of the horses from the disease of glanders.

Opinion filed February 15, 1912.

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

Action for damages caused by the sale of glandered horses. Verdict and judgment for the plaintiff. Defendant appeals.

Affirmed on condition.

This is an action to recover damages occasioned by the sale of glandered horses. In the complaint two causes of action are joined, one in contract for breach of a warranty that the said horses were free from disease, and one in tort for a false and fraudulent warranty and statements of facts in relation to glanders, and a sale as a result thereof. Verdict and judgment were rendered for the plaintiff in the sum of $1,043.90, and defendant appeals.

L. N. Miller and *V. R. Lovell,* for appellant.

Lee Combs, for respondent.

Bruce, J. (after stating the facts as above). Defendant contends that the trial court erred both in refusing to compel plaintiff to elect under which of said causes of action he would proceed, and in not refusing to admit any evidence under the complaint on account of the alleged misjoinder of causes of action. There was no misjoinder, and the court did not err. "In the sale of a horse," says Mr. Phillips on page 184 of his work on Code Pleading, "the vendor may make both a false warranty and a false representation, and thus become liable to the vendee for the deceit and for the breach of warranty; and the vendee would, correspondingly, have two grounds of recovery, but would be entitled to only one relief in damages. The vendee in such a case can maintain an action based upon either right of action alone, or, since both rights of action arise out of the same transaction, he may base his action upon both grounds, stating them in separate causes of action. One of these two rights of action would arise from tort, the other from contract." See also 1 Pom. Remedies, 467; Humphrey v. Merriam, 37 Minn. 502, 35 N. W. 365; Robinson v. Flint, 7 Abb. Pr. 393, note; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917; Freer

v. Denton, 61 N. Y. 492. These authorities seem to be conclusive upon the proposition.

The remaining questions for us to consider are the admissibility of the admissions of the witness Alfred Jackson, and the question of the measure of damages in the case, and the admission of evidence in regard to value.

Provided that both tort and contract causes of action were properly joined in the complaint, which we hold to be the fact, and provided that sufficient evidence was adduced upon the trial, both the tort and the contract measure of damages could be made to apply in this case. Under the facts of the case, and since the witness H. S. Halverson, the secretary and treasurer and manager of the defendant company, testified on the trial that when he sold the horses he knew that "Needham was a farmer, and knew he had horses out there on his farm. I thought he would take these horses out there and work them, and knew he would mingle these horses with his. I supposed he would do this before I sold him the horses,"—there would be but little difference in the measure of damages under each cause of action. The measure of damages in tort, as given by § 6582 of the Code, is "the amount which will compensate for all the detriment proximately caused by the wrongful act, whether it could have been anticipated or not," and this is merely a restatement of the common-law rule. The measure of damages for breach of contract, as expressed in § 6563 of the Revised Codes of 1905, 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," and this section has been held to practically restate the common-law rule early laid down in the case of Hadley v. Baxendale, that the measure of damages in contract are those damages which were actually anticipated by the parties entering into the contract, or which are so probable and natural that they would have been reasonably anticipated by one entering into the relationship, if he had thought upon the subject. There can be no doubt that under the case of Larson v. Calder, 16 N. D. 248, 113 N. W. 103, the jury were justified in finding that a warranty was made in the premises, and that the horses, when sold, were afflicted with glan-

ders, and we believe that the jury were justified in finding such a fact even independently of the admissions of the witness Jackson, to which we will later refer. We cannot help but feel, however, that the admissions of the witness Jackson went far to produce this impression in the minds of the jury, and that if these admissions were inadmissible, the judgment should be reversed. We, however, do not believe that the appellant is correct in his contention that in this case the only measure of damages is that prescribed by § 6595 of the Revised Codes of 1905, which provides that "in estimating damages . . . 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." This is the measure by which to determine the value of the property of which the plaintiff is deprived. This statute applies to a case where the seller refuses to convey, and not to a case where a delivery is made and damages result from a breach of warranty of fitness, and the injury occasioned is not merely the loss of the goods sold, but the spread of a contagious disease and injury resultant therefrom.

In considering the admissibility of the admissions complained of, we have to consider the questions: 1st. Who was the witness Alfred Jackson, and what relationship did he bear to the defendant corporation? 2d. What was the nature of his admissions? and, 3d. when and where they were made? Who the witness Jackson was, and his relationship to the corporation, may be gathered from the testimony of the witness Halverson. Halverson testified that he himself was the secretary, treasurer, and manager of the defendant company, and that Jackson was working for him. "He (Jackson) had been working for the corporation and was working at the time that Needham got the horses. When I am away he has charge of the barn and the procuring and making sales of horses, and had been, on behalf of the defendant company." Alfred Jackson testified: "I handled and bought and sold horses and cattle for that company. I know where Halverson & Company got that team. I bought one about 20 miles north of McHenry, and the other I bought from a man by the name of Wentworth. . . .

I went out to prevent that one horse being killed. I had received information that it had been condemned by the state veterinarian for glanders, and I went out there to insist upon an examination before it was shot. . . . When I bought those gray horses from that man up north, one of them was running at the nose a little. That was about a month before I sold them to Mr. Needham. I don't know whether that running of pus from the nostrils of that horse continued all the time up to the time I sold them to Needham. . . . I did not deliver the horses to Needham. John Hanson led the horses out and handed them to Needham. I don't know if he got anything from me. I may have told him I would give him a bottle of medicine for the cold the horses had. . . . I have been with Halverson & Company three years, and have bought and sold a few horses during that time. They had a barn of fifty horses when this sale was made. Mr. Halverson sold most of the horses. Probably a hundred a year was sold out of the business there. I can't say how many horses I have handled there. . . . Beside acting for this corporation as purchaser and salesman, I also took charge of, and in many instances doctored, their horses and attended to them as best I could, giving them medicine and treatment which, in my best judgment, they needed from time to time. I don't think I was there at the time (the time of the delivery of the horses), and I did not see the barn man deliver the horses. The barn man was sometimes in the store, and he came in. It would not have been necessary for me to deliver them. The barn man came in and told me that he had delivered them. I went out to Needham's place at the request of Halverson & Company, on the 28th day of May, 1909, for the purpose of preventing them from killing one of the horses, and I told Needham what I came for." The plaintiff Needham testifies that "he had been in his place of business from time to time before the 1st of April, 1909, and had seen Mr. Halverson and Mr. Jackson in charge;" that on the 3d day of April, 1909, he met Mr. Halverson, and that Mr. Halverson guaranteed to him that the horses did not have distemper or any other disease, and "I said under that guaranty I will take the horses. He said, 'You will take them, will you?' and I said, 'You can consider them sold;' but, I said, 'I haven't got room where I am living now. I am going to move. I would like to have you keep them a week or ten days until I can get moved,' and he said,

that would suit him first rate. He said, 'This is the only team I have got, and I can use them right along every day cleaning out the stable.' 'Yes,' he said, 'I can use them.'" The witness further testified that on the 10th day of April, 1909, he went to the store and asked for Mr. Halverson, and the clerk informed him that "he was in Fargo;" that he told the clerk that he came because he had bought a team of horses, and that the clerk informed him that Mr. Jackson was in the barn; that he found Mr. Jackson in the barn, and that they examined the horses together; that Mr. Jackson said: "We guarantee those horses are free from any contagious disease, and if they are not you don't have to pay for them." That the witness said "that is what Mr. Halverson told me, and I will take the horses." And that Jackson went in and untied the horses and led them towards the door and handed him the halters; that the witness then gave the horses to his hired man, and that plaintiff then went into the store and settled for the horses, and that he had his bookkeeper draw up a note and mortgage. Practically all of the transactions with the company in fact, except the first transaction in regard to the contract of sale and purchase, were had through and with the witness Jackson, and it seems quite clear from the evidence that Jackson occupied the position of a joint manager. He certainly was in charge of the premises, and of the sale of the horses during the absence of H. S. Halverson, the vice president and secretary of the corporation, and the horses were delivered and the note signed during such absence. There can be no question that the delivery of the horses was either made actually by him or under his direction. It is clear, also, that if it had not been for his guaranty in regard to the freedom from glanders, or, at any rate, that if he had given any intimation that glanders were present, the plaintiff would not have executed the $300 note and mortgage, and taken the horses. The witness, Jackson, in short, was a party to the original sale, which was not consummated until a delivery of the horses and the execution of the note and mortgage. If this be the case, then his admissions made on the farm of the plaintiff, and when set out, or when he went out, to prevent the destruction of the horses, and to the effect that "I told Halverson that these horses had glanders, and I have been treating them all winter, and if he wants to interfere he will have to interfere himself. That is what makes their noses so red. I have been using a carbonized solution,

and it burned the nose,"—were admissible against the defendant corporation. It is true that Jackson denies having made these statements and questions in some other particulars the testimony of the plaintiff, but the jury evidently believed the plaintiff.

The case of Short v. Northern P. Elevator Co. 1 N. D. 159, 45 N. W. 706, is not antagonistic to this holding. In that case the court said: "There is literally no evidence in the record tending to show that Lighthall 'had charge of that elevator.' Much less is there evidence that he had 'exclusive control of the business connected therewith.' It is not incompatible with the evidence that Lighthall acted in a purely subordinate capacity, and that other officers and agents of defendant had the general supervision of defendant's business at said elevator. It is certain, at all events, that no testimony was put in the record tending to show any general agency in Lighthall."

In the case of Union Bank v. Wheat, 58 Mo. App. 11, the court, on page 15, says: "The defendant further objects that the court erred in permitting the witness, Walker, to testify as to admissions made by Carothers that he was only acting in respect to the exchange of merchandise for the land of Walker as the agent of defendant. It is true these admissions were made after the exchange had been effected, but they were not necessarily inadmissible for that reason. It appears by the evidence that when Walker conveyed his lands to Carothers the latter agreed to discharge certain indebtedness of Walker which was a lien on the land conveyed, and that this agreement had not been kept by Carothers. Walker applied to Carothers to know why he had not done so, when the latter stated as an excuse for his nonperformance that he had only acted as agent for defendant in making the sale of the goods. These admissions of Carothers were made during the continuance of his agency in regard to the transaction with Walker. The discharge of the liens on the land was part of the transaction which Carothers had undertaken to perform. It was as much a part of it as was the delivery of the merchandise. He was speaking of an unexecuted part of the agreement which he had failed to perform. Though long after the delivery of the goods, it was still a part of the transaction not then complete. Anything he said in respect to that matter was admissible to bind his principal, because it was a part of it. His agency, we think, having been established by other proof, his admis-

sions during its continuance in respect to the subject-matter of the same were clearly admissible."

In the case of Standefer v. Aultman & T. Machinery Co. 34 Tex. Civ. App. 160, 78 S. W. 552, a contract for the sale of threshing machinery required the seller to send an expert to put the machinery in operation, and the seller's general and state agent and manager was sent out for this purpose. After making an ineffectual effort to make the machinery operate properly, he admitted that it was a worthless outfit, and was not the machinery he had represented it to be to the buyer, nor the machinery ordered, but that the machinery plaintiff had ordered was torn up in a railroad wreck, etc. Such admissions were held admissible against the seller in an action by the buyer for breach of warranty. "Brown, the agent," the court said, "was engaged at the time in an act in furtherance of the transaction concerning which he spoke, and his statements should have been admitted." It would be difficult to distinguish this case from the one at bar. The witness Jackson had been sent to prevent the destruction of the horses, which had been sold by his company, and which he himself had delivered. It is fair to assume from the evidence that he was sent because the company had warranted the horses, and would be likely to be held liable for a breach of their warranty, and because they held a chattel mortgage on the animals and were interested in the preservation of their security. The setting up of a threshing machine and putting it in operation is not materially different from keeping a horse from being put out of operation. Both acts are for the same purpose, to uphold the guaranty, express or implied, that the machine or the horse is fit for the purposes for which sold. The purpose of Mr. Jackson's visit to the farm was, as he stated, to insist upon an examination before the horses were shot, and to prevent their being shot if possible, and admission by him at the time, that the horses had the glanders and had had the glanders for some time, was certainly an admission in relation to the subject of his agency, though an admission which was extremely injurious to the corporation which he represented. The rule that the statements of an agent are not admissible against his principal if made after the original transaction does not apply where the admissions are made in a transaction which grows out of, and is really in consummation of the original transaction, or while the agent is acting under a new authority.

The rule is laid down by Mr. Mechem in his work on Agency, § 714, as follows: "The statements, representations, and admissions of the agent made in reference to the act which he is authorized to perform, and while engaged in its performance, are binding upon the principal, in the same manner and to the same extent as the agent's act or contract under like circumstances and for the same reason. While keeping within the scope of his authority and engaged in its execution, he is the principal, and his statements, representations, and admissions in reference to this act are as much the principal's as the act itself. Such statements, representations, and admissions are therefore admissible in evidence. . . . The statements, representations, or admissions must have been made by the agent at the time of the transaction, and either while he was actually engaged in the performance or so soon after as to be in reality a part of the transaction. . . . The reason is that while the agent was authorized to act or speak at the time or within the scope of his authority, he is not authorized at a subsequent time to narrate what he had done, or how he did it." In the case at bar the agent, Jackson, was authorized to prevent the destruction of the horses, and in attempting to do so he sought to urge Needham to interfere. The only ground of interference could be that the horses did not have the glanders. While on such mission, he admitted that the horses had glanders, and that he had known of the fact, and that his principal had known of the fact for some time and prior to the sale. These admissions were certainly admissions made in connection with his agency. So, too, it was evidently part of the agreement that no payment need be made for the horses if it turned out that they had glanders. When Jackson went out to ascertain the fact as to whether the horses had glanders or not, he certainly was acting in furtherance of the primary contract. The testimony was admissible at any rate to show the necessity of killing the horses and the right to recover damages therefor.

Nor do we believe that any material error was committed by the trial court in allowing the plaintiff Needham to testify as to the market value of the horses, even though no preliminary foundation was laid except by the proof that he was a farmer and the owner and purchaser; and the question was general in its nature, and was not confined to the locality, but was merely: "What was the market value of that horse at the time these horses were brought by you from Halverson to

your premises?" It is well settled that a farmer may testify without the ordinary and general foundation which is required of expert witnesses as to the value of the land and stock which he owns and has himself purchased. 13 Enc. Ev. 560; 1 Greenl. Ev. 16th ed. p. 430; 1 Wigmore, Ev. § 716; 17 Cyc. 113. Though technically speaking the question was too general and should have been confined to the locality, there can be no doubt that it was understood by the witness to be so confined, and that the defendant was not prejudiced.

When we come to the question of the damages awarded in this case, however, and the measure of damages adopted, we are not so well satisfied with the record. It is true that in a tort action proximate damages may be recovered, and in an action upon the contract damages which might reasonably have been anticipated. We believe that the spread of the disease to the other horses was a damage which was both proximate and which could have been deemed to have been reasonably anticipated as a consequence of a breach of the warranty. Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476. So, too, we believe that damages based upon the expenses of the burials and the fumigations, and the services of the veterinary surgeon, can well be sustained on the theory of expenses incurred in the prevention and reduction of damages, even if not proximate or anticipated. Larson v. Calder, 16 N. D. 248, 113 N. W. 103. But beyond this we cannot go. The plaintiff cannot recover for the value of the possible use of teams which might or might not have been used in plowing or breaking or harvesting, nor for the loss of crops which might or might not have been planted or raised. Such damages are both more or less speculative, and are lacking in proximity, and the direct chain of causation, and can hardly be said to have been anticipated. It is to be remembered, also, that the pleadings themselves limit the recovery for the services of the men in caring for, doctoring, and burying the horses, and for the cost of disinfectants to the sum of $50. This sum the plaintiff is entitled to recover under the evidence and the verdict of the jury. He is also entitled to the sum of $960 for the five horses destroyed, and to at least $3 a day for five days, or $15, for the loss of his own time. These items amount in all to the sum of $1,025. The defendant, on the other hand, is entitled to an offset of $336, the amount of the note and interest, and $50 for the amount actually received by the plaintiff from the state for

the horses ordered killed. He is not entitled to offset further sums which may or may not be recovered from the state, at any rate at this time. This gives to him a credit of $386. The verdict of the jury was for $950.75. The judgment of the trial court, together with costs and interest, was $1,043.90. If the plaintiff will remit from such judgment the sum of $311.75, within twenty days of the filing of the remittitur in the district court, the judgment of the district court as so modified will be allowed to stand. If the plaintiff does not desire to consent to this modification, the judgment of the trial court will be reversed and a new trial is ordered.

Mr. Justice BURKE, being disqualified, did not participate.

McCONNON & COMPANY v. LAURSEN et al.

(135 N. W. 213.)

Pleading — implied allegation that plaintiff is foreign corporation.

1. The complaint alleges that plaintiff "is and was a corporation duly organized and existing according to law," and sets out in full the contract for breach of which suit is brought, in which plaintiff, party of the first part, is designated as "a corporation of Winona, Minnesota." *Held*, that the complaint by reasonable inference alleges that the plaintiff is a foreign corporation, and that it was not error for the trial court to overrule the demurrer to the complaint upon the ground that the complaint did not contain the allegations required by § 7361 of the Revised Codes of 1905.

Action by corporation — necessity of proving corporate existence — admission of incompetent evidence of corporate existence.

2. By the express provisions of § 7362 of Revised Codes of 1905, in an action by a corporation, the plaintiff need not prove upon the trial the existence of the corporation, unless the answer, an allegation of which denies the exist-

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Note.—It seems to be well settled that, where a guaranty is absolute in its terms and definite as to its amount or extent, as was the case in McCONNON & Co. v. LAURSEN, or is one which binds the guarantor to pay unconditionally upon the default of the principal, no notice of acceptance by the guarantee is required, as shown by a review of the authorities in 16 L.R.A.(N.S.) 353. The later cases on the question of necessity of notice of acceptance to bind guarantor are collated in a supplemental note in 33 L.R.A.(N.S.) 960. And see also on this subject notes in 105 Am. St. Rep. 515, and 39 Am. Rep. 221.

ence of the corporation, is verified. In the case at bar the answer is not verified; therefore the admission of incompetent evidence tending to prove corporate existence of plaintiff was not prejudicial to the defendant, and is not grounds for reversing the judgment of the trial court.

Guaranty — necessity of notice of acceptance.

3. On the back of a written instrument containing all the terms and conditions of a contract whereby the plaintiff is to sell and deliver to defendant Laursen goods, wares, and merchandise f. o. b. Winona, Minnesota, is indorsed in writing the following: "In consideration of the sum of one dollar to us in hand paid by the party of the first part, and in further consideration of the execution by it of the within agreement, and the sale and delivery of its goods as therein provided to the party of the second part, we, the undersigned, jointly and severally guarantee to the said party of the first part, its successors, and assigns, the full and complete payment of all indebtedness of the party of the second part to the party of the first part, arising under said agreement, according to the terms and conditions thereof, and at the time and in the manner provided therein. (Signed) Walter Nelson (seal); (signed) Knud Christensen (seal)." *Held*, that such indorsement is an absolute guaranty to pay for such goods as are delivered to defendant Laursen, by the plaintiff, pursuant to the instrument on which such indorsement is contained, requiring no notice of acceptance by plaintiff, and that it is immaterial as to whether the consideration of $1, stipulated therein, was or was not paid, and immaterial as to whether the instrument on which such indorsement was contained, was signed by plaintiff at the time such indorsement was signed by the defendants, guarantors, and immaterial as to whether defendants, guarantors, were notified of the default of defendant Laursen, principal debtor, within a reasonable time after his default.

Opinion filed February 15, 1912. Rehearing March 14, 1912.

Action on guaranty. From a judgment of the District Court of Barnes county; *Burke*, J., in favor of plaintiff, defendants Nelson and Christensen appeal.

Affirmed.

Page & Englert, for appellants.

Lee Combs, for plaintiff and respondent; *Tawney, Smith, & Tawney*, of counsel.

NUCHOLS, District Judge. The complaint alleges that plaintiff "is and was a corporation duly organized and existing according to law," and sets out in full the contract between plaintiff and defendant Laursen,

for the sale to said defendant f. o. b. Winona, Minnesota, of medicines and other articles manufactured by plaintiff, in which contract plaintiff is designated as "a corporation of Winona, Minnesota," party of the first part. On the back of the contract is the following writing:

"In consideration of the sum of one dollar to us in hand paid by the party of the first part, and in further consideration of the execution by it of the within agreement, and the sale and delivery of its goods as therein provided to the party of the second part, we, the undersigned, jointly and severally guarantee to the said party of the first part, its successors, and assigns, the full and complete payment of all indebtedness of the party of the second part to the party of the first part, arising under said agreement, according to the terms and conditions thereof, and at the time and in the manner provided therein.

"(Signed) Walter Nelson,
"(Signed) Knud Christensen."

The complaint further alleges the sale and delivery by plaintiff to defendant Laursen, of goods and wares according to said contract, and the failure of the said defendant to pay therefor, and the giving of notice to the defendants Christensen and Nelson, of the default of Laursen, and a demand upon the defendants Christensen and Nelson for the payment of the amount due. Defendant Laursen made no appearance in the action. Defendants Nelson and Christensen demurred to the complaint, on the ground that plaintiff has no capacity to sue, and that it fails to allege whether it is a domestic or foreign corporation, and that the complaint fails to state facts sufficient to constitute a cause of action, for failure to comply with § 7361 of the Revised Codes of 1905, which demurrer was overruled. The last-mentioned defendants answered the complaint, denying generally all the allegations of the complaint, and further denying the incorporation of the plaintiff, and alleging that there was no consideration for the guaranty, and no notice of acceptance thereof by plaintiff had been given, and no notice of the default of the defendant Laursen has been given to the defendants, and other allegations which we need not consider in this opinion, which answer was not verified.

At the close of the testimony, on motion of the plaintiff, the court directed the jury to return a verdict in favor of the plaintiff for the amount demanded in the complaint, to wit, $1,053.60. After a motion for a new trial had been denied, defendants Christensen and Nelson ap-

pealed from the judgment of the district court, and assign numerous errors.

We will consider the errors assigned in the order in which they are presented in appellants' brief. The first assignment of error is that the court erred in overruling the demurrer to the complaint, on the ground that the complaint did not conform to the requirements of § 7361 of the Revised Codes of 1905. This section reads as follows: "In an action by or against a corporation, the complaint must aver that the plaintiff or the defendant, as the case may be, is a corporation. If incorporated under any law of this state, that fact must be averred; if not so incorporated, an averment that it is a foreign corporation is sufficient. The complaint need not set forth or specially refer to any act or proceeding by or under which the corporation was formed."

This statute is mandatory to the extent of requiring that the complaint of a plaintiff, suing by a name which indicates that it is not a natural person, must allege that it is a corporation, or state facts showing that it is an artificial being with a capacity to sue. By § 4200 of the Revised Codes of 1905, every corporation is granted the power to sue and be sued by its corporate name; and by § 7364 of the Revised Codes of 1905, a foreign corporation is given generally the same authority as domestic corporations to maintain actions in the courts of this state. The positive allegation in the complaint, that "plaintiff is a corporation," sufficiently alleges plaintiff's capacity to sue, and when the complaint also sets out in full the contract for a breach of which the suit is brought, in which plaintiff, party of the first part, is designated as "a corporation of Winona, Minnesota," we are agreed that the complaint sufficiently conforms to the statutory requirements, and by reasonable inference alleges that the plaintiff is a foreign corporation, and that it was not error for the trial court to overrule the demurrer. If the defendants desire a more specific allegation as to whether plaintiff was a foreign or domestic corporation, their remedy was by motion to make such allegation more specific, and not by demurrer. See Webber v. Lewis, 19 N. D. 473, 34 L.R.A (N.S.) 364, 126 N. W. 105.

Defendant's assignments of error Nos. 2, 3, and 4 relate to the same subject, each being directed to the action of the court in overruling objections to the admission of evidence tending to prove the in-

corporation of plaintiff. The evidence objected to was undoubtedly incompetent to prove corporate existence, if the answer had been verified. By the express provisions of § 7362 of the Revised Codes of 1905, in an action by a corporation, the plaintiff need not prove upon the trial the existence of the corporation, unless the answer, an allegation of which denies the existence of the corporation, is verified. In the case at bar the answer is not verified, and no proof of the incorporation of the plaintiff was necessary; therefore the admission of incompetent evidence tending to prove the corporate existence of plaintiff was not prejudicial to defendants, and is not ground for reversal of the judgment of the trial court.

The fifth assignment of error is that the court erred in permitting the president of plaintiff corporation to state the total amount of the goods shipped to the defendant Laursen under the contract. Witness had testified to the separate amounts of each shipment and had identified the invoices of each separate shipment, and the answer as given by the witness was merely the total of the separate amounts which anyone could ascertain by adding together the separate amounts. On cross-examination of this witness, counsel for defendants interrogated him as to the amount of each separate shipment. We find no error in the ruling of the court in overruling the objections to the answers of witness.

Assignments of error 6 and 7 relate to the rulings of the court in sustaining objections to questions by counsel for the defendants in the cross-examination of the president of the plaintiff corporation. The questions objected to did not relate to any matter as to which the witness had testified on direct examination, and were attempts to prove affirmative defenses by cross-examination of plaintiff's witness, and were properly objected to; and we think it was not error for the court to sustain objections to the questions.

Assignment of error number 8 is that the court erred in admitting in evidence the instrument of guaranty. The execution of the instrument was proved by the testimony of the defendants who signed it, and it was properly admitted in evidence.

The ninth assignment of error is that the court erred in sustaining the objection to the offer by the defendants of evidence tending to show that the consideration of $1, stipulated in the instrument of guaranty, had never been paid. The court did not err in rejecting such evidence,

as it was wholly immaterial as to whether the stipulated consideration of $1 had been paid or not. Emerson Mfg. Co. v. Tvedt, 19 N. D. 8, 120 N. W. 1094; Lawrence v. McCalmont, 2 How. 426, 11 L. ed. 326; Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686.

It is the stipulation for a valuable consideration, however small or nominal, passing from the guarantee to the guarantors, which makes the instrument an absolute guaranty, and the failure to pay the consideration stipulated would not change the absolute guaranty to an offer of guaranty. As was said in Lawrence v. McCalmont, supra, "if the consideration of $1 has not been paid, guarantors are now entitled to recover it."

The tenth assignment of error is that the court erred in not permitting defendants to introduce evidence tending to show that the contract between the plaintiff and the defendant Laursen was not executed by the plaintiff at the time defendant signed the guaranty indorsed thereon. It is not claimed by plaintiff that it notified the defendants of the acceptance of their guaranty; and if the execution, for a valuable consideration, of a guaranty of the performance of a contract before the contract is executed by the parties, is only an offer of guaranty, requiring notice of acceptance to make it binding on guarantors, then the defendants should have been allowed to introduce evidence to show that the contract was not executed at the time of signing the guaranty. The question of whether or not the contract was executed prior or subsequent to the signing of the instrument of guaranty would be a question of fact for the jury, as plaintiff's evidence is to the effect that the contract was executed by the plaintiff prior to the signing of the guaranty. This precise question has not been passed upon by this court, and the authorities on the question are not numerous. Counsel for the defendant rely mainly on the case of Barnes Cycle Co. v. Reed, 84 Fed. 604, in which the court said: "It will be noted that when thus signed [the guaranty] there was no valid subsisting contract between Schlaudecker and the Barnes Cycle Company. It only became a valid enforceable contract as against the Barnes Company five days later, when that company indorsed its acceptance and approval upon it. Under the circumstances we are of opinion that the undertaking of [the guarantor] was provisional, and not absolute. The Barnes Company was not bound to accept it, or,

indeed, to enter into the contract with Schlaudecker," and held that the instrument signed by the guarantor was only an offer of guaranty, requiring notice of acceptance to make it binding on the guarantor. But this case was appealed to the circuit court of appeals, and that court, while agreeing with the circuit court that the instrument was only an offer of guaranty, requiring notice to the guarantor, based its opinion on the ground that the instrument of guaranty, while reciting a valuable consideration, failed to state whether such consideration passed or was to pass from the guarantee or from the principal debtor; and the court made no mention of the fact that the contract was not executed at the time the guaranty was signed. 33 C. C. A. 646, 63 U. S. App. 279, 91 Fed. 481. But we believe the true rule to be as stated in Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173, following Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686; that if the receipt from the guarantee of valuable consideration, however small, is acknowledged by the guarantor, or such consideration is stipulated for in the instrument of guaranty, the mutual assent is proved, and the delivery to the guarantee, or for his use, of the guaranty, completes the contract. The instrument, on the back of which the instrument of guaranty was indorsed, contained all the terms and conditions according to which plaintiff was to sell and deliver goods to defendant Laursen, within a prescribed time; and the instrument of guaranty was a promise by the defendants, the guarantors, for a valuable consideration passing to them from the plaintiff, the guarantee, to pay for such goods, if the defendant Laursen failed to pay therefor. The instrument of warranty expressly referred to the instrument on which it was indorsed, and made such instrument a part of the guaranty. There is no question but what such instrument with the indorsement of the guaranty thereon was delivered to the plaintiff for its use, and that it acted thereon and delivered goods to defendant Laursen pursuant thereto. We therefore hold that the instrument of guaranty in the case at bar was an absolute guaranty to pay the plaintiff the price of goods sold by the plaintiff to the defendant Laursen, according to the terms of the instrument on which the guaranty was indorsed, and that the liability of the guarantors to pay therefor on failure of the principal debtor to pay therefor is absolute, requiring no notice of acceptance, regardless of whether the instrument containing all the terms

and conditions of a contract was executed by plaintiff prior or subsequent to the signing of the instrument of guaranty by the guarantors.

Assignments of error 11 and 12 relate to the same subject, that the court erred in sustaining the following question by counsel for defendants, to defendant Laursen: "Did you, after November 24th, 1908, make any sales of property to Walter Nelson, whereby you realized a certain amount?" The court sustained the objection to the question. Defendant offered to prove by the witness that he sold property to the amount of $700 to the defendant Nelson, and received the money therefor some months after defendant Laursen had failed to pay for the goods delivered to him by the plaintiff under the contract alleged in the complaint, but before defendants Christensen and Nelson had been notified by plaintiff of default in the payment on the part of defendant Laursen. The evidence shows that the plaintiff did not notify the defendants Christensen and Nelson, of the failure of the defendant Laursen to pay for the goods delivered to him, until some months subsequent to the time when such goods should have been paid for according to the terms of the contract of sale. Counsel for the defendants Christensen and Nelson claim that they were entitled to notice of default in payment by defendant Laursen, within a reasonable time after such default, and entitled to set off against the plaintiff's claim any damage resulting by reason of the failure of the plaintiff to notify defendants within a reasonable time of such default by the defendant Laursen. Section 6086 of the Revised Codes of 1905 declares: "A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal and without demand or notice," and § 6096 of the Revised Codes of 1905 provides that "mere delay on the part of the creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor." Having decided that the instrument signed by the defendants Christensen and Nelson was an absolute guaranty of the purchase price of goods to be sold to the defendant Laursen, by plaintiff, pursuant to the instrument or contract on which such guaranty was indorsed, and the undisputed evidence showing that goods of the value sued for were so sold and delivered to the defendant Laursen by plaintiff, and the same has not been paid for, then by the express provisions of the statutes mentioned, it is immaterial as to whether the defendants Christensen

and Nelson were, prior to the commencement of this action, notified of the default of the defendant Laursen, as the service of summons on the defendants Christensen and Nelson was sufficient notice. But if we should concede that the guarantors were entitled to reasonable notice of the default of the principal, and entitled to set off any damage resulting to either of said defendants from failure to give such notice, the evidence offered by the defendants Christensen and Nelson failed to show any damage resulting to either of said defendants. The evidence offered would only show that the defendant Laursen sold to defendant Nelson $700 worth of property, and received the money therefor, without showing whether such property was exempt from seizure on execution, or that such sale impaired the financial condition of the defendant Laursen, in any way, and would be no proof of the insolvency of the said defendant. We therefore hold that it was not error for the trial court to refuse such evidence.

The thirteenth and last assignment of error is that the court erred in directing a verdict in favor of the plaintiff for the amount demanded in the complaint. The undisputed evidence shows that the plaintiff supplied to the defendant Laursen goods of the value mentioned in the complaint, pursuant to the instrument or contract on which the instrument of guaranty was indorsed, which instrument of guaranty provides for a valuable consideration paid or to be paid by plaintiff, guarantee, to defendants Christensen and Nelson, guarantors, and that the price of such goods has not been paid to plaintiff, guarantee. And having decided that the instrument signed by the defendants Nelson and Christensen was an absolute guaranty, not requiring notice of acceptance, and that it was immaterial whether the instrument on which such guaranty was indorsed was or was not signed by the plaintiff at the time such instrument of guaranty was signed by defendants Christensen and Nelson, and that it was immaterial as to whether the consideration of $1, stipulated therein, was or was not paid before this action was commenced, and that the defendants Christensen and Nelson were not entitled to notice of default by the defendant Laursen, and that no evidence was offered by the defendants Nelson and Christensen, showing any damage resulting to either of them by the failure of plaintiff to notify them of the default of the defendant Laursen, there was therefore no question of fact to submit to the jury; and it was not

error for the trial court to instruct the jury to find in favor of the plaintiff for the amount demanded in the complaint.

Finding no error in the record, the judgment of the trial court is therefore affirmed, with the costs of appeal to respondent, to be taxed in the District Court.

Mr. Justice BURKE being disqualified by reason of having presided at the trial of the case in district court, S. L. NUCHOLS, Judge of the Twelfth Judicial District, sat in his stead by request.

JOHNSON v. GRAND FORKS COUNTY.

(135 N. W. 179.)

Primary elections — statute as to fees of candidates.

1. The fees required of candidates for nomination for county office by § 4, chap. 109, Laws of 1907, being 1 per cent of the salary, and the amount thereof bearing no relation to the services performed by the auditor in filing petitions to have the names placed upon the primary election ballot, such requirement is invalid. It is also invalid for the reason that it attaches a qualification to candidates for office, and to voters, not permitted by the Constitution.

Primary elections — as an "election" within meaning of Constitution.

2. Whether the primary election is an election within the meaning of that word as used in the Constitution, and as held in Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071, is not decided.

Opinion filed February 16, 1912.

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

Note. — The question whether primary elections are "elections" within the meaning of a Constitution or statute relating to elections generally, which is referred to, but not decided, in this case, has been considered in a number of cases, which are reviewed in a note in 18 L.R.A.(N.S.) 412.

Action by Henry J. Johnson against the county of Grand Forks and another. From a judgment for plaintiff, defendant appeals.

Affirmed.

O. B. Burtness, State's Attorney, for appellants.

Feetham & Elton, for respondent.

SPALDING, Ch. J. Certain candidates for county and legislative offices paid, under protest, the fees required of them by § 4, chap. 109, Laws of 1907, such fees running from $20 to $24 each. Their claims against the county of Grand Forks for a return of the sums so paid were subsequently assigned to respondent, who brought this action, setting forth in his complaint the facts entitling him to recover. To the complaint the county interposed a general demurrer. The demurrer was overruled and judgment entered for plaintiff. From this judgment Grand Forks county appeals.

The respondent relies solely upon the decision of this court in the case of Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071, which case involved the same questions here determined, except that that decision was rendered upon the corresponding proposition in the primary election law of 1905. In the law now under consideration the legislative assembly reduced the fee, required as a prerequisite to filing a petition for the printing of names upon the primary election ballot, one half. We see no difference in principle. In our opinion the sum exacted, by the 1907 statute, of candidates of the class of those whose claims are before us, is still beyond all reason as compensation for services in filing the petitions, and for this reason the portion of the statute in question is invalid.

The appellant insists that this court was in error in holding that the constitutional qualifications discussed in our former opinion apply to candidates for primary nomination, and that our opinion was erroneous in holding the primary election an election within the terms and meaning of the Constitution. The writer, at least, has been long of the opinion that a discussion of that question was unnecessary in the former case, and that, while the primary election may not be an election within the terms and meaning of the Constitution, fixing the qualifications of voters and candidates, to the full extent which that opinion appears to hold, yet that the legislative assembly cannot add to or take from such

qualifications further than is necessary to effect the purpose sought to be accomplished in providing a primary election law. It is self-evident that a primary election being provided only for party nominations, no one except adherents of parties, entitled to participate in making nominations, can vote at such elections, and that, to such extent, if a primary election law is in any sense valid the legislative assembly may limit the qualifications of voters on such occasions, as well as to confine them to their own party. We, however, do not pass upon this question further than to say that conceding, for the purposes of argument, all that appellant says in his brief would not change the result, and this question not having been discussed by respondent, and only suggested by appellant, and no authorities cited which are in point, we leave it for consideration when it is properly raised and discussed by counsel.

The judgment of the District Court is affirmed.

GALEHOUSE v. MINNEAPOLIS, ST. PAUL, & S. S. M. R. CO.

(— L.R.A.(N.S.) —, 135 N. W. 189.)

Writ and process — summons and complaint — indorsement of, by sheriff — presumption of regularity.

1. An indorsement stamped by means of a rubber stamp on the back of a summons and complaint, of the words, "In the sheriff's office, December 2, 1908, John J. Lee, Sheriff, Ward County," under § 2503 of the Codes of 1905, which makes it the duty of the sheriff to indorse "upon all notices and processes received by him for service, the year, month, day, hour, and minute of reception," and under § 7317 of the Code, which provides that "the presumption that official duty has been regularly performed is satisfactory if uncontradicted," will be deemed satisfactory evidence of the facts therein contained, and that the summons and complaint were delivered to the sheriff for service upon the day stated, in the absence of satisfactory proof to the contrary.

Note.—On the general question who is a passenger, see note in 61 Am. St. Rep. 77.

On the question whether an assault growing out of a quarrel commenced while an employee is acting within the scope of his employment may be regarded as a personal act of the employee, for which the employer is not liable, see note in 9 L.R.A. (N.S.) 475.

Carriers — who is a passenger.

2. A person is not a passenger, and entitled to consideration and protection as such, who, after waiting all day in a station for a train, and discovering that he will be unable to reach his destination in time for the accomplishment of the purpose of his journey, leaves the station and goes to an hotel for supper, and then returns to such station for the purpose of sending a telegram announcing the fact that he will be unable to make the journey, and that it is his intention not to attempt to do so.

Master and servant — assault by employee — scope of authority.

3. The mere fact that an employee is authorized to preserve order upon the premises of his employer does not make an assault committed by him upon a patron of his employer an act done within the scope of his authority, for which his employer will be liable, when the evidence shows that the assault made was not made for the purpose of preserving order or ejecting such person from the premises in pursuance of such authority.

Master and servant — assault by employee — scope of authority.

4. When there is a conflict in the evidence, but the testimony of the plaintiff's witnesses, if believed, would justify the jury in finding that a common carrier of telegraphic messages neglected to promptly deliver a death message to the plaintiff, so that plaintiff was unable to take a train by which he could have reached the home of the deceased in time for the funeral, and the plaintiff, after waiting all day in the station for a later train, and then finding that he would be unable to reach his destination in time, went to the telegraph office to send a message announcing the fact, and, on being informed that the wires were down and such message could not be sent, complained because of the failure of the company to deliver the message promptly in the morning, and, on account of such protest, was assaulted by the telegraph operator, the common carrier of telegraphic messages may be held responsible for such assault and liable in damages therefor.

Master and servant — assault by employee — provocation.

5. If, however, after going to the depot for the purpose of sending the message, and after being informed that such message could not be sent on account of the fact that the wires were down, the jury had found that plaintiff had not merely complained of the failure to deliver the message in the morning, but had called the employee a liar, or used other opprobrious language which incited the employee to make the assault, so that the assault was the result of the irritation occasioned by the use of such language, and not of the mere fact of the making of the complaint, the employer would not be liable in damages therefor. "One may not by his acts spoil an instrument, and then sue the manager because the performer does not make good music."

Person going to telegraph office to send message or make complaint as trespasser or licensee — right to protection.

6. A person who goes to a telegraph office to send a message or to make a

complaint as to the failure to deliver the same is not a trespasser or licensee, but a customer or patron, and is entitled to treatment and protection as such.

Appeal — presumption as to correctness of instructions.

7. Where the evidence is in conflict, and the record shows that the trial court instructed the jury, but omits entirely to include such instructions, it will be presumed on appeal that such instructions were correct, and properly presented the law and the issues to the jury.

Opinion filed February 17, 1912.

Appeal from the District Court of Ward county; *Burke,* J.

Action against defendant company for an assault committed by its employee upon plaintiff. Verdict and judgment for plaintiff. Defendant appeals.

Affirmed.

This is an action to recover damages for an alleged assault upon the plaintiff by one Clarence Holiday, an employee of the defendant, at its station in the city of Donnybrook. The complaint alleges that the defendant is a common carrier of passengers and freight, and of telegraph messages for hire and profit; that during the month of December, 1906, the plaintiff was in the passenger depot of the defendant company at Donnybrook as a passenger, and for the purpose of doing business in a lawful way with said defendant as a common carrier of passengers and telegrams, and that while so engaged and while attempting to send a telegram over the telegraph line operated by the defendant in connection with its line of railway, he was assaulted by the said Holiday, "who was then and there the servant, employee, and agent of the said defendant, acting within the scope of his employment, duty, and authority as such servant, employee, and agent of the defendant." The answer admits that the defendant is a railway company, but denies the other allegations of the complaint. It also alleges that if any assault was committed it was on account of the fact that the plaintiff made the first assault, and that the assault complained of was made in self-defense. It further pleads the two-year statute of limitations. The defendant and appellant maintains that the summons and complaint were not filed until December 12, 1908, and if this be the fact, the statute of limitations ran against the action. It is claimed by the plaintiff,

however, that the summons and complaint were delivered to the sheriff of Ward county for service on the 2d day of December, 1908. There is no evidence upon the point except the papers themselves. On the back of the summons and complaint there is stamped, by means of a rubber stamp, the words: "In sheriff's office. December 2, 1908, John J. Lee, Sheriff, Ward County;" and no other evidence but such indorsement was offered as to the date of the commencement of the action, plaintiff's attorney testifying merely that on his way home from his office—he did not recollect the date—he handed the summons and complaint to the deputy sheriff, and that he stamped it there with a rubber-stamp machine; that "he changed it before he put the stamp on;" that he "monkeyed with it, and put the stamp on there. How he changed it I don't know;" that he turned it either back or forward. There is some evidence, also, that this method of indorsing the date of receipt is the present custom of the office, but this evidence was objected to, and probably with reason, as it did not date back to the time of the transaction.

As far as the assault is concerned, and the reasons therefor, it is undisputed that at 2 o'clock in the morning a telegram addressed to the plaintiff was received by the defendant, announcing the death of the plaintiff's stepmother, and that the said telegram was not delivered until 9 o'clock; that the night train was late, and had the message been delivered promptly, plaintiff could have taken such train and attended the funeral; that in the afternoon he went to the depot of the defendant, intending to take the second train, but, after waiting around an hour or two, found that he could not possibly reach his destination in time, so left the depot and went to a hotel for supper, and after supper returned to the railway station for the purpose of sending messages to his relatives that he could not come; that the station agent, Hough, gave him some blanks, but told him that he could not accept the telegrams, as the wires were down. So far there is little or no conflict in the testimony, and it was after this point that the dispute occurs. According to the plaintiff's testimony, which is corroborated by the witness McCarthy, he then asked the station agent, Hough, why the message in the morning had not been delivered to him so that he could have caught the east-bound train, and that at this point one Holiday (the night operator, who was in the office and behind Hough) spoke up

and said, "I did not know where you lived, and, damn you, I would not have delivered the message if I had. I will show you about delivering messages!" and that said Holiday then rushed out of the office and assaulted the plaintiff. The witness McCarthy adds testimony to the effect that Holiday said: "We have had just about enough of you around here, coming down here trying to bull-doze the whole crowd, and I will show you;" and that he then rushed into the waiting room and made the assault, first unlocking the door of the office which intervened. The witness Holiday testified, on the other hand, that when Galehouse came into the office Holiday was probably at the instrument; that he was exchanging work until late at night; that Galehouse asked why that message had not been delivered when it was received; that Holiday probably said nothing at first, until Galehouse began to talk over the agent to him; wanted to know why he had not delivered that message; that he, Holiday, told him, Galehouse, that he did not know where he lived, and, further, that he could not get off at that time; that he believed Galehouse used some abusive language at that time; that he asked why he did not deliver the message, and he, Holiday, said, "I don't know where you live, and what about it even though I did not deliver the message?" and that Galehouse then told him to come outside and he would show him what about it; that he then rushed outside and unlocked the intervening door, and that immediately he got into the outer office Galehouse struck him and the combat began. Holiday also testified that it was his duty to keep order in the station, but from his evidence it is quite clear that in making the assault, if any, he was acting from personal motives, and not with any desire to preserve order in the building or eject the plaintiff for that purpose. It, indeed, appears to be quite evident from the testimony that he either went into the outer office because challenged so to do by the plaintiff, or because he was angry and wanted to give vent to his individual and personal spite. There is nothing in the evidence to show that the plaintiff was ordered to leave the building, or rebuked in any way by the agent, Hough, for making a disturbance, nor that the police authorities were called upon either before or during or after the fracas. There is, also, no evidence tending to show that the agent, Hough, actively tried to prevent or terminate the engagement. The parties were separated, if at all, by the witness McCarthy, who came into the build-

ing with the plaintiff. The agent, Hough, testifies that Galehouse called Holiday a liar, and that the lie was passed back and forth; that Galehouse invited Holiday to come out; that at that time he decided to interfere; that Holiday was very quick and went out; that he could not remember whether the door was open or shut, but that he reached it before he did and went out, and that as he was passing out of the door Galehouse struck him; that he, Hough, went back into the office and picked up the lantern, and that he heard quite a commotion out in the waiting room, and that he afterwards was told that Galehouse was knocked down; "I did not see, but when I got out there they were both on their feet and were going around, and it was pretty fast and exceeded all my expectations;" that there was no light in the outer room, and that it was merely lighted by the light which shone from the window of the inner office. The testimony of Hough and Holiday is corroborated to a greater or less degree by that of two other employees of the company.

On the trial the defendant and appellant objected to introduction of any evidence under the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and that the record did not show that the action was commenced within the period limited by law. It, also, at the conclusion of its testimony, moved the court to dismiss the action on the ground that the plaintiff had failed to establish the agency of Holiday; the fact that the telegraph company was any portion of the defendant; that the action had been brought within the statutory time; and that the assault was committed within the course of duty of the said Holiday as an employee of the company. These motions were overruled, and a motion was made to direct a verdict for the defendant on the same grounds. This motion was also overruled. A verdict was rendered in favor of the plaintiff and respondent for the sum of $300, and judgment entered thereon. A motion for a new trial was then made and overruled, and defendant appeals.

F. B. Lambert, for plaintiff and respondent.
Palda, Aaker, & Greene, for defendant and appellant.

BRUCE, J. (after stating facts as above). The first point to be

considered is whether the statute of limitations ran against the action in question. The presumption of law is that a public officer does and will do his duty. Section 2503 of the Code of 1905 makes it the duty of the sheriff to "indorse upon all notices and process received by him for service, the year, month, day, hour, and minute of reception, and issue therefor to the person delivering it, on payment of his fees, a certificate showing the names of the parties, title of paper, and time of reception." Section 6795 of the Revised Codes provides that "an attempt to commence an action is deemed equivalent to the commencement thereof within the meaning of this chapter when the summons is delivered with the intent that it shall be actually served, to the sheriff." While § 7317 of the Code provides that the presumption that official duty has been regularly performed is satisfactory if uncontradicted. In 25 Cyc. 1424, it is stated: "It will be presumed that the indorsement on a complaint of a certificate showing the date of filing, when made by the clerk of the court, is correct," while in the case of Lewis v. Seattle, 28 Wash. 639, 69 Pac. 393, where the filing marks of the complaint showed that the action was commenced within the statutory period, but the appearance docket indicated that it had been commenced one day later, and no evidence was introduced to show the true date, the court held that "the court will presume as against the statute of limitations where these dates disagree and no showing is made of the true date, that the certificate on the complaint shows the true date." It is presumed that an officer does his duty, and that his proceedings are regular. There seems in this case to be no evidence which even tends to disprove the contention that the summons and complaint were delivered to the sheriff for service upon the date stamped thereon, and it is clear from the authorities and from our statute that an action is commenced, so far as the statute of limitations is concerned, when the writ is filled out and delivered to the proper officer, with the bona fide intent to have it served at once, and not at the time that the actual service is made. Ewell v. Chicago & N. W. R. Co. 29 Fed. 57; Evans v. Galloway, 20 Ind. 479; Hampe v. Schaffer, 76 Iowa, 563, 41 N. W. 315; Johnson v. Farwell, 7 Me. 370, 22 Am. Dec. 203; McCracken v. Richardson, 46 N. J. L. 50; Davis v. Duffie, 18 Abb. Pr. 360; Riley v. Riley, 141 N. Y. 409, 36 N. E. 398; reversing 64 Hun, 496, 19 N. Y. Supp. 522; Goldenberg v. Murphy,

108 U. S. 162, 27 L. ed. 686, 2 Sup. Ct. Rep. 388. We do not think that the action was barred by the statute of limitations.

When we pass on to the merits of the case we find a sharp conflict in the evidence as to who was the aggressor in, and the reasons for, the physical controversy. We can find nowhere in the record the charge of the court to the jury, though the record shows that a charge was given. In its absence we must conclude that all questions were properly submitted to the jury, and since a verdict was rendered for the plaintiff we must conclude that these questions were resolved by the jury in favor of the plaintiff. The only questions, then, for us to consider are whether the plaintiff was a passenger, and, if a passenger, whether the railway company was liable to him for the assault, or, if not a passenger, whether the company, as a telegraph company in the transaction of the business as such, was responsible for the assault of its servant, Holiday, upon him.

We are clearly of the opinion that the plaintiff in this case was not a passenger at the time of the altercation, and that his right of recovery, if any, cannot be based upon that theory. His own evidence conclusively shows that he had no intention of taking a train that night, and that he was not at the time of the altercation upon the premises of the company either for the purposes of taking a train, or after having alighted from one. A passenger has been defined to be "one not a servant of the carrier who, by the consent of the carrier, express or implied, is being transported in the vehicle of the carrier from place to place, or who is at a station of the carrier with the intention of at once, or as soon as possible, entering upon such relation." Van Zile, Bailm. & Carr. § 594. There is no question that "a person who goes into the station of the carrier with the bona fide intention of becoming a passenger is entitled to the privileges and the rights of a passenger, at least so far as the safety of his person from abuse or assault, or defects in the station platforms, etc., is concerned." Van Zile, Bailm. & Carr. § 596, and cases cited. It is also probably true that the relationship continues while the traveler is on the premises of the carrier, even after he has alighted from the vehicle, for a period of time reasonably necessary to enable him to leave the premises. Van Zile, Bailm. & Carr. § 605, and cases cited. We can find, however, no authority to support the proposition that it continues for any longer period.

But the evidence shows, and counsel for appellant admits, that the defendant was, at any rate, engaged in the business of a telegraph company, and in such capacity was dealing with the plaintiff at the time of the assault. The evidence is clear that it took and transmitted messages, and that it was for the purpose of sending messages that the plaintiff was upon the premises at the time of the alleged assault. It is also clear that it was while discussing the plaintiff's failure to deliver the message received by the company in the morning and directed to the plantiff that the controversy occurred. Plaintiff was not a trespasser, nor was he merely a licensee. He was on the premises of the company or in their telegraph office on business connected with the business of the company as a telegraph company and at its implied invitation. He was there as a customer or patron, and not as a licensee or as a trespasser. It is undisputed that the company, for some reason or other, had failed to promptly deliver to him a death message in the morning. It is also undisputed that plaintiff went to the telegraph office in the evening for the purpose of sending some other messages, and that while there and after being told that such other messages could not be sent, he asked why the message in the morning had not been delivered to him, and that it was in discussing this matter that the controversy arose. There is, it is true, a conflict in the testimony as to who was the aggressor, but there is certainly enough evidence in the record to justify the jury in finding the facts for the plaintiff; at least it is a mere question of the credibility of the witnesses. It is also undisputed that the message which was addressed to the plaintiff and received in the morning was in relation to the death of a relative; that on account of the failure to deliver it he was unable to attend the funeral, and it was not unreasonable for him to ask for an explanation in the premises. Of course, if, as the witness Holiday testifies, the plaintiff dared him to come out into the other part of the office and settle the matter, or if the plaintiff himself intentionally provoked the assault, the company should not be held liable; but these matters have been decided by the jury, and we cannot interfere with their decision.

It is, of course, well established that the doctrine of *respondeat superior* does not, as a rule, apply where the tortious acts of the servant are not done in the course of his employment, but from personal malice. To use the language of Judge Cooley, "The liability of the master for

intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed from the nature of his employment to have authorized or expected the servant to do." Cooley, Torts, 2d ed. p. 627. This general rule, however, has been generally stated in cases where the main transaction in furtherance of which the tort was committed was not within the actual or apparent scope of authority. The learned judge illustrates this point as follows: "So, if the conductor of a train of cars leaves his train to beat a personal enemy, or from mere wantonness to inflict any injury, the difference between his case and that in which the passenger is removed from the cars is obvious. The one trespass is the individual trespass of the conductor, which he has stepped aside from his employment to commit; the other is a trespass committed in the course of his employment in the execution of orders the master has given, and apparently has the sanction of the master and contemplates the furtherance of his interests." See Cooley, Torts, 2d ed. p. 628. The rule in its entirety is perhaps as well stated in the editor's note following Franklin F. Ins. Co. v. Bradford, 88 Am. St. Rep. 770, 792, as anywhere else. "Where an agent," the editor says, "steps aside from the performance of the business for which he was employed by his principal and embarks upon a matter of his own, the principal is not liable for the consequences of the agent's act while so engaged. If, while engaged in executing the employment of his principal, he so conducts himself, whether negligently or maliciously, as to injure another, his principal will be liable. If, however, he forsakes such employment, and purely, for his own benefit or to gratify some personal hate, does an act unconnected with the service of his principal, the latter is not responsible for its consequences. The agent may immediately, after the commission of the act, resume the performance of the duties of his agency, and in the commission of the tort may have employed the instrumentalities furnished by the principal for the proper performance of his duties. As to the act itself, however, the doctrine of *respondeat superior* is inapplicable, and no liability therefor can attach to the principal." The question in the case at bar is whether the agent, Holiday,

at the time of committing the tort in question, was connected or unconnected with the service of his principal.

There is absolutely nothing in the contention of the respondent that Holiday committed the assault while attempting to preserve order in the depot and while acting in the capacity of a policeman. The only evidence which in any way tends to prove this contention is the statement of Holiday that it was his duty to preserve such order; but all the facts of the case, and his own admissions, conclusively show that he went out "to fix the plaintiff or let the plaintiff fix him," and that his main purpose was to satisfy his own anger and resentment, and not to preserve order, and the interests of his employer was the last consideration which actuated him. If we sustain the judgment in the case, then, it cannot be upon the theory that the plaintiff was a passenger, or that he was illtreated while the defendant's agent was seeking to preserve order, or that the agent was really acting with the interests of his employer in mind, though overzealously, but upon a theory which is more general and universal.

It would seem from the facts that the case comes clearly within the rule laid down in Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, where a patron of a theater was assaulted by the ticket agent in a controversy arising out of a claimed shortage in change. In this case a ticket had been sold to the plaintiff, and he afterwards went back to the ticket office, claiming that short change had been given to him. The court held that though the assault was committed in excess of the authority of the agent, it was still committed while he was acting as ticket agent, and as the result of a controversy arising out of the discharge of his duties. The assault in the case at bar was certainly committed in a controversy arising out of a transaction of the company and while the plaintiff was asking questions which he had a perfect right to ask the agent in relation to such business. In the Dickson Case, above cited, the court said that "the trouble was occasioned entirely by a dispute as to the purchase of tickets, and both the ticket seller and the doorkeeper acted within the business of their employment, maintaining that side of the controversy which was their master's interest." So, too, the Dickson Case is authority for another proposition which also seems applicable to the case at bar and sound in principle, and that is that there is a difference be-

tween a licensee and a patron, and that a patron is entitled to a consideration, which, perhaps, need not always be accorded to a licensee. "But common carriers, innkeepers, merchants, managers of theaters, and others who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping," says the court in the Dickson Case, "owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them." See also Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504.

The case of Richberger v. American Exp. Co. 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922, is very much in point. In it plaintiff has been made to pay an overcharge by a local express agent, and took the matter up with the general superintendent, who stated that the matter would be arranged. Later he went to the local express office to transact some other business, when the local agent in charge informed him that he desired to refund the overcharge to him, and then and there returned such overcharge. He at the time, however, required the plaintiff to sign a receipt for the same, and immediately on the reception of the receipt, and while the plaintiff was in the office of the company, cursed and insulted, and otherwise maltreated him. The Mississippi court sustained an action against the express company, and stated that the true test of liability was "not whether the tort was committed in pursuance of orders from the master, or against orders, whether the master ratified or not, whether the tort was wilful and malicious or not, but whether, and solely whether, the act constituting the tort was done in the master's business." In answer to the suggestion that the rule of strict liability as laid down in the case of Craker v. Chicago & N. W. R Co. supra, only applied to carriers of passengers on account of the fact that the passengers were more or less within their power and control, the Mississippi court said: "Doubtless there is a difference in the extent of the application of the principle as between carriers of passengers and express companies, measured exactly by the difference in the things done by them in the discharge of their duties, respectively. But the principle applies to both. An express company does not transport passengers, and

cannot be made liable as a carrier of passengers might for wilful torts committed by its agents on passengers in their transportation; but it keeps offices for the transaction of its proper business, a business calling to its offices every day thousands of citizens, and in its dealing with its customers in its offices, in its business, it is bound, in Judge Story's language, 'for respectful treatment and for decency of demeanor.' It is impossible to say on the allegations of this declaration, that the tort committed immediately upon the delivery of the receipt to the agent and because of the demand for the refunding of what was plaintiff's conceded due, was so separated in time or logical sequence as not to have been an act done in the master's business. The whole transaction occurred in the shortest time, and was one continuous and unbroken occurrence. The cursing and abusing and maltreatment were all administered in connection with the taking of the receipt, and immediately upon its delivery, and because of the demand of his rights in that matter, and while plaintiff was in appellee's office to transact and transacting this very business. What was said and done thus immediately upon the delivery of the receipt was part of the *res gestæ*. As well said by Judge Thompson in his Commentaries on Corporations, § 6299, top of page 4928: 'In this view, even under the modern doctrine, the acts or declarations of the servant or agent, tending to show his state of mind at the time of the act complained of, would be admissible in evidence as part of the *res gestæ*.'" The court then concludes by saying: "We close this opinion with the words of the same great judge [Andrews, J.] in the same case [Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 134, 21 Am. Rep. 597] to show here a case of liability: 'The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion, aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.'"

Another case that seems equally in point is that of the Georgia R. & Bkg. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565. In it the plaintiff purchased a railroad ticket from the defendant. At the time of such purchase he requested the agent to check his baggage for the train next going to Augusta, upon which he intended, himself, to embark, and

which was due in a few minutes; this the agent refused, and plaintiff was compelled to miss the train. After the train had passed, and, desiring to avoid further trouble and delay, he again requested the agent to check his baggage for the next morning's train stating to the agent that he had been badly treated about his baggage and would not soon forget it, or words to that effect, when the agent, without provocation and without notice or warning, made a malicious and violent assault upon him. The court reversed a verdict for the plaintiff because of an instruction in regard to sneering remarks, etc., and for which there was no foundation in the evidence. On the main questions of the case, however, it said: "We do not think Richmond was a 'passenger' when he returned to the railroad station the last time on the day he claims to have been unlawfully assaulted and beaten by the company's agent. He had no purpose of taking a train that day, having decided to resume his journey on the following morning. However, he undoubtedly had the right to go to the station for the purpose of looking after his baggage, and arranging to have it checked or safely stored until the next day. If he went there to attend to this business and conducted himself properly, he was entitled to respectful treatment from the agent; and if the latter, under these circumstances, unlawfully assaulted and beat him, it was his right to hold the company responsible in damages. The law on this subject is too well settled to require the citation of authority. It may, in this connection, be proper to add, however, that even if Richmond went to the station for the lawful purpose of attending to the business above mentioned, it was nevertheless incumbent upon him to treat the agent with the same respect due him by the agent. Therefore, if, instead of so doing, he, without provocation, used insulting or opprobrious language to the agent, which naturally enough resulted in a difficulty, the company should not be held responsible. In other words, if Richmond, by his own improper behavior, unfitted the agent from exercising the care and prudence which were essential to the performing in a proper manner his duty to the company and to the plaintiff, the latter should not complain. The case would then stand somewhat like that of Peavy v. Georgia R. & Bkg. Co. 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70, in which Judge Bleckley remarked that 'the plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the [company's servant]

was out of tune.' If, however, the truth be that Richmond went to the station not really for the purpose of transacting any legitimate business with the agent, but simply to upbraid or reproach him because of a real or supposed grievance occurring at an earlier hour of the day, and a difficulty then arose between these men, it was one in which the company had no concern whatever, and should be treated as any other fight occurring between ordinary citizens."

It would seem, indeed, as if the true rule was contained in the cases last cited, and the test is whether while dealing with the agent and in a manner that he is authorized or invited to deal with him in, the assault occurred, or whether it was entirely outside of the transaction, although arising out of the transaction, or was provoked by him so as to degenerate into a personal difficulty rather than one between him and the employer. Sending a telegram, asking for change, or complaining because of a delayed telegram, is the transaction with the employer rather than with the agent, and unless the discussion turns into personal vituperation the employer is a person concerned. If, in the case at bar, the testimony of defendant's witnesses is to be believed, and the jury had found that the assault occurred either because the plaintiff called the witness Holiday a liar, or challenged him to come out and settle the issues with him, the company would not have been in any way liable, and the reasoning of the case of Johanson v. Pioneer Fuel Co. 72 Minn. 405, 75 N. W. 719, would have applied. The conflict, in fact, would have been a personal one, and the result of a personal dispute and personal vituperation. If, on the other hand, the testimony of the plaintiff and his witness McCarthy is the testimony which is to be credited, the action can be maintained. The jury evidently resolved the doubt in favor of the plaintiff, and we cannot well interfere with their decision.

There can be no doubt that the weight of authority is to the effect that an employer will not be liable for the torts of his servants committed entirely outside of the scope of their authority and duty, and from malicious and personal purposes. There are also numerous authorities which explain the holding of the case of Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504, and the cases which follow it, upon the theory that in the case of the railway company the passenger is under the exclusive control and power and at the mercy of the em-

ployees of the company. There are few authorities, however, which hold that the employer should not be held liable for an assault committed without authority upon a person while he is dealing with the employee in a matter which is in the scope of the authority of the agent. We do not, indeed, believe that the *dicta* in the case of Williams v. Pullman Palace Car Co. 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631, is good law, which states that "a person has the right to enter a bank for the purpose of collecting a check and to present it to the paying teller for payment, but if, on such presentation, the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with any clerk with reference to the purchase of goods, but if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor; or, if one on lawful business should knock at the door of any private house and, on asking the servant who answered the call, for permission to see the master, the servant should assault and beat him, would the master be responsible? Clearly in all such cases the lawfulness of the party's conduct, and the fact that the injuries were received while he was properly dealing with the servant as servant, would not suffice to bind the master unless the latter had expressly or impliedly authorized the act, or had been guilty of some fault in knowingly employing so dangerous a servant." We, indeed, believe the statement to be only a half truth, and the question is as to whether the assault is committed while discussing, or in relation to, a matter with which the person assaulted has a right to deal with and discuss with the agent. There can be no question that, if the occasion of the assault is something entirely extraneous to the subject of the visit or the interview, and extraneous to the subject-matter concerning which the agent has express or implied authority, that the master will not be liable, but to go any further is hardly warranted by the decisions or by sound public policy. If the assault arises out of a purely personal matter, the employer should not be liable, but if it arises out of a dispute in regard to the business of the principal, which the third party is justified in transacting with the agent, the matter is entirely different. Daniel v. Petersburg R. Co. 117 N. C. 592, 4 L.R.A.(N.S.) 485, 23 S. E. 327. Plaintiff in this case had a right to send his message and reasonably to inquire why the message in the morning had not been de-

livered. The mere fact that he made the inquiry and the complaint before is not controlling. In the evening he found that not only could he not take his train, but that he could not send his message on account of the wires being down. It was but reasonable and natural for him to complain of the supposed neglect in the morning, if for no other purpose than to induce the employees of the telegraph company to use every means to aid him in the present juncture. We are not sure, it is true, that his complaint was reasonable in form. There is a sharp conflict of the evidence on this proposition, but as to this matter we believe that the verdict of the jury is conclusive, and we must assume, in the absence of any instructions in the record, that the instructions properly covered the questions in controversy. To say that one cannot make a complaint at a telegraph office but at the risk of a personal assault, for which the assailant alone will be liable, and that, when hearing such complaint, the agent is not acting for his employer, is to extend the rule of the cases altogether too far.

The judgment of the District Court is affirmed.

BURKE, J., having presided on the trial in the court below, did not participate.

NORTHERN SHOE COMPANY v. CECKA.

(135 N. W. 177.)

Appeal — questions not raised below.

1. The question of the sufficiency of an affidavit for attachment cannot be raised for the first time in the supreme court.

Attachment — effect of adjudication of bankruptcy.

2. It is not a ground for quashing attachment proceedings in an action to recover the purchase price of the goods attached, that the debtor has been adjudicated a bankrupt and that such goods have been selected and set apart to him as exempt.

Bankruptcy — filing claim in, as waiver of right of attachment.

3. The fact that plaintiff, after the adjudication in bankruptcy, abandoned attachment proceedings instituted by him within four months prior thereto, and

filed his claim thereafter as a general creditor, does not constitute a waiver of his right to attach, or estop him from subsequently attaching property in an action for the purchase price after the same has been set apart to the debtor by the bankruptcy court as exempt.

Opinion filed February 26, 1912.

Appeal from District Court, Nelson county; *Charles F. Templeton, J.*

From an order denying defendant's motion to quash certain attachment proceedings and to dismiss the action, defendant appeals.

Affirmed.

Statement of Facts.

The facts are not in dispute, and are as follows:

During 1908, 1909, and part of 1910 the appellant owned and conducted a store at Michigan City, in Nelson county, North Dakota. He bought shoes, etc., from the respondent, valued at $3,181.24, and made partial payments amounting to $2,439.68, and owed respondent $741.56 as a balance on open account. March 25, 1910, respondent sued appellant in the Nelson county district court to recover said balance, and obtained an attachment under subd. 8, § 6938, Rev. Codes, which was levied upon the greater part of the shoes, etc., in controversy in the present action.

During the pendency of said action and while said shoes, etc., were in the possession of the sheriff, appellant filed his voluntary petition in bankruptcy in the United States court, and was adjudged a bankrupt on July 26, 1910. In the schedule of debts forming part of his petition in bankruptcy, appellant set out the balance of account which he owed to the respondent, and made mention of the action pending thereon. Notice was given and a meeting of creditors held on August 10, 1910, at which respondent was represented by a duly authorized agent who had in his possession and filed for allowance and payment a claim against appellant and his estate in bankruptcy, which had been prepared and verified by respondent's treasurer on August 6, 1910, the basis of which was the balance of account owing by appellant to respondent, together with the costs of the aforesaid action and attachment

proceedings. In this claim it is stated that "said corporation has not, nor has any person by its order, or to the knowledge or belief of deponent, for its use, had or received any manner of security for said debt whatever." The claim was allowed, and was voted by respondent's agent in the election of a trustee which followed. One Henry G. Middaugh, one of respondent's attorneys in the above-mentioned action, was elected trustee, and shortly thereafter respondent released its attachment on said goods and caused the sheriff to deliver the same to appellant's trustee. The shoes were then restored to appellant's stock and passed into the possession of his trustee, together with a miscellaneous lot of other property. Such attachment was abandoned because it was unenforceable on account of the indefiniteness of the description of goods as claimed exempt. The schedule in bankruptcy did not specify any particular property as exempt, but contained a general claim for $1,000 exemptions from the stock in trade, and the goods attached in this case were not pointed out as part of these exemptions until sometime after the appointment of the trustee.

In due time appellant made application to his trustee to have his exemptions set apart, and furnished therewith a list of all of his property, including the shoes, etc., above mentioned. Pursuant to said application, appraisers were appointed and an appraisement made of all of said property. Thereafter said trustee set apart said shoes, etc., to the appellant as his exemptions, and the goods were delivered to the appellant in the early fall of 1910. After making said selection the trustee filed a report of his proceedings as required by subd. 11, § 47, of the bankruptcy act. Upon the filing of such report, notice to creditors was given and twenty days allowed by rule XVII. in which creditors might take exception to the trustee's action relative to allowing said exemptions. No appearance was made or exceptions taken by the respondent, and said report was approved by the referee, all of said proceedings having been taken and fully completed at least thirty days prior to the commencement of the action thereinafter mentioned.

On January 12, 1911, respondent commenced a second action in the lower court to recover the same debt, and caused a second attachment to be issued. The second attachment was levied upon the same goods, seized under the first writ, and some additional goods, and all of the

same has since been held under said levy by the sheriff of Nelson county.

Appellant thereafter moved the lower court to set aside said second attachment and to direct a return of the goods, which motion was denied. The appeal is from such order.

Nothing has been paid to appellant's creditors, and the assets held by the trustee will probably not yield more than five cents on the dollar. The goods attached were sold by respondent to appellant, and the sum sued for is the purchase price thereof. The sheriff's return on the attachment describes the shoes taken.

Frich & Kelly, for appellant.
Murphy & Duggan, for respondent.

FISK, J. (after stating the facts as above). A sufficient answer to appellant's first contention is the fact that it is clear, from the record, that the question of the sufficiency of the affidavit for attachment was not raised or passed upon in the court below. Mahon v. Fansett, 17 N. D. 104, 115 N. W. 79.

Appellant's other and chief contention, as we understand it, is in effect that respondent, by its conduct in abandoning its first attachment and consenting that the property be turned over to the trustee in bankruptcy, and by filing its claim in the bankruptcy court as an unsecured creditor; and also by failing to object to the report of the trustee turning the shoes over to the debtor as exempt,—thereby waived its right to thereafter pursue such exempt property by attachment in the state court, and that it is estopped on account of such facts from so doing. Appellant's counsel seem to labor under the belief that, because of these facts, the debtor gains some right in this exempt property which, but for the bankruptcy proceedings, he would not have possessed: *viz.*, the right to own and enjoy the same freed from any claim of the respondent to attach it for the purchase price. In other words, having been set apart to him as exempt by the bankruptcy court, such property is wholly and forever after exempt as against the claims of all creditors whose claims were provable in bankruptcy, even though as to certain of such creditors no exemptions are allowed under the state statute. Counsel attempt to differentiate this case from Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L.R.A. 770, 88 N. W 703, on

the ground that in such case the attaching creditor filed no claim and made no appearance in the bankruptcy court, and that the exempt property which was there attached was never in the possession of the trustee. We are unable to discover how such facts are in any manner controlling. We fail to see how the fact that respondent participated in the proceedings in the bankruptcy court should operate to deprive it of the remedy which it now asserts. The remedies, even if two remedies existed, were not at all inconsistent, as appellant contends. In fact, at the time it filed its claim as a general creditor this remedy did not exist at all, and, of course, it had no means of knowing that the debtor would later on select, and cause to be set apart to him by the bankruptcy court, these shoes as exempt. In other words, it had no choice of remedies at that time. How, then, respondent's acts, as above stated, can operate to create an estoppel in appellant's favor, we are wholly at a loss to comprehend. Surely, appellant was bound to know that, the statute, on exemptions were allowed him as against an attachment for the purchase price, and consequently if he selected property as exempt which he had not paid for, that his creditors might pursue it. The bankruptcy court cannot make property exempt which under the statute is not exempt, nor does it attempt to do so. This is not a case like some of those cited by counsel, where respondent has, by contract or otherwise, expressly waived his remedy of attachment, or by an election of remedies has lost such right.

Appellant cannot assert a waiver or estoppel based on the fact that the first attachment was abandoned, for under the Federal law the adjudication of bankruptcy operated to annul such attachment levy, and respondent did nothing except what the law itself, in effect demanded that he should do. See § 67 f. bankruptcy act. Counsel for appellant are clearly in error in their assumption that respondent, under the first attachment, had a lien which might, except for plaintiff's voluntary acts, have survived the adjudication of bankruptcy. The plaintiff had no lien except by virtue of the levy of its attachment. The Code nowhere gives a special lien to a vendor of chattels who has delivered same to his vendee, except as he may acquire such lien by the levy of an attachment or execution in an action to recover the purchase price. Certain language employed in the opinion in Weil v. Quam, 21 N. D. 344, 131 N. W. 244, might possibly be construed to the contrary, but we there merely

intended to hold that the statute confers a special right to attach or levy upon specific personal property in an action for its purchase price.

We are agreed that the prior decisions of this court, as well as the decisions of other courts hereafter cited, fully sustain the order made by the learned trial court.

See Re Kaeppler, 7 N. D. 435, 75 N. W. 789; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; Jewett Bros. v. Huffman, 14 N. D. 110, 103 N. W. 408; Re Durham, 104 Fed. 231; Re Little, 110 Fed. 621; Re Hill, 96 Fed. 185; Re Wells, 105 Fed. 762; Re Jackson, 116 Fed. 46; Re Edwards, 156 Fed. 794.

Order affirmed.

GOLDSTEIN et al. v. PETER FOX SONS COMPANY.

(40 L.R.A.(N.S.) 566, 135 N. W. 180.)

Writ and process — erroneously describing copartnership as a corporation — amendment.

1. Where a summons wherein a defendant company was erroneously named as a corporation, when in fact it was a copartnership, was personally served within the state on a partner as the managing agent of the alleged corporation, it constitutes a valid service upon the partner and copartnership sufficient to vest jurisdiction in the court to permit, on proper showing made, an amendment of the summons and complaint served, that the defendant company may be designated therein as a partnership with partners named.

Note.—The question of the effect of erroneously describing defendant in process as a corporation, instead of an individual or partnership is considered in a note appended to this case in 40 L.R.A.(N.S.) 566. And, as shown by the cases there reviewed, the decision in GOLDSTEIN v. PETER FOX SONS CO., sustaining the right to permit an amendment in such case so as to charge defendant as a partnership, instead of as a corporation, is in harmony with the general weight of authority, though in some courts such a misdescription is interpreted not as bringing the right defendant into court under a wrong name, but as suing the wrong party, and in those jurisdictions an amendment to correct the defect is deemed a bringing in of new parties, and is therefore not allowed.

On the question of defects in service as affecting jurisdiction generally, see note in 61 Am. St. Rep. 485.

Writ and process—erroneously describing copartnership as corporation — service on one partner as managing agent — amendment.

2. Such service was not void, and the amendment so permitted did not thereby bring new parties defendant into the suit; but instead, it merely was descriptive of the entity against whom the action was brought and upon whom service was made.

Erroneous description of partnership as corporation in summons — service on one partner as managing agent — joint judgment against several partners.

3. Such personal service upon a partner confers jurisdiction upon the court to enter judgment under § 6884, Rev. Codes 1905, jointly against the partner served and all members of the partnership named; and where property is *in custodia legis* by virtue of the levy of an attachment in the action, the court has authority under said statute to order that the property held be sold and applied in satisfaction of the judgment.

Special appearance to challenge jurisdiction.

4. Where the jurisdiction of the court over the person of the defendant is challenged under a special appearance made pending the action and before judgment, the same is not a general appearance and a judgment entered by default is valid.

Appeal — questions reviewable — judgment.

5. The question here presented going only to the jurisdiction of the court to enter the judgment sought to be vacated under a special appearance, this court will consider only the jurisdictional questions raised, and, on determining that the trial court had jurisdiction to enter the judgment, the decision of the trial court refusing to vacate the same is affirmed.

Opinion filed March 1, 1912.

An appeal from an order of the District Court of Richland county denying defendant's application to vacate the judgment entered and dismiss the action for want of jurisdiction; *Allen*, J.

Affirmed.

J. A. Dwyer and *Wolfe & Schneller*, for plaintiffs and respondents.

Purcell & Divet, for defendants and appellants.

Goss, J. The summons and complaint were issued November 6, 1908, with an attachment, in an action by these plaintiffs against the defendant company, designated as the Peter Fox Sons Company, a corporation, instead of against a copartnership with members named as

now entitled. A car of poultry was attached November 9th, and personal service of summons, complaint, warrant of attachment, and notice of levy was then made at Hankinson upon Anthony Fox, one of the copartners. The defendant company was named as a corporation, and service upon it was attempted to be made by such personal service upon Anthony Fox as its managing officer, then within the state, and alleged to be in charge of the poultry attached. The provisional remedy was issued; and no question of the regularity of the levy or attachment proceedings is raised other than the right of the court to permit the amendment made to all the pleadings and files, so the action is now entitled against a partnership, defendant, with copartners named. On the 30th day after such levy and personal service upon Anthony Fox, and while the action was pending against the company named as a corporation, the many Foxes as members of the partnership entered, by their attorneys, a special appearance in the action brought against the alleged corporation. Therein they recited that they are "appearing specially for the purpose of objecting to the jurisdiction of the court, and for no other purpose, and move the court for an order setting aside the service of summons herein and dismissing this action." With the motion as a part thereof, made under special appearance, was a notice of hearing thereon, set for January 5, 1909; supporting the motion were affidavits of Frank Fox and Joseph Fox, wherein they aver that the Peter Fox Sons Company is not a corporation, but a partnership, consisting of eight partners named Fox; and that no service has been made upon them except the service of the summons upon Anthony Fox as an officer, agent, or representative of the Peter Fox Sons Company, charged as a corporation; and that all members of said partnership are residents of Chicago, and there engaged in the commission business. A continuance of the hearing on the motion was had under agreement between counsel and the court until January 19th, when it was further continued, to be taken up at the convenience of the court and counsel. To that date no general appearance had been made by the attorneys for these appellants.

On December 19th, without notice, upon a showing by affidavits, plaintiffs moved the court to amend all the pleadings *nunc pro tunc*, to read as now entitled. And on December 21st, and while the motion to set aside the service was pending, the motion to amend *nunc pro*

tunc was granted, and all pleadings and files amended accordingly, as of the date of the commencement of the suit, November 6, 1908; and a new complaint was filed so entitled, wherein the copartnership relation of defendants was pleaded. All this was without notice to the opposing counsel, who had appeared on the motion to dismiss made under special appearance. Thereafter, and on January 19th, seventy-four days after this issuance of the attachment, and more than sixty days from its levy, defendants being in default in general appearance, on proof thereof by affidavit and on proof on the merits submitted, the court entered findings of fact and conclusions of law under which, on January 20, 1909, a judgment was entered in favor of plaintiffs and against defendants jointly, adjudging the sale of the personal property levied upon; that its proceeds should be applied in satisfaction of such judgment and costs.

Immediately after the entry of this judgment, on affidavits and under a special appearance, an order to show cause was applied for and issued. It briefly recited the proceedings had and the pendency of the prior motion under special appearance, and cited plaintiffs to show cause forthwith why the service of the summons, the judgment entered, and all other proceedings had, should not be vacated and set aside and the action be dismissed. In applying for this order to show cause, defendants endeavored to avoid making a general appearance. Their motion was: "Come now the above-named defendants, appearing specially for the purpose of this motion and none other, objecting to the jurisdiction of the court, and move the court for an order setting aside and vacating the service of summons herein, and vacating and setting aside the judgment heretofore entered herein against the defendants, and vacating and setting aside all proceedings heretofore had herein." On the return of the order to show cause the court, on February 10, 1909, denied the motion, thereby refusing to vacate the judgment or dismiss the action. Appellants appeal therefrom, assigning error sufficient to require a review of these entire proceedings.

A discussion of jurisdictional principles is now in order. Jurisdiction to issue the provisional remedy of attachment upon compliance with the statutory requisites was vested in the court by statute. A summons was issued, regular on its face, accompanied with a verified complaint and affidavit and undertaking for attachment, and upon their presentation the clerk issued from the court a warrant of attachment for

service by levy thereunder as provided by law, and the property of the defendant, the Peter Fox Sons Company, was levied upon under the supposition that such company was in fact, as designated, a corporation. Whether the defendant was a corporate entity, existing as such by law, or whether instead it was a contractual entity, a partnership made up of various natural persons, is, so far as the validity of the provisional remedy is concerned, of no consequence. The warrant and proceedings had thereon, being regular, were valid until set aside. The court had jurisdiction of the general subject-matter and had acquired, under a valid levy, possession of property upon which it could proceed *in rem*, regardless of whether it ever procured personal service upon the defendant named in the process, it having power to proceed against such defendant by substitute service by the publication of summons. This power existed by virtue of the property so obtained under the levy. To that extent for sixty days after the issuance of the warrant of attachment, by force of statute, § 6950, Rev. Codes 1905, a quasi or conditional jurisdiction remained in the court, for which purpose, under § 6850, Rev. Codes 1905, from the time of "the allowance of the provisional remedy the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings." The proceedings had, then, even though designated as against a corporation which in fact was nonexistent, were valid, and clothed the court with jurisdiction to such an extent as might be necessary for it to control subsequent proceedings, including the property levied upon. And the writ, being valid, likewise protected the officer in his levy. While life was remaining in the proceedings had by provisional remedy, jurisdiction was thereby conferred upon the court to amend any process or pleadings, by changing, as it did, the designation of the defendant from a corporation to a copartnership with individual members named. Such amendment could be made, subject, of course, to attack by motion for any irregularity existing. But until so attacked the warrant and proceedings had thereon was valid, and thereby kept in the court the jurisdiction it possessed by virtue of the warrant of attachment issued and the levy had, pending the service of the summons. But such authority failed before entry of judgment and on the expiration of the sixty-day period prescribed by § 6940, Rev. Codes 1905, without service of summons or a first publication thereof, unless it be that the service at-

tempted by the delivery of the summons and other papers to Anthony Fox was a valid service, conferring thereby jurisdiction upon the court of the person served, be it corporation or members of partnership. What, then, was the effect of such service where the summons was directed against the Peter Fox Sons Company, a corporation, as defendant, when in fact the Peter Fox Sons Company existed, not as a corporation, but as a partnership, and the person upon whom such summons was served, instead of being the supposed managing agent of the corporation, was a member of such copartnership? Was such service a valid service or was it void? If void it was no service, and the court could thereon base no jurisdiction. But if the service was merely defective, and as such subject to some attack thereon, it was valid until attacked, and necessarily conferred jurisdiction upon the court of the person served. And who was served? Certainly not something having no existence. Nor was it a corporation that was sought to be reached and brought before the court, but instead, it was "the Peter Fox Sons Company," who had dealt with and had become liable to these plaintiffs. And in this connection, under the affidavits filed against the granting of the order to show cause, it appears that this Peter Fox Sons Company had placed in circulation cards describing their business, carefully refraining from stating what they were, and upon inquiry made to Anthony Fox by the attorney of record for plaintiffs, prior to suit, that he might know whether to sue it as a partnership or corporation, this party, bearing the appropriate cognomen of Fox, informed him that the Peter Fox Sons Company was a corporation. Taking the moving affidavits of this company as true, such statement must have been false; and whether it was made to enable defendant company to urge the contention now before us, or, on the contrary, made without reference to any action to be brought, it is unnecessary to ascertain. Granting the falsity of such statement and plaintiffs' reliance thereon, it is unnecessary to determine the real intent underlying the falsehood. This managing officer of the company, when served with summons, knew it was the Peter Fox Sons Company, a partnership, that was served, as he well did the impossibility of serving a nonexistent corporation, by mistake or misapprehension so designated. As is well said in Ex parte Nicrosi, 103 Ala. 104, 15 So. 507, an action wherein a person doing business under a company name was served with a summons

designating the company name, as a corporation, the court holds the term "corporation" to be merely descriptive of a named defendant, and not a part of the name itself. The reasoning of the court is as conclusive as it is unanswerable on the question before us. We quote from the opinion:

"It is clear that the Roswald Grocery Company, whatever it was, whether a partnership, a corporation, or an individual assuming the name for the purposes of trade, was the party against whom or which suit was instituted, has all along been prosecuted, and will be continued if and after the amendments moved for are allowed. There is, in other words, no question here as to the identity of the defendant throughout all the proceedings which have been or may, in any proposed event, be had, being originally and at all times the same in the mind of the plaintiff. The entity which entered into the rental contract, which has enjoyed the shelter of plaintiff's house, which has failed to pay the agreed price therefor, and which is sought, in this action, to be coerced into payment thereof, is one and the same, whether it be a contractual entity (a partnership), an artificial entity (a corporation), or a personal entity (an individual); and, whether one or another of these entities, its name is the same.—'The Roswald Grocery Company'—and its liability is the same and enforceable by the same remedies. That entity, whatever its character, or the source or manner of its being, was proceeded against originally in this case and brought before the court by attachment of its property. Once there it was found that a mistake had been made; not as to the entity itself,—not as to the party sued,—but merely in respect of describing what kind of an entity the party defendant was. The motion to amend stated and confessed this mistake of description. The plaintiff averred and showed this mistake, and he asked to correct it. He, in effect, said to the court that while he had sued the proper party, and had levied on the goods of the proper party, he had misdescribed that party, not, indeed, in respect even of the name of the defendant, but in respect solely of the status of that proper party, as being an artificial, instead of a personal, entity; for surely the averment that the Roswald Grocery Company was a corporation is not part of the name of that company. It might as well be said that to aver that Jones & Smith is a partnership is to make the averment of partnership a part of the

name 'Jones & Smith'; or that to sue 'John Smith, a man,' is to make the defendant's name not John Smith only, but 'John Smith, a man.' And to omit such averments no more changes the name of the corporation than of the partnership or the individual. It is not a question of name. . . . But it is a matter of description, a change of which does not affect the identity of the party sought to be described, but only gives accuracy and certainty to it. The case of Western R. Co. v. Sistrunk, 85 Ala. 356, 5 So. 79, is, on principle, in point. The averment that a defendant is a corporation is there held to be descriptive of a named defendant, and not a part of the name itself; and that, where this description had been omitted, it might be added without offense to the limitations upon our very broad statutes of amendments. Its addition did not change the party sued. Being merely descriptive when it is at first stated by mistake, it is not conceivable how its elimination could make of that thing which it was incorrectly supposed to describe a different thing. To add it does not change the name—being no part of the name—and, it being already stated, to strike it out cannot. Being stricken out in this case, the suit is against the Roswald Grocery Company. The further amendment is that this company is Esther Roswald, and that she is engaged in business, rented this house, executed these notes, and owes this debt under the name and style of the 'Roswald Grocery Company.' . . . The amendments should have been allowed. We feel that a different conclusion would be to emasculate our very liberal, and to be liberally construed, statute on the subject, which requires the allowance of amendments to cure 'any defect of form or substance.' "

And in this connection we have, in § 6883, Rev. Codes 1905, a similar statute reading:

"The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or, proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

The foregoing leaves but little to add. Defendant will contend that such an amendment is in reality bringing in new parties to the suit, and, therefore, if permissible, service of summons upon such new

parties is necessary, citing thereunder White v. Johnson, 27 Or. 282, 40 Pac. 511, 50 Am. St. Rep. 726, and notes thereto, and similar holdings. If the amendment here permitted amounted to the bringing in of new parties, counsel's contention would be supported by the weight of authority, but it does not substitute anew for the old party. It merely makes definite the character of the real party sued, the necessity for the knowledge concerning which, besides being proper for the sake of certainty, is that the court may order the appropriate judgment in form and comply with the statute in such respect. See Western R. Co. v. Sistrunk, supra, above referred to, holding: "An amendment to a complaint and summons, showing that the defendant is a body corporate and is sued in its corporate capacity, does not operate to substitute a new party defendant." Consult also Nisbet v. Clio Min. Co. 2 Cal. App. 436, 83 Pac. 1077, wherein defendant was sued as the Clio Mining and Milling Company, a corporation. Two corporations existed,—one, the Clio Mining Company; and the other the Clio Mining & Milling Company, as named, which latter company attempted to defend because of misnomer for the mining company intended to be sued and upon whom service of summons was made. An amendment was permitted and the action continued as against the real company concerned, although erroneously named as the other corporation. Thereon the court says: "Under the circumstances disclosed by this record it would be sticking in the bark, and sacrificing substance for shadow, to lay down the technical rule that the plaintiff was stripped of the privilege or right to amend his pleading by the voluntary appearance of the Clio Mining & Milling Company in an action plainly brought against another corporation of a similar name, but different residence. In the case at bar the body of the complaint clearly indicated that the intention was to sue the Clio Mining Company and recover upon its debt, and parties appearing in that action could not close their eyes to substantial facts, and rely upon mere technical omissions in the caption or title of the cause," citing Anglo-American Packing & Provision Co. v. Turner Casing Co. 34 Kan. 340, 8 Pac. 403. In Stowers Furniture Co. v. Brake, 158 Ala. 639, 48 So. 89, it is held that "where the complaint did not show whether defendant company was a partnership or a corporation, it was properly amended to show that it was a corporation," in line with Gans v. Beasley, 4 N. D. 140, 59 N. W. 714, where, as in

this case, service was attacked under a special appearance. But the opposite contention was urged in Gans v. Beasley, that the summons was addressed to no person, and that no person was required to answer, and that the court obtained jurisdiction of no person by the service. Amendment *nunc pro tunc* was had as in this case. The court says: "An attempt was made to describe the defendants in the original summons, but such description was imperfect inasmuch as it gave only their firm name, and did not give the full Christian and surnames of the individual members of the firm, as good practice requires." The amendment was held proper that the right to amend as to names of parties exists "where the amendment does not operate to prejudice the parties, and does operate in furtherance of justice. But the right to amend must be qualified so as to forbid an amendment which effects an actual change of parties." This decision, in 1894, placed our state in line with the more recent authorities, that the service of a summons containing a misnomer, but where served upon the party to the suit, confers jurisdiction; and having the right, the court may, in its discretion, permit an amendment in the designation of the party litigant. Newton v. Melville Mfg. Co. 17 Abb. Pr. 318, note, and Skoog v. New York Novelty Co. 4 N. Y. Civ. Proc. Rep. 144, hold that "where persons doing business under the name of the New York Novelty Company were served with summons in that name, a motion to amend the summons by inserting the names of such persons as defendants should be granted if there was no corporation by that name, though the complaint alleged that it was such corporation."

See also Hathaway v. Sabin, 61 Vt. 608, 18 Atl. 188; Messler v. Schwarzkopf, 35 Misc. 72, 71 N. Y. Supp. 241; York v. Nash, 42 Or. 321, 71 Pac. 59; and Baldock v. Atwood, 21 Or. 73, 26 Pac. 1058. See also 30 Cyc. 144: "Under the codes and practice acts of the several states much latitude is now permitted with regard to amendments affecting parties, and it is usual that the court be permitted, on motion of either party at any time, in furtherance of justice, and on such terms as may be proper, to permit an amendment adding or striking out the name of a party, or correcting a mistake in the name of a party, or changing the character in which he is sued." And 31 Cyc. 487, that "as a general rule, under the statutes, a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect

an entire change of parties. But where the right corporation has been sued by the wrong name, and service has been made upon the right party, although by the wrong name, an amendment substituting the true name of the corporation may be permitted." And the same authority on page 489,—that "an amendment charging defendant as a partnership, instead of as a corporation, may be allowed, and the converse has been held. Likewise it has been held that where an action is brought by plaintiff as copartners, instead of as a corporation, through a mistake of facts concerning their incorporation, they may be permitted to amend by making the corporation plaintiff,"—citing Farmers' & M. Bank v. Glen Elder Bank, 46 Kan. 376, 26 Pac. 680; Anglo-American Packing & Provision Co. v. Turner Casing Co. 34 Kan. 340, 8 Pac. 403; Teets v. Snider Heating Mfg. Co. 120 Ky. 653, 87 S. W. 803; Haggarty v. Strong, 10 S. D. 585, 74 N. W. 1037. See also 38 Century Dig. cols. 1177 et seq. and 40 Century Dig. cols. 2789 et seq.; 15 Decen. Dig. §§ 94, 95, et seq.; see 19 Enc. Pl. & Pr. 573, where it is stated that "it is the general rule that where parties have been once brought under the jurisdiction of the court, such jurisdiction can be lost only by actual dismissal of the action, and amendments of the pleadings will not require a new service of process."

In many of the foregoing cited cases the defendant, misnamed, has appeared generally and sought an advantage because of such misnomer, by answer, plea in abatement, or motion, invoking the jurisdiction generally of the court; and to such extent, the additional reason why jurisdiction should be sustained that the defendant submitted to the jurisdiction of the court existed over that here found. But authorities held that under a statute similar to § 6883, Rev. Codes 1905, once jurisdiction attaches the authority of the court is ample to correct a mistake in name or designation of the party sued. The authorities are practically unanimous in holding with the Alabama case quoted, that the designation of the defendant as a corporation or partnership does not thereby conclude the court from permitting an amendment to the process or pleading that the same shall describe the legal entity of the real party, whether person, partnership, or corporation. Where the correct person, either natural or artificial, is served in an action brought against it on a cause of action existing, when it is erroneously named, jurisdiction is conferred upon service made upon it, and, hav-

ing jurisdiction, power exists to amend in furtherance of justice to conform to the fact.

Defendants contend that the service made upon Anthony Fox was under a supposition that a corporation was being served and that he was served as an officer of a corporation; and knowing that such substitute service was made for such purpose, and that no corporation existed, and that no valid proceeding could be had against it, he had the right to ignore, as he did, such service; and that plaintiff could not thereunder, to his prejudice, change by amendment the action to constitute one against a partnership of which he was a member, and thereby bind him or any members of the partnership individually by such service. This reasoning overlooks the fact that the Peter Fox Sons Company is the defendant, by whatever name it may exist, and Anthony Fox, personally, and through him his copartners, were charged with notice of the pendency of this suit and the knowledge of the law; and that thereunder an amendment was permissible that the suit might continue against the members of the partnership jointly, obedient to § 6847, Rev. Codes 1905, that "when the action is against two or more defendants, and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows: (1) If the action is against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise directs; and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served; . . . or (2) if the action is against defendants severally liable he may proceed against the defendants served in the same manner as if they were the only defendants." Under this statute the court, having had power to amend after personal service upon one member of the partnership, had jurisdiction to order a joint or joint and several judgment against such person; and where the property *in custodia legis* was the joint property of the several partners, one of whom was served, the court properly ordered a joint judgment in so far as it was necessary to enforce the same against the joint property.

In reaching our conclusions, we have not overlooked the following cases, in part holding the contrary, and to that extent against what we believe to be the weight of authority: Leatherman v. Times Co. 88

Ky. 291, 3 L.R.A. 324, 21 Am. St. Rep. 342, 11 S. W. 12; Bassett v. Fish, 75 N. Y. 303; New York State Monitor Milk Pan Asso. v. Remington Agri. Works, 89 N. Y. 22; which last case, in an unsatisfactory *per curiam* opinion, without citation of authority, reverses the same case in 25 Hun, 475. The Kentucky case tries to discriminate its holding from Heckmon v. Louisville & N. R. Co. 9 Ky. L. Rep. 297, 4 S. W. 342, supporting our conclusions herein.

Nor do the following, cited in appellant's brief, apply, or announce any rule inconsistent with our holding: Powers v. Braly, 75 Cal. 237, 17 Pac. 197; Plemmons v. Southern Improv. Co. 108 N. C. 614, 13 S. E. 188, and Thompson v. Allen, 86 Mo. 85, to the effect that, on the bringing in of a new defendant, service must be had upon him before further proceedings be taken. As heretofore stated, the amendment permitted brought in no new party, but merely permitted a change in description of the entity of the Peter Fox Sons Company, the defendant. While said partnership could not at common law be proceeded against as a legal entity without the partners being named, yet it was sued under its firm name with service upon one partner, and jurisdiction was thereby conferred upon the court of the Peter Fox Sons Company, in whatever capacity it might exist; and having such jurisdiction of it, the amendment allowed, designating its individual members, was not in fact bringing in new defendants. Had it been sued as a partnership, with partners named and service been made upon Anthony Fox, one of them, no question could be raised but that the court could render the judgment entered. With the same facts existing, but without designation of corporate entity or naming of partners, under Gans v. Beasley, 4 N. D. 140, 59 N. W. 714, the same thing here done and the same judgment here entered would necessarily have to be sustained. The erroneous designation of the defendant company as a corporation certainly could not defeat jurisdiction when under such holding a failure to characterize the entity sued does not.

The appellants, throughout this proceeding, have acted on the theory that no general appearance has been made. Their every act has been performed under a special appearance, although they have thereunder procured the issuance of an order to show cause by the court, and, upon the service thereof and appearance of opposing parties thereunder, have participated in the hearing called by the court. Whether so doing

would be considered as an appearance generally or an appearance under the special appearance made to invoke the court to issue the order, we do not determine, as it is not necessary to do so. We have assumed that no general appearance herein has been made in law. The order to show cause is general in its terms, and the party is cited to respond to proceedings other than those sought under the special appearance. Whether the participation in the determination of these matters, on the return of the order, is a waiver of the special appearance made, we do not decide. The weight of authority is that the invoking of the power of the court to determine more than the question of the jurisdiction of the person is a submission of the person to the jurisdiction, or, in other words, one cannot, by motion under special appearance, challenge, in effect as by demurrer, the right of the court to entertain the subject-matter or act thereon, without submitting jurisdiction of the person as fully as though the same matter had been challenged by demurrer, even though the whole proceeding be attempted under a special appearance.

Following appellants' theory of the case, and consonant with his assignment of error, we do not pass upon whether the court abused its discretion in entering this judgment with the motion pending before it; nor do we treat the application other than as one solely of jurisdiction in the lower court to enter the judgment. As defendant there challenged only the jurisdiction, and that was there, as here, determined adversely to him, it was in no sense there, and is not here, to be treated as an application to vacate the judgment on other than strictly jurisdictional grounds.

Therefore our conclusion is that the service of this summons was not a void act, but instead clothed the court with jurisdiction over the Peter Fox Sons Company, whatever its legal status was; and possessing jurisdiction by attachment of the property, and with the personal service on Anthony Fox, having jurisdiction of the person and subject-matter, the court could permit the amendment as made, the defendant being wholly in default; that the effect of such amendment was not to substitute or bring in new parties defendant, but merely to establish the identity of the true party sued and served; and hence service of the amended or a new summons and amended pleadings was unnecessary, the court retaining jurisdiction by the service had, and

with authority, under § 6847, Rev. Codes 1905, thereunder to enter judgment, as it did; and which judgment was and is valid; and vacation of the judgment being sought on jurisdictional grounds only, the findings of its validity is the equivalent to a denial of the application to vacate it. Accordingly the judgment appealed from is affirmed, with costs.

SPALDING, Ch. J., dissents.

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CHAMPERTY.

Deed in this case was given by one out of possession, and who had not received the rents or profits from the premises for more than a year just previous to the execution of the deed. *Held* void, as against one in possession, under color of title of a foreclosure sale, and the possession of a tenant, or the possession of a tenant of a prior owner, *held* to be the possession of the defendant. Cotton v. Horton, 1.

CHATTEL MORTGAGES.

Evidence examined, and *held*, that it shows the property described in two chattel mortgages had been neglected and placed in jeopardy by the mortgagors, and its value thereby lessened, and the debts secured rendered insecure, so that, under the terms of the mortgages, the mortgagee was justified in commencing foreclosure proceedings before the apparent maturity of the debt. Englund v. Souther, 261.

CHILDREN. See Wills, 318–319.

CHRISTIAN NAMES. See Mortgages, 469.

COMMON CARRIERS. See Master and Servant, 616.

1. A person is not a passenger and entitled to consideration and protection as such who, after waiting all day in a station for a train and discovering that he will be unable to reach his destination in time for the accomplishment of the purpose of his journey, leaves the station and goes to a hotel for supper, and then returns to such station for the purpose of sending a telegram, announcing the fact that he will be unable to make the journey, and that it is his intention not to attempt to do so. Galehouse v. Minneapolis, St. P. & S. S. M. Ry. Co. 615.
2. A clause in a special contract with a common carrier, which provides in substance that when property is injured, as a condition precedent to a right of action, plaintiff must give notice in writing of any claim for damages or injury to the officer or station agent, before said property is removed from the place of destination, is not prohibited by the provisions of law limiting the right of such common carrier to exonerate itself from certain liabilities for negligence, fraud, and wilful wrongs. Cooke v. Nor. Pac. R. Co. 266.

CONSPIRACY.

The civil action of conspiracy is a tort action, and cannot, in general, be main-

CONSTITUTIONAL LAW. See Constitution, 363.

COURTS.

CREDITORS. See Fraudulent Conveyances, 46.

CRIMINAL CONVERSATION.

EXECUTIONS.

FRAUDULENT CONVEYANCES.

HABEAS CORPUS.

LANDLORD AND TENANT.

1. A landlord who agrees in his contract with his tenant during the continuance of the lease to furnish heat for the proper heating of the building leased, and fails to keep his contract, after having been given notice of the defect and allowed a reasonable time in which to remedy the same, commits acts which in law will be regarded a constructive eviction of the tenant from the premises. Russell v. Olson, 410.
2. The contract being silent upon the measure of damages, the statutory rule prevails. The damages, therefore, in this case, should be such as may fairly and reasonably be considered either arising naturally or as according to the usual course of things from such breach of contract itself, or such as will reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. While profits may be considered in proper cases in estimating damages, proof of them must be of a high character, and not such that the jury are left to speculate or guess what, in fact, they are or would be. Russell v. Olson, 410.

LIABILITY. See Corporations, 329; Negligence, 251; Surface Waters, 153.

LIENS. See Adverse Claims, 304; Judgment, 534.

1. Plaintiff's testimony as to the making of a demand on the defendant for the grain in controversy, and as to the market value thereof at the date of such demand, examined, and *held* competent and sufficient in the absence of any showing to the contrary. Fried v. Olsen, 381.
2. Evidence examined and shows that the defendants Frank and Tompkins were the owners of adjoining lots in the city of Minot, North Dakota; that in August, 1907, F. decided to build a three-story brick building upon his lot, and advertised for bids and let the contract for the same. Some time thereafter T. decided to build upon his lot, and consulted the contractor and architect already employed by F., and entered into a contract with the contractor to build a three-story building upon his lot; such building, however, to be only one third the size of F.'s building in other respects. The contractor bought the material for both buildings from plaintiff; but there is evidence of separate estimates, so that plaintiff could have kept separate bills. Plaintiff gave a notice by registered letter, as required by § 6237, Rev. Codes 1905, to each lot owner, to the effect that his building and lot would be held for the material therein used. Later plaintiff filed a joint lien against both lots and buildings. *Held*, that the contracts were separate and distinct, and that the joint lien filed against both premises is void. Meyer Lumber Co. v. Trygstad, 558.

STATUTES—continued.

5. Section 3013, Rev. Codes 1905, which provides that "the county treasurer of each county wherein any city or municipal corporation shall have constructed a bridge or shall hereafter construct a bridge over any navigable stream, shall pay to the city treasurer of such city or municipality, whereby such bridge has been constructed, or is about to be constructed, all money in the county treasury or which may come into the county treasury, in the bridge fund of such county, which may have been or shall be levied, assessed and collected from persons and property, or either, in said city or municipality," construed, and *held* to be a valid enactment. State v. Anderson, 65.

6. In construing a statute, the courts will give effect to the spirit, rather than the mere letter, of the same, with a view of effectuating the evident intention of the legislature; and to this end the courts, where necessary to carry out the evident legislative intent, will limit general language of an act to the cases contemplated by it. In other words, where the enforcement of general statutory provisions to particular facts clearly not in the contemplation of the legislature would lead to unjust and absurd results, the court is justified and required to limit the application of such general provisions so as not to thwart the legislative will. Power v. Hamilton, 177.

STATUTES CITED AND CONSTRUED.

REVISED CODES OF 1905.

STATUTES CITED AND CONSTRUED—continued.

CONSTITUTION.

LAWS OF 1889.

LAWS OF 1890.

LAWS OF 1897.

LAWS OF 1899.