REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

FEBRUARY, 1910, TO MAY, 1911.

F. W. AMES
REPORTER

VOLUME 20

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FOR THE STATE OF NORTH DAKOTA.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. D. E. MORGAN, Chief Justice.

HON. BURLEIGH F. SPALDING, Judge.

HON. CHARLES J. FISK, Judge.[1]

HON. JOHN CARMODY, Judge.[2]

HON. S. E. ELLSWORTH, Judge.[2]

F. W. AMES, Reporter.

R. D. HOSKINS, Clerk.

---

[1] Elected to fill vacancy caused by resignation of Judge Young, and qualified January 10, 1907.

[2] By constitutional amendment, adopted November 3, 1908, the membership of the court was increased to five, and Judges Carmody, who qualified January 18, 1909, and Ellsworth, who qualified January 18, 1909, were appointed additional members.

JUDGES OF THE DISTRICT COURT.

District No. One,
CHARLES F. TEMPLETON.

District No. Two,
JOHN F. COWAN.

District No. Three,
CHARLES A. POLLOCK.

District No. Four,
FRANK P. ALLEN.

District No. Five,
J. A. COFFEY.

District No. Six,
W. H. WINCHESTER.

District No. Seven,
W. J. KNEESHAW.

District No. Eight,
K. E. LEIGHTON.

District No. Nine,
A. G. BURR.

District No. Ten,
W. C. CRAWFORD.

District No. Eleven,
FRANK FISK.

District No. Twelve,
S. L. NUCHOLS.

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

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

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH DAKOTA

WILLIAM SCHEER v. CLINTON FALLS NURSERY CO., A Foreign Corporation.

(124 N. W. 1115.)

Sales — Remedies of Buyer — Overpayment — Complaint.

1. A complaint in an action to recover as for money had and received, *held* to state facts sufficient to constitute a cause of action where it appears that the money sought to be recovered consists of an overpayment through mistake of fact of the purchase price of goods purchased, as a result of a deficiency in the shipment, although it appears from such complaint that defendant had the right during a certain season to supply such deficiency, and it is not alleged that such season had terminated at the time the suit was brought, the parties having, by contract, expressly stipulated, in effect, that no goods shall be paid for until actually delivered.

Sales — Overpayment — Demand — Accrual of Action.

2. Plaintiff ordered from defendant, under a contract containing a stipulation as above stated, certain nursery stock consisting of trees. The next day, after delivering same, plaintiff discovered a deficiency in the shipment, and immediately demanded the return to him of the portion of the purchase price corresponding to such deficiency, or the balance of the trees.

Held, that immediately upon a denial of such demand a cause of action accrued in plaintiff's favor for the recovery of such overpayment.

Note.—The right to recover back overpayments is considered in a note in 24 L.R.A.(N.S.) 517, which shows that the general rule that payments made in mistake of fact may be recovered is applicable when it is sought to recover overpayments.

The general question as to when assumpsit lies to recover money paid is the subject of a note in 38 Am. Dec. 44.

Sales — Overpayment — Demand.

3. Other contentions of appellant relative to the sufficiency of the demand and the nature of the action, considered, and overruled.

Opinion filed February 3, 1910.

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

Action by William Scheer against Clinton Falls Nursery Company. From a judgment in plaintiff's favor and from an order overruling defendant's motion for a new trial, defendant appeals.

Affirmed.

Geo. K. Shaw, for appellant.

J. J. Youngblood, for respondent.

FISK, J. This is an appeal both from an order denying defendant's motion for a new trial and from a judgment. The amount of plaintiff's recovery in district court is $18.30 exclusive of costs and disbursements.

The action originated in justice court and was brought to recover the amount of a certain overpayment made by plaintiff to defendant for certain nursery stock consisting of Russian willows theretofore ordered from defendant by plaintiff. Such order was in writing and by its terms provided, among other things, as follows: "If for any reason said Clinton Falls Nursery Company does not make a delivery at said place in above-mentioned season (spring 1906), I agree to take the goods if sent by express C. O. D., provided all charges are paid. Anything that may be left out, the same to be deducted from the amount of the bill." It is thus apparent that under the contract no trees were to be paid for until delivered, and that as to any shortage in shipment the contract price thereof was to be deducted from the total price to be paid.

It is undisputed that the shipment when delivered to plaintiff was short to the extent of 583 willows, the contract price of which was 3 cents apiece, and that plaintiff did not discover such shortage until the next day after receiving the trees and paying the full bill, when he immediately demanded of the defendant's agent or servant to whom he

made such payment the repayment to him of the amount of such excess payment. Appellant's assignments of error do not require extended notice.

It is first contended that the complaint fails to allege facts sufficient to constitute a cause of action, the point being that the complaint upon its face discloses that the action was prematurely brought for the reason that it is therein alleged that this nursery stock was to be delivered sometime during the planting season of 1906, and there is no allegation as to when such planting season commenced and terminated. In other words, the contention is that no cause of action could accrue to plaintiff until such planting season terminated, as, up to that time, defendant had the contract right to supply the deficiency in such shipment. Such contention is manifestly unsound, and is based upon a clearly erroneous conception of plaintiff's rights.

Plaintiff, as before stated, was not to pay for any trees until delivery, and any shortage in shipment was to be deducted from the total agreed purchase price. This being true, a cause of action immediately arose in plaintiff's favor upon discovery of such shortage, to recover the excess payment, as for money had and received by defendant to plaintiff's use. While defendant had the right to deliver such trees and to collect therefor at any time during such planting season, it had no right to retain money paid to it by plaintiff, through mistake, in excess of the price of the trees actually delivered. This is too plain for discussion.

This disposes of appellant's first two assignments of error.

It is next urged by appellant's counsel that, during such planting season, defendant tendered to plaintiff the balance of such willows, which tender was refused. Counsel failed to direct our attention to any testimony in the record sustaining his contention. It is true the witness Saunders testified that he tendered to plaintiff certain willows which were in the livery barn and which had previously been ordered by one Hunt, but plaintiff denies such tender, and the most that can be claimed is that there is a conflict in the testimony regarding such tender. This being true, we are not disposed to disturb the findings of the jury, especially in view of the fact that the trial court, on motion for new trial, refused to disturb such findings.

It is also urged by appellant's counsel that plaintiff repudiated his contract by bringing this action prior to the expiration of the planting season of 1906, and hence defendant was not bound to offer to further perform its part of the contract. We are at a loss to understand how the attitude of plaintiff in seeking to recover this excess payment, made through mistake of fact on his part, could thus operate. We think such contention is sufficiently answered by what we have heretofore stated regarding the rights of the respective parties growing out of such contract of purchase.

What we have just said regarding the last assignment sufficiently disposes also of the fourth assignment, which is predicated upon the erroneous theory that the action is one to recover damages for the nonperformance of the contract. It is not a case for the recovery of damages, nor did plaintiff in any manner rescind or attempt to rescind the contract, hence what is said in appellant's brief under his fourth assignment of error is wholly inapplicable to the case at bar as we view it. There was no necessity of plaintiff rescinding the contract as a condition to his recovery of such excess payment.

Appellant's last contention, that no demand was made by plaintiff upon defendant prior to suit for the return of such money, is, we think, without merit. The contention is that such demand should have been made on defendant at its home office in Owatonna, Minnesota, instead of upon its representative in this state, Saunders, to whom such moneys had been paid. We think the demand upon the latter, under the circumstances, was sufficient, if a demand was necessary. Furthermore, it is quite apparent from defendant's attitude that any demand wheresoever or upon whomsoever made would have been unavailing.

The order and judgment appealed from are affirmed. All concur.

GILBERT HOLTAN v. JOHN A. BECK.

(125 N. W. 1048.)

Evidence — Action for Recovery of Office — Sufficiency of Evidence — Presumptions — Innocence.

In an action brought under chapter 25 of the Code of Civil Procedure for the purpose of trying title to the office of sheriff of McLean county, it appeared from admissions of the pleadings that defendant and appellant received a majority of the votes cast for the office of sheriff of said county at the general election held in McLean county in November, 1908; that he was declared to be elected by the county board of canvassers, and a certificate of election issued to him by the county auditor; that he qualified by taking the oath of office and filing a good and sufficient official bond, which was duly approved by the board of county commissioners of McLean county; that he thereupon entered upon and performed the duties of said office of sheriff, and was, at the beginning of said action, exercising the functions of said office, claiming title thereto, and refusing to surrender the same to the plaintiff as his successor in office. On the trial of said action, plaintiff, in support of his title to said office, over defendant's objection, offered in evidence parts of the minutes of the board of county commissioners of McLean county, reciting that on January 7, 1909, at a regular meeting of the board, a resolution was passed, declaring the office of sheriff of said county to be vacant by reason of the fact that John A. Beck, the party elected thereto, was not a resident of McLean county as then constituted; and that at a subsequent meeting, on January 8, 1909, said board appointed Gilbert Holtan as sheriff of said county and accepted his official bond. Plaintiff also offered in evidence a primary election petition of defendant, John A. Beck, in a part of which he stated under oath that on March 14, 1908, he was a resident of McClusky, which at the time of the trial and at all times after December 24, 1908, was in the newly segregated county of Sheridan; also, a copy of the poll list of McClusky precinct, showing that on June 24, 1908, J. A. Beck voted at a primary election held in that precinct. Upon the introduction of this testimony, plaintiff rested, and defendant offered no testimony whatever.

Held, that plaintiff has failed by competent evidence to prove the allegations necessary to sustain his action, and that the trial court should have granted the motion made by defendant at the close of plaintiff's testimony to dismiss the action.

Opinion filed February 11, 1910. Rehearing denied April 13, 1910.

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

Civil action by Gilbert Holtan against John A. Beck for the purpose of obtaining the remedy formerly obtainable by the writ of quo war-

ranto in trying the opposing claims of plaintiff and defendant to the office of sheriff of McLean county. A judgment was entered declaring the plaintiff entitled to the office, and ousting defendant, from which judgment defendant appeals.

Judgment reversed, and action dismissed.

Hyland & Nuessle, for appellant.

When causes creating a vacancy arise, it exists regardless of the action of the board. Rev. Codes, § 422; 29 Cyc. Law & Proc. p. 1401, cases cited, note 44; People ex rel. Finigan v. Perkins, 85 Cal. 509, 26 Pac. 245; State ex rel. Atty. Gen. v. Matheny, 7 Kan. 327; Re Atty. Gen. 14 Fla. 277; Johnson v. Mann, 77 Va. 265; People ex rel. Tracy v. Brite, 55 Cal. 79.

There is no presumption that J. A. Beck and John A. Beck are the same. Jones, Ev. ¶ 99, and cases cited; Andrews, Pl. ¶ 71, note and cases cited; Andrews v. Wynn, 4 S. D. 40, 54 N. W. 1047; 16 Cyc. Law & Proc. p. 1056; Ambs v. Chicago, St. P. M. & O. R. Co. 44 Minn. 266, 46 N. W. 321; Bennett v. Libhart, 27 Mich. 489; Lawson, Presumptive Ev. Rule 58, p. 255.

Respondent must show his appointment, disqualification of appellant, and a vacancy. 29 Cyc. Law & Proc. p. 1419, and cases cited in note; Tillman v. Otter, 93 Ky. 600, 29 L.R.A. 110, 20 S. W. 1036; Miller v. English, 21 N. J. L. 317; Throop, Pub. Off. 785, and cases cited; State ex rel. Clarke v. Board of Health, 49 N. J. L. 349, 8 Atl. 509.

Presumption is against crime and in favor of innocence. Revised Codes, § 7317, ¶ 1; Kadlec v. Pavik, 9 N. D. 278, 83 N. W. 5; Jones, Ev. ¶ 100; Excelsior Mfg. Co. v. Owens, 58 Ark. 556, 25 S. W. 868; Klein v. Laudman, 29 Mo. 259; Smith v. Fuller, 16 L.R.A.(N.S.) 98, and note, 138 Iowa, 91, 115 N. W. 912; Waddingham v. Waddingham, 21 Mo. App. 609.

McCullouch & Gibson (*Engerud, Holt, & Frame,* of counsel), for respondent.

Election of unqualified person to office is of no effect. People v. Morrell, 21 Wend. 563; State ex rel. Hartshorn v. Walker, 17 Ohio, 135; State ex rel. Ives v. Choate, 11 Ohio, 511; Carleton v. People, 10 Mich. 250; People ex rel. Tracy v. Brite, 55 Cal. 79; Yonkey v.

State, 27 Ind. 236; Re Bagley, 27 How. Pr. 151; Throop, Pub. Off. §§ 424, 426.

It was the duty of county commissioners to recognize vacancy and fill it. Yonkey v. State; Re Bagley; State ex rel. Ives v. Choate; and People ex rel. Tracy v. Brite, supra.

Exercise of power to appoint presumes lawfulness of such appointment. 9 Enc. Ev. p. 183; Eldodt v. Territory, 10 N. M. 141, 61 Pac. 105; Conklin v. Cunningham, 7 N. M. 445, 38 Pac. 170; Wenner v. Smith, 4 Utah, 238, 9 Pac. 293; Thompson v. Holt, 52 Ala. 501; State ex rel. Jackson v. Howard County, 41 Mo. 251; Throop, Pub. Off. § 558; Salem v. Eastern R. Co. 98 Mass. 451, 96 Am. Dec. 650.

Action of board was conclusive on collateral attack. State, Amerman, Prosecutor, v. Briggs, 50 N. J. L. 114, 11 Atl. 423; Johnson v. Towsley, 13 Wall. 83, 20 L. ed. 486; Oxborough v. Boesser, 30 Minn. 1, 13 N. W. 906; Robb v. Brachmann, 24 Ohio St. 3; State ex rel. Ocean County v. Vanarsdale, 42 N. J. L. 536; 1 Herman, Estoppel, §§ 435–439; notes to Duchess of Kingston's Case in 3 Smith, Lead. Cas. 2101.

ELLSWORTH, J. This appeal arises out of a civil action brought under the provisions of chapter 25 of the Code of Civil Procedure for the purpose of trying, as formerly under the writ of quo warranto, the opposing claims of plaintiff and defendant to the office of sheriff of McLean county. The plaintiff (respondent here) alleges, in substance: That he is a resident and elector of McLean county as it is at present constituted. That at the general election held in November, 1908, there was submitted to the electors of McLean county, as it then existed, the question of dividing said county by creating out of a portion thereof a new county to be known as "Sheridan county." That at such election a majority of the votes cast on the proposition of dividing the county were in favor of the creation of the new county of Sheridan. That thereafter such proceedings were had by the governor of the state of North Dakota and the board of county commissioners that said county of Sheridan was segregated from the county of McLean; such proceeding being complete on December 24, 1908; that, at the same general election in which the vote on county division was taken, the defendant, John A. Beck, was a candidate for the office of sheriff

of McLean county as it then existed, and received a majority of the votes cast at said election for such office. That, upon the canvass of said vote by the county board of canvassers, a certificate in the form provided by law was executed and delivered to said defendant by the county auditor of McLean county. That said defendant, at the time of said general election, was, and ever since has been, and now is, a resident and elector of that territory inclosed within the boundaries of the newly organized county of Sheridan, and has been such resident and elector continuously since the 24th day of December, 1908, and is not now, and has not at any time been, a resident or elector of McLean county as it now exists. That on the 8th day of January, 1909, the board of county commissioners of McLean county, at the regular annual meeting of such board, by resolution appointed the plaintiff to the office of sheriff of McLean county to fill the vacancy caused by the disqualification of the defendant. That thereupon plaintiff qualified as required by law, by executing and filing the oath of office and an official bond, and on the 16th day of January, 1909, made demand upon defendant for the possession of the books, records, and other property belonging to said office. That the defendant then and there refused, and still refuses, to surrender said office, or any of the books, papers, or records thereof, to plaintiff, and continues to withhold the same and to remain in possession of the sheriff's residence; and denies plaintiff's title and right to such office. Then follows a prayer for judgment, declaring that plaintiff is the rightful sheriff of McLean county and entitled to exercise the powers and functions of that office and to take and receive from defendant the books, records, and other property pertaining thereto; and that defendant be ousted and excluded therefrom and enjoined from in any manner interfering with or intruding into said office.

The defendant admits the allegations of the complaint with reference to the election held in November, 1908, and the results thereof so far as they relate to the division of McLean county and the office of sheriff of said county. He admits that by official declaration of the board of county canvassers he was entitled to receive, and did receive, a certificate of election from the county auditor to said office of sheriff. He denies that he was on and after December 24, 1908, a resident of that portion of the former territory of McLean county now constituting

the new county of Sheridan, and in that behalf alleges that at the time of the general election in November, 1908, and ever since, he has been, and now is, a resident and elector within the territory which is comprised within the county of McLean as it is now constituted, and that he is now, and has been ever since the 24th day of December, 1908, continuously, a resident, citizen, and elector of said county. He further alleges that, after receiving the certificate of election to said office, on the 4th day of January, 1909, he took and executed the oath of office and filed with the county auditor of McLean county a good and sufficient official bond; that same was duly approved by the board of county commissioners of said county; that thereupon he did enter upon and perform the functions and duties of said office, and has at all times since the 7th day of January, 1909, exercised and performed all the duties, powers, and functions of said office of sheriff of McLean county, and is now exercising and performing the same.

The case came on for trial before the district court without a jury on July 21, 1909, and the plaintiff offered in evidence certain pages of the minute book of the county commissioners of McLean county, from which it appeared that on January 7, 1909, at a regular meeting of the board of county commissioners, a resolution was passed reciting the division of McLean county and the creation of the new county of Sheridan by means of the vote taken at the general election held in November, 1908; that the segregation of Sheridan from McLean county was fully completed on December 24, 1908; that the defendant, Beck, a resident of the village of McClusky, formerly in the county of McLean, but now a resident of the county of Sheridan, had been elected, had qualified, and was then acting as and occupying the office of sheriff of McLean county; that by reason of the fact that said defendant was not an elector of the county of McLean or a resident of the county in which the duties of the office are to be discharged, and therefore not qualified to hold the office of sheriff of said county, the same was declared to be vacant. A further portion of the minutes of the county commissioners was then offered, showing that at a meeting of said board on January 8, 1909, with all members present, "on motion Gilbert Holtan was appointed sheriff of McLean county," and that on February 1, 1909, at a meeting of said board, "on motion the official bond of Gilbert Holtan, sheriff, was accepted, the same having

been approved as to form by the state's attorney." The paper containing the official oath and bond of Gilbert Holtan as sheriff was then offered in evidence, and it, together with the offers made of parts of the records of the county commissioners' proceedings, was objected to by defendant on the ground that all of such evidence was incompetent, irrelevant, and immaterial, in that it did not show, or tend to show, any legal appointment of plaintiff as sheriff of McLean county, or that any vacancy in the office of sheriff of such county existed at the time such appointment was made. Plaintiff then offered in evidence a paper designated as "primary election petition of John A. Beck," containing, among other things, an affidavit of John A. Beck made on March 14, 1908, in which he deposed in the words, "I reside at McClusky in the county of McLean and state of North Dakota." There was also offered in evidence a primary election poll-book for McClusky precinct of said McLean county for an election held June 24, 1908, on which the name of J. A. Beck appeared as that of one who voted in that precinct at that election. The offer of these exhibits was objected to by defendant for the same reasons given in his objection to the other evidence. Plaintiff then testified that he was a resident of McLean county as constituted at the time of the trial, and that he had executed the oath of office and official bond offered in evidence. At the close of his testimony, plaintiff rested his case, and defendant moved for a dismissal of the action on the ground that plaintiff had wholly failed by competent evidence to prove the allegations set out in his complaint, and had not shown himself entitled to hold the office of sheriff or to recover in the action. This motion was denied by the court, and the defendant elected to stand thereon, and did not offer any evidence whatever in his own behalf.

The district court thereupon entered its findings of fact, which, among others, contained the following: "That said defendant was at the time of said election, and ever since has been, a resident and elector within that territory which is comprised within the boundaries of said newly organized Sheridan county, and was not and is not a resident or elector of the county of McLean as it now exists and has existed since the 24th day of December, 1908." It further found that the allegations of plaintiff's complaint were true, and, as a conclusion of law, that the defendant, Beck, was disqualified to hold and ineligible to

the office of sheriff of McLean county after the completion of the organization of Sheridan county; that a vacancy existed in the office of sheriff of McLean county on January 7, 1908; and that plaintiff was legally appointed to and qualified for said office, and was entitled to a judgment ousting defendant therefrom and requiring him to surrender to plaintiff the books, records, and property pertaining thereto. Defendant demands that the action be tried anew in this court, and specifies as error of the district court its findings that the defendant, Beck, was not a resident of McLean county as constituted at the initiation of the action; that by reason thereof the office of sheriff was vacant; and that defendant was legally appointed to and entitled to the same.

The first question presented for our consideration, therefore, is whether or not the findings of the court that defendant, Beck, was not a resident of McLean county as constituted on January 7, 1909, is supported by the evidence introduced for that purpose. As there was no conflicting evidence introduced by defendant, if there is any competent proof whatever to support the finding of the court, it will not be disturbed. If the finding is sustained, the conclusion necessarily follows that defendant was disqualified to act as sheriff of McLean county, and that by reason of such fact a vacancy existed in the office.

An examination of the evidence offered by respondent serves to show that there is no direct evidence that on January 7, 1909, Beck was not a resident of McLean county as then constituted. Plaintiff in offering in evidence the record of the proceedings of the county commissioners of McLean county on January 7, 1909, and subsequent dates, relies wholly upon a presumption arising from the fact of plaintiff's appointment. The rule relied on is that "the exercise of the power of appointment and the issuing of a commission to an appointee is presumptive, but not conclusive, evidence of the existence of a vacancy in the office to which the appointment is made." 9 Enc. Ev. p. 183. It is conceded by respondent that the county commissioners were without power to remove defendant from office, and that the part of their resolution reciting that after December 24, 1908, defendant, Beck, was not a resident of McLean county, is without evidential force. It is also conceded that in case defendant was not a resident of the county in which the duties of his office were to be discharged, on January 7,

1909, such fact by operation of law rendered his office vacant. Rev. Codes 1905, § 422, subd. 7. If such vacancy in fact existed, then the board of county commissioners was vested with the right of appointment to fill the vacancy. Such appointment, however, must be made not only by formal action of the board, but "in writing." Rev. Codes 1905, §§ 428, 431.

It is apparent from the section above quoted that the last act contemplated on the part of the appointing power is the issuance to the appointee of a writing in some form, whether it be denominated "commission" or "certificate of appointment." Until this writing is executed, the appointment is not final and irrevocable, but may be reconsidered at any time before such certificate is issued and another person appointed to the office. Conger v. Gilmer, 32 Cal. 75. When issued, it "is manifestly the best evidence of the officer's title, with or without accompanying evidence of the jurisdiction of the officer or body issuing the certificate as the general rules of evidence may require." Throop, Pub. Offi. § 297. This writing is evidently the "commission" contemplated by the rule of evidence above quoted upon which respondent relies, which, when introduced in evidence, operates not only to raise a presumption of an existing vacancy in the office to which the party named in it is appointed, but serves also as evidence prima facie of his title to the office. Chandler v. Starling, 19 N. D. 144, 121 N. W. 198.

The appointment shown by the record of the proceedings of the county commissioners introduced in evidence by plaintiff and respondent is at best inchoate, and, in view of the objection made by appellant, the proof offered must be regarded as secondary and incompetent for the purpose of showing a valid appointment or of establishing title to the office. No attempt was made to show anything more than that a motion or resolution was passed by the board of county commissioners. Even if we assume that all formality in the matter of an appointment in writing may be dispensed with, it does not appear that the resolution adopted was in writing. No attempt was made to show that a certificate of appointment was at any time issued and was lost or destroyed, in order to lay the foundation for secondary proof of appointment. Such evidence, therefore, not only wholly fails to raise a presumption of an existing vacancy in office, but fails entirely to prove

the fact of appointment, or that plaintiff had acquired any title to the office. It was therefore properly objectionable on all the grounds urged by appellant, and cannot be considered for the purpose of sustaining the finding of the court.

The affidavit of appellant sworn to by him on March 14, 1908, may be regarded as an admission by him that at that date his residence was at McClusky. This court will take judicial notice of the fact that the village of McClusky was at that time within the territory now embraced in the new county of Sheridan and outside of the boundaries of McLean county as constituted on and after December 24, 1908.

Appellant contends that the expression, "at McClusky," can be taken only to mean that appellant's postoffice address was at that point, and that his actual residence might be at a point sufficiently distant therefrom to bring it within the limits of McLean county as at present constituted. He further contends that there is no sufficient identification of John A. Beck the defendant, with J. A. Beck, the party whose name appears upon the poll list of the primary election held in McClusky precinct on June 24, 1908; and that, even though the voter who is named was in fact the defendant, there is nothing to show that the portion of McClusky precinct in which he then resided was not within the present limits of McLean county. In our view of the entire case, however, a determination of these points is not necessary or important, and it may therefore be assumed that on March 14, 1908, and June 24, 1908, appellant was a resident of McClusky precinct and living beyond the boundaries of McLean County as constituted after the segregation of Sheridan county on December 24, 1908. His residence thus assumed, it is claimed there arises a presumption applicable to a status such as possession, ownership, residence, and the like that, once shown to exist, it continues until the contrary is established by evidence either direct or presumptive. This presumption, though it has been recognized in many cases as existing, does not seem to be established as "a genuine rule," and is "always disputable, sometimes entitled to considerable weight, but frequently liable to be rebutted by very slight circumstances." 1 Jones, Ev. § 52; 4 Wigmore, Ev. § 2531.

Assuming, therefore, that defendant, on June 24, 1908, had his place of residence outside of the limits of McLean county as now con-

stituted, does it follow, as a reasonable presumption from the facts shown, that his residence at this place continued after the time that he qualified as sheriff of McLean county, claimed title to the property and emoluments of that office, and entered upon the exercise of its very important functions? We have already noted that the presumption of continuity of residence may be rebutted by slight circumstances raised either directly or presumptively.

If it appears, in an action such as this, that the person against whom it has been commenced is guilty of usurping, intruding into, or unlawfully holding or exercising the office in question, the court is authorized not only to render judgment ousting and excluding him therefrom, but may in its discretion impose upon him a fine not exceeding $5,000. Rev. Codes 1905, § 7359. If he is falsely assuming or pretending to be or to act as a county officer when he is not such in fact, he is liable to fine and imprisonment. Rev. Codes 1905, § 8632. If he is wilfully exercising any of the functions of his office after the expiration of his term and the qualification of his succcssor, he is guilty of a misdemeanor. Rev. Codes 1905, § 8646. If, knowing his term to have expired or his office to be vacant, he refuses to surrender to his successor the books and papers appertaining to his office, he is also guilty of a misdemeanor. Rev. Codes 1905, § 8647. It is alleged in plaintiff's pleading, and is one of the undisputed facts present in this case, that defendant holds a certificate of election to the office of sheriff of McLean county for a term of two years from January 4, 1909, has made and filed his official oath and bond, is exercising and claiming the right to exercise the duties of the office, and is refusing to turn over the books and papers belonging to said office, or to permit plaintiff to enter into the same. It follows that unless he has, between June 24, 1908, and the initiation of this action, transferred his residence from the county of Sheridan to McLean county, every act that he has performed as sheriff of McLean county is an unlawful act, and that he is guilty of a crime and misdemeanor, and is liable to fine, forfeiture, and imprisonment. In the face of a state of facts such as this, the slight and inconclusive presumption that his residence still continues in Sheridan county entirely disappears. "The law will not presume that a party has committed an unlawful act." Kadlec v. Pavik, 9 N. D. 278, 83 N. W. 5. Such presumption is one of the

strongest known to the law, and clearly outweighs any presumption that a state of fact shown to exist continues unchanged for several months thereafter.

It is urged by the plaintiff in this action that the fact with reference to appellant's place of residence was peculiarly within his own mind and most easily proved or disproved by him; and, if such residence was in McLean county, defendant might in a few words have given direct testimony that would have settled conclusively the entire matter, and that the fact that he sat mute and did not offer any testimony whatever "is most persuasive against him." It will be noted, however, that the plaintiff, while attacking the title to office of one whom he admits is acting in the office, elected to rest his case entirely upon presumption. In such a case appellant was entirely within his rights in also deciding to rest upon the much stronger presumption arising out of his incumbency of the office. Plaintiff might at any time, in presenting proof upon what he admits is "a vital point," have called appellant to the stand, and under a statutory right of cross-examination have inquired of him as to his residence at and after the time of the segregation of the territory now comprising Sheridan county from that of McLean county, without in any manner binding or concluding himself by his statements. Schwoebel v. Fugina, 14 N. D. 375, 104 N. W. 848. The duty to furnish direct and positive testimony of any essential fact is certainly first the duty of the party having the burden of proof.

In an action of this character, it is incumbent upon plaintiff to show by clear and satisfactory evidence his title to the office claimed. He cannot rely upon the weakness of the defendant's title. In this particular plaintiff has wholly failed. His evidence not only falls short of showing even presumptively a vacancy in the office, but also fails to show a valid and irrevocable appointment. As noted above, the presumptions are all in favor of defendant's lawful tenure of the office at the time of the beginning of this action. As against this state of facts, plaintiff must show not only an actual vacancy existing therein, but a valid appointment thereto. "A 'vacancy in office,' within the meaning of the law, can never exist when an incumbent of the office is lawfully there and is in the actual discharge of official duty." State

ex rel. Standish v. Boucher, 3 N. D. 389, 21 L.R.A. 539, 56 N. W. 142.

At the close of the evidence offered, the district court should have granted defendant's motion to dismiss the action.

The judgment entered by the district court is, accordingly, reversed, and it is directed to enter a judgment dismissing the action.

FISK, J. (concurring specially). I concur in the result arrived at in the foregoing opinion; but, as to that portion of the opinion wherein it is held that the proof of plaintiff's appointment by the board of county commissioners is insufficient, I choose to express no opinion, as a decision of such question is wholly unnecessary to a decision of the case.

CARMODY, J. I concur with Judge FISK.

On Petition for Rehearing.

PER CURIAM. A petition for rehearing filed by respondent's counsel in this case calls attention to an inadvertent misstatement in the opinion of this court in the clause, "It is conceded by respondent in this case that the county commissioners were without power to remove defendant from office, and that the part of their resolution reciting that after December 24, 1908, defendant, Beck, was not a resident of McLean county, is without evidential force." It is apparent, from an examination of respondent's brief, that this clause is inaccurately framed, and should have read: "It is conceded by respondent that the county commissioners were without power to remove defendant from office. The part of their resolution reciting that after December 24, 1908, defendant, Beck, was not a resident of McLean county, is therefore without evidential force." While it is true that respondent does not concede that the preamble to the commissioners' resolution referred to in the opinion is without evidential force, it is obvious that such is the case. Respondent's contention in his brief, and also upon his motion for rehearing, is that under the provisions of § 2339, Rev. Codes 1905, after the division of a county it becomes the duty of the board of county commissioners of the original county to inquire into

and determine what offices have become vacant by the segregation of a part, in order that any vacancies found to exist may be filled; and that a finding of fact made in the course of an official inquiry instituted in the performance of that duty carries with it at least prima facie evidence of truth. The authority for such inquiry respondent claims is necessarily implied from § 2339, which reads as follows: "The county commissioners of a county from which a portion segregates under this article shall immediately after such segregation redistrict their county into the districts provided for by the laws then existing and shall fill the vacancies occasioned by such segregation in the manner provided by law for filling vacancies." A reasonable construction of this section, according to its terms, discloses no additional duty required of the county commissioners except that of creating new commissioners' districts when rendered necessary by the division of the county. If in performance of this duty it incidentally appears that the office of county commissioner or possibly some other of the county offices are vacant by reason of the division, the board is required to fill the vacancy. If the purpose of the statute is to require as a duty of the county commissioners an inquiry into the fact of vacancies in office, the means under which such inquiry could be fairly and justly made would certainly be provided, including, among other important incidents, notice to the party whose office may be declared vacant. No such notice is provided for; neither is an orderly procedure of any kind governing the conduct of such inquiry indicated or suggested. The evident purpose of this statute is to provide only for redistricting the county after the segregation of a part, and the power of the county commissioners to inquire into or declare a vacancy in office is in no manner extended by its provisions. As any evidential force to be given the finding of the county commissioners that a vacancy existed depends wholly upon whether it was made as the result of an inquiry which the commissioners were authorized or required to institute, it follows that under the facts of this case such finding is wholly without weight either as a direct or presumptive means of proof.

Counsel in his petition for rehearing also attacks the reasoning of the opinion to the effect that the evidence submitted of respondent's appointment is insufficient to establish prima facie his title to the office or to raise a presumption that a vacancy existed in the office. His contention is that the record of the action of the county commissioners

made by the county auditor on his minutes is an ample and sufficient compliance with the statute requiring that an appointment to fill a vacancy be made in writing, and dispenses with the necessity of a formal written commission. In the view of the writer of this opinion, such contention is without merit. The commission provided for by statute is evidently a writing signed by the appointing power, and not simply a written record of its oral action; and nothing short of production of the document itself will satisfy the conditions required of a party who elects to rely wholly upon a presumption arising from the fact of such appointment, or to base a claim of title to office upon it. There is the same differences between the appointment in writing required by law and an entry on the commissioners' minutes stating the fact of appointment as there is between any official document duly executed by the officer required to make it and the history of his act in making and signing such a paper written by another and entirely different person. In this view, however, as will be noted from an examination of the opinion, the other members of this court do not deem it necessary to the result announced to concur, but hold that, even though the appointment shown by the evidence of this case raises a presumption of vacancy in office, such presumption is entirely overborne by the counterpresumption that defendant did not commit a crime by taking, holding, and attempting to perform the duties of a county office when he was not a resident of the county.

The petition for rehearing is therefore denied.

ST. ANTHONY & DAKOTA ELEVATOR COMPANY, a Corporation, v. ISIDOR DAWSON and John H. Byfield, Copartners as Dawson & Byfield.

(126 N. W. 1013.)

Personal Property — Sales — Implied Warranties.

1. On a sale of personal property by the owner, there is an implied warranty of title free from incumbrance.

Sales — Constructive Possession — Effect as to Implied Warranties.

2. There may be an implied warranty of title of personal property on a sale thereof, although only in the constructive possession of the seller as bailor.

Note.—The courts unanimously hold that the warranty of title which is im-

Warehouse Receipts — Effect of Assignment — Transfer of Title.

3. An indorsement in blank followed by an unconditional delivery by the holder of a warehouse receipt for grain stored in a public elevator, to a creditor for a valuable consideration, passes the title to the grain represented by the ticket, and is a transfer of the title and a sale of the grain to such creditor.

Warehousemen — Delivery of Ticket to Elevator Company — Sales.

4. Where such creditor as holder of such storage ticket therefore delivers the same to the elevator company and receives the money due thereon, a sale of the grain is thereby made.

Sales — Payment of Encumbrances by Purchaser — Damages.

5. A person who sells personal property on which there is a valid mortgage, and the purchaser is compelled to pay said mortgage after an adjudication of its validity, is liable to such purchaser for the amount of the mortgage and costs.

Sales — Defense of Title to Property Warranted — Damages — Attorney's Fees — Demand upon Warrantor to Defend.

6. If such purchaser, when sued for conversion in disposing of the property on which the mortgage was, requests the seller to defend the action, and he does not, the purchaser is entitled to recover, in addition to the amount of the mortgage and costs, special damages for a reasonable attorney's fee when pleaded and proven.

Opinion filed March 8, 1910. Rehearing denied June 10, 1910.

Appeal from District Court, Cavalier county, *Kneeshaw*, J.

Action by St. Anthony & Dakota Elevator Company against Dawson & Byfield. Judgment for defendant, and plaintiff appeals.

Reversed.

Guy C. H. Corliss, for appellant.

Where a warrantor of title is notified to defend a suit for the breach of such title and fails to defend, the recovery in such suit fixes the damage. 24 Am. & Eng. Enc. Law, pp. 740–742; 2 Black, Judgm. §§ 572, 574; 22 Cyc. Law & Proc. p. 106; First Nat. Bank v. First Nat. Bank, 68 Ohio St. 43, 67 N. E. 92.

Cleary & McLean and *Jeff M. Myers*, for respondent.

Transfer of storage tickets transfers the grain stored. Best v. Muir, 8 N. D. 44, 73 Am. St. Rep. 742, 77 N. W. 95.

MORGAN, Ch. J. This is an action for damages based upon a breach

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plied on a sale of personalty protects against outstanding liens and encumbrances, as shown by a review of the authorities in a note in 16 L.R.A.(N.S.) 410.

For a discussion of the general subject of warranty implied on sale of chattels, see note in 62 Am. Dec. 460.

of an implied warranty of title on an alleged sale of wheat to the plaintiff by the defendants. The complaint alleges that the defendants sold the wheat to the plaintiff, and that the same was encumbered by the lien of a chattel mortgage which the plaintiff was compelled to pay to the owner thereof, the Robertson Lumber Company. The answer denies that the defendants sold such wheat to the plaintiff, and further alleges that the same was sold to the plaintiff by the owner thereof, through the defendants as his agents. The action was tried to the court, a jury having been waived. Findings of fact and conclusions of law in favor of the defendants were made, and, pursuant thereto, the action dismissed. The plaintiff appeals from the judgment entered on such findings, and alleges that the findings of fact are not sustained by the evidence, and that the conclusions of law are not warranted by the facts.

In substance, the facts are as follows: One H. J. Spenst was the grower and owner of the wheat in controversy. In 1906 he mortgaged it as a growing crop to the Robertson Lumber Company to secure an indebtedness from him to such company. This mortgage was duly filed in the office of the register of deeds. After the filing of said mortgage, Spenst executed and delivered to the defendants two mortgages upon the same crop. In October of said year, one of the defendants, on behalf of his firm, interviewed Spenst in regard to the payment of the mortgages due said firm, and had in his possession at that time replevin papers for the purpose of taking possession of the mortgaged property. Spenst was not willing to have the property taken, and possession thereof was not taken under the replevin papers, but an arrangement was entered into between Dawson, representing his firm, and Spenst, whereby Spenst was to pay to the defendants the sum of $500 at once, and the defendants agreed to extend the payment of the balance for one year upon the payment of said sum. At said interview, it was agreed that the wheat should at once be hauled to market, and Spenst caused the same to be done soon thereafter; the last load having been delivered at the plaintiff's elevator on the 12th day of October, 1906. On the evening of that day, Spenst and the defendant Byfield met at the elevator, and storage tickets were issued by the plaintiff's agent to Spenst for all the wheat that he had delivered up to that time, amounting to 882 bushels. The storage

tickets were delivered by the agent to Spenst at that time, and the same were immediately indorsed by him in blank, and, after such indorsement, he delivered same to Byfield with instructions to "go and get your money." There was nothing said in regard to the market price of the wheat at that time, but the number of bushels, grade, and dockage were figured up. Spenst and Byfield then left the elevator, and went to the office of the defendants. At the office a new arrangement was entered into between them. It provided that Spenst should pay the sum of $31 in addition to what the storage tickets represented, and he was to return to the defendants a span of horses which he had purchased from them. The defendants were to receive $557 under his new contract, and the return of the horses, and upon the payment of the $31 and the return of the horses the indebtedness was to be canceled. On the following day defendants surrendered the storage tickets at the elevator office, and a cash ticket was issued to them in lieu thereof, and, upon the surrender of the cash ticket, the plaintiff paid them the full amount called for by them, being $526.25.

It is somewhat uncertain whether anything was said at the elevator on the 12th as to what the price of the wheat was at that time. From matters that transpired afterwards between Spenst and the defendants, it appears that they considered the value of such storage tickets to be $526.25. We do not deem this to be of any materiality in view of what happened thereafter in reference to the conditions under which possession was afterwards unconditionally given to the defendants of the storage tickets. The controverted question in this case is whether the storage tickets were absolutely and unconditionally turned over to the defendants to become their property, or whether the same were turned over to them as Spenst's agents, under which he was to receive the money represented thereby, to be applied on the indebtedness. On his cross-examination, Byfield states that these tickets were turned over to him as his property, but he afterwards, to some extent, qualifies that statement. On the back of the storage tickets is found a certain memorandum, which is in these words:

Date sold, Oct. 13, 1906.

66 30/60 bu. Price 64½c. Amount, $42.85. Less storage and insurance, collected,.....Net proceeds, $42.85.

Received from the St. Anthony & Dakota Elevator Co. forty-two and 85/100 dollars ($42.85) in full payment for this ticket.

[Signed] H. J. Spenst, Grower.

The indorsement on the back of the other storage ticket was precisely the same, except as to the number of bushels and price. On the 13th of October the following cash ticket was issued by the plaintiff's agent, and delivered to the defendants:

Dresden, N. Dak. Station, Oct. 13, 1906.

No. 341.

Bought of H. Spenst, 822 20/60 bu. No. 1 (grade) at 64½c. pr bu., $530.40. Less storage,.....Net value, $530.40.

The St. Anthony & Dak. Elevator Co.
By A. J. Foss, (Agt.)
Received payment.
H. Spense,
By J. H. Byfield.

Upon the surrender of this cash ticket the elevator agent paid the defendants the sum of $526.25.

These facts are practically all conceded to be true, and the appellant in his brief concedes them to be true for the purpose of his contentions, and therefrom argues that the conclusions of law are not warranted by the facts. Under such circumstances, we are to consider the facts as to their sufficiency to warrant a dismissal of the action as a matter of law. It is conceded that, when the elevator tickets were turned over to Byfield at the elevator office, the defendants were entitled to receive only $500 out of the proceeds thereof. Under the subsequent arrangements, they became entitled to all the proceeds of said tickets. Under these facts, what conclusions can properly be drawn as to whether the wheat was sold to the plaintiff by Spenst or by the defendants? Inasmuch as the facts are conceded, the findings of the trial court are not entitled to the usual presumption in their favor. The question presented to us is whether the conclusions of law are warranted by the facts or not. The respondent contends that the storage tickets, cash ticket, and the indorsements there-

on conclusively show that the defendants did not buy the wheat from Spenst nor sell it to the plaintiff. Standing alone and unexplained, this contention would have force. The question of the manner of doing business at this elevator in respect to storage tickets was proven in this case, and therefrom it appears that it was a uniform and general custom that the grower's name, if he delivers the grain at the elevator, is always used in receipting for the money, although the ticket may have been sold by him and be presented at the elevator by the purchaser as its owner. This evidence as to custom or general usage was not objected to, and is therefore not denied, and must be taken as true in this case. Whatever force would have to be given to these indorsements standing alone or unexplained cannot be given to them in view of such evidence. The indorsements, therefore, have no force as evidence that the defendants acted as Spenst's agents in this transaction. The question before us is what was the legal effect of the indorsements of the storage tickets in blank by Spenst, in connection with his action in subsequently agreeing that the defendants were absolutely and unconditionally entitled to them and their entire proceeds. Under this new arrangement, Spenst relinquished all claim to the tickets, and the defendants thereafter had absolute control thereof. The delivery of the wheat by Spenst to the elevator company was a bailment. The title did not vest in the elevator company by such delivery. The title remained in Spenst. Under the terms of storage tickets, Spenst had the right to demand possession of such wheat, and the elevator company would be compelled to turn the same over to him, if in its possession and the same could be done, and, if the same was not in its possession, and the identical wheat could not be delivered, it was compelled to deliver to Spenst an equal number of bushels of wheat of like grade. These matters are elementary, and no authorities need be cited in support of them.

It is also beyond controversy that the assignment and delivery of storage tickets unconditionally passes the title to the property and to the storage tickets to the person to whom they are delivered. This is a statutory provision in our state. Rev. Codes 1905, § 2266. It is therefore beyond dispute that the defendants became the absolute owners of the storage tickets and of the wheat represented thereby under the new arrangements made on October 12th. By presenting such

storage tickets to the elevator company and receiving the money due thereon a sale of the wheat was made by the defendants. By turning over the tickets to the elevator company and receiving the money thereunder, the elevator company ceased to be bailee and became the owner of the wheat. It is clear to us that no other effect can be given to the transaction than to hold that a sale was made by the defendants. In legal effect the facts are the same as though they had delivered the wheat at the elevator themselves and received the money therefor. In that case no question could be raised as to their having sold the wheat.

It is contended, however, that in any event there was no sale by the defendants from which an implied warranty would follow, inasmuch as there was no express claim of ownership, and possession of the wheat was not in the defendants when it was sold to the plaintiff. We think that the defendants were in the constructive possession of the wheat after the storage tickets were turned over to them, and this is sufficient to sustain a sale with implied warranty of title that it is free from encumbrance. The statute provides that an implied warranty arises when a person sells personal property as his own, and it is claimed that defendants did not sell this wheat as their own. What we have already stated disposes of this contention. We have held that the sale was not made by them as agents of Spenst, which is the same as holding that the sale was made as their own property.

In this case special damages were pleaded, and evidence as to such damages was received. The special damages pleaded and proven are attorney's fees necessarily paid out by the plaintiff in defending the action brought against it by the Robertson Lumber Company. After that suit was begun, the plaintiff herein demanded that the defendants defend that action. They did not comply with this demand, and plaintiff defended it, although unsuccessfully. Evidence as to the reasonableness of the attorney's fee in that case was submitted on this trial, and the trial court found that the sum of $150 was a reasonable attorney's fee in that action. The appellant insists in this court that said sum shall be allowed to it as damages. The respondent does not resist it in the brief, and does not consent to it. It is left entirely without argument, and no authorities are cited by either party as to the allowance of such disbursements as special damages.

We are satisfied, on principle, that the amount should be allowed in this case. The defendants having refused to defend the action, the plaintiff might jeopardize its right to recover what it paid, if it paid the amount of the mortgage or did not defend the action. If the Robertson Lumber Company mortgage was invalid for any reason, or there was any defense to it, and it had been paid by the plaintiff, no recovery could be had against the defendants on account of such payment. It was therefore a safe and business-like precaution for the plaintiff to defend said action and secure an adjudication as to the validity of the alleged prior mortgage.

We think, also, that such attorney's fees are allowable as special damages, under the provisions of § 6574, Rev. Codes 1905, when pleaded and proven. Whether that section is applicable or not is not material, as such attorney's fees may be recovered as special damages under the ordinary rule of law that full compensation is recoverable in such cases. Whereas the authorities are not in harmony upon this question, the great weight thereof is in favor of the allowance of such attorney's fees in cases where the covenantor is requested to defend the suit when brought. The authorities on this question are collected in 11 Cyc. Law & Proc. p. 1167. See also 8 Am. & Eng. Enc. Law, 2d ed. p. 190. In Seitz v. People's Sav. Bank, 140 Mich. 106, 103 N. W. 545, where a similar question was considered as upon the breach of covenants pertaining to real estate titles, the court said: "The cases are not agreed, but the better rule in our opinion, and the one sustained by the weight of authority, is that the expenses of the defense of title, including attorney's fees, are recoverable."

For these reasons, the appellant is entitled to recover from the defendants the amount of the judgment recovered against it by the Robertson Lumber Company, with the costs of that suit and interest, together with the sum of $150 as attorney's fees, with interest thereon from the date of said judgment.

The judgment is reversed. All concur.

JOHN J. STUBBS, Suing for the Use and Benefit of Charles Battelle, v. W. G. HOERR.

(125 N. W. 1062.)

Opinion filed March 18, 1910.

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

Action by John J. Stubbs against W. G. Hoerr. Judgment for plaintiff, and defendant appeals.

Modified and Affirmed.

Cochrane & Bradley, for appellant.

Lynn & Coventry, for respondent.

PER CURIAM. Aside from certain unimportant details, including the parties, the real property involved, and amount of taxes, the facts are the same as those in McKenzie v. Boynton, 19 N. D. 531, 125 N. W. 1059, with this exception, that in the case at bar plaintiff, at the time notice of the expiration of the time for redemption was attempted to be served on him, was a nonresident of this state. The stipulated facts disclose that a notice, signed "Emmons County, North Dakota, by W. H. Allen, County Treasurer," was sent by registered mail, addressed to plaintiff at Papillion, Nebraska, but was never delivered, same having been returned; also that the said Allen, as treasurer, caused to be published in the Emmons County Record an alleged notice addressed "To all persons, companies, or corporations who have or claim any estate, right, title, or interest in, or claim or lien upon, any of the several pieces or parcels of land described in the list hereto attached." Such alleged notice contains a list of names and a description of various tracts of land opposite such names, and plaintiff's name appears therein, opposite which is a description of the land in controversy. The same is signed "Emmons County, N. D., by H. W. Allen, Treasurer." The attempted service of the notice of the expiration of the time for redemption was clearly insufficient. The statute (section 14, chap. 67, Laws 1897) requires services of such notice to be made, where the

owner of the land is a nonresident of the state, by registered letter addressed to such owner at his last-known post office address, and by publication thereof in a newspaper published in the county where the land is situated, for at least thirty days. Not only does the record fail to show that plaintiff's last-known address was Papillion, Nebraska, but the notice as published in such newspaper, even conceding that the county treasurer had the right to give such notice, is not a compliance with the statute. A notice addressed generally, and running to no particular person or persons, and describing different tracts owned by different persons, is not a sufficient compliance with the statute. The rule announced in Ambler v. Patterson, 80 Neb. 570, 114 N. W. 781, and Id. 80 Neb. 575, 117 N. W. 990, under a similar statute is, we think, sound. To the same effect are the decisions in Iowa. See White v. Smith, 68 Iowa, 313, 25 N. W. 115, 27 N. W. 250, and Adams v. Burdick, 68 Iowa, 666, 27 N. W. 911.

No proper notice of the expiration of the time for redemption having been served, the rules announced in McKenzie v. Boynton, supra, are controlling, and require an affirmance of the judgment appealed from, after the same is modified in the particulars in which the judgment in McKenzie v. Boynton was directed to be modified; appellant to recover his costs on this appeal.

THE COUNTY OF BURLEIGH, North Dakota, a Public Corporation, v. THE COUNTY OF KIDDER, North Dakota, a Public Corporation.

(125 N. W. 1063.)

Limitation of Actions — Specialty Created by Statute — County Debts.

1. An action against a county to enforce a liability arising from an indebtedness of plaintiff county, charged upon the defendant county by an act of the legislature segregating from plaintiff county a portion of its territory, and annexing such territory to defendant county, is upon a specialty created by the statute, and is not within the provisions of the statute of limitations of this state.

Note. —The question of the liability for debts of territory annexed to a county, city, or other municipality is the subject of a note in 27 L.R.A.(N.S.) 1147, and

Limitation of Actions — Creation of Fund Essential to Pleading of Statute.

2. A county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund, without first showing that it has provided such fund.

Division of County — Apportionment of Debt — Legislative Rule Exclusive.

3. Where a county is divided, and the detached territory is annexed to another county, the rule for the division and apportionment of the debts between such county and the county to which the detached territory is annexed belongs exclusively to the legislature, and not to the courts; and when the legislature has determined how the debts shall be apportioned, the courts cannot interfere.

Pleas of Laches.

4. For reasons stated in the opinion, *held*, defendant county cannot successfully invoke the doctrine of laches as a defense.

Opinion filed March 19, 1910.

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

Action by Burleigh County against Kidder County. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph W. Walker, for appellant.

Appellant being ultimately liable on the obligation, statute began to run when respondent paid it. State v. Baker County, 24 Or. 141, 33 Pac. 530; Frank v. Brewer, 54 Hun, 633, 26 N. Y. S. R 590, 7 N. Y. Supp. 182; Barnsback v. Reiner, 8 Minn. 59, Gil. 37; Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1077; Mt. Desert v. Tremont, 75 Me. 253.

Statute of limitations applies to counties. 19 Am. & Eng. Enc. Law, 2d ed. p. 191. It is a meritorious plea. Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Trowbridge v. Schmidt, 82 Miss. 475, 34 So. 84.

R. N. Stevens, State's Attorney, and *Geo. W. Newton*, for respondent.

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the authorities there reveiwed show that, as a general rule, in the absence of statute or constitutional provision to the contrary, such territory is liable for its proportionate share of the existing indebtedness.

The broader question of the legal results of change of county boundaries and of the erection of a new county out of part of an old one is considered in a note in 85 Am. Dec. 100.

Legislature may impose burdens upon counties. Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; Guilder v. Dayton, 22 Minn. 366; State ex rel. Slipp v. McFadden, 23 Minn. 40; State ex rel. Atty. Gen. v. Pawnee County, 12 Kan. 426; Re Division of Howard County, 15 Kan. 194; Sedgwick County v. Bunker, 16 Kan. 498; McDonald v. Maddux, 11 Cal. 187; State ex rel. Police Comrs. v. County Ct. 34 Mo. 546; Depere v. Bellevue, 31 Wis. 120, 11 Am. Rep. 602; Stone v. Charlestown, 114 Mass. 214.

Trustee of a direct trust, when sued by beneficiary, cannot plead statute of limitations. Von Hoffman v. Quincy, 4 Wall. 554, 18 L. ed. 410; Lincoln County v. Luning, 133 U. S. 529, 532, 33 L. ed. 766, 768, 10 Sup. Ct. Rep. 363; Parish School Directors v. Shreveport, 47 La. Ann. 1310, 17 So. 823; Maenhaut v. New Orleans, 2 Woods, 108, Fed. Cas. No. 8,939; In Bullard v. Bell, 1 Mason, 243, Fed. Cas. No. 2,121.

Where a statute expressly enjoins a duty, such duty cannot be excused by statute of limitations. Coster v. Murray, 5 Johns. Ch. 522; Oliver v. Piatt, 3 How. 409, 11 L. ed. 657; Lewis v. Hawkins, 23 Wall. 119, 23 L. ed. 113; Rush County v. State, 103 Ind. 497, 3 N. E. 165; State ex rel. Hord v. St. Joseph County, 90 Ind. 359; Harrodsburg v. Harrodsburg Educational Dist. 9 Ky. L. Rep. 605, 7 S. W. 312; Underhill v. Sonora, 17 Cal. 173; Union P. R. Co. v. Durant, 95 U. S. 576, 24 L. ed. 391; State ex rel. Hudson v. Trammel (Mo.) 11 S. W. 747; Sawyer v. Colgan, 102 Cal. 283, 36 Pac. 580, 834; State ex rel. Davis v. Lincoln County, 23 Nev. 262, 45 Pac. 982.

Not until funds are in the treasury, properly applicable, will the statute begin to run. State ex rel. Davis v. Lincoln County, supra; Spaulding v. Arnold, 125 N. Y. 194, 26 N. E. 295; Sawyer v. Colgan, supra; Gasquet v. Directors of City Schools, 45 La. Ann. 342, 12 So. 506; King Iron Bridge & Mfg. Co. v. Otoe County, 124 U. S. 459, 31 L. ed. 514, 8 Sup. Ct. Rep. 542.

CARMODY, J. The plaintiff commenced this action September 5, 1907, to recover a judgment against the county of Kidder, adjudging that said county is indebted to it for a just and equitable proportion of the bonded indebtedness of Burleigh county existing on the 10th

day of March, 1885, and based upon the assessment in said Burleigh county for the year 1884, and the amount of such indebtedness under the provisions of the special acts, chapters 23 and 24, passed by the legislature of Dakota territory March 10, 1885, segregating from Burleigh county townships 137–144, inclusive, in range 74, west of the fifth principal meridian, and annexing them to Kidder county. From a judgment in favor of plaintiff, defendant appeals and desires a review of the entire case in this court.

The facts necessary to a decision of this case are as follows: In the year 1873 plaintiff was organized as a county. In the year 1880 defendant was organized as a county. Prior to the 10th day of March, 1885, the county of Burleigh included within its boundaries townships 137–144, inclusive, north of range 74. That on the 10th day of March, 1885, the legislature of the territory of Dakota, by an act entitled "An Act to Define the Boundaries of Kidder County," being chapter 23 of the Special Laws of 1885, segregated such townships from the county of Burleigh, and included them within the county of Kidder, and that since that time they have continued to be, and now are, a part of the county of Kidder. That on the 10th day of March, 1885, the legislature passed an act entitled "An Act to Amend an Act Entitled 'An Act Defining the Boundaries of Kidder County,'" being chapter 24 of the Special Laws of 1885, which act, as far as material here, is as follows:

"Section 1. That the portion of Kidder county segregated from the said Burleigh county, lying in range 74 west, shall not be released from its just and equitable proportion of the bonded indebtedness of said Burleigh county, at the date of the passage of this bill, and that said county of Kidder shall assume and pay said indebtedness.

"Sec. 2. That within sixty days after the passage and approval of this act, the county commissioners of said Kidder county shall meet the county commissioners of Burleigh county, in the city of Bismarck, and the said commissioners of the two counties shall constitute a joint board of commissioners whose duties it shall be to ascertain the amount of the bonded indebtedness to be assumed by the county of Kidder, . . . the assessment of Burleigh county for the year eighteen hundred eighty-four being taken as the basis of valuation, and when so ascertained the commissioners of said county of Kidder shall, and are hereby authorized, to execute and deliver to the board of

county commissioners of Burleigh county, for such share of the bonded indebtedness so ascertained, bonds of the county of Kidder with interest coupons attached, bearing the same rate of interest, due and payable at the same time as the bonds of Burleigh county, against which they are issued."

That the total valuation of all property in Burleigh county for the year 1884, as shown by the assessment for that year, was the sum of $3,079,253, and that the total valuation of all property in said townships 137–144, both inclusive, for the year 1884, as shown by the assessment in said Burleigh county for such year, was the sum of $48,250, and that the total of the bonded indebtedness of Burleigh county on the 10th day of March, 1885, was the sum of $114,867.50. That all of said bonded indebtedness was paid by respondent on and prior to July 1, 1894. That no part of said bonded indebtedness was ever paid or assumed by said Kidder county, nor were any bonds for such share of the bonded indebtedness issued by said Kidder county, nor has Kidder county ever levied or collected any tax to pay its proportion of such bonded indebtedness, nor any part thereof. That on the assessed valuation of Burleigh county for the year 1884 the proportion of the bonded indebtedness of said Burleigh county to be assumed by Kidder county was $1,803.15, on the 10th day of March, 1885, and the interest thereon to November 1, 1908, was $2,269.89, making a total sum of $4,073.04, for which sum the respondent had judgment. That no joint meeting of the county commissioners of the said two counties of Kidder and Burleigh has ever been held for the purpose designated in said chapter 24, or at all, except that pursuant to a notice by the county auditor of Burleigh county the boards of county commissioners of Kidder county and Burleigh county met at the courthouse in the city of Bismarck on the 2d day of September, 1895, in the matter of the transfer of range 74 from Burleigh county to Kidder county, but no agreement was arrived at, and nothing was done. The minutes only show that the matter was discussed at length, after which the boards adjourned until September 3, 1895. In the fall of 1895 the respondent was claiming from appellant the sum of $2,655.57 on account of the segregation of the territory hereinbefore described from Burleigh county and the annexation of said territory to Kidder county.

The minutes of the commissioners of appellant, Kidder county, show that on the 7th day of October, 1895, a motion was passed instructing the county attorney of Kidder county to meet with the county commissioners of Burleigh county October 8, 1895. Nothing, however, was done in the matter. On the 8th day of January, 1896, the board of county commissioners of Kidder county passed a resolution, expressly denying that appellant was indebted to respondent in any sum of money whatever on account of said segregation and annexation, but, as a matter of compromise and to avoid litigation, offered to pay respondent the sum of $600. That there was in the year 1884, in said Burleigh county and in the townships segregated therefrom and annexed to said Kidder county, a large number of odd-numbered sections of land, as shown by said assessment, within the place limits of the grant to the Northern Pacific Railway Company, made by the act of Congress approved July 2, 1864, and upon which the survey fees had not been paid to the United States government. That the assessed valuation of Burleigh county for the year 1884, aside from the assessment on such odd-numbered sections of land, was the sum of $1,890,204. That the assessed valuation for the year 1884 of the townships segregated from the county of Burleigh and annexed to the county of Kidder, aside from the assessment of the said odd-numbered sections, was the sum of $1,900. That the odd-numbered sections in Burleigh county, and in the townships segregated from Burleigh county and annexed to Kidder county, were patented to the Northern Pacific Railroad Company by the patent from the United States government in the years 1895 and 1896. All of the evidence regarding the odd-numbered sections was objected to by respondent as irrelevant and immaterial.

At the close of respondent's case, appellant made a motion to dismiss the action for the following, among other, reasons: "That it affirmatively appears, and there is no evidence tending to show to the contrary, that the cause of action set out, or purported to be set out, in plaintiff's complaint accrued more than ten years prior to the commencement of this action." At the close of the testimony appellant made the following motion: "Both parties having rested, the defendant moves the court that this action be now dismissed, upon the ground that it is admitted by both parties hereto of record that all of the outstanding indebtedness of Burleigh county, existing on March 10, 1885,

was paid and satisfied as the same matured, both coupons and bonds, and the last of said bonds and coupons having been matured more than six years, and more than ten years, prior to the commencement of this action."

The following are the ultimate facts claimed by the appellant to be established by the evidence, and upon which it relies for reversal: (1) That the cause of action set forth in the respondent's complaint did not accrue within ten years prior to the commencement of this action. (2) That the total valuation of Burleigh county in the year 1884, as shown by the assessment of said county for that year, was the sum of $1,890,204, and that the total valuation of all property in said townships 137–144, both inclusive, in said range 74, in the year 1884, as shown by the assessment of said Burleigh county for said year, was the sum of $1,900. (3) That the valuation of the property in said townships so set off to said Kidder county, in the assessment of said Burleigh county for the year 1884, is (by computation) 0.1006 per cent of the valuation of all the property in said Burleigh county, in the assessment of said county for said year. (4) That the sum of $115.55 is (by computation) the just and equitable portion of the bonded indebtedness of Burleigh county at the date of the passage of said acts, *viz.*, March 10, 1885; that the sum of $186.50 is the interest thereon, at the rate of 7 per cent per annum from said date to November 1, 1908, and that the gross amount of said sums is $301.05, and that the said county of Kidder was justly indebted to the said county of Burleigh, if in any amount whatever, on November 1, 1908, in the said sum of $301.05, and no more.

But three questions are to be determined on this appeal: (1) Whether the statutes of limitations ran against the county of Burleigh; (2) whether the odd-numbered sections of land in the county of Burleigh, and in that portion segregated from the county of Burleigh and annexed to the county of Kidder, should be considered in fixing the assessed valuation of Burleigh county in the year 1884; (3) laches on the part of respondent.

Chapter 28, Rev. Codes 1877, which were in force on March 10, 1885, provides: "For county sinking fund such rate as in the estimation of the board of county commissioners will pay one year's interest on all the outstanding debt on the county, with fifteen per cent on

the principal." From the foregoing it appears that the general provisions of the statutes then existing provided for the raising of funds to meet the indebtedness of counties. It is elementary that like or similar provisions must be retained as long as the indebtedness continues. Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403. The statute of limitations is what is known in law as a statute of repose. It is a statute enacted as a matter of public policy, to fix a limit in which an action must be brought or the obligation will be presumed to have been paid. The statute is intended to run only against those who are neglectful of their rights, and fail to use reasonable and proper diligence in the enforcement thereof. They are based on the presumption of law that, from the lapse of time, it is fair to presume that the debt has been paid. Barnes v. Turner, 14 Okla. 284, 10 L.R.A.(N.S.) 478, 78 Pac. 108, 2 A. & E. Ann. Cas. 391.

In the case at bar the county commissioners of appellant were, within sixty days after March 10, 1885, required to meet the county commissioners of respondent in the city of Bismarck and ascertain the amount of the bonded indebtedness to be assumed by appellant, and executed and delivered to the board of county commissioners of respondent bonds of appellant county of Kidder, with interest coupons attached, bearing the same rate of interest, due and payable at the same time as the bonds of Burleigh county, against which they are to be issued. To provide a fund for the payment of such bonds and interest when due, the board of county commissioners of appellant county were required to create a county sinking fund, and levy a sufficient tax on the taxable property in the county to pay one year's interest on the bonds, with 15 per cent on the principal, and make such levy each year until the bonds and interest were paid. It is undisputed that appellant neither executed nor delivered the bonds, and never made any provision for the payment of the amount of the bonded indebtedness to be assumed by it or the interest thereon.

The respondent in this action contends that chapter 24, Laws 1885, contains special provisions that take this claim out of the bar provided by the general statute of limitations. It is by virtue of the provisions of this act that respondent seeks to maintain this action against appellant. No action could be maintained against appellant upon the

bonds issued by respondent, except by force of the act of the legislature approved March 10, 1885. The liability or obligation of appellant to pay its proportionate share of the bonded indebtedness of respondent could not arise except by legislative action. Under the provision of the act segregating townships 137–144, inclusive, range 74, from Burleigh county and annexing them to Kidder county, appellant assumed and agreed to pay its proportionate share of the bonded indebtedness of respondent on March 10, 1885. Its liability was fixed and determined by said act. The bonded indebtedness was originally to be paid by Burleigh county. Kidder county, except for the provisions of the statute referred to, could not be held answerable for the debt, or any portion thereof. This debt or obligation is in the nature of a specialty, and in our opinion is not barred by the statute of limitations. In 1 Wood on Limitations, § 39, it is said that "the test [by which to determine] whether a statute creates a specialty debt or not might be said to be whether, independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether, independently of the statute, a right of action exists for the breach of the duty or obligation imposed by the statute. If so, then the obligation is not in the nature of a specialty, and is within the statute; . . . but, if the statute creates the duty or obligation, then the obligation thereby imposed is a specialty, and is not within the statute." Apply this test to the present case. Independently of the statute, the law does not imply any obligation upon appellant, Kidder county, to pay the debt, or any part thereof; nor, independently of the statute, could any right of action be maintained by respondent against appellant. But the statute does create the duty or obligation on appellant to pay its proportionate share of such bonded indebtedness, and the obligation thereby imposed is a specialty, and is not within the provisions of the statute of limitations pleaded herein. The cases, although different in their facts, are all more or less akin in principle to the present case, and the general trend of all analogous cases is substantially in the same vein, and is in accord, with the views we have expressed. Robertson v. Blaine County, 47 L.R.A. 459, 32 C. C. A. 512, 61 U. S. App. 242, 90 Fed. 63; Bullard v. Bell, 1 Mason, 243, Fed. Cas. No. 2,121; Van Hook v. Whitlock, 3 Paige, 409; Cowenhoven v. Middlesex County, 44 N. J. L. 232; State v.

Baker County, 24 Or. 141, 33 Pac. 530; Pease v. Howard, 14 Johns. 479; Lane v. Morris, 10 Ga. 162; Higby v. Calaveras County, 18 Cal. 176; Cork & B. R. Co. v. Goode, 13 C. B. 826; Barnes v. Turner, supra.

The courts are practically unanimous in holding that the statute of limitations does not begin to run against a warrant issued by a municipal, or quasi municipal, corporation, and payable out of the fund, until the corporation has provided a fund from which it may be paid. Wetmore v. Monona County, 73 Iowa, 88, 34 N. W. 751; Gasquet v. Directors of City Schools, 45 La. Ann. 342, 12 So. 506; Fernandez v. New Orleans, 46 La. Ann. 1130, 15 So. 378; Apache County v. Barth, 6 Ariz. 13, 53 Pac. 187; Potter v. New Whatcom, 20 Wash. 589, 72 Am. St. Rep. 135, 56 Pac. 394; Brannon v. White Lake Twp. 17 S. D. 83, 95 N. W. 284; Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646; State ex rel. Davis v. Lincoln County, 23 Nev. 262, 45 Pac. 982; Sawyer v. Colgan, 102 Cal. 283, 36 Pac. 580, 834; Meyer v. San Francisco, 150 Cal. 131, 10 L.R.A. (N.S.) 110, 88 Pac. 722; Greer County v. Clarke & Courts, 12 Okla. 197, 70 Pac. 206; Spaulding v. Arnold, 125 N. Y. 194, 26 N. E. 295; King Iron Bridge & Mfg. Co. v. Otoe County, 124 U. S. 459, 31 L. ed. 514, 8 Sup. Ct. Rep. 582; Stewart v. Custer County, 14 S. D. 155, 84 N. W. 764; Atchison v. Leu, 48 Kan. 138, 29 Pac. 467; School Dist. No. 5 v. First Nat. Bank, 63 Kan. 668, 66 Pac. 630; Hubbell v. South Hutchinson, 64 Kan. 645, 68 Pa. 52.

Cork & B. R. Co. v. Goode, supra, as an action of debt by a railway company against one of its members, for cause, under the authority of an act of Parliament, and the plea was that such cause of action did not accrue within six years, and this plea was confronted by a demurrer. Chief Justice Jervis said: "I think it is an action upon statute. . . . But for the act of Parliament, no action could be brought by the company against one of its own members. This, therefore, is an action brought in respect of a liability created by statute, and therefore is an action founded upon the statute, and the plea which relies upon the six years' limitation is no answer to it." In Lane v. Morris, supra, a stockholder pleaded the statute of limitations in an action brought against him upon his liability for the debts of a corporation.

The court held that the cause of action was founded on the statute creating his liability, and numerous authorities were there cited to sustain the position that an action of debt, founded upon a statutory liability, has never been considered as being within the statute of limitations of England or of like statutes in this country, but that such statutory liability has always been regarded in the nature of a specialty. In the course of the opinion the court said: "There can be no doubt that the liability of the defendant, as a stockholder, for the ultimate redemption of the bills of the bank, is created by the eleventh section of the statute incorporating the Planters' & Mechanics' Bank of Columbus. Without that section in the act he would not be liable to the plaintiff as a holder of the bills of the bank." In Bullard v. Bell, supra, Mr. Justice Story held that the statute of New Hampshire did not apply as a bar to an action of debt against a stockholder of a bank, under the provisions of its charter imposing a personal responsibility upon the shareholder for the notes of the institution in case they should be dishonored. In Angell on Limitations, p. 80, it is said that "where the liability of the defendant is created, not merely by the act of the parties, but by the positive requisitions of a statute, the plaintiff is not barred." The facts alleged in the complaint bring the case at bar within the general rule that, when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without first showing that a particular fund has been provided, or that the particular method prescribed by the statute has been complied with. This general principle is clearly stated in Lincoln County v. Luning, supra. In Hubbell v. South Hutchinson, supra, the court said: "It is the settled law of this state, however, that the statute of limitations does not run in favor of a municipal, or quasi municipal, corporation upon its outstanding obligations until the corporation has provided a fund with which payment thereof may be made." We do not think the cases cited by appellant are in point. While some of them hold, apparently, contrary to the views herein expressed, it will be observed that there are particular circumstances which tend to distinguish them and take them out of the general rule.

In Mt. Desert v. Tremont, 75 Me. 252, by an act of the Maine legislature passed in 1848, the township of Mt. Desert was divided, and the defendant formed a separate township. By the terms of the act

each township was to receive a proportion of the town property, of the money on hand, and pay its proportion of the liabilities and debts against the town of Mt. Desert. In the act it was also provided that the defendant should pay its share of any of the liabilities of the said township of Mt. Desert now existing, and which may hereafter arise in any and all suits at law, now pending against or in favor of said town of Mt. Desert. On April 22, 1848, one Daniel Kimball was obliged to pay a judgment against the inhabitants of Mt. Desert, he being a resident of the town, and his property having been levied upon. In 1850 he obtained a judgment against the township of Mt. Desert for the amount he had paid, and in 1876 it was paid him by the township of Mt. Desert. On September 7, 1877, the township of Mt. Desert commenced the action against the defendant to collect its proportion of the amount of the judgment paid to Daniel Kimball. The defendant pleaded the statute of limitations, which plea was overruled, the court saying: "The payment having been made within six years next before the date of this writ, we fail to perceive upon what principle of law the action can be considered barred by the statute." By the common law of the New England states, derived from immemorial usage, the estate of any inhabitant of a county, town, territorial parish, or school district is liable to be taken on execution of a judgment against the corporation. 15 Am. & Eng. Enc. Law, p. 1067. In Trowbridge v. Schmidt, 82 Miss. 475, 34 So. 84, which was a petition for a writ of mandamus by Smith against Trowbridge, mayor, the municipal board allowed Smith $500 for damages to his real estate in grading her streets. The mayor refused to sign the warrant, claiming that when Smith filed his claim for allowance with the board it was barred by limitation. The court sustained his plea. This was a claim for unliquidated damages for tort, and would not come within any of the principles herein stated.

Appellant cites 19 Am. & Eng. Enc. Law, 2d ed. p. 191, and notes. One of the cases cited in note in 19 Am. & Eng. Enc. Law, 2d ed. p. 191, was where an action was brought by the city to determine adverse claims to real estate; the court held that the statute of limitations ran against the city. In another case cited in said note (Harrison County v. Dunn, 84 Iowa, 328, 51 N. W. 155), the court held that an action against the estate of an insane person to recover the cost of sup-

port furnished to him while an inmate of the state asylum, brought in behalf of a county, is subject to the bar of the statute; statutes having been enacted making a statute of limitations applicable to suits by state. In all the cases cited in the said note there are circumstances that distinguish them from the case at bar.

Appellant contends that there was an error in the assessment of Burleigh county for the year 1884, on account of the odd-numbered sections within the land grant to the Northern Pacific Railroad Company having been assessed, the title to which land had not yet passed from the United States. It is a matter of history that until the decision of the Supreme Court, in the case of the Northern P. R. Co. v. Traill County (Northern P. R. Co. v. Rockne) 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201, which was decided December 7, 1885, it was generally believed throughout the territory that the railroad land grant was subject to taxation, and the taxing officials acted on such understanding. However, it is immaterial in this case. The assessment for the year 1884 was a public record at the time the special acts in question were approved, and became laws on March 10, 1885. The power of the legislature over a county is absolute except as restrained by the Constitution. State ex rel. Slipp v. McFadden, 23 Minn. 40; Richland County v. Lawrence County, 12 Ill. 1; State ex rel. Atty. Gen. v. Pawnee County, 12 Kan. 426. Where a county is divided, the rule for the division and apportionment of the debts and property between such county and the detached territory belongs exclusively to the legislature, and not to the courts; and, when the legislature has determined how the debts and property shall be divided and apportioned, the courts cannot interfere. Sedgwick County v. Bunker, 16 Kan. 498; Putnam County v. Allen County, 1 Ohio St. 322; Lee County v. Phillips County, 46 Ark. 156; Morgan v. Beloit, 7 Wall. 613, 19 L. ed. 203; Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552.

In Laramie County v. Albany County, supra, the legislature of the territory of Dakota passed two acts creating the counties of Albany and Carbon out of a portion of the territory of the complainant county, reducing the area of that county more than two thirds; and fully two thirds of the wealth and taxable property previously existing in the old county were withdrawn from its jurisdiction, and its

limits were reduced to less than one third of its former size, without any provision being made in either of said acts that the new counties, or either of them, should assume any proportion of the debts and liabilities which had been incurred for the welfare of the whole before these acts were passed. Payment of the outstanding debts having been made by the complainant county, the present suit was instituted in her behalf to compel the new counties to contribute their just proportion toward such indebtedness. In denying the right of plaintiff to recover, the court said: "The legislature of a state possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. Where the legislature does not prescribe any different regulations, the rule is that the old corporation owns all the public property within its new limits, and is responsible for all debts contracted by it before the act of separation was passed, which debts it must pay, without any claim for contribution from the new subdivision."

In Putnam County v. Allen County, supra, a portion of Putnam county was added to the county of Allen; and, in order to enable Putnam county to retain her capacity to pay off her debt, and to do justice in the premises, the legislature provided as follows: "That the commissioners of the counties of Allen and Putnam shall meet on or before the first Monday of April next, or within sixty days thereafter, and ascertain and determine the amount of the public debt of Putnam county, exclusive of that for the surplus revenue loaned to said county, and the proportion which the value of the taxable lands set off by this act to the county of Allen from the county of Putnam bears to the value of the taxable lands by this act remaining in Putnam county; and hereafter each year, until the public debt aforesaid shall be paid off and discharged, there shall be paid out of the treasury of Allen county, upon the order of the auditor thereof, to the treasurer of Putnam county, a sum which shall bear the same proportion to the amount raised in that year by Putnam county for the payment of the debt aforesaid, as the value of the taxable lands so set off as aforesaid, bears to that of those so as aforesaid remaining in Putnam county; and the same shall be applied to the extinguishment of said debt, and to no other purpose; and it shall be the duty of the commissioners of Allen

county to levy a sufficient tax to raise said sum." Within the time prescribed by the statute, the commissioners of Putnam county met at Kalida, having notified the commissioners of Allen county of the meeting. The commissioners of Allen county failed and refused to attend. The commissioners of Putnam county proceeded to ascertain the debt of Putnam county, and found that it amounted to over $10,000, and, in accordance with the rule laid down in the statute, made a computation of what amount of this debt should be liquidated by Allen county. Allen county claimed that this law was unjust, but the court said: "But whether she was required to pay more than her share we have not the means of accurately ascertaining. Nor is it important in the present controversy; for if the legislature, in the exercise of a constitutional power, were mistaken in judgment, it would not render their act unconstitutional or void." The court further said: "If the amount were fixed in the mode contemplated in the statute, or if it were liquidated by judgment, mandamus would be the proper remedy to compel the auditor to perform the ministerial act of drawing the order, but until the amount is thus liquidated, we think the auditor cannot be compelled to act; the time for his action has not arrived." This was an application for a writ of mandamus against the county auditor. It will be seen from this last case that the county of Burleigh pursued the proper remedy to have the amount due from appellant liquidated by judgment. It will also be noticed in this case that the legislature apportioned the amount to be paid according to the value of the taxable lands, leaving out of account all personal property.

The contention of appellant that the assessed valuation of the railroad lands for the year 1884 should be deducted from the assessed valuation of all property in Burleigh county, and in that portion segregated from Burleigh county and annexed to Kidder county, must be overruled.

We do not think that respondent has been guilty of such laches in the premises that a court of equity will not enforce the respondent's claim. In the case of the United States v. Alexandria, 4 Hughes, 545, 19 Fed. 609, the court says: "But where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin;

certainly as between the immediate parties to the transaction. . . . But the parties to the present transaction are, on one side, a government of permanent stability, and on the other, a municipal corporation older than the government. They are not like natural persons, whose relations and obligations are all more or less affected by mere lapse of time."

The amount found by the trial court to be due from appellant to respondent county November 1, 1908, is the sum of $4,073.04 gross, and such finding is in no way challenged by appellant.

The judgment is clearly right, and must be affirmed. All concur.

ANDREW P. FORZEN v. WARREN W. HURD.

(126 N. W. 224.)

Negligence — Principal and Agent — Setting Prairie Fire.

1. In order to hold a party liable for loss occasioned by a prairie fire which it is undisputed he did not set or negligently permit to escape from his control, it must appear that the parties who originated and tended the fire were, in so doing, acting under his express or immediate direction, or that they were at such time in his employ, and required or directed by him to do certain work the due performance of which, in the ordinary course, involved the setting of fire to the prairie grass.

Trial — Directed Verdict — Appeal and Error — Question for Jury.

2. In reviewing the action of a trial court in denying a motion made by defendant at the close of the whole testimony for a directed verdict, if it appears that the question of the sufficiency of the evidence introduced to support a verdict is in some doubt, and that the jury found and rendered a verdict in plaintiff's favor, the ruling of a trial court submitting the question of fact to the jury will not be disturbed.

Note.—The liability of a person for the acts of others in setting out fire seems to depend upon the same principles which govern generally in attempts to hold one person liable for the acts of another, as shown by a review of the authorities, which are not numerous, in notes in 21 L.R.A. 255 and 6 L.R.A.(N.S.) 882.

The narrower question of the liability of an employer for fire set out by an independent contractor for the purpose of clearing land is considered in a note in 17 L.R.A.(N.S.) 788.

Trial — Instructions.

3. A charge to the jury, which contains no exposition whatever of the elemental principles upon which depends the liability of a party, and makes the law of the case entirely dependent upon inferences from the testimony or resolvable from the degree of credibility to be given the different witnesses, is misleading and insufficient.

Trial — Instruction — Liability for Setting Fire.

4. An instruction that a defendant may be held liable for damages occasioned by a prairie fire if the jury find the fact to be that the men who set and tended the fire were working for the defendant "at that time in the course of their usual employment on the farm, and doing his work the same as your men do when you are gone," contains a misdirection as to the law, as it incorrectly assumes that the ordinary and usual work of a farm permits or requires the setting of fire to the prairie grass under conditions that render such act extremely hazardous.

Oral Instruction — Waiver of Written Charge.

5. The giving of oral instruction to a jury is authorized only in an exceptional case in which the parties deliberately and voluntarily assent thereto, and should be given only after such consent is obtained and entered on the minutes, at such time and in such manner as will not operate to the prejudice of the rights of either party.

Opinion filed April 12, 1910.

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

Action by Andrew P. Forzen against Warren W. Hurd, for damages occasioned by a prairie fire. Plaintiff had judgment and defendant appeals.

Judgment reversed and new trial ordered.

T. F. McCue, for appellant.

The master, to be liable for servant's acts, must have such control over him as to be able to direct his performance of service, and prescribe the acts to accomplish the end. Callahan v. Burlington & M. River R. Co. 23 Iowa, 564; St. Louis, Ft. S. & W. R. Co. v. Willis, 38 Kan. 330, 16 Pac. 728; Kellogg v. Payne, 21 Iowa, 575; Rait v. New England Furniture & Carpet Co. 66 Minn. 76, 68 N. W. 729, 20 Am. & Eng. Enc. Law, p. 180; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133.

A master may loan his servant; and when so loaned is not liable for the acts of such servant. Miller v. Minnesota & N. W. R. Co. 76

Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188; Cotter v. Lindgren, 106 Cal. 602, 46 Am. St. Rep. 255, 39 Pac. 950, 20 Am. & Eng. Enc. Law, 2d ed. p. 178.

The court shall only instruct as to the law of the case. Bardwell v. Ziegler, 3 Wash. 34, 28 Pac. 360; State v. Barry, 11 N. D. 428, 92 N. W. 809; Ryan v. Farley & L. Mfg. Co. 140 Iowa, 619, 119 N. W. 86; People v. Clarke, 105 Mich. 169, 62 N. W. 1117.

R. G. McFarland, for respondent.

Statement of case must specify wherein the evidence is insufficient to sustain the verdict. Rev. Codes, 1905, § 7058; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; 2 Spelling, New Tr. & App. Proc. § 433.

If the evidence is such that different minds may draw different conclusions, case is for jury. Knight v. Towles, 6 S. D. 575, 62 N. W. 964; Gates v. Max, 125 N. C. 139, 34 S. E. 266; McRea v. Hillsboro Nat. Bank, 6 N. D. 353, 70 N. W. 813; Zink v. Lahart, 16 N. D. 56, 110 N. W. 931; Johnson v. Barber, 10 Ill. 425, 50 Am. Dec. 416; Standard Oil Co. v. Parkinson, 82 C. C. A. 29, 152 Fed. 681; 1 Thomp. Neg. 2d ed. §§ 518 to 536; 31 Cyc. Law & Proc. pp. 1671 to 1675.

ELLSWORTH, J. The complaint, as cause of action, alleges that defendant was the owner of much land in Wells county, in the vicinity of that owned and occupied by plaintiff, and on October 25th, 1901, was engaged in burning a fire guard around his own premises and around the land of other persons and owners; that while so engaged in setting fire to the wild prairie grass, which on that day was frosted, dry, and inflammable, he and his servants negligently permitted the fire so set to burn out of and escape from an insufficient fire guard intended to confine it, and, driven by a high wind then prevailing, rapidly to extend in one continuous conflagration to the premises of plaintiff, upon which it burned and destroyed a large quantity of hay in stack, for which loss and injury damages are claimed. The answer of defendant is a general denial. Upon the trial it appeared that on the day mentioned in the complaint three persons, named Bowers, Ridgeway, and Culp, were engaged in burning a fire break between sections 11 and 14 in the township in which plaintiff's land lay, and while so engaged fire set and tended by them escaped from the limits in which they were seeking to confine it, and burned over the inter-

vening prairie and reached and destroyed plaintiff's hay. It is admitted that plaintiff was not present at the origin of this fire, that he did not set it and was in no manner instrumental in permitting its spread, unless it can be said that he was responsible for the acts of the three men named above. At the time of the trial Bowers was deceased, and his testimony had been taken during his lifetime. Culp, so far as his evidence is material, testified by deposition as follows: "I worked for W. W. Hurd in October, 1901, for about three weeks previous to the fire; commenced work about that time and continued until the 15th day of November, 1901. My duties were building fences, burning fire guards, and doing carpenter work. While I was engaged in this capacity a prairie fire escaped on the 25th day of October, 1901. I was engaged at that time somewhere on the north line of section 14, township 145, range 73, in Wells county. At the time the fire escaped J. B. Bowers and W. W. Ridgeway were with me. We were burning out the center between the plowing in order to make the fire break around W. W. Hurd's land. The plowing was done by other parties; they plowed three furrows north of the section line and then three furrows south of the section line. We were burning grass between the furrows. . . . The fire escaped about 2 o'clock in the afternoon of that day. The wind was blowing pretty hard for burning fire guards. Myself and Mr. Ridgeway thought the wind too strong, but Mr. Bowers was the foreman, he was the boss, so we went on and did what we were told. We had a team and a wagon, one barrel of water, and three mops. We also had two torches for lighting fires. . . . I was paid by the day. The carpenter work which I spoke of was done on the ranch after we had finished the building of fences and burning fire guards. I own land and live in McLean county." Ridgeway testified that in burning the fire break between sections 11 and 14: "It was my job, the wind being northwest, to fire on the south side first so as to have the fire go against the wind. As near as I can tell I was there with the torch, lighting it a little at a time, and they (Culp and Bowers) would keep it from spreading to the south, and I think Mr. Bowers was making overhanded licks, when it flashed up and got beyond me, and, in about a minute, it was going across the prairie at a pretty rapid rate. As I remember, we hadn't burned any fire breaks until that afternoon. We

burned out this line between [sections] 11 and 12, but we didn't do it on that day. We just started to burn that afternoon. I think we started between sections 11 and 14 at the east and going west. Mr. Culp assisted me, and I was on the south side, burning against the wind, with the lighted torch. I would go in front as it would burn against the wind. Culp was on the other side. . . . Mr. Culp, Mr. Bowers, and myself were burning the fire break. Mr. Bowers was directing it. He was foreman. I was working under Mr. Bowers,—working for him. I was employed by him. Mr. Bowers paid me for my service. Mr. Bowers directed the acts that were done on the day when the fire was set out. . . . Mr. Bowers at that time was residing on his own homestead. I boarded at Bowers' at the time I was burning this fire break, at Bowers' home. Mr. Hurd did not give me any directions whatever with reference to this burning complained of in the complaint."

The defendant, Hurd, called by the plaintiff as a witness, testified that he owned sections 13 and 23 in the township in which the fire occurred and other land in the township east; that he had no other land in that immediate vicinity; that he was farming and stock raising in the fall of 1901, and as a stock raiser he had to protect the grass by fire guards; that on October 25th, 1901, Bowers was not working for him. Sometime before that date Bowers had worked for him, but was not working for him at that time; that on October 25th, he did not have any persons at work burning fire guards. That in the earlier part of the month he had fire guards burned on the west line of section 7 in the township east and on the north line of section 13, the land he owned in this township; that he did not pay Ridgeway, Bowers, or Culp for burning fire guards on October 25th, 1901; that they were not working for him; that Ridgeway was working for Bowers at the time of this fire, and he was burning the fire guards on his own responsibility. That Culp was in his employ on October 25th, 1901, but that on that date Bowers did not have enough help to burn fire guards, and he let Culp go and help him; that he paid Culp for the time he worked for him, but Bowers paid him back for Culp's service; in other words, they exchanged work; that he was not personally interested in the burning of the fire guards when the fire escaped; that Culp was in Bowers' employ that day and working for him. That he

paid Culp in the sense that payment for that day's work was included with that for Culp's other services; but Bowers paid him back for Culp's time on that day; that Bowers broke these fire guards; that he had a crew on his farm burning fire guards until he got to the corner of his land; that he had a fire guard burned on the north line of section 13, which corners on section 11; that this was the northwest corner of his land and the end of his burning fire guards; that Bowers then took up the burning of fire guards and followed it out.

Called as a witness on his own behalf Mr. Hurd testified directly as follows: "Ridgeway, Bowers, and Culp were not in my employ on October 25th, 1901, the date of the fire. They were not performing any labor for me on that day. I never directed this fire to be set out. It was not set out by any of my employees or under my direction. Culp, Ridgeway, and Bowers were not performing any labor for me on the date of the fire. They were not in my employ, nor were they told by me to set the fire complained of in the complaint. I was not the owner of the land at that time or any other time. Culp was formerly in my employ, but was working for Bowers on this particular date, and Bowers paid for his services. Culp might have thought he was working for me. As a matter of fact he was working for Mr. Bowers. I hired him out to Mr. Bowers. Mr. Culp is mistaken if he says he was working for me on that day; he was working for Mr. Bowers."

The other testimony introduced upon the trial is chiefly in reference to the amount and value of the hay destroyed, and has no material bearing upon the question of defendant's responsibility for the damage occasioned by the fire. At the close of plaintiff's case and again at the conclusion of all the testimony, defendant moved the court to direct the jury to return a verdict in his favor on the grounds that, "taking the evidence as submitted by the plaintiff, it would not support a verdict in favor of plaintiff," and "taking all the evidence together it did not establish a cause of action against the defendant." These motions were each denied by the court, and such rulings are assigned as error on this appeal. The defendant also excepted to each and every of the instructions given by the court in its charge to the jury; and to each sentence and line of each instruction, and particularly to certain parts of the same which, so far as they are material, will be referred to hereinafter. The jury rendered its verdict in favor of the

plaintiff. On the rendition of this verdict, defendant moved the court for judgment notwithstanding the verdict, on the grounds set out in his motions for a directed verdict. This motion was also denied, and such action of the court is assigned as error.

The defendant, as appellant before this court, calls pointedly the court's attention to the fact that the evidence introduced upon the trial presents as undisputed facts that the fire was not set or permitted to spread by any act of defendant nor upon his premises, nor, so far as appears, for his benefit or under his direction; that the fire was admittedly set and permitted to spread and cause damage, by a party of three persons none of whom stood in such relation to defendant that the doctrine of *respondeat superior* can be invoked to create liability on his part; that the district court should, upon this evidence, have directed a verdict in favor of defendant, and, having refused to do so and to render judgment notwithstanding the verdict, this court should now reverse the judgment rendered, and direct a dismissal of the action.

It is readily apparent that defendant cannot be responsible for the damage caused by the fire in question, unless there is competent evidence connecting him with the persons who set the fire and negligently permitted it to spread, in such relation that, under the law, he is requird to respond for the consequences of their negligent acts. Plaintiff's theory in this particular seems to be that at the time of the fire these men were in the employ of defendant, and acting under his express direction in all they did, or that the setting and tending of the fire in this manner was within the scope of the duties which, by the terms of their employment, they were required to perform. If there can be said to be such competent evidence as will reasonably sustain a finding of the jury that this relation existed, there was no error in the ruling of the district court in denying defendant's motion for a directed verdict.

An examination of the evidence tending, even remotely, to connect defendant with the acts of the persons through whose negligence the fire originated and spread, discloses that it is of the most meager and unsatisfactory character. It proceeds almost entirely upon the principle of vague inferences, derived from the fact that two of the men had been employed by defendant, before or after the fire, to burn fire

guards or do general farm work, and that the work of firing the prairie grass that was being done on October 25th, 1901, was for his benefit. Defendant admits that the witness Culp was employed by him as a farm hand on the day of the fire, and that he probably paid him for such services as he rendered on that day; but claims that he had arranged with Bowers that Culp should be under his directions during that time, and that Bowers should pay defendant for the value of Culp's services. Even assuming, however, that Culp was in defendant's employ on the day in question, and that he had directed him generally to assist Bowers and Ridgeway in burning out a fire guard, there is no evidence that he either set the fire or negligently permitted it to escape from control. On the other hand, the witness Ridgeway, as will be observed from his testimony quoted above, testifies that he set the fire on the side of the strip inclosed by the fire guard, opposite the wind, while Culp was working on the other side; and that after the grass was ignited, the fire "flashed up and got beyond me, and, in about a minute, it was going across the prairie at a pretty rapid rate," notwithstanding the efforts of Bowers to prevent it. It would seem, therefore, that unless defendant was responsible not only for the acts of Culp, but also for the joint acts of Ridgeway, who set the fire, and of Bowers, who permitted it to escape, he cannot be said to be liable for the consequences of the fire, even though between him and Culp there existed on that day the relation of master and servant. If, in the determination of a motion such as this for a directed verdict, the denials of the defendant could be given due weight, and the question determined from a preponderance of the evidence, there is little question but that it could be resolved only in defendant's favor. As we can, however, under well-settled rules of practice, consider only the testimony of the plaintiff and his witnesses in the light most favorable to his contentions, disregarding all conflicts, we hesitate to disturb the action of the trial court in refusing to direct a verdict; as any point of doubt on a motion such as this should be resolved in favor of the correctness of a ruling which submits issues of fact to a jury. In this connection we may say, however, that there is so near an approach to an entire failure of testimony connecting defendant with the acts of the persons who started the fire, that unless the showing in this regard upon the new trial, which will be ordered herein upon other grounds,

is materially strengthened, the question whether there is evidence sufficient to sustain a verdict in favor of the plaintiff will be in doubt whenever properly presented.

We next come to a consideration of the instruction of the court to the jury. Defendant excepts not only to specific portions of the instructions given, but to the charge as an entirety, claiming not only that it is misleading, faulty, and erroneous in particular instances, but that it is as a whole deficient in that it does not contain a proper exposition of law points directly involved in the case and necessary to its determination. Defendant's counsel claims that the charge is not only deficient in these particulars, but that it is poorly constructed and contains many ill-advised statements and improvident comments upon the evidence and the effect to be given it by the jury; and suggests that conditions attending the preparation and delivery of this charge, largely prejudicial to defendant, are attributable to the fact that it was given orally at the close of the argument, without a stipulation of counsel previously obtained that it might be so given, and at a time when an objection by defendant's counsel to an oral charge could have resulted only in compelling the entire course of the trial to await the preparation of a written charge.

It may be objected that appellant's exceptions to the charge in all its parts, sentence by sentence, is too general to direct the attention of the court to a critical examination of the structure of the entire document, or to point out that it fails in particular instances to comply with the requirements of statute. Respondent's counsel, however, in maintaining that the charge is a proper one in the particulars excepted to by appellant, urges that "the instructions of the court should be considered as a whole," and that "when so considered the instructions are not open to the criticism made by appellant." Our attention being thus invited by both parties to the charge in its entirety, we will examine it for the purpose of determining not only whether certain clauses, considered with the context, are vulnerable to exceptions urged by appellant, but whether it contains such clear and impartial exposition of the law points involved in the case as the law, in the interest of both parties, requires shall be made.

The court, after calling the attention of the jury to the point that its duty was to settle disputed questions of fact arising on the evidence,

and giving a brief outline of plaintiff's cause of action as stated in his complaint, proceeded as follows: "There is no dispute but that this fire was set by some person, and set negligently; there is no dispute in the evidence about that, and was negligently set. The laws of the state of North Dakota forbid the burning of prairies except under certain conditions, which were not complied with in this case, but Mr. Hurd denies that he set this fire. It is not claimed by plaintiff that Mr. Hurd personally set this fire, but it is claimed that his men, working on his farm and about his business and under his orders, set this fire, and therefore Mr. Hurd would be responsible. Mr. Hurd has been on the stand and denied this. He states that this fire was set by some men who were formerly employed by him, and who were not at that time in his employ, except one man who he says was in his employ the rest of the time during the month, but on this day he was loaned to this other man, who he claims set the fire. If this is true, and you, in your province as a jury in settling this disputed fact, find that Mr. Hurd is correct in his testimony, then he would not be liable at all, because the work was not done for him or under his direction. However, there is the testimony of the man who set the fire, whose deposition was read here, which is to the contrary effect. You have heard this testimony, and you will remember it. You will decide first of all whether Mr. Hurd is liable, because if he is not liable you would be wasting your time in arriving at how much hay was burned and how much it was worth. If you find that this fire was started by the other man, in the manner Mr. Hurd claims it was, then your verdict will be for the defendant,—that is, for Mr. Hurd,—that he owes nothing; and you will not concern yourselves over the amount of hay burned, or the price. If, on the other hand, as jurymen, you find the fact to be that these men were working for Mr. Hurd at that time, in the course of their usual employment on the farm, and doing his work the same as your men do when you are gone, even though Mr. Hurd may not have been present at the time, you will find that the acts of these men were the acts of Mr. Hurd, and he would be liable for the damage done." The remainder of the charge is devoted entirely to the manner in which the value of the hay destroyed was to be determined, the burden of proof, and the rules by which the credibility of the witnesses are to be tested. The excerpt

from the charge above quoted includes, without omission, all that portion having any bearing whatever upon the principle of law by which defendant's liability is to be determined.

It is evident at a glance that the law point in the case upon which all other issues depend is that of the liability of defendant for the acts of others. The fact that a fire was set by someone, and by other parties negligently permitted to escape and spread until it destroyed plaintiffs property, presents not the slightest ground in law for holding defendant liable for the loss. The principle under which he could be held liable, if at all, according to the evidence, was that the persons who originated and tended the fire were in so doing acting under his express or immediate direction, or that at such time they were in the employ of defendant to do certain work, the due performance of which necessarily involved the setting of fire to the prairie grass; or in other words, that they were at the inception of the fire acting within the scope of the duties which they were charged by him to perform. Whether or not such relation existed between the persons in question and the defendant was the crucial point to be drawn as a conclusion from the evidence, and in reaching their conclusion it was the duty of the jury to first, as far as possible, reconcile any apparent conflict in the testimony, or, in case it was impossible to do this, to weigh the testimony of each witness and determine from the preponderance of the evidence the ultimate facts as they existed. The instructions of the court seem to proceed upon the theory that the testimony of the defendant and of the witnesses Culp and Ridgeway is in irreconcilable conflict; that if the jury believed the testimony of defendant it should resolve the law point of the case in his favor and hold him not liable; or, on the other hand, if it believed the testimony of Culp, which is declared to be "to the contrary effect," it should find that the acts of the men who set and tended the fire were the acts of Mr. Hurd, and he would be liable for the damage done. To demonstrate the fallacy of this instruction, it is only necessary to compare the testimony of defendant with that of Culp, when it is, at once, apparent that not only are their respective statements not of "contrary effect," but are for the greater part in agreement, differing only on the point of whether or not Culp was directly in the employment of defendant on the day of the

fire; while the testimony of Ridgeway, so far as it touches on that given by defendant, corroborates it throughout.

Further than this, the instruction places a construction upon certain evidence that is wholly unwarranted by any of the testimony in the case. There is no evidence in the record to the effect that either Bowers or Ridgeway, when they set the fire in question and permitted its escape, were "working on his (defendant's) farm and about his business and under his orders." Ridgeway expressly states that he was employed by Bowers, and not by defendant, and defendant states in the most explicit manner that Bowers was not working on his farm or doing any work with which he was concerned, or under his orders. The testimony of Culp is referred to as "the testimony of the man who set the fire." This is a misstatement of fact directly contradictory of the undisputed testimony of Ridgeway that he set the fire when Culp was working in another place. The instruction that defendant should be held liable in damages if "you find the fact to be that these men were working for Mr. Hurd at that time in the course of their usual employment on his farm, and doing his work," is not only misleading in its bearing on the facts the jury was authorized to find, but contains a misdirection as to the law of the case. There was no evidence whatever upon which the jury could base a finding that either Bowers or Ridgeway were working for Mr. Hurd on his farm, or doing his work there or elsewhere at the time of the fire; and even had such evidence been full and competent, the fact that they were "working for Mr. Hurd at that time in the course of their usual employment on the farm, and doing his work the same as your men do when you are gone," such fact would not render defendant liable for the acts of these men if, without express direction from him, they saw fit to go upon other lands than those of defendant, and there perform the hazardous act of setting fire to the prairie grass under conditions when it was extremely likely to escape and burn over and cause damage upon surrounding lands. By no amount of straining permissible in a situation such as this, can such acts as these be brought within the scope of the duties of men employed to do the ordinary work on a farm.

As we view it, the charge in the portions herein referred to is misleading in its comment upon the effect to be given the evidence, and

contains misdirection upon the law point upon which rests the question of defendant's liability, sufficiently serious to require a reversal of the judgment. The prejudicial character of those instructions specially excepted to is not corrected by the charge in its entirety. In fact, a consideration of the charge as a whole only serves to emphasize the fact that it contains not only misdirection as to the effect to be given the evidence, but fails to give such clear and explicit direction upon the law points applicable to the case as defendant was entitled to expect. It fails in any part to bring before the jury the elemental principle upon which depends the liability of defendant, and makes the law of the case entirely resolvable from the degree of credibility to be given the different witnesses.

The contention of defendant that the deficiencies of the charge proceed, partially at least, from the fact that it was hastily prepared, and delivered orally at the conclusion of the argument, without any previous stipulation of counsel that this might be done, is suggestive of a means by which many of the deficiencies apparent in this charge may be avoided in future trials. The statute provides that "no court shall instruct the jury in any civil action unless such instructions are first reduced to writing." Rev. Codes 1905, § 7021. In 1893 there was enacted the additional provision, "that with the consent of both parties entered in the minutes, the court may instruct the jury orally," etc. Rev. Codes, 1905, § 7022. It is apparent that this exception was not intended to abrogate the rule requiring that instructions be in writing, but was enacted for the purpose of permitting the giving of an oral instruction in an exceptional class of cases, usually of small importance, in which both parties have voluntarily consented that this may be done. The contemplation of the statute is evidently that this consent shall be volunteered by the party, or, at least, that if requested by the court the request should be made at a time when there is still abundant opportunity for the court to prepare its instructions in case such consent is refused by either party, without interfering with the progress of the trial. A proper respect for the rights of litigants would seem to dictate that such request should not be made in the presence of the jury or in such manner that either party, if he sees fit to refuse assent, will suffer prejudice in the minds of the jury on account of resulting delay. If, as suggested by counsel in this case, there has

grown up in a district of this state a practice of giving oral instructions in all cases, however simple or complicated the issues may be, where the consent of the parties has not been volunteered or requested, or indeed inquired for until after the argument of counsel and the case is otherwise ready for submission to the jury, it is unquestionably an abuse and misapplication of the statute providing for the giving of oral instructions in certain cases. If the infirmities of the charge under consideration proceed to any degree from such cause, there is strong reason for the exercise of greater care in this particular upon another trial.

For the errors in the instructions hereinbefore noted, the judgment of the District Court is reversed and a new trial ordered. All concur.

CHARLES BERGSTROM v. KASJA SVENSON.

(126 N. W. 497.)

Public Lands — Death of Homesteader — Alien Heirs — Right to Land.

In December, 1896, one Axel Bergstrom made a homestead entry on certain government land in Pierce county, and in May following he died intestate, leaving surviving him the plaintiff, his brother, who is a citizen of the United States and a resident of this state, also the defendant, his mother, an alien, who is a citizen and resident of Sweden. In June, 1903, plaintiff made final proof pursuant to § 2291, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 1390, and received final receiver's receipt, and in June, 1905, a patent for said land was issued by the government, running to the heirs of Axel Bergstrom. This is the statutory action to determine adverse claims, and the sole question involved is whether by such patent the fee title to the land was conveyed to the alien mother or to the citizen brother. *Held*, construing § 2291, U. S. Rev. Stat., that the mother, being an alien, was incapable of making final proof, and hence not qualified to receive title from the government, and such title is quieted in plaintiff, who is the sole heir capable of making such proof and receiving title from the government.

Opinion filed April 29, 1910.

Note.—Under the common law, an alien is held to have no inheritable ability, and therefore to be incapable of taking title to real property by descent. See review of authorities in notes in 6 L. ed. U. S. 488, 28 L. ed. U. S. 934, and 31 L.R.A. 177. But this general rule has been to a considerable extent modified by statute both in this country and in England, as shown by the notes in 31 L.R.A. 85, 31 L.R.A. 146, and 12 Am. St. Rep. 93.

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

Action by Charles Bergstrom against Kasja Svenson. Judgment for plaintiff, and defendant appeals.

Affirmed.

Bangs, Cooley, & Hamilton, for appellant.

Heirs of devisees of deceased entryman take as grantees of the government, not by inheritance. Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Gould v. Tucker, 20 S. D. 226, 105 N. W. 624; Dawson v. Mayall, 45 Minn. 408, 48 N. W. 12; Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; Wittenbrock v. Wheadon, 128 Cal. 150, 70 Am. St. Rep. 32, 60 Pac. 664; Haun v. Martin, 48 Or. 304, 86 Pac. 371.

Right of succession is exclusively of state cognizance. Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; Anderson v. Bell, 140 Ind. 375, 29 L.R.A. 541, 39 N. E. 735; Eddie v. Eddie, 8 N. D. 376, 73 Am. St. Rep. 765, 79 N. W. 856; Cooper v. Ives, 62 Kan. 395, 63 Pac. 434; Caldwell v. Miller, 44 Kan. 12, 23 Pac. 946; Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Wittenbrock v. Wheadon, supra; Dukes v. Faulk, 37 S. C. 255, 34 Am. St. Rep. 745, 16 S. E. 122; Braun v. Mathieson, 139 Iowa, 409, 116 N. W. 789; Cooper v. Wilder, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591.

Albert E. Coger, for respondent.

"Heirs" as used in United States homestead law means heirs who were citizens of the United States when final proof was made. Agnew v. Morton, 13 Land Dec. 228; Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50.

Rules of construction as applied to deeds and wills do not apply to patents and other public grants. Braun v. Mathieson, 139 Iowa, 409, 116 N. W. 789; Towner v. Rodegeb, supra; 26 Am. & Eng. Enc. Law, 2d ed. pp 427, 432; Smith v. Pipe, 3 Colo. 195; Kiefer v. German-American Seminary, 46 Mich. 636, 10 N. W. 50; Nash v. Sullivan, 29 Minn. 206, 12 N. W. 698; Smith v. Townsend, 148 U. S. 494, 37 L. ed. 534, 13 Sup. Ct. Rep. 634; Payne v. Mathis, 92 Ala. 585, 9 So.

605; Landes v. Brant, 10 How. 348, 13 L. ed. 449; Morehouse v. Phelps, 21 How. 294, 16 L. ed. 140.

FISK, J. This is an appeal from a judgment of the district court of Pierce county, and comes here for trial *de novo*. The facts are not in dispute, and, as found by the trial court, are substantially as follows:

"(1) That one Axel Bergstrom in his lifetime made a homestead filing on government land pursuant to the laws of the United States. [Here follows a description of the land which is situated in Pierce county.]

"(2) That the said Axel Bergstrom was the brother of the plaintiff, Charles Bergstrom, and that the defendant, Kasja Svenson, is the mother of the said Axel Bergstrom.

"(3) At the time of the death of Axel Bergstrom, he had not made proof to the premises hereinbefore described, but, after his death, proof was made to said land, and thereafter patent was issued by the government of the United States running to the heirs of said Axel Bergstrom, deceased.

"(4) That at all the times herein mentioned the plaintiff was, and now is, a citizen of the United States and a resident of North Dakota, and the defendant was a citizen of Sweden, and was at all times herein mentioned, and now is, a resident of Sweden. That said Axel Bergstrom left surviving him no heirs at law or next of kin who are citizens of the United States, save and except the plaintiff, Charles Bergstrom."

This is the statutory action by the son against the mother to determine adverse claims to the real property in controversy.

As stated by the appellant's counsel: "The sole question for determination is whether under the United States patent granting the lands to 'the heirs of Axel Bergstrom' the fee title was conveyed to the alien mother of the deceased entryman or to the citizen brother." The entire controversy turns upon the construction to be placed on § 2291 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 1390. Whatever our decision may be, it is not necessarily final as the same may be ultimately reviewed by the Supreme Court of the United States. Section 2291 reads: "No certificate, however,

shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in § twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." It is entirely clear from a reading of the above statute that alien heirs are incapable of making final proof, even though under the local state statute where the land is situated they might inherit had the deceased entryman left an estate. This is firmly established, both by the decisions of the land department and by the courts. It is plaintiff's contention that in no event can alien heirs derive any title to a homestead under the above statute, and that the words "the heirs of Axel Bergstrom" contained in the patent in the case at bar should be construed to mean "the heirs of Axel Bergstrom who were citizens of the United States at the time final proof was made herein." On the contrary, counsel for defendant contend, in effect, and with much plausibility, that the grant by the government to "the heirs of Axel Bergstrom" conveys title to defendant, as she is the sole heir of the deceased entryman under the state statute, and that we must look alone to such statute to determine who the grantee is under such patent. The learned trial court upheld the contention of the plaintiff and quieted title in him. While the matter is by no means free from doubt, and, strange as it may seem, no court, so far as we are able to discover, has ever been called upon to pass on the precise question here involved, we feel constrained to concur in the views of the trial court by holding that plaintiff, being the sole heir capable of taking advantage of the privilege afforded by § 2291, supra, takes the title under the patent. The language employed in the latter portion of said statute would seem to permit of no other

construction. It reads: "Then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent," etc. It is contrary to the whole policy of the homestead law that persons not citizens of the United States may, under any conditions, acquire title thereunder. This is manifest from the various provisions of the act limiting the beneficiaries thereof to persons only who are citizens.

While, as stated by counsel for appellant, defendant is, under our state statute, the sole heir of Axel Bergstrom, and as such would, although an alien, inherit any property left by him, still such fact is in no manner controlling. Axel Bergstrom had no estate in such homestead, and hence could leave no inheritable interest therein. He merely possessed an inchoate right therein,—a mere preference right to obtain title upon compliance with the homestead act. This is expressly conceded, and counsel for appellant make no claim to any rights through inheritance under the state statute; their contention being that their client takes by purchase from the government. In other words, they contend that the patent grants the land to defendant the same as if she had been specially designated as the sole grantee therein. Such contention is based upon the postulate that the patent names the grantee as the "heirs of Axel Bergstrom," and that the state statute must alone be consulted to determine who are such heirs. This line of reasoning is quite persuasive, but we think it fallacious. It runs counter to the express language of the federal statute above cited, as well as to the well-recognized policy of the government in enacting the homestead law. In the light of such statute, it is, we think, reasonably clear that the words "the heirs of Axel Bergstrom," as used in the patent, must be construed to mean the persons who are capable of making proof under the provisions of § 2291, aforesaid. No other persons are entitled to a patent. Defendant, being an alien, was incapable of making proof, and, such being true, she is to all intents and purposes the same as if dead. It has been thus held by the land department of the govern...ent in sustaining the right of a person to make final proof, who, under the local state statute, would not inherit. Agnew v. Morton, 13 Land Dec. 228. The above case involved facts analogous to those in the case at bar, and, in construing the Federal statute, First Assistant Secretary Chandler said:

"Section 2291 of the Revised Statutes provides for the issuance of patent, after satisfactory final proof, to the 'heirs or devisee' in case of the death of the entryman leaving no widow. But such heirs or devisee shall be citizens of the United States at the time final proof is made. It is manifest that the father and mother, while citizens of Great Britain, cannot make proof and obtain patent for the land. Being thus incompetent, their right to make final proof and receive patent for the land while subjects of a foreign country is the same as if they had no existence." To the like effect is the decision of the Washington court in Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50, from which we quote as follows: "The homestead law vests the rights in the land in the claimant himself for his exclusive benefit, and if he die before patent issues, leaving no widow, then in his heirs, or devisees, if they be at the time citizens of the United States. U. S. Rev. Stat. §§ 2290, 2291, U. S. Comp. Stat. 1901, pp. 1389, 1390. The alien heirs are incompetent to make proof and secure title to a homestead [citing Agnew v. Morton]. The answer in the case at bar alleges that the deceased homesteader left no heirs who were citizens of the United States. They are therefore incompetent to make the necessary proof and secure title as heirs of the deceased. There is no authority in the land laws for an executor or administrator to consummate the inchoate claim of a deceased homesteader for the benefit of the creditors. . . . If a homestead claimant dies before patent issues, or before the right to demand a patent has accrued, the land does not become a part of his estate. Upon his death, all his rights under the homestead entry cease, and his heirs become entitled to a patent, not because they have succeeded to his equitable interest, but because the law gives them preference as new homesteaders, and allows them the benefit of the residence of their ancestor upon the land. Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233. . . . The heirs do not succeed to such rights by inheritance, but by virtue of the law which merely grants to them preference rights. If they fail to exercise those rights, or if, as in this case, there are no heirs capable, as citizens of the United States, of succeeding to such rights, then there is no one else to whom any preference right survives, and

the land is open as a part of the public domain for occupancy by any qualified homesteader."

Counsel for appellant cite and rely upon Caldwell v. Miller, 44 Kan. 12, 23 Pac. 946, and Hutchinson Invest Co. v. Caldwell, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504, as well as other cases. In its opinion in the latter case the Supreme Court of the United States uses certain language, which, if applicable to the case at bar, would seem to support appellant's contention. Among other things the court says: " 'It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated,' and, although Congress might have designated particular grantees to whom the land should go in the first instance, it did not do so, nor make use of words indicative of any intent that the law of the state should not be followed. . . . The object sought to be attained by Congress was that those who would have taken the land on the death of the pre-emptor, if the patent had issued to him, should still obtain it notwithstanding his death, an object which would be in part defeated by the exclusion of any who would have so taken by the local law if the title had vested in him." It will be noticed, however, that this case involved the pre-emption law and the construction of § 2269, U. S. Rev. Stat. and hence is not in point. The case of Braun v. Mathieson, 139 Iowa, 409, 116 N. W. 789, involved rights under the former timber culture act. It will be seen upon examination that § 2291, relating to final proof under the homestead act, is materially different from § 2269, relating to such proof under the pre-emption act, as well as the law relating to such proof under the timber culture act.

Lastly, appellant's counsel call attention to § 2448, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 1512, which provides: "Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life." It is well settled, however, that the

above section has no application under the facts of this case. It was enacted merely for the purpose of avoiding the rule that a patent issued to a dead man is void, and it only applies to cases where the deceased entryman had complied with the law, and was entitled to a patent at the time of his death. 20 Am. & Eng. Enc. Law, 2d ed. p. 432.

The views above expressed lead to an affirmance of the judgment appealed from, and it is accordingly affirmed. All concur.

STATE OF NORTH DAKOTA v. PETER ILDVEDSEN.

(126 N. W. 489.)

Criminal Law — Intoxicating Liquors — Words and Phrases — "One Place" — Election between Acts.

1. Defendant was tried and convicted of the crime of keeping and maintaining a liquor nuisance in a certain building situated in the city of Minot, a particular description of the place not being designated. The proof showed that at the date the offense was committed defendant conducted a hotel, and that in the rear of such hotel, and but 3 feet therefrom, is a small building, with a sidewalk between them and a narrow passageway, and that, to gain entrance to or exit from such small building, it was necessary to pass through the hotel. The proof shows that defendant made sales of intoxicating liquor, both in the basement of the hotel and in this little building in the rear. *Held*, under the facts, that both structures were used by defendant together for the convenient conduct of the prohibited traffic, and that within the meaning of § 9373, Rev. Codes 1905, they constituted "one place" for the maintenance of such nuisance. Hence it was not error to deny defendant's motion to require the prosecution to elect which building they would rely on as the place where the nuisance was maintained.

Intoxicating Liquors — Nuisance — Judgment of Abatement.

2. Following the rule announced in State v. Poull, 14 N. D. 557, 105 N. W. 717, *held* that, upon conviction for keeping and maintaining a liquor nuisance, the court is not authorized to direct the abatement of such nuisance, where the indictment or information fails to particularly describe the place where such nuisance is maintained.

Intoxicating Liquors — Conviction — Lien for Fine and Costs — Harmless Error.

3. The judgment upon a conviction for keeping and maintaining a liquor

nuisance adjudged that a lien be established for the amount of the fine and costs against the property on which the evidence discloses that such nuisance was maintained.

Held that, even if this was error, was nonprejudicial, for the reason that the proof discloses defendant to be the owner of such property, and under § 9379, Rev. Codes 1905, such fine and costs are made a lien on all of defendant's real property until paid.

Opinion filed April 30, 1910.

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

Peter Ildvedsen was convicted of maintaining a liquor nuisance, and appeals.

Affirmed in part.

R. H. Bosard and *G. W. Twiford,* for appellant.

Dudley L. Nash, State's Attorney, and *George L. Reyerson,* Assistant State's Attorney, for the State.

FISK, J. Appellant was convicted in the district court of Ward county of the crime of maintaining a liquor nuisance, and he prosecutes this appeal from the judgment of conviction. The charging part of the indictment is as follows: "That at said time and place the said Peter Ildvedsen did wilfully, unlawfully, keep and maintain a certain place, to wit, a saloon in a building situated in the city of Minot, in the county of Ward, state of North Dakota, in which said building intoxicating liquors were sold, bartered, and given away as a beverage," etc.

It is conceded by the appellant's counsel that there is sufficient proof of defendant's guilt to sustain a conviction; the sole contention being that, over his objection, the state was erroneously permitted to prove two separate and independent offenses, and that it was prejudicial error to deny his motion to require the prosecuting officer, at the close of the state's case, to elect on which offense the state would rely. We are agreed that in such ruling the trial court did not commit error. It will be observed that the indictment does not particularly describe the place or building where the nuisance was maintained. Such place is designated in general language as "a building situated in the city of Minot." The case of State v. Poull, 14 N. D. 557, 105 N. W. 717,

relied on by appellant, when carefully read, may, we think, be easily differentiated from the case at bar. In the Poull Case there were two buildings on the lots described in the information. On the front was defendant's dwelling house and on the rear was a barn. The two buildings were in no way connected together, but, on the contrary, were, as stated in the opinion, "wholly disconnected and independent." We quote further from the opinion as follows: "The information charged the maintenance of the nuisance at one building, and that cannot be held to be two buildings not connected together, but, on the contrary, wholly disconnected and independent. A nuisance is maintained by keeping a place for the purposes named in § 7605, Rev. Codes 1899; that is, by selling liquors at a place or keeping it there for purpose of sale, or permitting persons to resort to such place for the purpose of drinking intoxicating liquors. Under this section, the word 'place' is restricted in its meaning, and cannot be construed to mean all buildings on a particular lot when not shown to be united in some way. Two buildings on one lot are not necessarily one place. . . . The facts in this case are not like those in State v. Brown, 14 N. D. 529, 104 N. W. 1112, recently decided by this court. In that case both structures formed a part of the same place, and were described as within one curtilage." In marked contrast to that case the testimony in the case at bar tends strongly to disclose that the small house in the rear of defendant's hotel was connected therewith and used by defendant conjointly with the hotel building as one place for the unlawful maintenance of a liquor nuisance. The case of State v. Brown, supra, is particularly applicable to this case. There, as here, the maintenance of but a single nuisance was alleged, and it is clear that both structures were used together for the convenient conduct of the prohibited purpose. To gain entrance to or exit from the small building, it was apparently necessary to pass through the hotel washroom. The small building was only about 3 feet from the rear door of the hotel, and there was, as stated by some of the witnesses, merely a sidewalk or passage way between them. It is clear that the small building was "adjacent to and within the curtilage of the latter" within the rule announced in State v. Brown, and both buildings as thus used constituted one "place" within the meaning of the statute prohibiting the keeping of a "place" for such unlawful traffic. It was therefore

not error to deny the defendant's motion to require the prosecution to elect which building it would rely on as the place where such nuisance was kept and maintained by defendant.

But one other matter requires notice. Error is assigned as to that portion of the judgment wherein a lien for the fine and costs is adjudged against the premises, and the small building ordered closed for the period of one year. Such assignment is not supported in the brief by argument, nor is it otherwise referred to. Upon what ground this portion of the judgment is claimed to be erroneous we are not advised by the brief of counsel, but we assume that such assignment of error is predicated upon the fact that the particular description of the place where such nuisance was maintained is not designated in the indictment. Section 9373, Rev. Codes, makes it mandatory upon the court to direct the officer in the event "the existence of such nuisance is established, either in a criminal or equitable action, . . . to shut up and abate such place by taking possession thereof, . . . and said officer . . . shall securely close said building . . . and keep the same securely closed for the period of one year, unless sooner released." It is the settled rule, however, not only of this court but elsewhere, that, where an abatement of the nuisance is sought, the alleged nuisance must be particularly identified in order to furnish a sufficient basis for the order of abatement. State v. Thoemke, 11 N. D. 386, 92 N. W. 480, and cases cited; and also State v. Poull, supra.

In so far, therefore, as the judgment directs an abatement of the nuisance, the same is erroneous and must be modified, but this in no manner affects the other portions of such judgment. Regarding that portion of the judgment decreeing a lien upon the premises for the amount of the fine and costs, we think the same, if error at all, is error without prejudice. Section 9379, Rev. Codes, makes all fines and costs assessed against any person in prosecutions for maintaining liquor nuisances a lien upon the real property of such person until paid. There is nothing in the record tending to show that defendant is not the owner of the real property upon which he maintained such nuisance, and, being in possession, in the absence of proof to the contrary, the presumption is that he was such owner. Hence, in the absence of a specific provision in the judgment making such fine and

costs a lien, the statute aforesaid does so. The language found in § 9383 that, "In prosecutions under this chapter by indictment or otherwise, it shall not be necessary . . . to describe the place where sold or kept for sale, except in prosecutions for keeping and maintaining a common nuisance and in proceedings for enjoining the same or when a lien is sought to be established against the place where such liquors are illegally sold or kept for sale," must in the light of § 9379 be construed to apply merely to cases where a nuisance is kept and maintained on leasehold premises, and it is sought to establish a lien thereon. The provisions of § 9379, establishing a general lien on all defendant's real property for such fine and costs, renders it unnecessary and useless to establish a special lien on any particular property owned by him, and upon which the nuisance is maintained. Hence it could not have been the legislative intent in enacting § 9383 to require a particular description in all cases, but merely in those prosecutions where a general lien is not provided for in said section. The judgment in this respect, even if erroneous, is in no way prejudicial to defendant.

The District Court is directed to modify its judgment in the particular above stated, and, as thus modified, the same is affirmed. All concur.

W. E. BEDDOW v. FRED C. FLAGE.

(126 N. W. 97.)

Appeal and Error — Failure to Serve Undertaking with Notice — Permission to File Later.

Appellant served notice of appeal on March 1, 1909, but did not serve the undertaking on appeal until twenty-three days later. Both were filed with the clerk of the district court on March 26th. Respondent moves to dismiss the appeal for failure to serve a copy of the undertaking with the notice of appeal as required by § 7220, Rev. Codes 1905.

Held, that such failure is not jurisdictional, and that the facts present a proper case entitling appellant to invoke the aid of § 7224, which provides:

"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 may be just."

Appellant is accordingly permitted, on payment of $25 terms, to furnish a new undertaking or make a cash deposit as prayed for.

Opinion filed April 30, 1910.

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

Action by W. E. Beddow against Fred C. Flage. Judgment for plaintiff, and defendant appeals.

Motion to dismiss denied.

C. W. Davis, for motion.

Knauf & Knauf and *C. S. Buck,* opposed.

FISK, J. This is a motion by respondent for an order dismissing the appeal, the sole ground of the motion being that the undertaking on appeal was not served with the notice of appeal. The notice was served on March 1, 1909, and the undertaking on March 24, 1909. Both were filed in the office of the clerk of the district court at the same time,—March 26th thereafter. It is the contention of respondent's counsel that service of a copy of the undertaking, simultaneously with the service of the notice of appeal, is essential to the jurisdiction of this court. Such contention is manifestly very technical, and ought not to be upheld if the provisions of the appeal statute are susceptible of a more liberal and reasonable construction than that contended for by appellant. This precise question has never before arisen in this state, so far as we are aware, but in our sister state—South Dakota—statutory provisions similar to our own have been construed, and, as respondent's counsel contends, favorably to his view. Counsel cites and relies upon McConnell v. Spicker, 13 S. D. 406, 83 N. W. 435, and Morrison v. O'Brien, 17 S. D. 372, 97 N. W. 2. The case of McConnell v. Spicker does not support counsel's contention. It was squarely held in that case that it is not essential to the jurisdiction of the appellate court that a copy of the undertaking should be served with the notice of appeal, but what the court did hold is that the undertaking must be executed at the time the notice of appeal is served,

and if it is thus executed at said time the supreme court acquires jurisdiction of the appeal, even though the appeal may not be perfected by reason of noncompliance with the statute with reference to perfecting the appeal by doing any other act necessary to be done. The court expressly cites, with approval, the prior case of Mather v. Darst, 11 S. D. 480, 78 N. W. 954, wherein, among other things, it was said: "Counsel for respondents contended that the service of the undertaking upon the respondents presents a jurisdictional question, and that, in the absence of such service, this court has no jurisdiction of the appeal. In this contention, counsel are clearly in error. By § 5215, Comp. Laws, it is provided that 'the appeal shall be deemed taken by the service of the notice of appeal and perfected on service of the undertaking for costs.' And § 5219 provides, 'To render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant.' When the notice of appeal is duly served, and an undertaking executed, this court has jurisdiction of the appeal, although the appeal may not be perfected by the performance of all the acts specified in the statute. This is made clear by § 5235, which prescribes 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 make it effectual . . . 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 may be just.' . . . The failure to serve the undertaking as prescribed in § 5231 does not therefore affect the jurisdiction of the court; and the service of the undertaking might now be allowed to be made, under the provisions of § 5235, if the motions had been made in time."

In Morrison v. O'Brien it was held, however, that the service of the copy of the undertaking with the notice of appeal is obligatory upon the appellant, and cannot be omitted without rendering the proceedings irregular and the appeal subject to dismissal upon motion, but that the failure to file the undertaking or serve a copy thereof with the notice of appeal, when such failure is the result of mistake or accident, may be remedied under the provisions of § 461 of the South Dakota Code of Civil Procedure, which is the same as § 7224, Rev. Codes 1905, of this state.

The former Code of New York contained provisions relating to ap-

peals very similar, if not identical, with the Code of this state and of South Dakota, and the early decisions in New York seem to support to some extent, but not fully, the views announced by the South Dakota court. See Cushman v. Martine, 13 How. Pr. 402; Smith v. Heermance, 18 How. Pr. 261; New York Cent. Ins. Co. v. Safford, 10 How. Pr. 344; Raymond v. Richmond, 76 N. Y. 106. In Cushman v. Martine it was said: "Sections 334 and 340 [Code], taken together, import that an appeal is ineffectual for any purpose unless the notice of appeal and a copy of the undertaking are served, at the same time, on the adverse party. Section 334 enacts that an appeal shall be of no force or effect whatever until the prescribed undertaking has been executed, etc. The execution of an undertaking imports and includes a delivery of it. Sections 334 and 340 prescribe what shall constitute a delivery of it. It is delivered by filing the original and serving a copy of it; and § 340 is peremptory that the copy shall be served with the notice of appeal. If the filing of an undertaking, and service of a copy of it, subsequent to the service of notice of appeal, would make the appeal effectual from the time a copy of the undertaking was served, and operate as a stay of proceedings from that time, then this absurdity would follow: The respondent must except to the sufficiency of the sureties, 'within ten days after the notice of the appeal.' . . . If a copy of the undertaking may be served six days after the notice of appeal, it may be served twelve days thereafter, and after, it will be too late to except to the sufficiency of the sureties."

It seems to be the holdings of these cases that the undertaking on appeal must be executed at the time of the service of the notice of appeal, and that a copy of such undertaking must be served contemporaneously with the service of such notice. In other words, that the language of the statute, "the original must be filed with a notice of the appeal, and a copy showing the residence of the sureties must be served with the notice of appeal," should be literally construed, requiring service of the undertaking at the same time the notice is served. Since the foregoing New York cases were decided, the statute in that state has been amended so as to permit the undertaking to be served after the service of the notice, and at any time prior to the expiration of the time for taking the appeal. Raymond v. Richmond,

supra. Were it not for the decisions above cited construing statutes like ours to the contrary, we might be inclined to adopt a more liberal rule, and hold that the word "with," as used in the statute, was intended to be thus used in one of its well-recognized primary senses, meaning "in addition to." There appears to be respectable authority for thus cnstruing such word as used in somewhat analogous statutes. 30 Am. & Eng. Enc. Law, 2d ed. p. 891, and cases cited; Hummert v. Schwab, 54 Ill. 142; Goldie v. McDonald, 78 Ill. 605; Rosenthal v. Ruffin, 60 Md. 324; Furness v. Helm, 54 Ill. App. 435. Such a construction would appear to more nearly harmonize the various sections of our appeal statute, portions of which are apparently inconsistent with the idea that both the notice and undertaking must be served at the same time. If the legislature contemplated that the taking of an appeal and the perfecting thereof could only be accomplished at the same instant of time, it seems somewhat strange that § 7205, Rev. Codes, was not drawn in different language. The taking and the perfecting of the appeal are treated in the statute as wholly separate and independent acts, and, furthermore, there seems to be no good reason why these two steps should be so closely connected in point of time. It is reasoned, however, in some of the cited cases, in effect, that because of the language in § 7221 of our Revised Codes giving respondent "ten days after such notice of the appeal" in which to except to the sureties, that respondent would be deprived of such right if appellant should be permitted to serve the copy of undertaking after the date upon which the notice of appeal is served. It will be observed, however, that the language quoted does not purport to limit such time for excepting to the sureties to ten days after service of the notice of appeal, but merely to ten days after such notice of the appeal, and we think it might plausibly be argued that the meaning thereby intended was that respondent could thus except within ten days after acquiring knowledge of the appeal (*i. e.*, the perfected appeal) by the service of the undertaking. There is no appeal which is effectual for any purpose until the undertaking for costs is "executed," which latter word has been construed to mean "executed and served." Cushman v. Martine, supra. Hence the words "notice of the appeal," as used in § 7221, supra, might be said to have reference to the notice or knowledge of the perfected appeal as furnished by the service of the copy of undertaking,

and not merely to the "notice in writing" mentioned in § 7205, Rev. Codes, 1905.

The judge who wrote the opinion in Cushman v. Martine, supra, also wrote the opinion in the case of Webster v. Stephens, 3 Abb. Pr. 227, a few months earlier, wherein it was held, in effect, that, to make a complete and perfect delivery of the undertaking to the use of respondent, it should be filed, and that an exception to the sureties within ten days from the date of such filing is in time.

Furthermore, it will be observed that by the latter section an appeal is not taken until the notice is filed as well as served. The appeal was not taken in this case, therefore, until March 26, 1909, although the notice was served on March 1st. The undertaking and notice were filed at the same time, hence the appeal was both taken and perfected on March 26th.

However this may be, we feel disposed to follow, as nearly as possible, the settled rule of construction adopted by the courts of New York and South Dakota under like statutes, leaving it to the legislature to amend the statute if, in its wisdom, a different rule should prevail. This conclusion, however, does not lead to a dismissal of the appeal. It appears that appellant has, in good faith, given notice of appeal and attempted to perfect the same, and we think that the facts disclose a case authorizing us to grant him the relief provided for by § 7224. This section reads: "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 may be just."

Appellant invokes the aid of such statute, and, we think, fairly brings himself within its provisions. Such statute no doubt was enacted to cover cases like the one at bar. We think appellant, as terms, should reimburse respondent for his costs of the motion. It is therefore ordered that, on payment to respondent's counsel of the sum of $25, appellant may serve and file a new undertaking or make a cash deposit as prayed for by him, and that, unless this is done within ten days from notice of this order, the appeal will be dismissed. All concur.

JOHN BRUEGGER, as Trustee of the Bruegger Mercantile Company, v. JOSEPH CARTIER.

(126 N. W. 491.)

Judgment — Trial by Court — Time for Entry — Effect of Delay.

1. Section 7039, Rev. Codes 1905, providing, upon the trial of any question or issue of fact by the court, its decision thereon and conclusions of law upon such decision and direction for entry of judgment in accordance with such conclusions must be given in writing and filed with the clerk within sixty days after the cause has been submitted for decision, does not make void a judgment rendered after the expiration of that period.

Courts — Change of Judicial Districts — Effect Upon Judgments — Validity.

2. After an action in Williams county was tried, and before it was decided, the county was by chapter 116, Laws 1903, detached from the second judicial district, and with other counties formed into the eighth judicial district. *Held*, that a judgment in such action entered on an order of the judge of the second judicial district, filed thereafter, was at most voidable, and the party complaining of such judgment not having made an application to vacate the same as provided by § 6766, Rev. Codes 1905, the judgment is valid.

Judgment — Relief in Equity — Effect of Fraud or Accident.

3. In an action in equity to obtain a new trial of an action at law or to be relieved from a judgment entered in such action, on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that in the trial thereof matters were determined adversely to the party complaining, to the prejudice of his interests, and that he was, by fraud or accident, deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault.

Opinion filed April 30, 1910.

Appeal from District Court, Williams county; *C. A. Pollock*, J.

Action by John Bruegger, as trustee of the Bruegger Mercantile Company, against Joseph Cartier. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Reversed.

Greenleaf & Fisk and *Albert J. Dwyer*, for appellant.

Equity will relieve against a judgment which it is against conscience to execute, where the holder of the judgment is deprived of rights without his fault, if it is allowed to stand. Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362; 1 Black, Judgm. §§ 356, 366; 23 Cyc.

Law & Proc. pp. 991, 992; Freeman, Judgm. 3d ed. § 486; Radzuweit v. Watkins, 53 Neb. 412, 73 N. W. 679; Knight v. Hollings, 73 N. H. 495, 63 Atl. 38; Kelleher v. Boden, 55 Mich. 295, 21 N. W. 346; Telford v. Brinkerhoff, 163 Ill. 439, 45 N. E. 156; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Kitzman v. Minnesota Thresher Mfg. Co. 10 N. D. 26, 84 N. W. 585.

New trial may be granted and execution of judgment enjoined. 1 Black, Judgm. § 357; Yancey v. Downer, 5 Litt. (Ky.) 8, 15 Am. Dec. 35; Oliver v. Pray, 4 Ohio, 175, 19 Am. Dec. 595; Knifong v. Hendricks, 2 Gratt. 212, 44 Am. Dec. 385; Hunt v. Boyier, 1 J. J. Marsh. 484, 19 Am. Dec. 116.

Geo. A. Gilmore, for respondent.

Equity will not intervene when remedy by motion is available and adequate. 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; Rehearing, 14 N. D. 95, 103 N. W. 392.

There was remedy by mandamus. 4 Current Law, 304, 305; 26 Cyc. Law & Proc. pp. 192(3), 210 (u); Bridgeport Electric & Ice Co. v. Bridgeport Land & Improv. Co. 104 Ala. 276, 16 So. 93; Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007.

CARMODY, J. This is an appeal from an order sustaining a demurrer of defendant to plaintiff's complaint, and dismissing the action upon its merits. This action was brought by the plaintiff herein, as trustee of the Bruegger Mercantile Company, for equitable relief against a judgment secured by the defendant herein in a former action wherein said defendant was plaintiff and the plaintiff herein, as the trustee of the Bruegger Mercantile Company, was defendant; said judgment being for specific performance of a certain contract for the conveyance of a parcel of land situate in the city of Williston. The amended complaint alleges: That on the 1st day of March, 1897, the said plaintiff was, by an instrument in writing executed by all the members of the Bruegger Mercantile Company, a partnership, appointed trustee of the real estate of said partnership, and took possession thereof. That on the 24th day of September, 1898, plaintiff entered into a contract with defendant, whereby he agreed on payment of $200

to convey the real estate in controversy to the defendant, part of which was paid on the 24th day of September, 1898, and the balance became due on the 24th day of September, 1899, with interest at 8 per cent. The contract was in writing and contained the usual covenants of performance on the part of both parties. In case of forfeiture of the contract by failure of defendant to perform his part thereof, the real estate was to revert to plaintiff; time of payment being the essence of the contract. That subsequently a misunderstanding grew out of said contract through the refusal by defendant to comply with its terms. That on the 15th day of February, 1901, the said defendant commenced an action against this plaintiff to require him to specifically perform his part of the said contract by the delivery of a good and sufficient deed of conveyance of the premises hereinbefore mentioned. That plaintiff filed an answer in said action, alleging that defendant had not complied with the terms of said contract, that payment under the same had not been made nor tendered in accordance with the terms of said contract, and that said plaintiff as trustee had tendered defendant a deed for said property, which deed said defendant refused, and that upon such refusal this plaintiff declared said contract canceled, and notified said defendant in writing of his election to cancel said contract. That upon all the issues the said cause came on for trial before the Honorable John F. Cowan, judge of the second judicial district; a jury having been waived. That as a part of the evidence necessary to determine the issue presented by the pleadings in said action various papers in writing were introduced in evidence as follows: Exhibit 1: A contract in writing entered into between plaintiff and defendant that was subsequently canceled by agreement. Exhibit 2: The written contract entered into between plaintiff and defendant hereinbefore referred to. Exhibit 3: A notice in writing given by said defendant to said plaintiff of the deposit of a sum of money in the Citizens' State Bank of Williston for the payment of the final amount due to said trustee under said contract; such notice showing certain restrictions placed upon said bank concerning the payment of said money to plaintiff herein. Exhibit 4: A written notice served by plaintiff upon defendant notifying him of the cancelation of said land contract by plaintiff. Exhibit 5: Another written notice of the cancelation of said contract by plaintiff and served upon defendant. Ex-

hibit 6: A written notice demanding the payment of the balance due on said contract and served upon said defendant by plaintiff. Exhibit 7: A written declaration of the cancelation of said contract by said plaintiff and served upon defendant. Exhibit 8: The deed tendered to defendant by plaintiff. Exhibit 9; Certificate of deposit for money deposited in said Citizens' State Bank, as a tender, such certificate showing the restrictions that were placed upon the payment of said money to said trustee. Exhibit 10: Plat of the town site of Williston, North Dakota. That the Honorable John F. Cowan, judge aforesaid, took said cause under advisement on the 4th day of March, 1901, and retained the same, and took no action nor rendered a decision in said cause until the 18th day of August, 1906, when the said judge decided said cause in favor of the defendant and against the plaintiff. And on the 18th day of August, 1906, at Devils Lake, North Dakota, made an order for the entry of judgment, on which order judgment was entered in the district court of Williams county, requiring plaintiff to convey the premises in controversy to the defendant within twenty days from the 18th day of August, 1906, by a good and sufficient warranty deed, and, if plaintiff should fail to make execute, and deliver said deed to defendant within ten days after the expiration of the said twenty days, then the judgment should operate as a deed and transfer of title to said premises from plaintiff to defendant. That, at the close of the hearing of said cause, all of the exhibits were placed in possession of the court. That between the trial of said action and the 18th day of August, 1906, without the knowledge and through no fault of this plaintiff, the various exhibits hereinbefore mentioned were lost, and after diligent effort on the part of this plaintiff, when he sought to perfect his appeal from said decision, he was unable to obtain said exhibits or copies of the same, except copies of the contract in controversy. That on the 22d day of July, 1907, plaintiff appealed said cause generally to the supreme court, but owing to his inability to recover the lost pleadings and exhibits mentioned hereinbefore, or to obtain copies of the same, he was unable to perfect a complete record of said action, and was therefore unable to prosecute his appeal from said judgment in good faith and with effect, and for that reason upon the motion of this plaintiff, setting forth the reasons herein mentioned, and supported by an affidavit setting forth the facts pleaded in this complaint, and

showing said supreme court appellant's endeavor to recover said lost pleadings and exhibits or to obtain copies thereof, and his failure so to do through no fault on his part, said appeal was by the supreme court for those reasons dismissed, without a consideration of such action upon its merits. That, by reason of his inability to perfect the complete record of the hearing of said cause had in the district court, he was unable to have judgment of the district court in said action reviewed by the supreme court and has been therefore deprived of a legal and substantial right. That the holding of the said cause by said court without rendering a decision therein for the period of five years, five months, and fourteen days was an unreasonable and unwarranted exercise of authority by the said district court, prejudicial to the rights of the plaintiff herein. Said delay not having been occasioned by sickness of the judge to whom said cause was submitted for decision, or by any other unavoidable casualty, the said judge lost all jurisdiction of such action, and the judgment by him in said action is therefore null and void and a cloud upon the title of plaintiff to the said property. That plaintiff received the sum of $90 from defendant as part payment for said real estate before said contract was forfeited, and he is willing to restore the same and place defendant in as good position as he was previous to the entering into of said contract, and do any other equity required of said plaintiff. That defendant is and has been in possession of said real estate since the date of the contract herein mentioned, and is claiming title thereto by reason of said void judgment. That it is contrary to equity and good conscience to allow the enforcement of said judgment, for the reason that the evidence adduced on the trial of said cause failed to disclose the right of plaintiff in said action to the relief prayed for in his complaint and granted in said judgment.

"The complaint further states that the evidence at said trial disclosed the failure of the defendant to comply with his contract," and the cancelation thereof by the plaintiff in this action after offering to perform his part of the contract. That J. H. Bosard, of Grand Forks, since deceased, had been acting as attorney for the defendant since the trial hereinbefore mentioned, and was not an attorney of record therein. That on the 22d day of January, 1906, it came to the knowledge of this plaintiff that the following described papers were dis-

covered in the office of said J. H. Bosard by his successor, to wit: Copies of the complaint and answer in the case of Cartier v. Bruegger; a duplicate of the original contract between said parties out of which said litigation originated; an exact copy of the deed tendered by plaintiff to the defendant; a paper purporting to be a certificate of deposit from the Citizens' State Bank of Williston to defendant for money deposited as a tender by said defendant; a copy of the deed for said premises from the St. Paul, Minneapolis, & Manitoba Railway Company to the plaintiff herein. That because of the discovery of the copies of the exhibits and pleadings hereinbefore mentioned, a retrial of said action may be had without jeopardizing the interests of either plaintiff or defendant. That said judgment is contrary to the law of said case, and that through no fault of plaintiff he was deprived of his right to have said unjust and inequitable judgment reviewed by the supreme court. That his right to have a review is a substantial right, and that he is deprived of his property without full compensation therefor, and that he has no adequate remedy at law for the relief herein prayed for.

The relief prayed for is that, upon plaintiff's doing such equity as may be required of him by the court, the judgment be declared null and void; that defendant be decreed to have no estate nor interest in said property, title be quieted as to said void judgment in this plaintiff; and that the defendant be forever debarred and enjoined from asserting any rights thereunder; that plaintiff recover possession of said premises, and that the court fix the value plaintiff may recover for their use and occupation, or that said defendant be ordered to submit to a retrial of the cause hereinbefore mentioned, or that, in case of his refusal, he be forever enjoined from asserting any rights whatsoever under said judgment.

To this complaint the defendant interposed the following demurrer: "Comes now the defendant in the above-entitled action, and demurs to the amended complaint filed herein by plaintiff, for the reason that said complaint does not state facts sufficient to constitute a cause of action,"—which demurrer was sustained by the court with leave to amend said amended complaint upon the payment of the costs, taxed at $10. Plaintiff having in open court declined to plead further, it

was ordered that this action be dismissed on its merits, from which order sustaining the said demurrer plaintiff appeals to this court.

Plaintiff assigns errors as follows: "(1) The court erred in holding that the amended complaint did not state facts sufficient to constitute a cause of action. (2) It was error to sustain the demurrer and dismiss the action on its merits."

Section 7039, Rev. Codes 1905, provides for a compulsory decision within sixty days after a cause is submitted to the court, sickness or unavoidable casualty excepted. The plaintiff contends that, under the facts alleged in the complaint in this case, that the Honorable John F. Cowan by holding the decision of the former action between these parties for more than five years lost jurisdiction under said § 7039, and that the judgment entered in said action is void. In this he is in error. Said section does not make void a judgment rendered after the expiration of 60 days. McQuillan v. Donahue, 49 Cal. 157; Edmonds v. Riley, 15 S. D. 470, 90 N. W. 139; Demaris v. Barker, 33 Wash. 200, 74 Pac. 362. In Demaris v. Barker, supra, the court says, in speaking of a similar statute: "But certainly it was never thought that the remedy was to be found in the holding that the judgment afterwards rendered is nugatory. To give it this construction is to prolong the very evil it is sought to avoid, and to punish the very persons whom it was intended should be its beneficiaries. If the judgment, when rendered, is to be declared void, then the litigants, who have already been subjected to an unconstitutional delay, must again be subjected to the additional delays necessary to again bring the cause to the condition it was before the court violated its sworn duty. They must also pay the accruing costs necessary for that purpose. Were the delay something within the control of the litigant, were it caused by his own dereliction, the conclusion contended for might be tolerated. But the litigant cannot control the action of the court after he has submitted his cause for its decision." It may be that the plaintiff could by writ of mandamus have compelled the judge to render his decision at any time after the expiration of the sixty days provided in § 7039 had expired, but the judgment is not void because of the failure of the judge to render his decision within the time required by law.

While the cause was held under advisement by the judge of the

second judicial district in which the action was pending, Williams county was, by a law passed in 1903, detached from the second judicial district, and, with other counties, formed into the eighth judicial district, and a judge appointed therefor. Appellant contends that as Judge Cowan did not become judge of the eighth judicial district, but remained judge of the second judicial district, he lost jurisdiction to decide the cause, and that the judgment is void. Section 6766, Rev. Codes 1905, is as follows: "No order or judgment given by the judge of any district contrary to the limitations of the preceding sections shall for that reason be void, but such order or judgment may be vacated upon application within thirty days from the time the same shall have been made or given to the judge of the district in which the action or proceeding in which the same was made or given is pending, and if appealable by the supreme court on appeal." We cannot agree with counsel. At most, the judgment would be voidable under said § 6766; and the plaintiff not having made any application to vacate the same, as provided by such § 6766, the judgment is valid.

A more serious question is: Do the allegations set forth in the complaint entitle the plaintiff to the equitable relief demanded therein? The rule laid down in 23 Cyc. Law & Proc. pp. 991, 992, is as follows: "As a general rule any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself there, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to enjoin the adverse party from enforcing such judgment. It must therefore be made to appear that it would be unjust and unconscientious to enforce the judgment, and equity will not interfere merely on account of hardship, or where it appears that there is no valid defense to the action." Black on Judgments, 2d ed. vol. I, § 366, says: "The leading case in America upon the subject of equitable relief against judgments at law is that of Marine Ins. Co v. Hodgson. In that case Chief Justice Marshall specified the grounds for the interference of equity in the following terms: 'Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judg-

ments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' And the principles here set forth, though perhaps somewhat extended by more recent decisions, have been adopted without question, as a general statement of the rule, in all our courts. 'When a party goes into chancery after a trial at law,' says a learned judge in New York, 'he must be able to impeach the justice and equity of the verdict, and it must be upon grounds which either could not be made available to him at law, or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party, without any negligence or other fault on his part.' 'A court of equity does not interfere with judgments at law unless the complainant has an equitable defense, of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.' So speak all the authorities." The case in which the quotation from Chief Justice Marshall is taken is Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362. The New York case from which the quotation is taken is Vilas v. Jones, 1 N. Y. 274. See also Hendrickson v. Hinckley, 17 How. 443, 15 L ed. 123. It is plain from the complaint that the loss of the exhibits, as alleged therein, was caused without any fault or neglect of the plaintiff or his agents. After the appeal had been taken and dismissed, and more than one year after he received notice of the entry of judgment, the following described papers and exhibits were discovered: Copies of the complaint and answer in the case of Cartier v. Bruegger, in which the judgment, hereinbefore mentioned, was rendered, a duplicate of the original contract between the plaintiff and defendant, out of which the litigation originated; a copy of the deed tendered by plaintiff to defendant; a paper purporting to be a certificate of deposit in the Citizens' State Bank of Williston to the said Joseph Cartier for the money deposited as a tender; a copy of the

deed for said premises from the St. Paul, Minneapolis, & Manitoba Railway Company to the said plaintiff.

It appears to us that the original contract between the parties and the deed tendered by the plaintiff to defendant are very material to a proper decision of the former action, and that the plaintiff was, without any fault of his, deprived of their use in making the statement of the case in the former appeal. The principles contended for by the plaintiff in this action were before this court in two cases. The first is the case of Kitzman v. Minnesota Thresher Mfg. Co. 10 N. D. 26, 84 N. W. 585, which action was brought to permanently enjoin the collection of a judgment. The court says: "It therefore appears by the complaint that this plaintiff had a defense as against the note upon which said action was based, and further appears that on account of certain fraudulent representations made by the plaintiff in the other action, through its authorized agent, this plaintiff was induced to refrain from interposing such defense, and in consequence of plaintiff's neglect to do so a judgment was entered by default against this plaintiff. It seems entirely clear to this court that the allegations of the complaint show that this plaintiff has an adequate remedy at law by a motion to vacate the judgment in the other action. . . . This familiar remedy by motion is both speedy and economical, and it is also well settled that in granting this relief by motion the courts will exercise the powers of a court of equity applicable in administering the relief sought in actions of this nature." The court in this action held the complaint insufficient, using the following language: "We shall hold in this case that the complaint is insufficient, and place our ruling upon the ground that under the statute, upon the facts stated, the plaintiff has an adequate remedy by motion under said section made in the original action. . . . In this case we do not desire to go further than to hold that, where it appears that a party who seeks to enjoin the collection of a judgment by means of an independent action has an adequate remedy at law by motion, such action will not lie."

In the case at bar the plaintiff cannot obtain any relief by motion in the original action, the lost papers not having been found for more than one year after the judgment therein had been entered and notice of entry thereof served upon plaintiff's attorneys. In the case of

Freeman v. Wood, 11 N. D. 1, 88 N. W. 721, Freeman & Company, being insolvent, made an assignment for the benefit of their creditors to the defendant, Wood. Wood accepted the trust, and made an accounting to the district court. A decree or order was entered by the court discharging Wood and his bondsmen from further liability on account of said assignment and trust. The action was instituted to compel defendant to account anew for said property, and as preliminary to such relief plaintiffs asked that the decree of discharge entered by the court be vacated of record. A demurrer to the complaint was sustained. The court says: "No time is stated in the complaint at which the plaintiffs or any of them discovered the fraud of which they are complaining, and hence we must assume for the purposes of the case on this appeal that such discovery was made in fact within a year after the judgment complained of was entered." Neither of these cases is an authority against the plaintiff in the case at bar. Where the party had a remedy at law by appeal or motion to vacate or for a new trial, and has lost it, without fault on his own part, by causes which he could not control, preventing him from applying for it in due season, equity will not refuse to enjoin the judgment merely because the remedy at law, if it had been available, would have been appropriate and adequate. 23 Cyc. Law & Proc. p. 984; Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007; Bailey v. Stevens, 11 Utah, 175, 39 Pac. 828; Curran v. Wilcox, 10 Neb. 449, 6 N. W. 762; Holland v. Chicago, B. & Q. R. Co. 52 Neb. 100, 71 N. W. 989; Zweibel v. Caldwell, 72 Neb. 47, 99 N. W. 843. See same case 72 Neb. 53, 102 N. W. 84; Ritchey v. Seeley, 73 Neb. 164, 102 N. W. 256; De Garcia v. San Antonio & A. P. R. Co. (Tex. Civ. App.) 77 S. W. 275; Oliver v. Pray, 19 Am. Dec. 595, and notes (4 Ohio, 175); Breckett v. Banegas, 116 Cal. 278, 58 Am. St. Rep. 164, 48 Pac. 90; Kansas & A. Valley R. Co. v. Fitzhugh, 61 Ark. 341, 54 Am. St. Rep. 211, 33 S. W. 960; Little Rock & Ft. S. R. Co. v. Wells, 61 Ark. 354, 30 L.R.A. 560, 54 Am. St. Rep. 216, 33 S. W. 208; Notes to Little Rock & Ft. S. R. Co. v. Wells, 54 Am. St. Rep. 218 to 261, inclusive; Smithson v. Smithson, 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300. In Curran v. Wilcox, supra, the plaintiff, intending to appeal from a judgment against him, applied to the reporter for a transcript of the proceedings. The reporter furnished

a transcript, but it was found to be so imperfect as to be entirely unintelligible and worthless; that the testimony of several witnesses was omitted therefrom and the exceptions taken by the plaintiff were also omitted; that it was impossible to prepare the bill of exceptions within the time limited, and the attorneys for defendant refused to agree to an extension of the time. The district court sustained a demurrer to the complaint, and the plaintiff appealed. The court, in reversing the judgment, says: "As the attorneys for the plaintiff are alleged in the petition to have relied upon the reporter for a transcript of the proceedings, which, without fault on their part, they were unable to obtain, and these allegations, for the purposes of this action, are admitted by the demurrer, the case clearly falls within that of Dobson v. Dobson, 7 Neb. 296. The law will not permit the plaintiff to be prejudiced in his rights by reason of the failure of an officer of the court to do his duty."

In Holland v. Chicago, B. & Q. R. Co. supra, the stenographer, having lost part of his notes, was unable to furnish a transcript as required. On this account the plaintiff was unable to prepare a bill of exceptions, and to secure a review of his case in the supreme court. Some of the testimony was by depositions. The case had been tried before, and the reporter's notes of the proceedings on the first trial were to be had. The court says: "As the appellant was free from blame for the loss of the reporter's notes, he should not be held responsible upon an assumption that, if the transcript had been sooner ordered, it could have been furnished. The appellant gave the order for his transcript within the time limited for that purpose, and there should be no inference that, if he had been more diligent than the requirement of the court demanded, the official reporter might have been able to supply the necessary transcript. The judgment of the district court is reversed, and this case is remanded, with instructions to allow a new trial in the case wherein the notes of the testimony were lost by the official reporter."

Zweibel v. Caldwell, supra, was an action brought to set aside a judgment. The complaint alleged that Zweibel and his attorneys exercised due diligence to procure a transcript of the record in that case for the purpose of prosecuting error to the supreme court, and were unable, through no fault of theirs, to procure it within six months,

and the procuring of the transcript was prevented through the inability of the clerk of the court to furnish it within the time, and that Zweibel, having lost his right to review on error, was therefore entitled to a new trial in the former action. There was a judgment for the plaintiff granting a new trial, and defendant appealed. In this case defendant's attorneys had part of the files, and did not return them within the proper time, although demands had been made upon them for their return, and, by reason of their failure to return the files, the clerk was unable to obtain the files and the plaintiff unable to secure his transcript. The court, in reviewing some of its previous decisions, says: "In all of these cases the constitutional right to a review is spoken of and treated as absolute. It is true the question as to the necessity of some showing of error in the judgment complained of is not touched upon in any of them. In the absence of such a showing, the loss without fault of one's constitutional right of review would seem sufficient to warrant a new trial, and that prejudice will be presumed." In the case of Ritchey v. Seeley, supra, the court says: "It is further contended that it is not made sufficiently to appear that the plaintiff has a valid defense to the original action, or would be victorious on a new trial, but we think that enough is shown to establish good faith and to tender a seriously litigable issue. To require much more than this would be to put the cart before the horse, and, in effect, to compel a new trial before granting one, and so to render the latter, if granted, a needless formality."

In Oliver v. Pray, supra, the plaintiff attempted to take an appeal in the original action. The clerk on his request drew up the appeal bond, which was executed by him and his sureties, and approved and accepted by the clerk. At the time of the execution of the bond the costs had not been taxed, and a blank was left for their insertion, which the clerk, by accident or mistake, omitted to fill in. On motion of the respondent and defendant herein on the sole ground that the costs had not been inserted in the appeal bond, the appeal was dismissed by the supreme court, and this action was brought to set aside the judgment; it being too late to take another appeal. The court says: "The injury, if any, to the complainants, has originated with the clerk who prepared the bond, or with the appellant who executed it. Uniform practice has fixed the drafting of these bonds upon the

clerks. Their offices are usually furnished with blanks for the purpose. The bill and evidence show conclusively that the bond was in good faith prepared by the clerk, and in good faith executed by the principal obligor." The court further says: "The law would be dishonored if courts were furnished with no powers to place the parties thus situated *in statu quo*, and thus prevent probable injustice. There is no principle to be found in the books, which forbids a court of chancery from granting relief under such circumstances. Reason, justice, equity, require it." In Kansas & A. Valley R. Co. v. Fitzhugh, supra, the court held that if, after a trial at law, the right of appeal is cut off by the death of the presiding judge, before he can sign a bill of exceptions, relief may be granted in an equitable action. In De Garcia v. San Antonio & A. P. R. Co., supra, the court says: "Where, at the time of discovery of fraud in procuring a judgment, it would have been impossible by reason of the state of the record and the impossibility of then securing a statement of facts for the defrauded party to have secured a review by appeal, the judgment may be set aside by a court of equity, there being no adequate remedy at law." This was an action where a judgment had been obtained against the complainant by fraud. Other cases might be cited sustaining the principle of obtaining relief in equity against a judgment at law, but to do so would extend this opinion to an unwarrantable length. The cases cited by respondent on this question are not in point.

English v. Aldrich, 132 Ind. 500, 32 Am. St. Rep. 270, 31 N. E. 456, was an action to foreclose a junior mortgage, and appellant, who held a senior mortgage, was made defendant. The complaint alleged that any lien held by appellant was junior and subordinate to the mortgage in suit. The junior mortgagee took judgment, adjudging his mortgage the senior lien on the property. The senior mortgagee brought a bill in equity to set aside the foreclosure, alleging that he relied on statements of a clerk in the office of the counsel for the junior mortgagee that the object of making the senior mortgagee defendant was to bar his equity of redemption under a judgment for costs held by him in another action. The court says: "A court of equity possesses inherent power to set aside a judgment procured and entered by fraud practised upon the court, or for a mistake made by it, but this power will only be exercised in clear cases, and when the

party asking it is himself without fault, and when he proceeds without unreasonable delay after the discovery of the fraud or mistake." The court further held that appellant had no right to rely upon a statement of the clerk in the attorney's office as against the allegation in the complaint against him. In Chezum v. Claypool, 22 Wash. 498, 79 Am. St. Rep. 955, 61 Pac. 157, the plaintiff made a motion to vacate and set aside a judgment against him, which motion was denied by the court, from which order he failed to take an appeal. The court held that he, having failed to take an appeal from the denial of his motion, is estopped to maintain an action in equity to cancel the judgment. The court only held that a judgment void upon its face may be set aside upon motion even after the statutory time in which to move to set aside a judgment has expired. As hereinbefore stated, the judgment sued on in the case at bar is not void. Respondent insists that, where one perfects an appeal and abandons it, his right to appeal is exhausted. We do not think the doctrine contended for applies to the facts in this case, as the right to have the action reviewed in the appellate court on all the issues involved was lost without any fault, neglect, or mistake of his. See cases hereinbefore cited. It may be true that appellant might have compelled Judge Cowan under a writ of mandamus to decide the action, but he was not obliged to apply for such a writ. The district court erred in sustaining the demurrer.

The order appealed from is reversed, and the case is remanded to the District Court for further proceedings according to law. All concur, except FISK, J., not participating.

LYDIA OTTOW v. AUGUST FRIESE and Bertha Friese.

(126 N. W. 503.)

Mortgage Foreclosure — Affidavit of Sale — Amendment.

1. Under the Compiled Laws of 1887, a statement in an affidavit of sale incorrectly reciting that the sale was made at a place other than the one named

Note.—As to right to rescind or abandon contract because of other party's default, see note in 30 L.R.A. 33.

in the notice of sale may be corrected as against the mortgagor by the filing of another affidavit several months after the sale, reciting the sale to have taken place as advertised.

Res Adjudicata — Judgment Signed by Judge — Entry in Judgment Book.

2. A judgment signed by the presiding judge finally determining the rights of the parties and entered in the judgment book is a "final judgment," and may be proved as such as a former adjudication of the issues in the pending suit.

Action to Determine Adverse Claims — Same as Common-Law Action of Ejectment.

3. Under chapter 29, Comp. Laws of 1887, an action to determine adverse claims to and for the possession of real estate was maintainable to the same effect as an action of ejectment under the common law.

Ejectment — Forcible Entry and Detainer — Pleading.

4. In such actions the district court had original jurisdiction, and the facts necessary to state in a cause of action were not the same as those on which an action for forcible entry and detainer was maintainable.

Judgment — Res Adjudicata — When May be Pleaded.

5. A former adjudication may be pleaded and proven where the issues in the former action and in the pending action are the same.

Vendor and Purchaser — Waiver by Abandonment.

6. A contract for the sale of real estate may be waived by abandonment of the land and of the contract by the vendee, and his rights thereunder extinguished thereby.

Valid Foreclosure.

7. Evidence considered, and *held* to show a valid foreclosure, and that the plaintiff has the title to the land in suit.

Opinion filed April 30, 1910.

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

Action by Lydia Ottow against August Friese and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

S. G. Roberts, for appellant.

W. J. Clapp, for respondent.

MORGAN, Ch. J. This is an action to quiet title. The complaint is substantially in the form provided by § 7525, Rev. Codes 1905, and alleges that plaintiff is the owner of the land described in the complaint. It is further generally alleged that defendants claim a certain

estate or interest in, or liens or encumbrances upon, said land, adverse to the plaintiff. The relief demanded is that the defendants be required to set forth all their adverse claims in order that their validity may be determined, and the title quieted, and defendants barred from further claims to the land. Defendants allege that they became the owners of the land by patent from the United States August 19, 1880, and that they have owned the same ever since, and have claimed it as their homestead and deny plaintiff's ownership and her right of possession thereto. The prayer of the answer is that plaintiff's action be dismissed and the title to the land quieted in the defendants. The trial court made findings of fact and conclusions of law in plaintiff's favor. Defendants appeal from a judgment entered on these findings, and demand a trial *de novo* in this court under the provisions of § 7229, Rev. Codes 1905.

The evidence is undisputed, and the following is a summary thereof: (1) Defendants were the owners of the land in question on November 19, 1880, and on that day executed and delivered to David Wood a mortgage thereon to secure an indebtedness from them to said Wood. (2) On March 3, 1883, the defendants executed a second mortgage on said land to Fuller & Johnson, to secure an indebtedness to that firm. (3) Through proceedings by advertisement, regular in all respects up to the sale, said David Wood foreclosed his mortgage on the 17th day of March, 1885. The notice of sale stated that the sale would take place "in front of the First National Bank Building of Casselton, in the city of Casselton," etc. (4) The land was bid in at such sale by David Wood, the mortgagee, and an affidavit of the sale was made by the deputy sheriff who conducted it, and said affidavit was filed in the office of the register of deeds of Cass county, on the 21st day of March, 1885. In this affidavit the deputy sheriff stated that the sale took place "at the front door of the courthouse in Fargo," etc. (5) A certificate of sale was duly issued by the sheriff through the deputy sheriff who conducted the sale, and the same was filed and recorded in the office of the register of deeds on the 21st day of March, 1885. In the certificate of sale it was recited that the sale took place "in front of the First National Bank of the city of Casselton," etc. The certificate contained all other facts required by the statute in force at that time, and stated that a deed would be issued to

the purchaser at the end of one year from the sale, unless redeemed from before that time. (6) On the 17th day of March, 1886, the sheriff of Cass county, through his deputy, executed and delivered to Fuller & Johnson, mortgagees in the second mortgage, a certificate of redemption from the sale under the David Wood mortgage. In that certificate of redemption it was recited that the sale under the David Wood mortgage was "made on the 17th day of March, 1885, at the front door of the First National Bank of Casselton, in the city of Casselton, in said Cass county." (7) On the 17th day of June, 1886, the sheriff of Cass county made, executed, and delivered another certificate of redemption to Morris E. Fuller, John A. Johnson, Edward M. Fuller, and George German, persons doing business under the firm name of Fuller & Johnson. In said certificate of redemption it was recited that said premises were sold "at the front door of the courthouse in the city of Fargo, in said Cass county," and said certificate further recited that "this duplicate is made to correct an error in a certain certificate heretofore made by me on March 17, 1886, and filed for record March 18, 1886." (8) On the 2d day of June, 1886, the sheriff of Cass county executed and delivered to Morris E. Fuller, John A. Johnson, Edward M. Fuller, and George German, members of the firm of Fuller & Johnson, a deed of said premises, which said deed was duly recorded in the office of the register of deeds on the 2d day of June, 1886. (9) On the 19th day of March, 1886, Fuller & Johnson executed and delivered a deed of said premises to one Fere Piper, which said deed was duly recorded in the office of the register of deeds on the 2d day of June, 1886. (10) On the 5th day of July, 1886, the same persons made and delivered their deed of said premises to Ferdinand Piper. In this deed it was recited that it was made to correct an error in the given name of the grantee in said deed of March 19, 1886. (11) On the 28th day of May, 1886, the deputy sheriff, who conducted the sale, made and filed another affidavit of sale in the office of the register of deeds, in which it was stated that the sale under the David Wood mortgage was made "at the hour of 11 o'clock in the forenoon on the 17th day of March, 1885, at the front door of the First National Bank of the city of Casselton in said county of Cass," etc. In this affidavit it was further stated: "This affidavit is made to correct certain clerical errors in a former affidavit made by

this affiant on the 18th day of March, 1885, and recorded in the office of the register of deeds of Cass county," etc. (12) On the 29th day of June, 1886, said David Wood made, executed, and delivered his deed of said premises to Ferdinand Piper. (13) On the 4th day of January, 1905, said Ferdinand Piper made, executed, and delivered a deed of these premises to the plaintiff in this action.

Appellants contend that the title to the land in suit is still in August Friese. This is based on the fact that the affidavit of foreclosure sale made by the deputy sheriff recited "that the sale was made at the front door of the courthouse in the city of Fargo," etc., while it was advertised to take place at the city of Casselton. As stated before, the certificate of sale and the deed recited that the sale took place according to the advertised notice, and in front of the first National Bank of Casselton. Besides this, the deputy sheriff made and filed another affidavit, stating that the sale took place at Casselton, and that the statement in the former affidavit, to the effect that the sale was made at the courthouse in the city of Fargo, was a clerical mistake.

It is claimed that there was no proof that the sale did take place at Casselton. This contention is based on the fact that the affidavits of the deputy sheriff are self-contradictory and prove nothing. We do not think this to be true, even if the record contained no other evidence. The second affidavit states that it is made to correct an error in the former affidavit, and the record plainly shows what the error was. The certificate of sale, the deed, and other papers, show that the sale was made in front of the Casselton Bank. The error in the first affidavit is clearly proven by competent evidence. Very slight evidence would be sufficient in such a case, as there is no contention that the sale was not in fact made in Casselton. It is claimed that the certificate of redemption issued by the sheriff of Cass county on the 17th day of June, 1886, reciting that the sale was made at the front door of the courthouse in the city of Fargo, should be considered as evidence that the sale was in fact made at the courthouse. It will be noticed that this certificate contains a recital that it was made to correct a clerical error in a former certificate, and from this statement it is claimed that the error in the former certificate was in reference to the place of the sale. There is nothing on which to base this assumption. It is more probable that this recital was made in view of the fact that in the

former certificate the name of the firm of Fuller & Johnson was simply given, and not the individual names of the parties composing the firm.

The appellants, however, do not rest their objections to the validity of the foreclosure solely on the ground mentioned. In addition to the alleged failure of proof, they allege that the deputy sheriff had no authority or right to make further or amended proof of sale after the filing and recording of the first affidavit. There is nothing in the statute in reference to filing more than one affidavit of sale. This foreclosure was made under the Compiled Laws of 1887, which authorizes a foreclosure of real-estate mortgage to be made by sale at any place within the county where the real estate was situated. Those laws further provided the manner in which a foreclosure of the real estate mortgage may be made. They required a notice of sale, certificate of sale, and contained provisions for a redemption within a year, and, if no redemption was made, the delivery of a sheriff's deed to the purchaser. These laws further provided for the filing and recording of certain affidavits to perpetuate the evidence of the sale.

Respondent's contention is that the sale was complete and valid as a matter of fact and as a matter of law, without the filing of any affidavit of sale, and that the statute contemplates that the affidavit shall be filed solely as evidence of the sale, and not as a part of the sale. Without intimating that the foreclosure was invalid by reason of the clerical mistake in the recital of the affidavit as to the place of the sale, we are satisfied that another affidavit was properly filed to make the record comply with the facts by correcting a purely clerical error. The statute permits an affidavit of sale to be filed under certain circumstances; that is, to perpetuate the evidence of the sale. In this case one was filed which recited a sale at a different place than that described in the notice. This was not any proof of the sale as it was made. An affidavit reciting a sale at Fargo is not any proof of a sale at Casselton. It follows, therefore, that no affidavit of sale pursuant to the notice for sale at Casselton was, in a legal sense, made until the second affidavit was filed. The time during which such an affidavit might be filed was not limited by the statute. We think that it was competent to file such additional affidavit at the time when it was filed by the officer. The authorities are few that apply to this state of facts. In

Wiltsie on Mortgage Foreclosure, § 819, it is stated: "If the affidavits are defective, it seems that amended affidavits may be filed according to the facts; as against the mortgagor, at least, they may be filed at any time." In § 823 of the same work, it is stated: "Affidavits required in a foreclosure by advertisement are simply evidence of the completion of the proceedings, and are for the benefit of the purchaser at the sale, and may be made at any time after the sale has been completed." See also Bunce v. Reed, 16 Barb. 347; Mowry v. Sanborn, 72 N. Y. 534.

In foreclosures by action the authorities are general that amendment to the returns of sheriffs or other officers on the foreclosure of mortgages on real estate may be made at any time upon order of the court, in cases where innocent persons are not affected. We think the principles applicable to such amendments are in point on this case. In this case no one was affected or injured by the filing of the additional affidavit, as no new rights had accrued since the sale.

It is further claimed by the appellants that the plaintiff cannot recover in this action, on the alleged ground that Ferdinand Piper, her grantor, never had title to the land. This contention is based on the fact that the deeds from Fuller & Johnson to said Piper were merely quitclaim deeds and conveyed the present interest of the grantors only. As redemptioners, Fuller & Johnson quitclaimed to Piper before receiving a sheriff's deed. Afterwards the sheriff made and delivered his deed of this land to said Fuller & Johnson. The quitclaim deed to Piper was at least an equitable assignment of Fuller & Johnson's right to the deed under their redemption. It conveyed to Piper all the right, title, and interest of Fuller & Johnson to the land. Thereafter the sheriff gave a deed of this land to Fuller & Johnson; but Fuller & Johnson had no right to such deed at that time, as they had previously quitclaimed their rights to the land to Piper. Fuller & Johnson, however, subsequently deeded this land by a quitclaim deed to Piper, and through this deed was conveyed to Piper the interest that was acquired by Fuller & Johnson through the sheriff's deed delivered to them after they had quitclaimed to Piper. Piper having conveyed the land to the plaintiff, the title was vested in her. Our conclusion on this objection to the foreclosure proceeding is that the title was conveyed to Piper, and by him to this plaintiff.

There is, however, another ground on which the plaintiff's title is valid, and gives her the right to maintain this action. In the year 1886, Ferdinand Piper brought an action in the district court of Cass county against the defendant August Friese for the possession of the land involved in this suit. In that case, Piper's complaint alleged that he was the owner in fee simple of the land, and entitled to the possession of the same, and that the defendant was wrongfully and unlawfully in the possession thereof and wrongfully withheld the possession from the plaintiff, and judgment was demanded for the possession of said land. The defendant answered and denied that the plaintiff was the owner of the premises or entitled to their possession. After a trial before a jury, a verdict was found in favor of the plaintiff, that he was entitled to the possession of the land and that the defendant unlawfully withheld the same from him. Pursuant to such verdict, a judgment was entered that the plaintiff was entitled to the possession of the premises. Subsequently a writ was issued commanding the defendant to deliver the possession of the premises to the plaintiff in that action, and the writ was served upon the defendant, and subsequently the defendant was dispossessed from the said premises by the sheriff of Cass county, acting under proper authority. There was no appeal from that judgment. The plaintiff in that action or his grantees have been in possession of said premises ever since. The defendant has not been in possession of the premises since 1887.

The title of the plaintiff in that action and his right to the possession of the premises were based solely and entirely upon the foreclosure action which the plaintiff relies on in this action. The same issues that are litigated in this action were necessarily in issue and litigated in that action, and were necessarily adjudicated in that action. Having been an issue in that action, and having been adjudicated in that action, the matter is *res adjudicata* in this case. This is an additional ground why the defendant cannot prevail in this action. The defendants, however, claim that the judgment in that case was void, as shown on its face, upon the alleged ground that the district court of Cass county had no jurisdiction to entertain that action. The precise contention is that the court had no jurisdiction of the subject-matter of that action. Their contention is that the action was one for the forcible entry and detainer of real estate of which the district court had no jurisdiction

as an original action. However that may be under pertinent facts, it is clear to us that the action was one for the possession of the real estate in question, and that it was brought under chapter 29 of the Compiled Laws of 1887, which authorizes an action for the possession of real property wrongfully withheld from one entitled thereto. From a reading of the complaint, answer, verdict, and judgment in that action, we are entirely satisfied that it was properly brought under that chapter, and that it was not intended as an action of forcible entry and detainer.

The allegations of the complaint do not correspond to any of the conditions under which the action of forcible entry and detainer is maintainable, as laid down in article 7, chap. 1, Justice's Code, Comp. Laws 1887. The allegations of that complaint are as follows: First, an express allegation that the plaintiff was the owner in fee of the real estate described, and had been the owner thereof since the 29th day of March, 1886, and that he was entitled to the exclusive possession of the same. Second, the complaint alleges: "The defendant is now, and ever since the 29th day of March, 1886, has been, wrongfully and unlawfully in the possession of said premises, and now wrongfully and unlawfully withholds possession thereof from the plaintiffs." After which there are allegations in the complaint of a demand for the possession and the annual value of the use of the land since March 29, 1886. The prayer for judgment is: First, for the possession of said premises; second, for damages; third, costs. The verdict found in reference to all allegations of the complaint, and the judgment determined all the facts alleged in the complaint and denied in the answer. We are therefore entirely satisfied that the issues in that case determined finally the issues in this case, and that the matter is now res adjudicata so far as these parties are concerned.

It is the contention of the defendant, however, that no legal judgment was ever entered upon the verdict in that case. The judgment was signed by the judge of the district court, and, after reciting the verdict in full, was as follows, in part: "Therefore it is adjudged that the plaintiff, Ferdinand Piper, recover of the defendant August Friese the possession of the real property described in the complaint." And this was followed by words, "by the court," and signed by Wm. B. McConnell, Judge. It was therefore a "final judgment," and

not an order for judgment. The fact that the judgment was signed by the judge, of itself, does not deprive it of its force as a final adjudication of the rights of the parties. Further, the judgment was regularly entered in the judgment book. Under the repeated decisions of this court, this constituted a final judgment and determined the rights of the parties. McTavish v. Great Northern R. Co. 8 N. D. 333, 79 N. W. 443; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016.

It is further claimed that Piper conveyed the land to two persons at different times under contracts for the sale thereof, and that those persons did not reconvey the land to him, and that in consequence of this fact he had no title to the land, and could not convey same to the plaintiff in this action. It is true that two contracts were made between two different parties under which Piper agreed to convey the land upon compliance with certain conditions. These conditions were never complied with, and the parties with whom Piper made the contracts abandoned the possession of the land and abandoned the contracts. Under the decisions of this court, such contracts may be abandoned and forfeited in that way, and the title remains in the grantor without any conveyance from the person abandoning the land and the contract. By abandoning the contract and the land, the provisions of the contract are deemed waived, and the contract annulled and extinguished. Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856.

The judgment of the district court is affirmed. All concur.

C. L. MILLER v. GUSSIE R. SMITH, Sarah Smith, Richmond Smith, All Heirs of R. R. Smith, Deceased, and All Other Persons Unknown, Claiming Any Estate or Interest in or Lien or Encumbrance upon the Property Described in the Complaint, and Their Unknown Heirs.

(126 N. W. 499.)

Deed as Mortgage — Evidence.

1. A deed of real estate, absolute in terms, will not be declared a mortgage, unless the evidence is clear, specific, satisfactory, and convincing that such was the intention of the parties when the conveyance was executed.

Deed as Mortgage — Test — Intent of Parties.

2. One of the most decisive tests to determine what the intention of the parties was is whether there exists a debt from the grantor to the grantee, as there can be no mortgage without a debt or liability to be secured.

Deed as Mortgage — Parol Evidence.

3. The form of the conveyance is not controlling, and parol evidence is admissible to show what the real agreement was.

Deed as Mortgage — Evidence — Declaration of Parties.

4. The declarations of the parties at the time and subsequently are also admissible to determine what the real intention was.

Deed as Mortgage — Agreement to Reconvey — Evidence.

5. A contract to reconvey on fixed terms does not necessarily show that the transaction was for security purposes, although the sum to be paid on a reconveyance is a sum equal in amount to the sum secured by a former mortgage.

Mortgage — Change of Conveyance — Evidence — Transaction Closely Scrutinized.

6. A security contract may be changed to an absolute conveyance, subject to an option to repurchase under fixed terms. On such issues the intention of the parties is the test, but the fairness of the transaction will be scrutinized to see that the act was not influenced by financial circumstances of the debtor or the oppression of the creditor.

Note.—Does a deed absolute on its face, but intended as a mortgage, convey the legal title, see note in 11 L.R.A.(N.S.) 209.

As to effect generally of deed absolute with agreement to reconvey, see note in 17 Am. Dec. 300.

Mortgages — Equitable Mortgage — Contract to Reconvey before a Certain Day.

7. Evidence considered, and *held* not to show that a deed and accompanying contract are a mortgage, but an absolute deed, with the privilege of a reconveyance on payment of a definite sum on or before a day certain.

Opinion filed May 3, 1910.

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

Action by C. L. Miller against Gussie R. Smith and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Geo. W. Thorp, Rickel & Dennis, for respondent.

John Knauf, for appellant.

MORGAN, Ch. J. Action to quiet title, involving the title and ownership of the E. ½ of section 29, township 138 N., R. 65 W. in Stutsman county. The plaintiff claims the title thereto in fee simple. Defendants contend that the conveyance under which plaintiff holds the land is a mortgage, and ask for an accounting, and to be allowed to redeem from such mortgage on payment of the amount found due. Plaintiff recovered judgment in the district court. Defendants appeal, and ask for a review of the entire case under § 7229, Rev. Codes 1905.

The leading facts are the following:

In August, 1899, the defendant Gussie R. Smith and her husband, R. R. Smith, since deceased, leased a hotel in Cedar Rapids, Iowa, owned by the plaintiff's wife. The plaintiff acted as his wife's agent in that matter, and in all matters connected with the hotel. This lease was for five years. The Smiths were not able to furnish the hotel without borrowing money, and, in place of mortgaging the hotel furniture, they concluded to make other arrangements, and thereafter the plaintiff agreed to become surety for them at one of the banks for the sum of $1,000 for ninety days, and the Smiths agreed to indemnify him by giving him a mortgage on this land. Subsequently it was found that it would take $1,250 to buy the required furniture, and plaintiff thereupon indemnified the bank for $250 additional. On August 16, 1899, a note and mortgage were executed and delivered to the

plaintiff to secure him on his liability to the bank. The note at the bank was extended at the end of every 90 days until October 16, 1900. About this time the plaintiff informed Mrs. Smith that the bank did not wish to extend the note again, and in consequence thereof the following arrangement was agreed upon between the Smiths and plaintiff: The Smiths were to give him a warranty deed of this land, absolute in terms. Plaintiff was to retain the note and mortgage for $1,250. Plaintiff was to give, and did give, the Smiths a contract as follows, to wit: "Whereas, said C. L. Miller, at the special instance and request of the said Gussie R. and R. R. Smith, signed a note as surety for them for the sum of $1,250.00, payable to the Merchants National Bank of the city of Cedar Rapids, aforesaid, which said note is now due and payable, and whereas, the said Gussie R. and R. R. Smith are unable to pay the same, and whereas, the said Gussie R. and R. R. Smith, on the 16th day of August, A. D. 1899, executed a certain land mortgage to the said C. L. Miller to indemnify and hold him harmless against the payment of said note on—(premises described), now it is agreed by and between the parties that the said C. L. Miller is to pay the said note and the said Gussie R. and R. R. Smith to make a deed for the above-described premises to the said C. L. Miller upon the following conditions, to wit: The said C. L. Miller to still retain said note and mortgage, and if the said Gussie R. and R. R. Smith shall pay to the said C. L. Miller, on or before October 16, 1901, all moneys including costs, taxes, and other expenses, together with 7 per cent interest per annum on the same, then the said C. L. Miller will sell and reconvey the said premises back to the said Gussie R. and R. R. Smith or their heirs or assigns, and deliver up and duly cancel the said note and mortgage, or, if the same is not paid by the said time, the said C. L. Miller will deliver up to them said note and mortgage, if no other encumbrance is found against said land, and in which case said Gussie R. and R. R. Smith are to have no other or further claim at law or in equity upon said premises so conveyed to him, but his title to be absolute and perfect in fee simple."

The deed was immediately placed on record by the plaintiff. During the year following the delivery of this deed nothing transpired to change the relation of the parties to the land or to the contract, except that the plaintiff paid the bank the sum of $1,250 after the execution of

the papers on the 16th day of October, 1900. The Smiths had paid the interest to the bank on the $1,250 note up to that date. When the year was about to expire, Mrs. Smith sent for the plaintiff to come to the hotel, and they talked over matters there, and she then gave him $3,200 worth of notes for collection, out of which, when collected, he was to pay the rent in arrears due his wife. At this same interview, plaintiff handed her the mortgage of August 16, 1899, and the $1,250 note, and a satisfaction or written discharge of the mortgage, which she says "he told me at the same time I should put it away, as I might need it again." In regard to this interview there is some conflict. Mrs. Smith says that she was to have the right to redeem at any time, and that the plaintiff so stated to her at this interview. Plaintiff positively denies that any such talk was had or promise made at any time after the surrender of the mortgage and other papers, about October 16, 1901.

After the turning over and acceptance of the note, mortgage, and satisfaction piece, nothing transpired between the parties concerning this matter until March 25, 1902, when Mrs. Smith wrote the plaintiff as follows: "Patterson, Mar. 25, 1902: My Dear Mr. Miller: Your letter was forwarded me from Reading. I am glad to know everything is all right in Cedar Rapids and as far as money is concerned we are square, but in kindness and consideration I am still your debtor." The letter to which this was a reply referred to all arrears of rent having been paid out of the notes placed in plaintiff's hands for collection. On September 11, 1902, Mrs. Smith wrote to the plaintiff as follows: "We are expecting in a few days to go to Dakota to attend to matters out there, and I would like to know if you are still willing to allow me to redeem the half section of land you have for what it cost you." In response to this letter, the plaintiff wrote her that he had given another party an option or agreement to sell this property. It is claimed by Mrs. Smith that she answered this letter of plaintiff's, and complained that he should have given another party an option on the land when he had agreed to let her redeem it. The plaintiff, however, testifies that he never received this letter. On June 20, 1903, Mrs. Smith wrote the plaintiff, and in the letter used this language: "Now I want to know if you will allow me to keep the control of twenty-nine until you dispose of it otherwise. I inclose

you a diagram. The black lines are the lands I am interested in. The crosses are your half of twenty-nine, and the ring is the farmer's. Now you can see how convenient your land is for the farmer to pasture his stock on, which he is now doing, and how inconvenient it is for me to have him there. Indeed, I can see how foolish it was not to redeem this land myself when I had the chance, and I wish you would set a price on it and give me an option on it until after harvest,—not that I have not land enough, and more than I will ever need, but it makes it very inconvenient to have a half mile right in the middle of my farm belonging to someone else." The land was uncultivated land, with no one in actual possession thereof. From these papers and letters and the evidence we are to determine whether the defendant should, on equitable principles, be permitted to redeem at this time. This must depend upon what was the intention of the parties on October 16, 1900, when the deed and accompanying contract were executed and delivered. It is the intention of the parties at that time that must govern, and parol evidence is admissible on that issue, under § 6153, Rev. Codes 1905. Subsequent acts and declarations are admitted in evidence only as having bearing on what the original intention was. If the parties intended the deed to be security simply, it should be deemed a mortgage, whatever its language may be. The degree of proof required before a deed absolute in form will be declared a mortgage is well established. It requires that the evidence must be clear, convincing, and specific before the deed will be declared a mortgage. It must be such evidence that leaves in the mind of the chancellor no substantial doubt. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714; Wells v. Geyer, 12 N. D. 316, 96 N. W. 289; Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301; Little v. Braun, 11 N. D. 410, 92 N. W. 800; Northwestern F. & M. Ins. Co. v. Lough, 13 N. D. 601, 102 N. W. 160; Devore v. Woodruff, 1 N. D. 143, 45 N. W. 701; Wallace v. Johnstone, 129 U. S. 58, 32 L. ed. 619, 9 Sup. Ct. Rep. 243; Conway v. Alexander, 7 Cranch, 218, 3 L. ed. 321; Rogers v. Beach, 115 Ind. 413, 17 N. E. 609; Smith v. Crosby, 47 Wis. 160, 2 N. W. 104; Elston v. Chamberlain, 41 Kan. 354, 21 Pac. 259.

In considering the evidence we find that Mrs. Smith is contradicted in all particulars by the plaintiff. In every conversation with

him in which she claims that he agreed to allow her to redeem, he positively denies such conversation, and positively denies making any promise to her that she might redeem. We also find that she is uncorroborated except in a single instance. This corroboration is so meager as hardly to deserve mention. A clerk at the Cedar Rapids hotel claims that he overheard a conversation between the plaintiff and Mrs. Smith in October, 1901, wherein plaintiff stated to her that she need not worry about redeeming the land, and could take all the time she wanted to redeem. This conversation was on the street in front of the hotel, and the witness was a few feet from the persons having the conversation, and was not connected therewith. He did not get a clear understanding of the subject of the conversation while it was going on, and simply learned that something was being said about redeeming. He thereafter asked Mrs. Smith about the conversation, and stated on the witness stand as follows: "I thought I was not absolutely sure what they were talking about, and I said, 'Were you talking about the hotel,' She said: 'No; about the land in North Dakota.'" Taking his testimony as a whole, it cannot have controlling weight in view of the other evidence, and especially in view of the fact that Mrs. Smith accepted, without any claim of a right to redeem, a surrender and cancelation of the note and mortgage a few days thereafter. These letters and documents are difficult to be understood on the theory that a right to redeem or to buy back existed after October 16, 1901. Up to that day the plaintiff was obligated to convey back on payment of a fixed price. It was not a right to redeem from the mortgage, but an option or privilege to demand a deed pursuant to the contract of October 16, 1900. There was ample consideration for this agreement, being the cancelation of the indebtedness and giving back the evidence thereof. One of the strongest and surest tests as to whether a conveyance absolute in form shall be deemed a security conveyance is the continuance of the indebtedness or its extinguishment. If the debt continues as such, it is a mortgage. The mortgage is an incident of the debt, and without a debt, obligation, or liability, there is nothing to secure, and consequently there can be no mortgage.

In Turner v. Kerr, 44 Mo. 429, the court said: "It is the law that if a deed, and either written or oral contract between the parties thereto, be entered into at the same time, by which the grantee agrees to re-

convey the premises to the grantor upon the payment by the grantor of either a pre-existing or then created debt, the transaction is conclusively presumed to be a mortgage, and no stipulation of the parties can make it otherwise. But to give rise to this presumption, there must exist a debt. There can be no mortgage without a debt. Whether a given transaction is a mortgage in the form of an absolute deed or a conditional sale is very often difficult to determine, because the elements of each are so nearly allied. The distinction between them lies in that the mortgage is security for a debt, while the conditional sale is a deed accompanied by an agreement to resell on specified terms." In Pomeroy on Equity Jurisprudence, 3d ed. vol. 3, § 1196, it is said: "If there is no indebtedness, the conveyance cannot be a mortgage. If there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the absolute deed as a mortgage. The presumption, of course, arises that the instrument is what it purports on its face to be, an absolute conveyance of the land. To overcome this presumption and to establish its character as a mortgage, the cases all agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail."

The right of the parties to make deeds as conditional sales is undoubted. In Rodgers v. Burt, 157 Ala. 91, 47 So. 226, the court said: "But there is no reason why a mortgagee should not, by contract subsequent to the execution of the mortgage, purchase from the mortgagor the equity of redemption or obtain a release of the statutory right of redemption, provided he do so fairly and for an adequate consideration." In Peagler v. Stabler, 91 Ala. 308, 9 So. 157, the court said: "Circumstances may be such as to render such a sale mutually beneficial, and entirely optional on the part of the mortgagor, uninfluenced by the relation of the parties." In the latter case it was also said: "To convert the instrument into a mortgage there must be a continuing, binding debt, in its fullest sense." In Henley v. Hotaling, 41 Cal. 22, the court said: "There can be no question that a party may make a purchase of lands, either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to reconvey the lands upon the payment of a certain sum, without any intention on the part of either party that the transaction should be in effect a mortgage. There is no absolute rule that the covenant to reconvey

shall be regarded, either in law or in equity, as a defeasance." See also McGuin v. Lee, supra; Knaus v. Dreher, 84 Ala. 319, 4 So. 287. Under these authorities we are satisfied that the transaction in question was not a security transaction.

Counsel for the defendant bases his argument upon the contention that the deed of October 16, 1900, was a mortgage. In this he is mistaken. It was an absolute deed with an accompanying option to repurchase within a year on payment of a fixed sum of money. This made it a conditional sale, which is distinguished from a mortgage by the circumstance of a fixed price as the basis for a reconveyance rather than an indebtedness. Up to October 16, 1901, a certain sum was to be paid to insure a reconveyance, but such sum was not payable as a debt, but was the price agreed upon for a reconveyance. The deed accompanying the contract contained no words to support the theory that the debt continued, or that the mortgage was to be redeemed or paid, before October 16, 1901. The subsequent letters written by Mrs. Smith show that she considered the plaintiff to be the absolute owner of the land until the letter of June 4, 1906, which was written after she had consulted an attorney. About this time Mrs. Smith went before a notary public and acknowledged the execution of the contract of October 16, 1901, and placed the same on record. The record of this contract was deemed a cloud upon his title, and the action was brought by him to quiet the title. Until that time there was no claim of a right to redeem, and when the word "redeem" was used in her letters, it referred to the contract in force from October 16, 1900, to October 16, 1901. As shown by the letters, she refers to the land as "your land," "the land you have," "until you otherwise dispose of it," "your half of twenty-nine," etc. In her letter of June 20, 1903, she acknowledges that she has no right in the land when she says: "How foolish I was not to redeem this land myself, when I had the chance." If the contract of October 16, 1900, was understood as conveying an indefinite right of redemption, why should she ask the plaintiff "if he would still allow her to redeem?" If she deemed herself the owner of the land, why should she ask permission "to keep the control of section 29 until you otherwise dispose of it?" If a mortgage was to continue after October 16, 1900, why was a change made in the form of the mortgage or security? Plain-

tiff already had a mortgage. If he was to get nothing more by the deed, it was superfluous to have the deed executed and recorded. This is a very strong circumstance to show that the parties intended the conveyance as an absolute one with the right to repurchase at the price fixed before October 16, 1901. Martin v. Martin, 123 Ala. 191, 26 So. 525. There is not a single fact proven showing that the debt was to continue, or that the deed was not absolute, subject to the one condition of the right to repurchase. It would seriously impair titles to nullify the solemn acknowledgment of deeds on mere uncorroborated admissions of a grantee, sworn to by the grantor only, but positively denied by the grantee. In ordinary actions this class of testimony is of small probative force. It certainly should be insufficient alone, and we hold it insufficient in this case to justify setting aside this deed when corroborated, as in this case, by the positive testimony of the grantee and the admissions of the grantor. In view of the convincing admissions in her letters, considered in connection with the unequivocal document of October 16, 1900, the cancelation of the debt, the discharge of the mortgage duly recorded, the surrender of the note and satisfaction of the mortgage to the grantee, and the positive evidence of the plaintiff, we think the defendant has failed in the contention set forth in her answer. Not only has she failed to substantiate her counterclaim in her answer by clear, convincing, and specific testimony, but we think it clearly appears that the facts are just the opposite to her contention, and that the deed was intended as a deed, and not as a mortgage, is proven by substantial testimony. Even if the rule, governing in some courts, were to be adopted that in case of doubt whether a conveyance is a mortgage or a conditional sale the benefit of the doubt is given to the debtor or grantor, the result in this case would be the same, as the character of the transaction is not, in our judgment, involved in any doubt.

It is intimated by counsel that the plaintiff took advantage of the financial embarrassment of the defendant. We do not find that the record sustains this allegation. In fact, it is not shown that she was in any particular financial distress. It is true that the hotel venture incurred a loss, but the plaintiff was not accountable for this. The evidence shows that she had considerable means. In one of her letters she frankly admits this, in asking the plaintiff to fix a price on the land,

when she says: "Not that I have not land enough, and more than I will ever need," etc.

As to the value of the land in October, 1900, there is no direct evidence. The trial court found, as a fact, that the amount of the original indebtedness with interest and taxes paid by plaintiff since 1900, equaled the reasonable value of the land. We are convinced that the great rise in land values between the year 1901 and 1906 was the incentive for bringing this action, and that it would not have been thought of had there been no such increase in values.

The judgment is affirmed. All concur.

ELLSWORTH, J., being disqualified, did not participate; W. C. CRAWFORD, judge of the tenth judicial district, sitting in his place by request.

STATE OF NORTH DAKOTA v. WILLIAM H. FLEMING.

(126 N. W. 565.)

Criminal Law — County Courts with Increased Jurisdiction — Practice.

1. Statutes and rules of practice pertaining to district courts in this state apply to proceedings in county courts with increased jurisdiction, under § 8289, Rev. Codes 1905.

Criminal Law — "Term of Court" — Information — Time of Filing.

2. A term of court within § 9791, Rev. Codes 1905, means a term of court actually held, and not one that may be held; and a criminal action should not be dismissed for failure to file an information at a term of court at which a defendant cannot be regularly tried by a jury.

Criminal Law — Arraignment of Accused — Discharge of Prisoner.

3. It is not error to refuse to dismiss a criminal action by reason of failure to arraign a defendant under § 9871, Rev. Codes 1905, where the arraignment is not made at the next term of the court after the information is filed, as that section does not prescribe that the arraignment must be made at said term.

Criminal Law — Time for Trial — "Awaiting Trial."

4. Under chapter 68, Laws 1907, pertaining to calling juries in county courts with increased jurisdiction, a jury is not necessarily to be summoned unless

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Note.—Failure promptly to bring to trial prisoner out on bail, see Meadowcroft v. People, 35 L.R.A. 176.

there is a criminal case "awaiting trial," and a case is not "awaiting trial" where the return of the justice on the preliminary examination only is filed, and the defendant is not in jail but at large on bail.

Criminal Law — "Next Term of Court" — Discharge of Accused.

5. It is not error to refuse to dismiss a prosecution under § 10307, Rev. Codes 1905, where the next term of court mentioned in that section is one at which the defendant could not have been regularly tried.

County Court — Criminal Law — Time for Trial.

6. Section 8300, Rev. Codes 1905, is expressly applicable to the dismissal of prosecutions in county courts with increased jurisdiction, for failure to prosecute the action in cases where the defendants are not confined in jail, but are only under bonds to appear at the county court.

Criminal Law — Dismissal when Defendant Has Bail — Question Not Decided.

7. Whether a criminal action should be dismissed where a defendant is at liberty under a bond for his appearance, by reason of failure to prosecute the action as provided by statute unless a trial is demanded, not decided.

Criminal Law — Remarks of State's Attorney — Harmless Error.

8. It is not prejudicial misconduct on the part of a state's attorney to state, in reference to an objection by defendant's attorney to a question asked him on his cross-examination at the trial, "counsel was a little slow in coming to the assistance of the witness," especially in view of a prompt caution from the court to the jury to disregard the remark.

Criminal Law — Jury Sole Judge of Facts — Instructions — Failure to Request.

9. The failure to instruct the jury in express terms that they are the sole judges of questions of fact, if ever prejudicial error, is not so where the charge in substance so states, and there is no request for a specific instruction on that point.

Fines — Imprisonment for Nonpayment of Fines and Costs.

10. A person convicted of assault and battery, and sentenced to pay a fine and costs which are taxed, and not paid, may be imprisoned as provided by § 10104, Rev. Codes 1905, for the nonpayment of the costs as well as the fine.

Opinion filed May 5, 1910.

Appeal from Bottineau County Court; *Kirk*, J.

William H. Fleming was convicted of assault and battery, and he appeals.

Affirmed.

Noble, Blood, & Adamson, for appellant.

J. J. Weeks, State's Attorney, for the State.

MORGAN, Ch. J. The defendant was convicted of the crime of assault and battery in the county court of Bottineau county. He appeals to this court, and assigns as error: (1) The overruling of motions for a dismissal of the prosecution; (2) misconduct of the prosecuting attorney during the course of the trial; (3) failure of the trial court to instruct the jury that they were the sole judges of all questions of fact; (4) the rendition of a judgment wherein the defendant was adjudged to be imprisoned in default of the payment of the costs of the prosecution.

To a proper understanding of the motions to dismiss the prosecution for the failure of the state to bring the case to trial, the following admitted facts are material: On March 30, 1908, the defendant gave an undertaking for his appearance at the next term of the county court, to which he had been held on the charge of assault and battery, after a preliminary examination before a justice of the peace. On April 6th, the return of the justice was filed in the office of the clerk of the county court. On the 7th day of April, to which day the February term of said court had been adjourned, that term of court was adjourned sine die. After April 7, 1908, no further proceedings were had in the case until August 1, 1908, when an information against the defendant was filed in the office of the clerk of the county court, charging him with the commission of said offense. The June, 1908, term had been regularly adjourned until August 1, 1908. Hence the information was filed as of the June term. The defendant was not arraigned under said information until the 9th day of June, 1909, when he pleaded not guilty. After a trial before a jury he was found guilty and sentenced to be imprisoned for twenty days in the county jail, and to pay a fine of $100, besides the costs, taxed at the sum of $50; and in default of payment of such fine and costs, he was ordered imprisoned for the further period of seventy-five days.

Before pleading to the information, the defendant made a motion to dismiss the prosecution for the failure of the state to call the defendant for arraignment from the 1st day of August, 1908, until the 9th day of June, 1909. In this motion it was alleged that, since the time said information was filed, ten terms of court had passed at any of which said defendant might have been called for arraignment and plea, and that three of said terms were jury terms at which a jury should

have been called and the defendant placed upon trial. Subsequently, and on the 11th day of June, the defendant filed a supplemental motion to dismiss the prosecution on the alleged ground that more than three terms had passed since the information was filed in the county court. Both motions were denied, and exceptions saved by the defendant.

It is admitted that no jury was called between March 30th, the time of filing the return of the justice, and June, 1909, at which term the defendant was tried. Two questions are raised by these motions: (1) The failure to file an information and the failure to have the defendant arraigned at the next term after the filing of the return of the justice of the peace in the office of the clerk of the county court; (2) the failure to bring the defendant to trial before the close of the third term after giving a bond for his appearance in the county court.

Before considering these questions, we will say that under § 8289, Rev. Codes 1905, the statutory provisions applicable to civil and criminal proceedings in the district courts also relate to county courts having increased jurisdiction, and all rules of practice applicable in the district court are in force in said county courts, unless otherwise provided by law. Prior to the 1907 amendment referring to county courts, the law providing for terms of court in county courts with increased jurisdiction on the first Tuesday of each month provided for trials by jury when demanded by criminal cases, and civil cases involving more than $50. Under chapter 68, Laws 1907, it is provided that terms of the county court held in the months of February, June, and December shall be jury terms, provided there be a criminal case "awaiting trial," or at least five civil cases involving issues of fact triable by a jury. Under said amendment a jury is not necessarily to be summoned unless a jury case is ready for or awaiting trial. We do not think that a case is awaiting trial when the accused has only been bound over and is not confined in jail, but at large under a bond for his appearance. It therefore appears that no term of court was held in said county at which defendant could have been tried from the time that he was bound over until June, 1909, when he was tried. In other words, the mere fact, that the statute provided for holding of a term of said court each month does not constitute a term of court within the meaning of this chapter.

In reference to the motion to dismiss the prosecution for the alleged

reason that no information was filed until August 1, 1908 (being the adjourned June term), although the statute provided for a term each month, it may be said that § 9791, which governs, does not prescribe any penalty for the failure to file the information during a term of the district court next following the filing of the return of the justice on the preliminary examination. It does not provide for a dismissal of the action if the information is not filed at the first statutory term. A reading of that section shows that terms of court which are merely fixed by statute are not necessarily terms of court held each month. The provision is that information shall be filed during each term "held," etc., etc. Without intimating that a failure to file an information in a case in which a person accused of crime has been held to answer during a term actually held would warrant a dismissal of the action, this motion was properly denied on the ground that the facts were not brought within the provisions of this section. No term was actually held between April and August, 1908, within the meaning of said section.

The defendant also relies upon § 9871, Rev. Codes 1905, which provides in a general way that the defendant must be arraigned on an information or indictment before the court to which it is presented. It places no limit upon the term or time during which the arraignment must be made. The defendant did not, therefore, bring himself within the provisions of this section.

The defendant also moved for a dismissal of the action for failure to comply with § 10307, Rev. Codes 1905, which reads as follows: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) When a person has been held to answer for a public offense if an information is not filed or an indictment found against him at the next regular term of the district court; (2) if a defendant whose trial has not been postponed upon his application is not brought to trial at the next term of the district court in which the information or indictment is triable after it is filed if an information, or if an indictment, after it is found." So far as this section is concerned, it may be sufficient to say that no regular term of the county court was held during the time between April and August, 1908, within the meaning of this section. In other words, as stated before, the mere fact that the law provides

that a term may be held at a given time does not necessarily constitute that a regular term of said court.

In regard to the second subdivision of said section, to wit, that defendant was not brought to trial at the next term of the court in which the information was triable, the case of State v. Foster, 14 N. D. 565, 105 N. W. 938, disposes of it. In that case it was held that a term simply provided for by statute at which no jury is summoned is not a regular term as contemplated by that section. This case is in point, and is decisive of this appeal, so far as application of this section is concerned. In that case it was said: "It is true § 403, Rev. Codes 1899, provides for a term of court in Grand Forks county for each month in the year except the months of August and September, commencing on the first Tuesday of each month. But these terms are not made regular jury terms by the statute. The same section requires the calling of a jury for at least two terms each year, and, with this exception, provides that a jury shall not be called for any term unless, in the opinion of the judge, there is sufficient business to demand a jury. No jury was called for the October or November terms, and the term at which the information was filed was the first jury term held after the defendant was committed. We are of opinion that a regular term of court, within the meaning of § 8497, means a court which is equipped with a jury for the trial of cases, and not a mere statutory term without a jury. This section was in force long before the so-called statutory terms were provided for, and that was its meaning then, and must be held to be its meaning now. This section requires two jury terms at least to be held each year in Grand Forks county. If they are held it cannot be said that a defendant is denied his constitutional right to a speedy trial. If, without good cause, the presiding judge should fail or neglect to call a jury for these two terms, a different question would arise, and one which we need not discuss, for there has been no such neglect of duty, and the defendant predicates no rights upon the fact that a jury was not called at the October and November terms. His position is that each statutory term is 'a regular term,' a position which, in our opinion, is not tenable."

Subdivision 2 of this section can have no application to this case for another reason. Section 8300, Rev. Codes 1905, expressly refers to

cases where the defendant is under bail for his appearance, and it expressly provides that the trial shall not be postponed longer than until the third term after such bail has been given. A person not committed to jail cannot, therefore, demand a dismissal of the action for want of prosecution until the third term after he is bound over. This is a part of the act prescribing the practice in county courts, and governs in cases like the one under consideration. Three terms of court did not pass since the giving of the appearance bond by the defendant, at which he could have been regularly tried and the case submitted to a jury. Hence it was not error to deny the motion to dismiss. The following cases are in point upon the construction of similar statutes: Byrd v. State, 1 How. (Miss.) 163; Com. v. Brown, 11 Phila. 370; State v. Reddington, 7 S. D. 368, 64 N. W. 170; Gallagher v. People, 88 Ill. 336; Meadowcroft v. People, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; Re Begerow, 133 Cal. 349, 56 L.R.A. 513, 85 Am. St. Rep. 178, 65 Pac. 828; State v. Lamphere, 20 S. D. 98, 104 N. W. 1038; Burnett v. State, 76 Ark. 295, 113 Am. St. Rep. 94, 88 S. W. 956; State v. Campbell, 73 Kan. 688, 9 L.R.A.(N.S.) 533, 85 Pac. 784, 9 A. & E. Ann. Cas. 1203; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733, 2 Am. Crim. Rep. 251.

Defendant relies upon People v. Morino, 85 Cal. 516, 24 Pac. 892, People v. Wickham, 113 Cal. 283, 48 Pac. 123, State v. Thompson, 32 Minn. 144, 19 N. W. 730, and State v. Radoicich, 66 Minn. 294, 69 N. W. 25. These cases were under similar statutes, but the facts are not like those in this case. The facts in the cases cited were held not to constitute a good cause for not discharging the defendants. In the case at bar it is held that good cause was shown for not putting defendant upon his trial. In this case the facts were not brought within the provisions of the statutes, and it is therefore held that there was no error in refusing to dismiss the prosecution. Good cause was shown for not dismissing the prosecution, which was that no jury term had been held and no facts shown to exist that made it the duty of the court to call a jury term. Whether prosecutions should ever be dismissed under facts just like the one at bar, in view of the fact that defendant at no time appeared and demanded a trial, we do not decide, although the question is discussed by counsel.

The record shows that the county court was in session during several

months, and it is claimed that the defendant should have been arraigned at some of these terms in order that he might have an opportunity to plead, and, if he desired, to waive a jury and submit to a trial by the court. At some of these terms, pleas of guilty were taken and the defendants sentenced. However, it is purely a matter of conjecture whether the defendant would have waived a jury if he had been arraigned. After the passage of chapter 68, Laws 1907, there was no provision authorizing a waiver of a jury trial in county courts. Conceding, without deciding, that such waiver could be made in an assault case, the question before us on the motion to dismiss is not affected by the fact that the defendant might have waived a jury trial. The statute of 1907 provides for three jury terms each year when certain cases are for trial. As stated in State v. Foster, supra, this is a compliance with the constitutional provision guaranteeing the right to a speedy trial.

Prejudicial misconduct of the state's attorney during the trial is urged as a ground for a new trial. We do not attach much weight to the contention that the alleged misconduct resulted in injustice or an unfair trial. While the defendant was under cross-examination by the state's attorney, the defendant's attorney interposed an objection to a question, and the state's attorney said in reference to the objection, "Counsel was a little slow in coming to the assistance of the witness." The defendant's attorney immediately excepted to this comment, and the court promptly cautioned the jury to disregard the remarks of counsel and to be governed only by the evidence in the case. Standing alone, we do not think that the remarks constituted prejudicial misconduct. In view of the prompt caution of the court to disregard the remarks, it would be unwarranted to presume that the defendant was in any way prejudiced. The case of Heller v. People, 22 Colo. 11, 43 Pac. 124, relied upon by the appellant is not in point. In that case the prosecuting attorney and his assistant made remarks of a very insulting nature and offers of testimony of the commission of other crimes by the defendant were made, and after being cautioned by the trial court, the prosecuting attorney persisted in such misconduct. In this case the insinuation referred only to the conduct of the defendant's attorney. There are other objections based on the conduct and remarks of the state's attorney which we deem equally without merit.

In one instance he charged the defendant with improper demeanor on the witness stand while giving his testimony. The remarks of the attorney were not out of place, and the defendant's actions deserved a rebuke from the court or counsel, or both.

Error is also predicated on the failure of the trial judge to charge the jury that they were the sole judges of all questions of fact. We think that the charge substantially covered this subject, and there was no request by defendant's counsel for a more specific instruction. If the objection were to be deemed meritorious in any case, it cannot be under the facts of this case, where the instructions substantially covered the ground and no request for more specific instruction was made.

Error is also assigned on the judgment. It is claimed that it provides a greater penalty than prescribed by the statute. As stated before, defendant was sentenced to imprisonment for twenty days, and to pay a fine of $100 and costs taxed at the sum of $50. If the fine and costs were not paid, he was to be imprisoned seventy-five days additional. Section 8875, Rev. Codes 1905, provides that assault and battery is punishable by imprisonment not exceeding thirty days, or by fine not less than $5 nor more than $100, or both. The claim is that a fine of $100 and imprisonment for ninety-five days is beyond the punishment prescribed by that section. This judgment is expressly authorized by § 10104, Rev. Codes 1905, which reads as follows: "A judgment that the defendant pay a fine and costs may also direct that he be imprisoned until both fine and costs are satisfied, specifying the extent of the imprisonment, which must not exceed one day for every $2 of the fine and costs," etc. This section controls what the judgment may be so far as imprisonment for failure to pay the fine and costs is concerned, and expressly authorizes imprisonment when costs are not paid as well as when the fine is not paid.

Finding no error in the record, the judgment is affirmed. All concur.

STATE OF NORTH DAKOTA v. THOR MOELLER.

(126 N. W. 568.)

Criminal Law — Evidence — Declarations of Co-Conspirator.

1. The principle upon which declarations of a co-conspirator not on trial are sometimes admissible in evidence against the conspirator who is on trial is that by the act of conspiring together the parties doing so have assumed as a body the attribute of individuality as relates to the prosecution of the common design or purpose; hence what is done or said by any one in furtherance of that design is the act of all. Evidence of such statements is also admissible on the ground of agency.

Criminal Law — Evidence — Declarations of Co-Conspirator.

2. In the trial of a physician on the charge of unintentionally causing the death of a patient by inflicting upon her a mortal wound while attempting to induce and procure a miscarriage, testimony of one P. was admitted relating to certain statements made to him by one D., a third party, who it was claimed had entered into a conspiracy with the defendant to commit the offense. Such statements, regardless of whether a conspiracy had been proved or not, were incompetent, for the reason that they were not made in the presence of the defendant, related to acts previously done or to be done in the future, and were not made in furtherance or in prosecution of the common purpose.

Criminal Law — Acts and Declarations of Conspirators — Instructions.

3. An instruction to the jury relating to the testimony of the witness P., charging that if they found a conspiracy between the person D. and the defendant existed, statements made or acts done by D. while either he or the defendant contemplated the formation of such a conspiracy afterwards carried into execution, or attempted to be carried into execution, by such conspirators, or which were so made or done while either or both of them were carrying or attempting to carry into execution the plan and procure such unlawful miscarriage as the result of such conspiracy, might be considered, is erroneous in that it omits the necessary element that such acts must have been done or statements made in furtherance and prosecution of the object of the conspiracy.

Note.—In a note on the general question of how near the main transaction declarations must be made in order to constitute a part of the *res gestæ*, in 19 L.R.A. 733, it is stated (page 745), in regard to the admissibility of declarations of co-conspirators, that the law governing the admissibility of such declarations depends rather upon their relation to the common object than to the actual time when made. Thus, STATE v. MOELLER is in accord with the general rule in excluding evidence of declarations not made in furtherance or in prosecution of the common purpose.

Criminal Law — Appeal and Error — Objections — Cumulative Evidence.

4. Sustaining objections to questions which, if answered favorably to the party inquiring, would furnish only cumulative evidence on a subject relating to which no conflict in evidence arises, is not necessarily reversible error.

Evidence — Cross-Examination — Redirect Examination — Conversation.

5. When a defendant, on cross-examination, has drawn from a witness parts of a conversation with a third party relating to a given subject, the plaintiff may properly require the witness to testify as to the remaining portions of the conversation on the same subject.

Criminal Law — Appeal — Admission of Incompetent Evidence — Cure of Error by Failure to Move to Strike.

6. Over defendant's objection, statements made by the witness P., not in the presence of the defendant, and not in furtherance or prosecution of the offense charged, but merely reciting acts that had been done or were in contemplation, were received in evidence. The contention by the state that this did not constitute error because the nature of the questions was such that they did not disclose to the court whether the answers would be competent or incompetent, and that defendant should have moved to strike out the answer, is met by the fact that after some of the questions referred to had been propounded, it must have been apparent to the court that they related to incompetent declarations.

Criminal Law — Harmless Error.

7. Certain other questions considered and passed upon.

Opinion filed May 6, 1910.

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

Thor Moeller was convicted of murder, and appeals from the judgment and an order denying a new trial.

Reversed, and new trial granted.

L. J. Palda, C. D. Aaker, and *Engerud, Holt, & Frame,* for appellant.

Statements, acts in themselves or accompanying other acts, and part of the *res gestæ,* brought home to one conspirator, are evidence against the other if it appears that they were used in furtherance of a common design. 1 Greenl. Ev. §§ 110, 111; 3 Greenl. Ev. § 94; Wharton, Crim. Law, 4th ed. §§ 704, 705; 2 Rice, Ev. chap. 30, p. 807 & § 336; 3 Enc. Ev. p. 429, and note 74; 12 Cyc. Law & Proc. p. 438; People v. Davis, 56 N. Y. 95; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; Samples v. People, 121 Ill. 547, 13 N. E. 536; State v. McGee, 81 Iowa, 17, 46 N. W. 764; State v. Walker, 124 Iowa, 414, 100 N. W. 354; Redding v. Wright, 49

Minn. 322, 51 N. W. 1056; Nicolay v. Mallery, 62 Minn. 119, 64 N. W. 108; State v. DeWolfe, 29 Mont. 415, 74 Pac. 1084; People v. McGarry, 136 Mich. 316, 99 N. W. 147; State v. Ryan, 47 Or. 338, 1 L.R.A.(N.S.) 862, 82 Pac. 703; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401.

Witness may be asked as to knowledge gained from text-books; to test such knowledge and to lay the foundation for impeachment, books themselves may be introduced. Clark v. Com. 111 Ky. 443, 63 S. W. 740; Hess v. Lowrey, 122 Ind. 225, 7 L.R.A. 90, 17 Am. St. Rep. 355, 23 N. E. 156; Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862; Hutchinson v. State, 19 Neb. 262, 27 N. W. 113; Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516; Ripon v. Bittel, 30 Wis. 614; Fisher v. Southern P. R. Co. 89 Cal. 399, 26 Pac. 894; State v. Wood, 53 N. H. 484; Clukey v. Seattle Electric Co. 27 Wash. 70, 67 Pac. 379; New Jersey Zinc & I. Co. v. Lehigh Zinc & I. Co. 59 N. J. L. 189, 35 Atl. 915.

Andrew Miller, Attorney General, *Dudley L. Nash,* State's Attorney, and *George L. Ryerson,* Assistant State's Attorney (*E. R. Sinkler,* of counsel), for the State.

Where there is no motion to strike out admissions and declarations, objection to their competency is waived. People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833; People v. Colvin, 118 Cal. 349, 50 Pac. 539; People v. Machado (Cal.) 63 Pac. 66; People v. Lawrence, 143 Cal. 148, 68 L.R.A. 193, 76 Pac. 893; State v. Smith, 124 Iowa, 334, 100 N. W. 40; Blum v. State, 94 Md. 375, 56 L.R.A. 322, 51 Atl. 26; State v. Rogers, 31 Mont. 1, 77 Pac. 293; State v. Coleman, 17 S. D. 594, 98 N. W. 175; State v. Rohn, 140 Iowa, 640, 119 N. W. 88; People v. Smith, 151 Cal. 619, 91 Pac. 511; Duncan v. State, 171 Ind. 444, 86 N. E. 641; People v. Pope, 108 Mich. 361, 66 N. W. 213.

The mode of raising objection to improper answer is by motion to strike out, or a request for instruction that the answer be disregarded. 8 Enc. Pl. & Pr. p. 246; Reiley v. Haynes, 38 Kan. 259, 5 Am. St. Rep. 737, 16 Pac. 440; Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180; Cowan v. Third Ave. R. Co. 31 N. Y. S. R. 145, 9 N. Y. Supp. 610; People v. Wilkinson, 38 N. Y. S. R. 994, 14 N. Y. Supp. 827; Baumier v. Antiau, 79 Mich. 509, 44 N. W. 939; People v. Coffman, 59 Mich.

1, 26 N. W. 207; Tebo v. Augusta, 90 Wis. 405, 63 N. W. 1045; Urbanek v. Chicago, M. & St. P. R. Co. 47 Wis. 59, 1 N. W. 464; Bigelow v. Sickles, 80 Wis. 98, 27 Am. St. Rep. 25, 49 N. W. 106; 8 Current Law, 248; State v. Botha, 27 Utah, 289, 75 Pac. 731; State v. Smith, supra.

A physician may testify as to a female's pregnancy, and give reasons for his belief, after examining the body. State v. Smith, 32 Me. 369, 54 Am. Dec. 578; Ayres v. Delaware, L. & W. R. Co. 158 N. Y. 254, 53 N. E. 22.

Defendant may show necessity for operation. Hatchard v. State, 79 Wis. 357, 48 N. W. 380; State v. Lee, 69 Conn. 186, 37 Atl. 75; State v. Schuerman, 70 Mo. App. 518.

SPALDING, J. The defendant was tried on an information charging him with having, at the city of Minot in Ward county, North Dakota, on or about the 4th day of October, 1908, caused the death of one Gina Lien by, while not having any design to effect her death, inflicting upon her a mortal wound while attempting to induce and procure a miscarriage, the same not being necessary to preserve the life of the female, and of which she died on the 7th day of October, 1908, at said city of Minot. He was convicted and sentenced to serve ten years in the penitentiary. From the judgment of conviction and order denying a new trial, an appeal comes to this court.

The record is very voluminous, and is composed largely of testimony of a number of physicians, including those who performed an autopsy, regarding the cause of the death as indicated by the condition of the body and organs. These witnesses exhibit a high degree of expert knowledge of the subject, and their testimony is far less conflicting than is usual when experts testify on behalf of both parties to an action of this importance. The young lady was about twenty-nine years of age. Her home was in the northeastern part of the state. She was about four months advanced in pregnancy. Dr. Engstad, of Grand Forks, testified that she called on him at his office, he thought, on the 1st day of October, 1908, and requested him to make an examination of her; that she said she thought she had heart trouble, but that on examination he found her heart perfectly normal and her lungs sound; that she then told him she had abdominal pains. When he examined for appendicitis

he discovered a large, aggravated uterus. Whereupon she acknowledged to him that she had been indiscreet, and requested him to perform an operation upon her, which he declined to do. He also testified that he made no examination after he discovered signs of pregnancy. His examination was only external. She left Grand Forks and arrived in Minot about 2 o'clock A. M. Sunday the 4th day of October, 1908, and took a room at the Leland Hotel, where she had a miscarriage, and died about 6 o'clock Tuesday morning, October 6, 1908, from septicæmia caused by injury to the uterus. The defendant visited her in her room in the hotel at different times between Sunday and early Tuesday morning. The claim of the state is that the injury to and the diseased condition of the uterus was caused by the defendant while engaged in producing a criminal abortion. The defendant's contention was that the diseased condition had been caused by an injury inflicted before he was called; that the fetus had died, and septicæmia had set in as a result of such previously inflicted injury, and that the treatment which he applied was proper and necessary under the conditions found by him. Barring the statements of the defendant to the coroner's jury, which were in accordance with his contention, the determination of the issue depended, with one very important exception, upon circumstantial evidence and the opinions of medical experts. The exception referred to was the testimony of one Paulsrud, who was permitted, over defendant's objections, to testify to acts and statements of one Dale, which were by the trial court held to be admissible against the defendant upon the theory that Dale and the defendant were co-conspirators in the procuring of the alleged abortion.

The result of this appeal depends largely upon the correctness of the ruling of the trial court admitting this evidence and his charge on the same subject to the jury. It will simplify matters to first consider this phase of the court's charge. The charge of the court on this subject was as follows: "In this case there has been received in evidence testimony relative to certain alleged statements of one L. W. Dale. I charge you that before you should consider any evidence relative to such statements, or such statements, you should be satisfied beyond a reasonable doubt from the testimony in the case other than such statements themselves that a conspiracy is proven to your satisfaction beyond a reasonable doubt to have existed between the defendant, Moeller, and L.

W. Dale, to procure the unlawful miscarriage of a pregnant woman, Gina Lien, and that after so finding such conspiracy for such purpose to have existed, you further find to your satisfaction beyond a reasonable doubt that such statements admitted in evidence were made while such conspiracy or plan to do such acts was in contemplation of the parties, or was being carried into effect, and after the inception of such conspiracy and before the final completion thereof, I charge you, however, that if such conspiracy between Dale and the defendant, Moeller, existed, and you so find, pursuant thereto in execution of the same the defendant unlawfully performed the acts to produce the miscarriage of Gina Lien, as charged in the information, then the jury may consider as testimony any statements made or acts done by either of such conspirators, provided such statements or acts were made by either, while either contemplated the formation of such conspiracy, afterwards carried into execution, or attempted to be carried into execution, by such conspirators, or were so made or done while either or both of them were carrying, or attempting to carry, into execution the plan to procure such unlawful miscarriage, as the result of such conspiracy, if such conspiracy existed."

In explanation of this charge, brief reference to the testimony to which it refers is necessary. It is shown that Dale had a slight acquaintance with the witness Paulsrud; that they met at the Leland Hotel in Minot, where both were stopping, on Saturday, the 3d of October, 1908, and conversed together on that day and on Sunday, the 4th and Monday the 5th, and that in their conversations Dale confided to Paulsrud the fact that he was looking after a girl who was at the hotel and who was in trouble, and that he had employed Dr. Moeller to relieve her, how much he was to pay him, when it was to be done, and her condition afterward. None of these conversations were in the presence of the defendant, and, with possibly one exception, not necessary to consider, all related to what had been done or what it was proposed to do. The court permitted Paulsrud to testify to these conversations, and the charge quoted to the jury is in harmony with the theory that this evidence was admissible. The appellant urges that, even if the evidence as a whole was sufficient to justify the submission of the question of conspiracy between Dale and the defendant to the jury, the charge of the court was erroneous and the evidence inadmis-

sible, because it permitted the jury to consider declarations or statements made to the witness by Dale, not accompanying acts done in the prosecution of the offense, and which constituted no part of the *res gestæ,* but on the contrary were merely in regard to acts already done or others in contemplation. On the argument in this court, the state's attorney conceded that the part of the charge under consideration and the admission of the evidence to which it related were erroneous, and prejudicially so. It is, however, the duty of this court to investigate for itself in cases of this nature, and we have given the subject most careful consideration. After so doing we are unable to adopt the theory of the trial court.

Acts and declarations of conspirators who are not on trial are sometimes admitted in evidence against a co-conspirator who is being prosecuted. The principle upon which such acts and declarations are admitted in evidence is that by the act of conspiring together the parties doing so have generally assumed as a body the attribute of individuality as relates to the prosecution of the common design or purpose, and that what is done or said by any one in furtherance of that design is a part of the *res gestæ*, and therefore the act of all. They are also admissible on the ground of agency. Most authorities are to the effect that a prima facie conspiracy must be established before the declarations of the co-conspirator are admissible, though some hold that the order of proof relating to it is subject to the discretion of the trial court. If the acts or declarations of the co-conspirator are not in furtherance of the common purpose, they are not admissible in evidence. Declarations made prior to the formation of the conspiracy, or those made after its execution, and declarations made relating to what the conspirators propose to do, by a co-conspirator, and not in furtherance of the common purpose, are inadmissible. State v. Walker, 124 Iowa, 414, 100 N. W. 354; Nicolay v. Mallery, 62 Minn. 119, 64 N. W. 108; State v. McGee, 81 Iowa, 17, 46 N. W. 764; People v. McGarry, 136 Mich. 316, 99 N. W. 147; Spies v. People (the Anarchist Case), 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, and 995, note 4, 17 N. E. 898, 6 Am. Crim. Rep. 570, and cases cited therein; State v. De Wolfe, 29 Mont. 415, 74 Pac. 1084; State v. Thibeau, 30 Vt. 100, and cases cited in note thereto in Book 10 Vt. Rep. Anno.; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; People v. Davis, 56

N. Y. 95; Lawrence v. State, 103 Md. 17, 63 Atl. 96; State v. Crofford, 133 Iowa, 478, 110 N. W. 921, Id., 121 Iowa, 395, 96 N. W. 889; Patton v. State, 6 Ohio St. 468; Fouts v. State, 7 Ohio St. 472. As this principle applies to the instructions of the court to the jury, it is apparent he wholly omitted to include the essential element that the declarations of the co-conspirator, even conceding the conspiracy to have been shown, must have been made in furtherance of the object of the conspiracy. This constitutes reversible error.

Applying this principle to the testimony of the alleged co-conspirator, it is enough to say that, with the exception of one question, which may have been proper, but which standing alone was entirely inadequate to connect the defendant with the crime, it may be divided into two classes: The first relates to certain acts of the defendant; the second to declarations of the alleged co-conspirator as to what arrangements he had made with the defendant, what was planned to be done, why it was to be done, and what had been done and the result. With the exception of the one question referred to, none of these declarations were pertinent to the carrying out or in furtherance of the enterprise. The witness and Dale met casually. They had a slight acquaintance. They took walks on the street together and conversed in the hotel, but the witness was not asked to and did not participate in any of the plans. The statements which he testifies Dale made were not made with a view of or to aid in carrying out the illegal conspiracy, if any existed. They were simply recitals of what had been done, and what it was proposed to do, without any disclosed purpose. They were also made without any opportunity for the defendant to cross-examine Dale, and not in defendant's presence. We are unable to discover any principle sustained by authority warranting the admission in evidence of these declarations, with the possible exception of two or three cases, where loose statements of the courts have indicated that statements of a co-conspirator were admissible, without distinguishing why admissible, and we think based upon facts making it unnecessary to do so.

It is urged by the state that the questions asked by it which elicited the testimony referred to did not furnish any indication that the answers would be incompetent, and that the questions were in themselves competent, and therefore the court did not commit error in allowing the witness to answer, and that defendant should have submitted motions to

strike out such answers, but, not having done so, the error, if any, was cured. This, of course, does not apply to or cure the error in the court's instructions which we have considered, and which was prejudicial; but, applying it to the testimony of the witness Dale, we think it is answered, even if abstractly correct, by the fact that after a few such questions had been propounded and answers given, it must have been apparent to the court and counsel what they all related to, namely, a conversation had between the witness Paulsrud and the third party, Dale, not in the presence of the defendant, and in relation to matters not in furtherance of the commission of the crime; at least this applies to a number of the obnoxious questions. Hence the failure to ask that the answers be stricken out did not cure the error. The acts which Paulsrud testified about were not all objectionable as evidence. Testimony as to what he saw the defendant do, bearing on the offense charged, was properly received, and also of some of the acts of Dale, for the purpose of establishing a conspiracy.

Error is assigned in permitting Dr. Engstad to give his opinion that it was unnecessary to procure a miscarriage. Dr. Engstad's examination was only superficial; he made nothing but a partial external examination, and when the girl informed him of her condition he went no further. This involves the question whether it was necessary for the state to negative the necessity for the operation. As this is not discussed in the briefs, we shall not pass upon it.

Error is assigned because Dr. Engstad was not permitted to testify in substance that it was not uncommon for women illegitimately pregnant to inflict injuries upon themselves, particularly upon the uterus, in an attempt to produce a miscarriage and conceal their condition. We do not pass upon the objections taken to questions of this nature, for the reason that the record shows similar questions were asked of experts and answered, and there is no conflict in the evidence on this point. An answer to this question, if in favor of appellant's contention, would only have been cumulative; hence, if it was error to sustain the objection, it was error without prejudice.

Dr. Engstad was asked on cross-examination to state whether an infection caused by an injury to the uterus might not remain dormant a greater or less period of time before it would spread out and give evidence of its presence. The state's objection to this question was

sustained. This ruling, we think, is correctly assigned as error. The defense submitted evidence tending to show that the time after the first meeting of the defendant and the girl was too short to admit of infection taking place then resulting in death on the morning of October 6th, and this question had a bearing on that issue. Error is assigned in permitting Dr. Engstad to state the conversation with Miss Lien when she called on him, where he gave her advice, and she promised not to have an operation performed. This ruling might be sustained on the same grounds on which the declarations of the third party, Dale, were held admissible, but the defendant had brought out part of the conversation between the girl and the doctor, and this entitled the state to show the whole conversation.

The fifth and sixth assignments of error relate to the sustaining of the state's objection to the following questions, asked one of the experts: "Q. Don't you know that the text-books dealing with obstetrics and gynecology lay it down as a fact of not uncommon occurrence for a woman in a pregnant condition to inflict injuries upon the walls of the uterus and cause similar conditions to those which were presented by the uterus described in this case?" and "Q. Does not Hearst say in his text-book that injuries to the internal walls of the uterus resulting in septicæmia may be inflicted, and in fact not uncommonly are inflicted, by the pregnant woman herself?" These questions were propounded to Dr. Larson, who conducted the autopsy. He was a most intelligent witness, but his experience was limited, and his testimony was based very largely upon knowledge gained from reading rather than from experience. Had these questions been submitted for the purpose of eliciting information as to the contents of text-books primarily, the ruling of the court might be, and doubtless would have been, correct, but it is now claimed that they were submitted solely for the purpose of testing the accuracy of the witness's knowledge and the correctness of his conclusions as an expert, that necessarily his opinions were based upon reading medical works, and that their bearing was upon the weight which should be given his testimony. If this was the reason assigned in the trial court, the ruling was error.

The fourteenth assignment of error relates to defendant's request, that the court instruct the jury that if the defendant inflicted a mortal wound upon Gina Lien, after an abortion or miscarriage had been ac-

complished, while trying to give relief from the effect of the abortion or miscarriage, then he is not guilty of the crime, even though he unlawfully procured the abortion without any necessity therefor. In view of the whole record this assignment can be disposed of by stating that we are agreed that the charge of the court, as given, adequately covered this ground. The last error assigned is that the court should have advised the jury to acquit the defendant for the reasons stated in his motion to that effect made at the close of the trial. The substance of the reasons given was that the state had failed to present facts sufficient to warrant a conviction. A careful reading of the entire record satisfies this court that it shows a sufficient conflict in competent evidence to justify its submission to the jury, and that the denial of defendant's motion was not error.

We have discussed the questions raised on this appeal in a somewhat general way, because to cover details would make it necessary to include in this opinion many pages of unsavory testimony, and extend it to an undue length, without any compensating clearness in giving the reasons for our conclusions.

For the reasons stated, the order of the District Court denying a new trial is reversed, and a new trial granted. All concur.

CLEVELAND SCHOOL DISTRICT v. GREAT NORTHERN RAILWAY COMPANY.

(28 L.R.A.(N.S.) 757, 126 N. W. 995.)

Measure of Damages — Destruction of Shade Trees.

Where shade trees are destroyed by the wrongful acts of another, and they

Note.—The holding in this case, that where shade trees which have no independent value are destroyed, the measure of damages is the difference between the value of the land before and after they were destroyed, is sustained by the weight of authority, as shown by an exhaustive review of the decisions in notes in 19 L.R.A. 653, 11 L.R.A.(N.S.) 930, and 28 L.R.A.(N.S.) 757; although it has been held in a few jurisdictions that, since there may be a difference of opinion as to whether a certain tract of land is more valuable with the trees than without them, thus making the injury one to the trees rather than to the land, the measure of damages is the fair and reasonable value of the trees destroyed, or, if the trees are only injured, the difference in value before and after the injury.

have no separable and independent value. or when their value is nominal, the measure of damages is the difference between the value of the land before and after they were destroyed.

Opinion filed May 21, 1910.

Appeal from District Court, Nelson county; *Honorable Chas. F. Templeton,* J.

Action by Cleveland School District, a corporation, against Great Northern Railway Company, a corporation. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Murphy & Duggan, for appellant.

The value of the trees destroyed, as they stood at the time of the fire, is the true measure of damages. Kansas City & O. R. Co. v. Rogers, 48 Neb. 653, 67 N. W. 602; Fremont, E. & M. Valley R. Co. v. Crum, 30 Neb. 70, 46 N. W. 217; Missouri, K. & T. R. Co. v. Lycan, 57 Kan. 635, 47 Pac. 526; Atchison, T. & S. F. R. Co. v. Hays, 8 Kan. App. 545, 54 Pac. 322; Kansas City, Ft. S. & M. R. Co. v. Perry, 65 Kan. 792, 70 Pac. 876; Andrews v. Youmans, 82 Wis. 81, 52 N. W. 23; Gilman v. Brown, 115 Wis. 1, 91 N. W. 227; Atchison, T. & S. F. R. Co. v. Geiser, 68 Kan. 281, 75 Pac. 68, 1 A. & E. Ann. Cas. 812; Mogollon Gold & Copper Co. v. Stout, 14 N. M. 245, 91 Pac. 724; Hooper v. Smith (Tex. Civ. App.) 53 S. W. 65; Norfolk & W. R. Co. v. Bohannon, 85 Va. 293, 7 S. E. 236; Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401; Stoner v. Texas & P. R. Co. 45 La. Ann. 115, 11 So. 875; White v. Chicago, M. & St. P. R. Co. 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146; Atkinson v. Atlantic & P. R. Co. 63 Mo. 367; Elvins v. Delaware & A. Teleg. & Teleph. Co. 63 N. J. L. 243, 76 Am. St. Rep. 217, 43 Atl. 903.

Kelly & Sampson and *Scott Rex,* for respondent.

The damage is the difference in the value of the land before and after the injury. Carner v. Chicago, St. P. M. & O. R. Co. 43 Minn. 375, 45 N. W. 713; Evans v. Keystone Gas Co. 148 N. Y. 112, 30 L.R.A. 651, 51 Am. St. Rep. 681, 42 N. E. 513; Hayes v. Chicago, M. & St. P. R. Co. 45 Minn. 18, 47 N. W. 260; Missouri, K. & T. R. Co. v. Lycan, 57 Kan. 635, 47 Pac. 526; Atchison, T. & S. F. R. Co. v. Geiser,

68 Kan. 281, 75 Pac. 68, 13 Am. & Eng. Enc. Law, pp. 538, 541; Joyce, Damages, § 2134; St. Louis, I. M. & S. R. Co. v. Ayres, 67 Ark. 371, 55 S. W. 159; Alberts v. Husenetter, 77 Neb. 699, 110 N. W. 657; Rowe v. Chicago & N. W. R. Co. 102 Iowa, 286, 71 N. W. 409.

CARMODY, J. This action was brought to recover damages for the destruction of ninety-five shade trees, situated on plaintiff's property, adjacent to the right of way of defendant. Plaintiff owns about 1½ acres of land adjoining the defendant's right of way, and had on this land on October 4, 1906, a consolidated school building, erected at a cost somewhat in excess of $6,000, and 95 to 100 young shade trees. The trees were set out in spring of 1904, and formed a double row along the westerly side and northerly end of the school ground. They were destroyed by fire on October 4, 1906, set out and allowed to escape by defendant's section men, who were engaged in burning off defendant's right of way adjacent to plaintiff's property. The evidence shows that at the time of the fire the trees had three seasons' growth and were in a thrifty, healthy condition. About 100 trees had been broken down or dried, so that the 95 trees had been set out, a few had been broken down or dried, so that the 95 trees destroyed by the fire were practically all the trees on the premises. Plaintiff in the complaint laid its damages at $950. The jury returned a verdict for $573, upon which judgment was entered. A motion for a new trial was made and denied, and this appeal is from such order and judgment. On this appeal the controversy turns on the measure of damages to be adopted in such a case, and the admissibility of testimony of value.

This case was tried in the court below by respondent on the theory that the measure of respondent's damages was the difference in value of the school property before and after the fire, and was submitted to the jury on such theory. The court charged the jury as follows: "In determining plaintiff's damages, if any, you will compare the actual value of plaintiff's property just before the fire and before the trees were burned, with the actual value of the same property after the fire and after the trees were burned. The difference in value will be the amount that plaintiff is entitled to recover, if anything." This instruction was excepted to by the appellant, and is assigned as error. The case was tried in the court below by appellant on the theory that the cost of replacing

the trees was the measure of respondent's damages. In this court, however, the rule of damages for which appellant contends is the value of the trees destroyed, as they stood appurtenant to and attached to the realty, and contends that the damage could not in any event exceed the difference between the value of the land before and after the fire, the value of the trees as they stood must be limited to the difference between the value of the land entire before and after the fire. Appellant, however, argues with great force and plausibility, that the fact that the damages should not exceed the said difference does not mean that such difference is the most accurate or direct test of the loss. It contends that such damages should be exactly the same, no matter by which method they are measured, if they are properly proven and found, and that it is a settled general rule of law that the measure of damages should be adopted which is the most direct and easiest of accurate application, likewise the simplest; that the rule adopted offends against this general principle; that it is indirect, in attempting to ascertain the damages by a proposition in subtraction; it is inaccurate in its practical application, for the reason that it compels the jury to think in thousands of dollars in values, where the actual damages could not be more than a few hundred dollars. It seems to us that the rule to be adopted in any case depends upon the character and object of the particular action. Some courts hold that the plaintiff has his election to sue either for the value of the thing destroyed or for the injury to the freehold, that is, for the difference in value of the real estate before and after the fire. Bailey v. Chicago, M. & St. P. R. Co. 3 S. D. 531, 19 L.R.A. 653, 54 N. W. 596.

In Bailey v. Chicago, M. & St. P. R. Co. supra, which was an action to recover damages for burning and destroying trees and shrubbery, the court says: "A party injured as complained of in this action may bring his suit for destroying his trees, and in such action recover the value of such trees, not as a part of the realty, but their intrinsic value as detached and separated therefrom and proved in the usual mode of proving value; or he may bring his action for injury to his real estate, and recover its diminution in value. Each action has its appropriate rule of damages." In the case at bar, the plaintiff, having brought its action for injury to the real estate, we think the measure of damages laid down by the trial court is correct.

Although the authorities are not uniform, the true rule is believed to be, that where property attached to realty is destroyed by fire the plaintiff may, at his election, seek to recover its value in its detached form, or as part of the realty, in which latter event the measure would be the difference in the value of the realty before and after the fire. 13 Am. & Eng. Enc. Law, p. 540 and cases cited.

The measure of damages for the destruction of fruit, shade, ornamental, or growing trees or shrubbery, is the difference between the value of the land before and after they were destroyed. Joyce, Damages, § 2134 and cases cited; Carner v. Chicago, St. P. M. & O. R. Co. 43 Minn. 375, 45 N. W. 713; Hayes v. Chicago, M. & St. P. R. Co. 45 Minn. 17, 47 N. W. 260; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Bevier v. Delaware & H. Canal Co. 13 Hun, 254; St. Louis, I. M. & S. R. Co. v. Ayres, 67 Ark. 371, 55 S. W. 159; Evans v. Keystone Gas Co. 148 N. Y. 112, 30 L.R.A. 651, 51 Am. St. Rep. 681, 42 N. E. 513; Rowe v. Chicago & N. W. R. Co. 102 Iowa, 286, 71 N. W. 409; Hooper v. Smith (Tex. Civ. App.) 53 S. W. 65; Mogollon Gold & Copper Co. v. Stout, 14 N. M. 245, 91 Pac. 724; Atchison, T. & S. F. R. Co. v. Geiser, 68 Kan. 281, 75 Pac. 68, 1 A. & E. Ann. Cas. 812; St. Louis & S. F. R. Co. v. Noland, 75 Kan. 691, 90 Pac. 273; Bailey v. A. Siegel Gas Fixture Co. 54 Mo. App. 50; Central R. & Bkg. Co. v. Murray, 93 Ga. 256, 20 S. E. 129; Hoyt v. Southern New England Teleph. Co. 60 Conn. 385, 22 Atl. 957; Shannon v. Hannibal & St. J. R. Co. 54 Mo. App. 223; Cleveland, C. C. & St. L. R. Co. v. Stephens, 74 Ill. App. 586; Terre Haute & L. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. 534; Stertz v. Stewart, 74 Wis. 160, 42 N. W. 214.

In Dwight v. Elmira, C. & N. R. Co. 132 N. Y. 199, 15 L.R.A. 612, 28 Am. St. Rep. 563, 30 N. E. 398, the court says: "A party may be content to accept the market value of the thing taken, when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of the thing taken or destroyed after severance from the freehold, so as to secure compensation for the damage done to his land because of it, then the measure of damages is the difference in value of the land before and after the injury. In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation, from

the realty, of which they formed a part, as indeed he should not have been, as such value was little or nothing, so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value. This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land, before and after the injury."

In Rowe v. Chicago & N. W. R. Co. supra, which was an action for damages for the destruction of an orchard by fire, the court says: "The true rule in such cases is that, 'when the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached that it has no value separate and independent of the real estate, or the injury is to the soil itself, the measure of damages is the difference in value between the real estate before the injury and after it.' " In this case the court instructed the jury "that, as to the orchard, the measure of plaintiff's damage would be the 'difference between the fair market value of the plaintiff's farm of 60 acres, upon which said orchard was, not including the grass or fences injured or destroyed, immediately before the fire, and its fair market value immediately after the fire, as injuriously affected by said fire.' " The rule contended for by the defendant was as follows: "The measure of damages in this case is the difference in value of the orchard just before and its value just after the fire, as an orchard." The court says: "We think the rule announced in the instruction given by the court is correct, and it is supported by the great weight of authority. It is impossible to separate the orchard from the land in estimating the damages. Appellant's contention results in fixing the value of each tree destroyed or damaged by the fire, and the aggregate of such values would be the measure of plaintiff's recovery. Such a rule may well be held applicable to the destruction by fire of buildings, fences, and other improvements, which may at once be replaced, where the exact cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage to the realty itself."

In support of the rule laid down by the Iowa court it cites 3 Elliott, Railroads, § 1239, Minnesota, Illinois, Wisconsin, New York, Kansas, Texas, Indiana, and 5 Am. & Eng. Enc. Law, p. 36.

The rule of damages contended for by appellant in this court is

held the correct rule in a few of the states, notably Nebraska, and in the early cases in South Dakota. The great weight of authority, however, sustains the measure of damages laid down by the trial court in the case at bar.

None of the assignments of error by the appellant as to the admission or exclusion of testimony are well taken. The testimony shows that the growing trees had a nominal value as trees for timber, separate from the ground on which they grew. The testimony offered by the defendant, as stated by its attorney, was the following:

Mr. Duggan: "The defendant at this time offers to prove by this witness that the trees such as were upon the Cleveland School District property at the time of the fire have and had then an actual market value, which market value was between $15 and $20 per hundred. Furthermore that such trees are customarily carried in stock by dealers, and transplanted, and that such dealers sell, transplant, and care for such trees, and that it is a known fact among nurserymen that 90 per cent of such trees live, grow, and thrive in this climate and locality, and that all the trees such as were upon the Cleveland School District at the time of this fire, or as many of similar trees, can be planted upon that school district, guaranteed to grow, replaced if they do not grow, and such a number according to all the known experience of nurserymen, all at a cost less than $150; that such trees, that is box elders of the age, size, height, and quality of trees that were upon this school district have an actual market value."

Under the rule of damages as laid down by the court this testimony was inadmissible. It did not tend in any way to prove or disprove the plaintiff's damages. See cases hereinbefore cited as sustaining the measure of damages laid down by the learned trial court.

The order and judgment appealed from are affirmed. All concur.

JAMES HACKNEY v. THOMAS L. ADAM.

(127 N. W. 519.)

Arbitration and Award — Failure to Take Oath of Arbitrators — Waiver.

1. The parties to this litigation by a valid agreement duly submitted their

differences to arbitration, and an award was made and filed in plaintiff's favor. That such award is meritorious is not questioned, but the arbitrators, deeming such award void for their failure to take an oath as required by statute and to cause the witnesses to be sworn, thereafter proceeded on notice to make a second award, which was made, filed, and affirmed, and judgment entered pursuant to an order of the district court. From such judgment and from an order denying defendant's motion to vacate the second award, defendant appeals.

Held: (1) That there is no competent proof showing a noncompliance with the statute requiring an oath to be taken by the arbitrators and requiring the witnesses to be sworn; and (2) conceding such noncompliance with the statute such irregularities were waived by the parties. Although both were present, neither party objected in any manner to the failure of the arbitrators to take the oath or cause the witnesses to be sworn. Where parties have appeared before the arbitrators and submitted their case without calling attention to their failure to take the oath or cause the witnesses to be sworn, and have waived until an award has been made and filed, they will be deemed to have waived such irregularities.

Arbitration and Award — Exhaustion of Arbitrators' Authority.

2. By making and filing the first award the powers of the board of arbitrators were exhausted, and the arbitrators became *functus officio*. Hence, the second award is a nullity, but in view of the fact that such award is identical in amount with the first, with the exception of costs, the order and judgment complained of are not prejudicial to appellant except to the extent of the excess of costs over those found in the first award. The judgment is modified to the extent of such excess of costs, and as thus modified is affirmed.

Arbitration and Award — Action on Award — Harmless Error.

3. While the first award has never been affirmed, and the time has elapsed for making application for an order affirming the same, an action will lie in respondent's favor on such award under § 7710, Rev. Codes 1905. Hence, appellant would gain nothing by a reversal of the judgment, and such reversal would, no doubt, merely result in further litigation ending in a judgment in respondent's favor.

Arbitration and Award — Affirmance of Award — Right to Vacation.

4. It was not error, for reasons stated in the opinion, to deny appellant's motion submitted April 20, 1908, to vacate the order affirming the second award, even conceding the invalidity of the first award.

Arbitration and Award — Review — Judgment on Award of Arbitrators.

5. The statute governing appeals in cases triable to the court without a jury has no application to the case at bar. We can review on this appeal only the alleged errors of law appearing in the record, duly excepted to.

Opinion filed June 15, 1910.

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

Action by James Hackney against Thomas L. Adam. From a judgment for plaintiff, and an order denying defendant's motion to vacate an award, defendant appeals.

Modified and affirmed.

James A. Manly and *John Knauf*, for appellant.

Making and filing an award ends the powers of arbitrators. 2 Am. & Eng. Enc. Law, p. 698; Doke v. James, 4 N. Y. 568; Fallon v. Kelehar, 16 Hun, 266; Calvert v. Carter, 18 Md. 73; Flannery v. Sahagian, 134 N. Y. 85, 31 N. E. 319.

Maddux & Rinker, for respondent.

Failure of witnesses and arbitrators to take oath, not objected to, will not invalidate award. Greer v. Canfield, 38 Neb. 169, 56 N. W. 884; Burnside v. Whitney, 21 N. Y. 148; Browning v. Wheeler, 24 Wend. 258, 35 Am. Dec. 617; Howard v. Sexton, 4 N. Y. 157; Caldwell v. Brooks Elevator Co. 10 N. D. 575, 88 N. W. 700.

FISK, J. This is an appeal from a judgment entered on an award of arbitrators, and also from an order thereafter made denying defendant's application to vacate such award and the order for judgment thereon. The agreement to arbitrate is in the usual form, and no question is raised regarding its validity. Pursuant to the agreement the two arbitrators selected by the parties appointed a third arbitrator. Thereafter, and on November 27, 1907, the board of arbitrators, by the consent of both parties, who waived notice of the meeting, met, heard testimony, and made its award in writing in favor of respondent and against appellant for the sum of $834.90 and the sum of $15 costs, which award was duly signed and acknowledged by each member of such board and filed. Thereafter these arbitrators, deeming such award irregular and void for the reason that they had not taken and subscribed an oath as required by § 7695, Rev. Codes 1905, issued a notice signed by them designating January 2, 1908, at 1 o'clock P. M. as the date, and the office of Maddux & Rinker, New Rockford, as the place for another hearing, which notice they caused to be duly served on the parties. At the appointed time and place such board met, the respondent appearing in person, but no appearance being made by appellant. Thereafter and on said date such arbitrators made their written award corresponding in amount with the

previous award with the exception of the costs, which they assessed at $99.60. On said day, the exact hour and whether before or after the award had been made being in dispute, appellant caused to be served upon the arbitrators a written notice signed by him objecting (in the language of the notice) "to any further hearing in the said matter upon the ground that said arbitrators have already made and filed in the office of the clerk of said court a pretended award in said matter, and that upon the making of said award as aforesaid the authority of said arbitrators in said matter was terminated. And that the said defendant hereby expressly revokes the authority of said arbitrators to proceed further in the said matter." The record discloses that the next step taken was on February 17, 1908, at which time respondent's attorneys served upon appellant and his attorneys a notice that on February 26th at 9 o'clock A. M. they would move the district court at chambers in Valley City for an order affirming such latter award. By stipulation of counsel the hearing on such application was postponed to March 26, 1908, at which time the district court made its order affirming the award and ordering judgment in respondent's favor, and against appellant for the sum of $834.90, debt and damages, and $54.60 costs. Such order recites that the cause came on for hearing on plaintiff's motion to affirm the award and defendant's motion to vacate the award and that plaintiff appeared by his attorneys Maddux & Rinker, and defendant by his attorneys James A. Manly and S. E. Ellsworth, and that after hearing counsel for each of said parties said cause was submitted, etc. Notwithstanding the appearance by defendant's attorneys at such hearing and their motion to vacate said award, the record discloses that another motion was made by defendant to vacate the award, dated March 28th and returnable April 7th. At another place in the printed abstract we find an order made by the district court denying such motion and refusing to vacate the order affirming the award, but it bears no date. The latter motion was not submitted to the court, however, until April 20th and consequently the order must have been made on or after such date. Judgment was entered on such award on April 16, 1908. At the hearing of defendant's last motion numerous affidavits were submitted by both parties, relating principally to the question whether defendant's notice, assuming to revoke the authority of the arbitrators, was served prior or

subsequent to the time when the last award was made. Upon this point there is a square conflict in the proof submitted, and we deem it unnecessary to set out at length in this opinion the affidavits thus submitted.

In the preparation of their brief appellant's counsel proceeded upon the theory that the case is in this court for trial *de novo*. In this they are in error. The statute governing appeals in cases triable to the court without a jury has no application to the case at bar, and we can only review on this appeal the alleged errors of law appearing in the record, duly excepted to. A statement of the case was duly settled embracing a specification of errors, which specification is incorporated in appellant's brief, and will be treated as assignments of error. Such specifications of error number seven, but as they all relate to the correctness of the rulings affirming the award, denying defendant's motion to vacate such award and in ordering and entering judgment thereon we shall dispose of them together.

It is nowhere contended by appellant that the award is not a just and meritorious settlement and disposition of the disputed questions submitted to the board. But his contentions, briefly stated, are: (1) That the powers of the board ceased November 27, 1907; or (2) such powers were legally revoked by him prior to the making of the award on January 2, 1908, and that as a necessary conclusion the court erred in refusing appellant's motion to vacate such award and the order affirming the same.

Were we to concede the correctness of both contentions we would not be prepared to agree to the conclusion of appellant's counsel. But, first, let us see whether the powers of the board were revoked as contended. If revoked, such revocation must have been effected prior to the final submission of the cause to the arbitrators for their decision. By § 7711 of the Code it is provided that "neither party shall have power to revoke the powers of the arbitrators after the cause shall have been finally submitted to them upon a hearing of the parties for their decision." In the light of this statutory provision the question as to whether appellant revoked the board's powers is manifestly a question of fact depending upon the proof submitted with reference to the time when the notice of such attempted revocation was served,—whether prior or subsequent to the time the cause was finally submitted

for decision. Upon this question of fact, as before stated, there is a square conflict in the proof, and this being true this court will not disturb the finding of the trial court which necessarily must have been adverse to appellant. As above stated, the cause is not before us for trial *de novo*. We are permitted merely to review the rulings of the trial court for the purpose of determining whether they or any of them constitute prejudicial error as a matter of law, and it is elementary that a finding which has substantial support in the proof cannot be urged as an error of law. We are therefore impelled to the conclusion that no revocation of the powers of the arbitrators was legally made.

A consideration of appellant's other contention, namely, that the powers of the board ceased on November 27, 1907, at the time of making and filing the first award, leads us to the belief that the same is correct, but we reach this conclusion for reasons widely different from those advanced by appellant's counsel. We think the first award was valid,—not void, as counsel assume. There is nothing in the record to warrant the conclusion that such award was a nullity. While the arbitrators, some time after such award was made, signed and caused to be served on the parties a notice of another hearing containing a recital of the mere conclusion that they deem such award irregular and void, we are unable to find any justification therefor in the record. While two of the arbitrators in their affidavit, which was used by appellant on his motion to vacate the order affirming the second award, give as their reasons for thus deeming the prior award void, "that the arbitrators were not sworn before making the first award filed herein on the 27th day of November, 1907, nor were any witnesses sworn in any hearing before making such award," such proof was incompetent and cannot be considered. Appellant nowhere challenges either the validity or the justice of such first award. It nowhere appears that either party, although both were present, objected in any manner to the failure of the arbitrators to take the oath or cause the witnesses to be sworn, even if such irregularities occurred; but, moreover, there is no competent proof before us that any such irregularities in fact occurred. It is well settled that arbitrators will not be permitted to impeach their award. The settlement of disputes by arbitrators is favored by the courts. Furthermore, a failure to object to such irregularities, conceding they occurred, operated as a

waiver thereof. We take it to be well settled that where the parties have appeared before the arbitrators and submitted their case without calling attention to the failure of the arbitrators to take the oath or to cause the witnesses to be sworn, and have waited until an award has been made and filed, they will be deemed to have waived such irregularities. Upon the plainest principles of law and justice this should be the rule.

We must therefore dispose of this appeal on the assumption that the first award was valid. Such assumption necessitates the conclusion that the second award was made without authority. The powers of the board were exhausted upon the making and filing of the first award. As soon as they made and filed such award the arbitrators became *functus officio.*

It does not follow from this, however, that the judgment and order must necessarily be reversed. With the exception of the costs the two awards are identical in amount. This being true, we fail to see how appellant was in any way prejudiced except to the extent of the excess of costs in the second award over those found in the first. If the judgment is modified in respect to such costs so as to conform to the award first made we fail to see how appellant is in a position to complain. The judgment will be thus modified. Appellant is not in a position to ask for any greater relief. In making his motion in the court below he was in the attitude of appealing to the favor of the court. He was duly notified of respondent's application for an order affirming the award. He resisted such application, but saved no exception to the adverse ruling thereon. Whether an exception to such ruling was necessary we need not here determine. Appellant predicates error upon the ruling denying his motion, submitted on April 20, 1908, to vacate said award and the order for judgment. It was not error to deny such motion for two reasons: (1) The subject-matter of such motion had been previously passed upon and determined by the district court; and (2) appellant did not bring himself within any of the statutory grounds enumerated in § 7699, Rev. Codes 1905, for the vacation of an award. That section is as follows: "Any party to such submission may move the court designated therein to vacate the same upon either of the following grounds: (1) That such award was procured by corruption, fraud or other undue means; (2) that there

was evident partiality or corruption in the arbitrators, or either of them; (3) that the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or refusing to hear any evidence pertinent and material to the controversy, or for any other misbehavior of such arbitrators by which the rights of any party shall have been prejudiced; (4) that the arbitrators exceeded their powers, or that they so imperfectly executed them, that a mutual, final and definite award on the subject-matter submitted was not made."

The order affirming the award and the judgment entered thereon cannot be said to be void or prejudicially erroneous except to the extent that the second award allowed costs in excess of those determined in the first award. Nothing would be gained by a reversal of such judgment. On the contrary, further litigation would, no doubt, result therefrom. While the first award, so far as the record discloses, has never been affirmed, and the time for making application for an order affirming the same has elapsed, it is, we think, clear that an action would lie at the suit of respondent on such award and judgment could no doubt be obtained thereon. Section 7710, Rev. Codes 1905, expressly so provides. It reads: "Nothing in this chapter shall be construed to impair or affect any action upon an award or upon any bond or other engagement to abide by an award." In view of this nothing could be gained by appellant, even if we should grant him the relief prayed for.

It is accordingly ordered that the District Court modify its judgment herein in conformity with this opinion, and, as thus modified, the same will be affirmed, but without costs to either party in this court. All concur, except ELLSWORTH, J., who is disqualified.

ANETA MERCANTILE COMPANY, a Corporation Existing under the Laws of North Dakota, v. E. J. GROSETH and Oline Groseth.

(127 N. W. 718.)

Justice of the Peace — Appeal — Service of Pleading with Notice.

1. In an appeal to the district court from a judgment rendered in justice

court by default, the serving of appellant's pleading with the undertaking is prerequisite to the transfer of jurisdiction to the district court.

Justice of the Peace — Appeal — Jurisdiction — Waiver.

2. The service of appellant's pleading in such cases pertains to the jurisdiction of the district court over the cause and subject-matter, and was not waived by the stipulation of the parties to continue the case over the January, 1909, term of the district court.

Opinion filed June 20, 1910. Rehearing denied Sept. 13, 1910.

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

Skulason & Burtness, for appellants.

Method of acquiring jurisdiction on appeal is established. Eldridge v. Knight, 11 N. D. 552, 93 N. W. 860; Deardoff v. Thorstensen, 16 N. D. 355, 113 N. W. 616.

General appearance confers jurisdiction. Steven v. Nebraska & I. Ins. Co. 29 Neb. 187, 45 N. W. 284; Goodrich v. Omaha, 11 Neb. 204, 7 N. W. 442; Auspach v. Ferguson, 71 Iowa, 144, 32 N. W. 249; Baisley v. Baisley, 113 Mo. 544, 35 Am. St. Rep. 726, 21 S. W. 29; Orear v. Clough, 52 Mo. 55; Peters v. St. Louis & I. M. R. Co. 59 Mo. 406; Shaffer v. Trimble, 2 G. Greene, 464; Grafton v. Union Ferry Co. 40 N. Y. S. R. 137, 13 N. Y. S. 878; Stanton v. Haverhill Bridge, 47 Vt. 172; Harvey v. Skipwith, 16 Gratt. 410; Marye v. Strouse, 6 Sawy. 204, 5 Fed. 494, 2 Mor. Min. Rep. 294; Miller v. State, 35 Ark. 276; Bazzo v. Wallace, 16 Neb. 290, 20 N. W. 315; Wm. Deering & Co. v. Venne, 7 N. D. 576, 75 N. W. 926; Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605; Moorhouse v. Donica, 13 Or. 435, 11 Pac. 71; Hayworth v. Rogan, 77 Tex. 362, 14 S. W. 70; Matthews v. Superior Court, 70 Cal. 527, 11 Pac. 665; Shay v. Superior Court, 57 Cal. 541; Morgan v. Garretson & G. Lumber Co. 105 Mo. App. 239, 79 S. W. 997.

M. A. Shirley, for respondent.

Appeal statutes are mandatory, and compliance therewith jurisdictional. Richardson v. Campbell, 9 N. D. 100, 81 N. W. 31; Haessly v. Thate, 16 N. D. 403, 114 N. W. 311; Deardoff v. Thorstenson, 16 N. D. 355, 113 N. W. 616; Eldridge v. Knight, 11 N. D. 552, 93

N. W. 860; Lough v. White, 14 N. D. 353, 104 N. W. 518; Thompson v. Fargo Heating & Plumbing Co. 14 N. D. 405, 104 N. W. 525.

Statutory provisions as to appeals are mandatory. Ramsdell v. Duxberry, 14 S. D. 222, 85 N. W. 221, 17 S. D. 311, 96 N. W. 132; Brown v. Chicago, M. & St. P. R. Co. 10 S. D. 633, 66 Am. St. Rep. 730, 75 N. W. 198; Plano Mfg. Co. v. Rasey, 69 Wis. 246, 34 N. W. 85; Telford v. Ashland, 100 Wis. 238, 75 N. W. 1006; Gruetzmacher v. Wanninger, 113 Wis. 34, 88 N. W. 929.

CARMODY, J. Judgment was entered by default in justice court against the defendants for $226.76. Appellants sought to take an appeal to the district court of Nelson county from such judgment, but omitted to serve their pleading with their notice of appeal and undertaking. The notice of appeal and undertaking were duly served and filed. The case was docketed in the district court previous to the January, 1909, term thereof. Before the opening of such term, the attorneys for the respective parties entered into a written stipulation for the continuance of the case over the January, 1909, term, which stipulation was filed in the district court on December 30, 1908. When the case was called on January 4, 1909, the court noted in the docket that the case was continued by stipulation. In May, 1909, the defendants made application to the judge of the district court, after notice to the respondent, for an order granting them leave to serve and file their pleading, but this motion was denied. Thereafter the attorney for the respondent served a notice of motion to dismiss the appeal upon the ground that the same had never been perfected by the reason of the failure to serve the pleading. This motion was granted, and judgment of dismissal entered accordingly, from which judgment this appeal is taken.

Appellants assign three errors: (1) The court erred in dismissing the appeal from the justice court, for the reason that the service of the pleading of the appellants with the undertaking on appeal is not a jurisdictional prerequisite, is not a mandatory, but a directory provision. (2) The court erred in dismissing the appeal from the justice court for the reason that, by the stipulation to continue the case, the respondent had made a general appearance in the district court, and had thereby waived any irregularities in the appeal. (3) The court

erred in refusing to permit the appellants to serve and file their answers.

Two questions are necessary to be considered for decision in the appeal: (1) Was the failure to serve and file appellants' pleading with the notice and undertaking jurisdictionally fatal to the appeal? (2) If such serving is jurisdictional, was there a waiver of the failure by the stipulation to continue the case over the January, 1909, term of said district court?

If these questions are answered adversely to the contention of the appellants, then the refusal of the court to allow appellants to serve and file their answer is not material. The sections of the Revised Codes of 1905, relating to appeals from justice courts, so far as material, are as follows: Section 8500: "The appeal is taken by serving the notice of appeal on the adverse party or his attorney and by filing the notice of appeal together with the undertaking required by law with the clerk of the district court of the county in which the appeal was taken." Section 8502: "To render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant by sufficient surety, to the effect that the appellant will pay all costs which may be awarded against him on the appeal not exceeding one hundred dollars, which undertaking shall be approved by and filed in the office of the clerk of the district court of the county to which the appeal is taken." Section 8506: "The undertaking for appeal must be served with the notice; also appellant's pleading when the judgment appealed from was taken by default." Appeals are matters of statutory regulation, and, unless the statute has been complied with, there is no appeal, unless there is a noncompliance with some requirement that can be and has been waived. Deardoff v. Thorstensen, 16 N. D. 355, 113 N. W. 616. Appeals from default justice judgments are not allowed in some jurisdictions. 24 Cyc. Law & Proc. p. 652, and cases cited.

It is earnestly contended by appellants that the service of the appellants' pleading is not jurisdictional, and that the district court acquired jurisdiction both of the person of the appellee, and of the subject-matter, upon the service and filing of the notice of appeal and the undertaking; that, if service of the pleading is one of the steps required to be taken to confer jurisdiction, such service relates only to

the jurisdiction of the person, and not of the subject-matter, jurisdiction of the subject-matter being conferred by the service and filing of the undertaking, and contends that whether the service of the pleading be regarded as a mere irregularity or as something which resulted in lack of jurisdiction of the person, then the stipulation to continue the case was a complete submission to the jurisdiction of the appellate court, and the defect was cured. Section 8506, supra, seems to us to be mandatory. It provides that the undertaking must be served with the notice, also appellant's pleading when the judgment appealed from was taken by default. There is no issue until the pleading is served. Hence there is no subject-matter at issue between the parties, and no issue to be tried or heard in the appellate court, until the defendant has answered or demurred, and thus made an issue, so that the requirement of the service of a pleading in such a case on the part of appellant would seem to be vitally essential in order to create an issue, a subject-matter in dispute, the jurisdiction over which is transferred to and vested in the district court by the proper taking of the statutory steps on appeal. The statute makes the service, approval, and filing of the undertaking and the service of appellants' pleading prerequisite to the transfer of jurisdiction from the justice court to the district court. Hence the stipulation to continue the case over the January, 1909, term did not give the district court jurisdiction of this appeal. Deardoff v. Thorstensen, supra; Richardson v. Campbell, 9 N. D. 100, 81 N. W. 31; Lough v. White, 14 N. D. 353, 104 N. W. 518; Eldridge v. Knight, 11 N. D. 552, 93 N. W. 860. If a party who appeals from a judgment of an inferior court does not file a bond with surety to the adverse party, as required by statute, the superior court has no jurisdiction of the action. Santom v. Ballard, 133 Mass. 464; Brown v. Chicago, M. & St. P. R. Co. 10 S. D. 633, 66 Am. St. Rep. 730, 75 N. W. 198; Oshkosh Waterworks Co. v. Oshkosh, 106 Wis. 83, 81 N. W. 1040; Gruetzmacher v. Wanninger, 113 Wis. 34, 88 N. W. 929; Bullard v. Kuhl, 54 Wis. 544, 11 N. W. 801; Plano Mfg. Co. v. Rasey, 69 Wis. 246, 34 N. W. 85.

In many cases where there has been an objection to the jurisdiction, because of some irregularity or defect in the service, or some merely technical defect in the process, it has been held that a general appearance by the respondent is a waiver of such objection, but this

rule applies only in cases where the court has jurisdiction of the subject-matter. Consent of parties may in a certain sense give jurisdiction of the person, but it cannot create a jurisdiction over the cause and subject-matter which is not vested in the court by law. Santom v. Ballard, supra; Burnley v. Cook, 13 Tex. 586, 65 Am. Dec. 79; Palmer v. Peterson, 46 Wis. 401, 1 N. W. 73. None of the cases cited are exactly like the case at bar. They all go to the general proposition that on an appeal from an inferior court to a superior court, and on an appeal from a city council to a district or circuit court, the statute regulating appeals must be substantially complied with, and nothing affecting the jurisdiction of the subject-matter can be waived. The jurisdiction of the subject-matter cannot be conferred by consent. As said by the court in Deardoff v. Thorstensen, supra, public policy requires that frivolous appeals be not made without compliance with requirements prescribed by law. Eldridge v. Knight, 11 N. D. 552, 93 N. W. 860, is not an authority for appellants. This was not an appeal from a default judgment, and what is said in that case only applies to judgments where issue is joined in justice court. Appellants' authorities are not in point, as none of them, as far as we can find, are under statutes like ours. Most of them are where there was some irregularity in the process by which jurisdiction was obtained over the person of the respondent, in which case it was held that jurisdiction of the person could be conferred by consent or by a general appearance.

Appellants ask leave by motion to amend the record by including the appellants' proposed separate answers. This amendment would not help appellants.

The judgment appealed from is affirmed. All concur.

GEORGE YOKELL v. A. O. ELDER.

(127 N. W. 514.)

Judgment — Evidence to Establish.

If a proper objection is made, a judgment cannot be proven by introducing in evidence the judgment docket containing an abstract of such judgment, nor

by parol evidence, in the absence of a showing that will allow the offer of secondary evidence.

Opinion filed June 24, 1910.

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

Action by George Yokell against A. O. Elder. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

Guy C. H. Corliss, for appellant.

F. Baldwin, for respondent.

CRAWFORD, Special Judge. This is an appeal from the district court of Foster county, which action was tried by the court without a jury. The plaintiff and respondent alleges in his complaint that he purchased 78 head of cattle from the defendant on or about October 1, 1891, and in the following year one F. Goodrich brought an action in justice court in claim and delivery to recover possession of a cow and calf that were purchased from the defendant at said time, which action was appealed to the district court and decided adversely to the plaintiff herein, and judgment rendered against plaintiff for the value of the cow and calf and costs, amounting to $109. The plaintiff further alleges that one Goodrich secured possession of one of the steers purchased from defendant at the time above mentioned, and he (the plaintiff) was compelled to bring an action in claim and delivery to recover the possession of said steer, which action was decided adversely to this plaintiff, and judgment for costs entered against him in the sum of $48.75.

The plaintiff presents a twofold ground of recovery: First, with respect to the cow and calf; and, second, with respect to the steer. Plaintiff's right to recover on the first ground depends upon his proving that a judgment for the value of the cow and calf and for costs was recovered against him, and the amount of such judgment, and that the same has been paid by him. The defendant claims that there is no competent proof that Goodrich ever recovered a judgment against the plaintiff, nor was the existence of such judgment, or its entry, admitted by the defendant. The docketing of such alleged judgment was proven by the introduction in evidence of a certified copy of the judgment docket. The defendant objected to the introduction of the certified copy

of the judgment docket when it was offered in evidence. The only other evidence concerning the purported judgment was the plaintiff's testimony, as follows: "I have since paid that judgment. I had to pay all the cost."

It becomes necessary to determine whether the certified copy of the judgment docket and the parol testimony are properly admissible as evidence of the recovery and entry of such judgment in the judgment record. In Baxter v. Pritchard, 113 Iowa, 422, 85 N. W. 633, the Iowa court said: "The only evidence introduced to show that plaintiff had a judgment was the judgment docket, and to this the defendant objected and his objections were overruled. . . . The record book is the best evidence of a judgment, and it or a certified transcript thereof is alone admissible to show a judgment where no foundation is laid for introducing secondary evidence." The above case was cited and approved by this court in Amundson v. Wilson, 11 N. D. 193, 91 N. W. 37. The defendant is not liable unless a third person has recovered a judgment against the plaintiff for the same cow and calf which was sold to plaintiff by defendant, and the only competent evidence that a judgment was recovered in such an action is the judgment roll itself or a duly authenticated copy thereof. If the judgment roll does not make clear the identity of the property involved, parol evidence may be admitted to show that the property sold is the same as that involved in the suit, but it is essential, first, to lay the foundation for such proof by introducing in evidence the record of the judgment itself or a certified copy thereof, which the plaintiff has failed to do in this action.

The same defects as to proof apply with equal force to the second ground of recovery with respect to the steer. The record contains no competent proof that the judgments pleaded were rendered or entered, and hence the judgment docket was not shown to be founded upon a judgment duly entered, or rendered, or that such judgment involved the same property as that involved in this action.

Under the circumstances we deem it proper and in furtherance of justice to remand the case for a new trial and such will be the order. The judgment is reversed, a new trial granted. and the cause remanded for further proceedings. All concur.

CRAWFORD, J., sitting in place of ELLSWORTH, J., disqualified.

STATE OF NORTH DAKOTA v. FRANK E. FUNK and August E. Johnson.

(127 N. W. 722.)

Criminal Law — Bail — Action on Bond — Performance Rendered Impossible by Other Arrest — Defenses.

1. It is a good defense to an action against the sureties on a bail bond that the state, intermediate the date of such bond and the time when by the terms thereof the principal was obligated to appear in court, caused the arrest of such principal on a criminal charge in another county, and kept him confined in the county jail thereof until after the date designated in the bond for his appearance.

Criminal Law — Bail — Action on Bond — Impossibility of Performance.

2. By such arrest and detention of the principal, performance of the conditions of the bail bond was rendered impossible by the state, the obligee in the bond, and therefore the default of the principal in failing to appear is excusable.

Opinion filed June 24, 1910. Rehearing denied September 12, 1910.

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

Action by the State against Frank E. Funk and another. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

W. S. Lauder and *J. M. Austin,* for appellants.

Act of God excuses performance of conditions of bail bond. Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287; Pynes v. State, 45 Ala. 52; McKee v. Com. 7 Ky. L. Rep. 286; People v. Meyer, 9 Misc. 726, 29 N. Y. Supp. 1148, 5 Cyc. Law & Proc. p. 115, and note 42; Conner v. State, 30 Tex. 94.

Detention of accused for crime in another county of the state, when his appearance is due according to the bail bond, exonerates sureties.

Note.—It is a well-established proposition of law, as shown by the authorities in a note in 23 L.R.A.(N.S.) 137, that the sureties in a recognizance will not be liable thereunder for the failure of the principal to appear, if such failure is caused by no fault of the principal. And certainly there could be no justice in holding the surety liable where the principal's default was not only not due to any fault on his part, but was actually caused by the State itself, as in STATE v. FUNK. The question what will excuse the surety from producing the principal is also considered in a note in 99 Am. Dec. 216.

Com. v. Overby, 80 Ky. 208, 44 Am. Rep. 471; Cooper v. State, 5 Tex. App. 215, 32 Am. Rep. 571; Taintor v. Taylor, 36 Conn. 242, 4 Am. Rep. 58; Belding v. State, 99 Am. Dec. 214, and note, 25 Ark. 315, 4 Am. Rep. 26; Steelman v. Mattix, 38 N. J. L. 247, 20 Am. Rep. 389; Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62; People v. Tubbs, 37 N. Y. 586; People v. Cook, 30 How. Pr. 110; People v. Moore, 4 N. Y. Crim. Rep. 205; Smith v. State, 12 Neb. 309, 11 N. W. 317; People v. Stager, 10 Wend. 431; Re James, 18 Fed. 853; Com. v. Webster, 1 Bush, 616; Smith v. Com. 91 Ky. 588, 16 S. W. 532; State v. Crosby, 114 Ala. 11, 22 So. 110.

Order of forfeiture does not preclude defense. State v. Lockhart, 24 Ga. 420; State v. Woodley, 25 Ga. 235; State v. Bugg, 6 Rob (La.) 63; Miller v. State, 35 Ark. 276.

J. E. Nelson, for respondent.

Fisk, J. This is an appeal from a judgment of the district court of McLean county. The facts are all stipulated, and are substantially as follows:

At the June, 1906, term of district court in and for McLean county, commencing June, 11, 1906, one Alexander Larron was informed against, charged with the crime of grand larceny. On June 14th he was arraigned, and pleaded not guilty. On his motion a change of venue was taken, and by order of court the action was transferred to Stark county, and Larron was admitted to bail in the sum of $2,000 in each case, there being two cases. On November 19, 1906, Larron, as principal, and defendants as sureties, executed and delivered their undertakings, whereby they jointly and severally undertook and agreed that said Larron should appear and answer such informations at the adjourned September 11, 1906, term of the district court of Stark county, to be held at Dickinson on December 3, 1906, being the next term thereof, and at all times hold himself amenable to the orders and process of the court, and, if convicted, to appear for judgment and render himself in execution thereof, or if he fail to perform either of said conditions that he pay to plaintiff the sum of $2,000 on each of said bonds, which bonds were approved by the clerk and by the acting judge who ordered the release of Larron thereunder. During all times subsequent to June 14, 1906, Larron was held in custody in the county jail of McLean county by the

sheriff thereof under instructions of the court, and on November 23d, and as soon as he was advised by his counsel so to do, under and by virtue of said undertakings, their filing, approval, and the order of the court, the said sheriff advised Larron that he was then and there released and discharged from custody on the charges on which he had been theretofore held, but immediately advised him that he, such sheriff, had been instructed and requested by the sheriff of Rolette county, North Dakota, to arrest and hold him in the event that Larron should be released on bail, and immediately informed him that he was then rearrested and to be held awaiting the arrival of the sheriff of Rolette county, and he was not permitted to leave such jail. At the time the sheriff said to Larron that he was released he further stated: "You are rearrested, and held for the sheriff of Rolette county." Thereafter the sheriff of Rolette county took Larron into his custody, conveying him to Rolette county without his consent or procurement and against his will and over his protest, and against the will and over the protest of these defendants. On December 4, 1906, being the second day of the adjourned September 11, 1906, term of the district court in and for Stark county, said cases were moved for trial. Larron failed to appear according to the conditions of such undertakings, and thereupon the court duly declared such undertakings forfeited. At no time prior to the final adjournment of said court did said Larron or defendants or either of them or anyone in his or their behalf appear and excuse or offer to excuse or explain Larron's failure to appear according to the terms of such undertakings, and at no time thereafter did Larron surrender himself, nor was he surrendered to any court or officer. Said sum of $4,000, the penalty of said undertakings, has not, nor any part thereof, been paid.

On November 30, 1906, and for a long time after December 4, 1906, and after the final adjournment of the said term of court in Stark county, Larron was forcibly and against his will held in custody and imprisonment in the county jail of Rolette county upon an alleged criminal charge under process of law and by the officers of said county; that solely on account of such imprisonment, and not otherwise, the said Larron could not and did not appear for trial in the district court of Stark county in discharge of the obligations of said bonds or undertakings, and that the charge upon which the said Larron was arrested

and held in custody in the said county of Rolette as aforesaid was not alleged to have been committed subsequent to the filing of the bonds aforesaid. While Larron was being held in custody in the county jail of McLean county as aforesaid, and after such bonds had been thus approved and filed, and after the order directing that Larron be discharged from custody had been filed and while the sheriff of McLean county was holding Larron for the sheriff of Rolette county, defendants, as such sureties, demanded of such sheriff that he surrender to them the custody of Larron, which demand was refused. Larron died on or about June 15, 1907, subsequent to the final adjournment of the adjourned September, 1906, term of the district court of Stark county. At the time of his death he was not held in custody but was a fugitive from justice. After the adjournment of such term of court and until the death of said Larron, there was no term of court held in Stark county at which said criminal actions could have been tried, and that such actions remained pending in said court until the time of his death.

On these facts the district court directed the entry of judgment in favor of the state and against these sureties for the amount of such undertakings, together with costs and disbursements. The appeal is from such judgment. Appellants urge three reasons in support of their contention that the judgment should be reversed. These are the following: "First. Larron, for whose appearance in court the bail bond was given, having been, by authority of the state, imprisoned in the county jail of Rolette county at the time fixed for his appearance for trial in the district court of Stark county, and when the order of forfeiture was made, his nonappearance was as matter of law thereby excused, and the appellants were not liable in this action. Second. Larron, never having been discharged from custody or given his liberty, in consideration of the giving and filing of the bail bond, the bond never became operative, and was wholly without consideration, and was therefore null and void, and appellants were not liable thereon. Third. The state, by its officers, having prevented the appellants, sureties on the bail bond, from taking Larron into their personal custody for their own protection, appellants were thereby as matter of law released from all further liability on said bond." We shall notice the first ground only.

The authorities are somewhat in conflict regarding the rights and liabilities of sureties under facts similar to the foregoing. Some courts have upheld the right of the state to enforce forfeitures under similar facts. The cases of State v. Merrihew, 47 Iowa, 112, 29 Am. Rep. 464, is much relied on by respondent's counsel owing to the claimed similarity of our Code provisions with the statute of Iowa. Certain sections of the Iowa statute are very similar to the Code of this state; but the provision of the Iowa law (Code 1873, § 4600), which was deemed controlling in that case, reads as follows: "If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, in its discretion, remit the whole or any part of the sum specified in the undertaking." Following the rule announced in State v. Scott, 20 Iowa, 63, the court in the later case seems to have held that, after forfeiture, the only provision of the statute of that state that aids a bail is the section above quoted. We have no such statutory provision. Section 10270, Rev. Codes 1905, cited by respondent's counsel, is widely different. That section provides: "Any surety on such undertaking may be discharged from further liability thereon, at any time before final judgment against him, by surrendering to the court or proper officer the principal in such undertaking, if such principal is a defendant in a criminal action, or if such principal is held as a witness in such action and it has not been tried; or by paying to the clerk of the court the amount specified in such undertaking, with costs as the court may direct." This section is 8460 in the Revised Codes of 1895. An error crept into the 1905 compilation by leaving out in the last line after the word "with" the word "such." It will readily be seen from the Iowa statute that no right was conferred upon the bail to a remission of the whole or any part of the sum specified, but it was made wholly discretionary with the court whether it would remit the whole or any portion thereof. Our statute, on the contrary, seems to confer on any surety the right to be discharged from liability by surendering the principal at any time before final judgment against such surety on the undertaking. If this is a correct construction of § 10270, then it would seem plain that, if the principal dies before judgment is entered against the surety, the latter's liability would thereby terminate, for it is obvious that by such death the surety is deprived of what otherwise would or might be a

valuable right to him. The facts in the case at bar differ from those in the Iowa case in this respect.

We have reached the conclusion that the judgment of the lower court must be reversed. We do not rest our decision, however, solely upon what we have above stated relative to the construction of § 10270. We are convinced that the weight of authority, both on principle and reasoning, support appellant's contention that when one is bound as bail for another for his appearance in a particular court at a particular time, and the state, before the time stipulated for the appearance, arrests the principal and detains him at another place, thus preventing him from appearing at the time and place stipulated, the bail will be exonerated during such detention. There are many authorities which might be cited in support of this rule. We cite the following: People v. Bartlett, 3 Hill, 570; Com. v. House, 13 Bush, 679; Woods v. State, 51 Tex. Crim. Rep. 595, 103 S. W. 895; State v. Row, 89 Iowa, 581, 57 N. W. 306; People v. Robb, 98 Mich. 397, 57 N. W. 257; Buffington v. Smith, 58 Ga. 341; 3 Am. & Eng. Enc. Law, 2d ed. p. 719. In State v. Row the Iowa court, among other things, said: "It is not to be said, as a legal conclusion, that, had he not been imprisoned at the instance of the state, he would neither have appeared, nor his sureties produced him, when his appearance was called for. The state by placing him in the penitentiary had rendered it absolutely impossible for him to appear, or for the sureties on his bond to produce him. Under such circumstances there could be no default." In Woods v. State, supra, the Texas court tersely said: "It may be that appellant was properly indicted in the county of Hamilton, and in one sense this may have been a fault on his part; still in our view it would constitute, no matter whether he was rightly or wrongly indicted in the other county, a sufficient cause for his exoneration, inasmuch as the very government which held him amenable to the charge in Bosque county had taken jurisdiction of him in Hamilton county." It is true the court in that case was considering a statute which provides that sickness of the principal or some uncontrollable circumstance preventing his appearance at court is a defense against forfeiture of the bail bond, but we think that, in the absence of such a statute, the rule is and should be that uncontrollable circumstances preventing appearance pursuant to the stipulations in the bond should

be sufficient to excuse a forfeiture. The Michigan court in People v. Robb, supra, cited with approval People v. Bartlett, supra, and other cases, and said: "No doubt the arrest and continued detention of the principal by the state on another charge, when such detention makes it impossible for the surety to produce the principal, must operate to discharge the surety from liability." As we understand the brief of respondent's counsel, he does not seriously question the correctness of the rule announced in the majority of the cases, but he contends that under our Code provisions upon the subject these authorities are not in point. We cannot concur in this view.

The judgment appealed from is accordingly reversed, and the district court is directed to dismiss the action. All concur, except MORGAN, Ch. J., not participating.

ROBERT BLESSETT and R. Percy Abbey v. E. L. TURCOTTE and M. Turcotte.

(127 N. W. 505.)

Appeal and Error — Statement of Case — Motion to Strike Out.

1. In this case, which was tried under § 7229, Rev. Codes 1905, counsel for appellants, after the entry of judgment, caused to be served upon counsel for respondents a proposed statement of the case, consisting of six typewritten pages relating to eighty-seven exceptions, also containing a specification that appellants desire a review of the entire case in the supreme court. No proposed amendments were ever served. In due time and without notice to respondents, the trial court made an order settling a statement of the case, which statement contains a complete and literal transcript of the stenographer's minutes, including all objections, motions, rulings, and exceptions appearing therein, and all of the evidence offered, including exhibits and proceedings had upon the trial. A motion by respondents to strike the proposed statement of the case, excepting only the six typewritten pages relating to the eighty-seven exceptions, and also to strike from the printed abstract so much of the same as relates to the statement of the case and the stenographer's minutes and the exhibits and all of the abstract, excepting the judgment roll, is denied.

Mortgages — Equitable Assignment — Deed of Mortgagee.

2. By virtue of his purchase of the premises in controversy from Galloway in the summer of 1896, appellant E. L. Turcotte succeeded to whatever rights

Galloway had in said premises, and became the equitable assignee of the mortgage executed by plaintiff Blessett to Galloway January 25, 1890.

Mortgages — Mortgagee in Possession — Equity — Adverse Claims — Conditions Precedent to a Recovery.

3. In an action by parties out of possession against a party in possession to determine adverse claims to real estate, which adverse claims are based upon a mortgage owned by defendant and a tax deed, which mortgage authorized the owner thereof to pay the delinquent taxes upon the premises covered by the mortgage and add the amount to his mortgage debt, before the plaintiffs are entitled to the relief prayed for, they must do equity and reimburse the defendant for all taxes paid by him, and also pay him the amount due upon his mortgage.

Opinion filed July 20, 1910.

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

Action by Robert Blessett and R. Percy Abbey against E. L. Turcotte. Judgment for plaintiffs, and defendants appeal.

Reversed, and new trial ordered.

Fred E. Harris (*Engerud, Holt, & Frame,* of counsel), for appellants.

Defendant has title by statute of limitations. Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3.

Robinson & Lemke, for respondents.

Tax paid by mortgagee cannot afford ground for adverse possession. Finlayson v. Peterson, 11 N. D. 53, 89 N. W. 855.

Tax deed when its recitals show a void sale is void on its face. Youker v. Hobart, 17 N. D. 296, 115 N. W. 839; King v. Lane, 21 S. D. 101, 110 N. W. 38; Reckitt v. Knight, 16 S. D. 395, 92 N. W. 1077; Thompson v. Roberts, 16 S. D. 403, 92 N. W. 1079.

Carmody, J. This action was commenced on the 17th day of February, 1907. The amended complaint alleges, in substance, as follows: That the plaintiffs have an estate and interest in certain land in Towner county, North Dakota, to wit, the N. E. ¼ of section 20, township 162, of range 68. That in 1891 the land was patented to plaintiff Blessett, and that by deed he conveyed some title or interest

therein to plaintiff Abbey. That plaintiffs are entitled to the immediate possession of said land. That the defendants claim certain estates or interest in said land adverse to plaintiffs. That in the spring of 1897, the said land being vacant and unoccupied, the defendants entered upon and took possession of the same, and that since said entry have remained in possession of and cultivated the same. That in the summer of 1896, the land being vacant and unoccupied, the defendants entered upon the same, plowed back 40 acres that had been previously broken and cultivated, and did not fence the land or live on it or put any buildings on it. That the use and occupation of said land was worth $400 per year. That the adverse claim of defendants is based on a mortgage dated January 25, 1890, made by plaintiff Blessett to W. F. Galloway to secure $700 and on an assignment of the mortgage to defendants, also on a pretended tax deed dated March 11, 1897, made by the county auditor to W. F. Galloway, and on a deed from Galloway to defendants dated May 20, 1897. That said tax deed is void, and defendants have never had any title or interest in or lien upon said land, except under said mortgage, and they have wrongfully failed to pay or account for the yearly rents and profits of said land; that during the first five years the rental value of said land was enough, and more than enough, to fully pay and discharge said mortgage debt, which did not exceed the sum of $300, when the mortgage was assigned to defendants. Plaintiffs ask that the defendants set forth all their adverse claims to said property, and that the validity thereof be determined and that the same be adjudged null and void; that plaintiffs do have and recover the immediate possession of said land with $400 a year for the rental value thereof, and that so much of the yearly rental value as may be necessary be first applied to the satisfaction and discharge of the mortgage in the same manner as if it had been indorsed thereon on the 1st day of December each year, and that plaintiffs have such other and further relief as may be just and the costs and disbursements of this action.

Defendants deny that plaintiffs have any estate or interest in said land; deny that plaintiff Blessett holds the legal title in trust for said other plaintiff, and allege that by virtue of a quitclaim deed dated February 13, 1907, plaintiff Blessett conveyed all his interest in said land to plaintiff Abbey, and allege that defendants are the owners and

entitled to the possession of said land by virtue of a tax deed dated March 11, 1897, issued by the county auditor of Towner county to W. F. Galloway and by a warranty deed from Galloway to said defendants executed May 20, 1897; deny that the deeds and mortgages and papers mentioned in plaintiffs' complaint are void, and allege that said deeds and papers are valid and legal; that said mortgage was given for a good and valuable consideration. Defendants allege that more than three years have expired since the execution and delivery of the tax deed mentioned in plaintiffs' complaint and set forth in defendants' answer; as a further defense, that defendants are the owners of the said land and have been in actual, open, adverse, and undisputed possession of such land for more than ten years prior to the commencement of this action, that they have paid the taxes and assessments legally levied thereon during said time, and that plaintiffs' alleged cause of action accrued more than ten years prior to the commencement of this action, and that the same is barred by the statute of limitations.

The facts established on the trial, as far as material here, are as follows: The land was patented to Robert Blessett. Blessett mortgaged the land to W. F. Galloway, defendant's grantor, January 25, 1890, to secure payment of a note for $700 of even date due January 25, 1891. On the 1st day of December, 1891, the land was sold for the delinquent taxes of 1890 to the state of North Dakota, and a certificate of sale issued thereon to the said state of North Dakota. On the 8th day of February, 1894, the said certificate of sale was assigned by George L. Main, county auditor of Towner county, to W. F. Galloway, in which assignment the land was described as the N. E. ¼ of section 2. On the 25th day of November, 1896, notice when time for redemption from the said tax sale, hereinbefore mentioned, would expire, was published, in which notice the land was described as the N. E. ¼ of section 2. On the 11th day of March, 1897, a tax deed on the tax sale hereinbefore mentioned was made by the county auditor of said Towner county to said W. F. Galloway. In the fore part of June, 1896, the defendant E. L. Turcotte by an oral contract made with W. F. Galloway, through his agent Geo. Galloway purchased said land for the sum of $300 and took possession of it, broke 40 acres, farmed and cultivated the land ever since, until the trial of the action, and paid all

taxes levied and assessed against said land beginning with the year 1896. At the time defendant Turcotte made the agreement with said Galloway for the purchase of said land, Turcotte took possession and went to breaking on the land. No person laid any claim to said land until the spring of 1907, when plaintiff Blessett wrote defendant Turcotte a letter stating that he had sold the land. As a payment for the purchase price of said premises on August 10, 1896, defendant E. L. Turcotte executed three promissory notes for $100 each, payable to W. F. Galloway, due, respectively, November 1, 1896, November 1, 1897, and November 1, 1898, which said notes were secured by a real estate mortgage executed on said premises to said W. F. Galloway by defendants Turcotte, who are husband and wife; that said notes were paid; that on the 20th day of May, 1897, said W. F. Galloway and wife executed and delivered to defendants Turcotte a warranty deed of said premises, consideration $300. On December 30, 1901, the said W. F. Galloway assigned to defendant E. L. Turcotte the real estate mortgage hereinbefore mentioned, given by plaintiff Blessett to said Galloway. On February 13, 1907, plaintiff Blessett conveyed to plaintiff Abbey by deed of quitclaim all his interest in said premises, and in the same instrument assigned to said Abbey all of Blessett's interest in the rents and profits, and authorized him to commence and maintain such action as may be necessary to recover the possession of such land and the rents and profits, and also appointed said Abbey his (Blessett's) attorney in fact to commence such action. The said quitclaim deed was executed in the city of Winnipeg, in the province of Manitoba, Canada. Plaintiff Blessett never paid any part of the indebtedness secured by the mortgage given by him to W. F. Galloway.

The case was tried by the court without a jury, and on the 21st day of December, 1907, the court made findings of fact and conclusions of law in favor of plaintiffs and against the defendants. The court found, among other things, that the defendants claim some interest or title to said lands adverse to plaintiffs, and that said adverse claim is based on the $700 mortgage from Blessett to Galloway, dated January 25, 1890, an assignment of said mortgage, the tax deed, hereinbefore mentioned, dated March 11, 1897, and the warranty deed, hereinbefore mentioned, given by Galloway to defendants Turcotte, and also on an oral agreement made in the summer of 1896, whereby in con-

sideration of $300, secured by three promissory notes and a mortgage on said land, the said Wm. F. Galloway did promise and agree to convey to the defendants title to said land. Pursuant to said promise he made to them a warranty deed and an assignment of said mortgage. The court also found that the tax deed is void; that neither said W. F. Galloway nor the defendants have ever had any title or lien upon said land, except under said mortgage. In the summer of 1896, the land being vacant and unoccupied, the defendants entered upon the same and plowed back 40 acres that had been previously broken and cultivated. There is no evidence and no claim that defendants fenced the land or lived on it or put on it any buildings. There is no direct evidence to show the amount due on the mortgage given by Blessett to Galloway, except that in consideration of $300, secured by three promissory notes, the mortgagee, Galloway, agreed to convey said land to defendants and made to them a deed of the land and an assignment of the mortgage; that during the years 1897 to 1907, inclusive, the reasonable value of the use and occupation of said land was enough, and $150 more than enough, to pay and discharge the mortgage debt. As conclusions of law, plaintiffs are entitled to judgment that said tax deed is null and void, that it be canceled and annulled, and that said mortgage be discharged and canceled, and that the plaintiffs do have and recover the possession of said land, and that the defendants and each of them have no right or title therein, also that the plaintiffs do have and recover a judgment of $150 against defendants and costs. Judgment was entered pursuant to said findings of fact and conclusions of law, from which judgment this appeal is taken. Appellants desire a review of the entire case in this court.

We are met at the outset by a motion of respondents to strike out the proposed statement of the case, excepting only the first six typewritten pages relating to the eight-seven exceptions. Said motion is made on the ground that no copy of any other part of the statement of the case was ever served on plaintiffs' attorneys, and on the ground that no part of the statement of the case which is included in the printed abstract was ever served on the plaintiffs' attorneys, and that nothing therein and no part thereof or anything purporting to be a copy of the same was at any time served on the plaintiffs' attorneys between the trial of this action and the time when the printed abstract was served.

We are also asked to strike from the printed abstract so much of the same as relates to the statement of the case and the stenographer's minutes and the exhibits and all of the abstract excepting the judgment roll. Such motion is based on the annexed affidavit of J. E. Robinson, the pleadings and proceedings herein, the records on file in the office of the clerk of the supreme court, and on the printed abstract herein. The affidavit of J. E. Robinson is quite lengthy, and states, in substance, that the only proposed statement of the case ever served on plaintiffs' attorneys was the six typewritten pages mentioned in said motion, marked, "Statement of the case," consisting of eighty-seven exceptions; that neither the stenographer's minutes nor a copy of the same nor any of the exceptions thereto attached were ever served on the attorneys for the plaintiffs; that the printed abstract herein does not contain a copy of any part of the six pages that were served as a statement of the case; that there was not served on the attorneys for the plaintiffs any specification such as is required by rule 16 of this court (91 N. W. ix).

This motion must be denied. The action was tried under § 7229, Rev. Codes 1905, familiarly known as the "Newman Law," which, as far as material here, is as follows: "In all actions tried by the district court without a jury, in which an issue of fact has been joined, excepting as hereinafter provided, all the evidence offered on the trial shall be received. . . . A party desiring to appeal from a judgment in any such action shall cause a statement of the case to be settled within the time and in the manner prescribed by article 8 of chapter 10 of this Code. . . . But if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement." Section 7058, Rev. Codes 1905, provides, among other things, as follows: "The proposed statement and amendments must, within twenty days thereafter, be presented by the party seeking the settlement thereof to the judge, who tried or heard the case upon five days' notice to the adverse party. At the time designated the judge must settle the statement. If no amendments are served, or if served, are allowed, the proposed statement may be presented with the amendments, if any, to the judge for settlement without notice to the adverse party." The proposed statement in the case at bar, consisting of six typewritten pages, served

upon the plaintiffs' attorneys, contained a specification that appellants desired a review of the entire case in this court. Rule 15 of this court (91 N. W. viii), as far as material here, is as follows: "In all cases where the specification shows that the entire case is to be reviewed in the supreme court, the statement of the case must contain a complete and literal transcript of the stenographer's minutes (including all objections, motions, rulings, and exceptions appearing therein), corrected by the district court on settlement to conform to the truth, and a literal transcript of all evidence offered by deposition (including all objections, motions, rulings, and exceptions shown by such depositions), and must contain all of the evidence offered (including exhibits) and proceedings had upon the trial." Plaintiffs' attorneys knew that the trial court had no authority to settle the proposed statement of the case served upon them. They served no amendments, and, when the proposed statement was presented to the trial court, it was settled in the only way in which the trial court could have settled it. There is no claim that the statement does not contain a complete and literal transcript of the stenographer's minutes, including all objections, motions, rulings, and exceptions, and all exhibits and proceedings had upon the trial. Respondents have not been prejudiced by the irregularity, if any, in the trial court's settling the proposed statement of the case, and it would be extremely technical to grant this motion. 3 Enc. Pl. & Pr. p. 500, and cases cited; Scribner v. Gay, 5 Mich. 511.

This brings us to the merits of the action.

Appellants claim: (1) The tax deed to Galloway was valid on its face. (2) It has been of record and possession held under it for more than nine years before action was commenced. (3) There was no competent evidence to impeach its validity. (4) E. L. Turcotte was the assignee of a mortgage given by Blessett for $700 and accrued interest, no part of which had been paid. (5) Turcotte had paid all taxes on the premises since 1896. (6) Blessett had abandoned the land. (7) If Turcotte was not the owner under the tax deed, he was the mortgagee in possession.

In our judgment the tax deed is void. The assignment of the certificate of sale to Galloway is void. It describes the land as part of section 2, instead of section 20. The assignment of the tax sale certificate must describe the land. It must be in writing and under the

hand and seal of the county auditor. Rev. Codes 1905, § 1588. The redemption notice is null and void. It describes the land the same as the assignment. The notice must describe the land, the amount for which the same was sold, the amount required to redeem, and the time when the redemption period will expire. Rev. Codes 1905, § 1608; Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566.

It is undisputed that in the summer of 1896, the land being vacant and unoccupied, defendant entered upon said premises and took possession thereof, and has held possession continuously ever since. His possession during all that time has been confessedly adverse. Plaintiffs allege, and it is undisputed, that the adverse claims of defendant are based upon the mortgage and tax deed. No claim is made but that the mortgage given by Blessett to Galloway was a good and valid mortgage, and that no part of the same was ever paid. It is apparent from the evidence that plaintiff Blessett abandoned the land and moved to Canada. He allowed the land to be sold for the taxes of 1890 and to go to a tax deed. He paid no taxes on the land beginning with the year 1896, and probably not before that time. The evidence does not show who paid the taxes on said land for the years 1891, 1892, 1893, 1894, and 1895. He made no claim to the land until February 13, 1907, when, for a consideration of $1, he conveyed his interest in it by deed of quitclaim to his coplaintiff, Abbey. This deed was made and executed at Winnipeg, Canada. As hereinbefore stated, plaintiff Blessett abandoned the land and moved to Canada, where he resided at the time the quitclaim deed to his coplaintiff, Abbey, was made. The mortgage executed by Blessett to Galloway gave him the right to pay the taxes and add the amount so paid to his mortgage debt. By virtue of his purchase of said premises from Galloway in the summer of 1896, appellant E. L. Turcotte succeeded to whatever rights Galloway had in said premises, and became the equitable assignee of the mortgage executed by plaintiff Blessett to Galloway January 25, 1890. It is undisputed that defendant Turcotte paid the taxes on said premises from 1896 to 1907, inclusive. There is no claim that any portion of the taxes so paid are invalid. The complaint is not strictly one for determining adverse claims. It seems to be a combination of an action to determine adverse claims for an accounting and to redeem from the

$700 mortgage. It prays that so much of the yearly rental value as may be necessary be first applied to satisfy and discharge the first mortgage in the same manner as if it had been indorsed thereon on the 1st of December each year, commencing with the year 1897, and that the plaintiffs have such other and further relief as may be just.

This is an equitable action to be determined on equitable principles. Before the plaintiffs are entitled to the relief prayed for, they must do equity and reimburse the defendant E. L. Turcotte for all taxes paid by him, also pay him the full amount due upon the mortgage, as well as the value of the permanent improvements, if any, placed on said premises by defendant or his grantor. On the other hand, the latter should be required to account to plaintiff for the reasonable value of the rents and profits of such land during the time he has been in possession thereof. The proof upon these matters, as well as upon the question as to the length of time, if any, that defendant and his grantor were in possession as mortgagees, is entirely lacking or altogether too meager to enable this court to intelligently dispose of the equities between the parties. Owing to the condition of the record in these respects, this court has been given much difficulty which might have been avoided. We are, of course, anxious that each party be accorded his full legal and equitable rights, and we have finally concluded that the only safe course to adopt is to order a new trial upon all issues excepting the issue involving the validity of the alleged tax deed. If, upon another trial, defendant shall fail to establish possession under the mortgage for a sufficient length of time to bar plaintiff's right of redemption, then the district court is directed to take a full account between the parties, as to the sum due, if any, on the note or notes secured by the mortgage; the amount of taxes paid by the defendant and his grantor on said property; the value of the permanent improvements, if any, made to said real property by defendant or his grantor; and the reasonable value of the use of such property or the rents and profits thereof, during the time defendant has been in possession of same.

The judgment of the District Court is reversed, and a new trial ordered in accordance with this opinion. MORGAN, C. J., and FISK, J., concur.

SPALDING and ELLSWORTH, JJ., dissenting.

ELLSWORTH, J. (dissenting). My dissent to the foregoing opinion is directed not so much against the conclusions reached by a majority of my associates upon the facts considered by them, as it is to the insufficiency of the record produced here by appellant to warrant the reversal of the judgment of the district court.

In its application to the law of appeal, the principle is elementary, and has for years been so recognized in the practice of this court that the party alleging reversible error in the judgment of a district court has upon him the burden of producing before this court a record of which this court is authorized to take legal cognizance, and which affirmatively shows upon its face the error upon which he relies. If the error appears on the face of the statutory judgment roll, all that is necessary to authenticate the record on appeal is proof by means of a certificate of the judge or clerk of court that it is the judgment roll. On the other hand, if the error relied on does not appear upon the judgment roll, but only in the record of the proceedings upon the trial, it is necessary before such error can be properly presented to and considered by this court that it be brought up by means of a statement of the case prepared, proposed, settled, and certified in the form and manner prescribed by law. The statute discloses in detail the acts that shall be done and the proceedings taken in order to obtain such authentication of a statement of the case, and, if these requirements are not complied with, the deficiency is not supplied by an admission or even a stipulation that the stated case as produced here truly represents the facts occurring on the trial. Thuet v. Strong, 7 N. D. 565, 75 N. W. 922. This court has not then before it a record of which it can take cognizance for the purpose of reversing a judgment which imports verity and upon its face is without error which warrants reversal.

A party desiring to have settled for the purposes of appeal a statement of the case which will show errors of law occurring upon the trial, or that the findings of the court are not sustained by the evidence, must "within thirty days after receiving notice of the entry of judgment or such further time as the court may allow, prepare the draft of a statement and serve the same upon the adverse party. Such draft must contain all the exceptions upon which the party relies, but no particular form of exception is required. . . . Within twenty

days after the service of the draft of a statement, the adverse party may propose amendments to the same and serve such amendments upon the other party. The proposed statement and amendments must within twenty days thereafter be presented by the party seeking the settlement thereof to the judge who tried or heard the case upon five days' notice to the adverse party. At the time designated the judge must settle the statement. If no amendments are served, or, if served, are allowed, the proposed statement may be presented with the amendments, if any, to the judge for settlement without notice to the adverse party. . . . It is the duty of the judge in settling the statement to strike out of it all redundant and useless matter and to make the statement truly represent the case notwithstanding the assent of the parties to such matter." Rev. Codes 1905, § 7058. If the case in which the statement is prepared is one tried by the court without a jury, and is not an action properly triable by a jury, the statement of the case is to be settled within the time and in the manner referred to in § 7058, although a different form is required both of the body of the statement and of the specifications of error embodied in it. If appellant desires to review the entire case, the only specification necessary is one to the effect that he desires such review in the supreme court. Rev. Codes 1905, § 7229. Rule 15, Supreme Court Rules.

In the case at bar it appears from the affidavit of respondents' attorney and from an examination of the statement of the case filed in this court that the only service made upon respondents' attorney for the purpose of obtaining a settlement of such statement was a document consisting of six typewritten pages designated by appellants' attorney as "draft of statement of the case" and consisting of seventy-seven so-called "exceptions," of which the first is, in the words: "Appellants herein specify that they desire a review of the entire case in the supreme court." The other exceptions or specifications refer entirely to certain proceedings had on the trial of the case being principally objections to the introduction of evidence. Under the rule of this court above referred to, the only exception that was necessary to the preparation of a statement of the case upon which appellant desired a review of the entire case was the one quoted above.

The others were therefore wholly unnecessary, and may be regarded as mere surplusage.

The proof of service upon attorneys for the adverse party of the proposed statement of the case, brought before the judge of the district court at the time settlement was applied for, consists of an affidavit of appellants' attorney to the effect that "on the 18th day of May, 1908, deponent deposited in the postoffice at Rolla, North Dakota, a letter sealed and addressed to Robinson & Lemke, Fargo, North Dakota, postage prepaid, containing a copy of the draft of statement of case in the above-entitled action; . . . that more than twenty days have elapsed since the mailing of said copy of draft of statement of case, and that during said time no proposed amendments to same have been served upon deponent." On this showing without notice to respondents' attorneys, on June 16, 1908, appellants' attorney applied to the district court for settlement of a statement of the case. The statement apparently presented by appellants' attorneys at that time and settled by the district court was a document including not only the six pages of typewritten matter served on respondents' counsel, but in addition thereto a transcript of forty-four pages, containing the testimony taken upon the trial of the action, to which was attached a number of exhibits consisting of a patent, mortgage, deed, certified copies of tax records, and some other papers; in fact, all exhibits introduced and all evidence offered or proceedings had by either party upon the trial. The judge of the district court in certifying the statement recited that "the statement of the case in the above-entitled action having in accordance with law been presented to me for settlement on the 16th day of June, A. D. 1908, and it appearing that due and proper notice of all proceedings therein relating to settlement of the same have been duly given by Fred E. Harris, attorney for defendants above, to Robinson and Lemke, attorneys for plaintiffs herein, and it appearaing that all proceedings herein have been regular and in accordance with law," etc. The statement, when certified, was filed with the clerk of the district court as a part of the record of the case, and was so transmitted to this court. Respondents' attorneys, according to an undisputed showing, received no notice whatever of this settlement of this statement except so far as the service of the list of "exceptions" can be said to operate as such, and did not know that a statement of the case containing a transcript

of the testimony and all exhibits claimed to have been offered in evidence was among the records until appellants' abstract upon appeal, in which is incorporated the greater part of this evidence, was served upon them. They then examined the record on appeal filed in this court, and, finding here a certified statement of the case containing a great mass of matter not contained in the draft served upon them, moved to strike from the files all parts of such statement except the six pages served, on the ground that these parts were not prepared and certified in such manner as to warrant this court in taking legal cognizance of them.

On the hearing of such motion, appellants' counsel did not dispute the fact that there was no service on respondents' attorneys other than that of the six pages of so-called "exceptions," but claimed that after such service and no amendment served within twenty days, when the proposed statement was presented to the judge of the district court for settlement, the judge of the district court was authorized in the discharge of his duty "to strike out of it all redundant and useless matter and to make the statement truly represent the case," to attach, if he saw fit, to the six pages served the forty-four additional pages of testimony together with the exhibits, and that respondent was in no manner prejudiced by such action of the district court for the reason that the statement so made up and completed was a true one, and that respondent, having failed to propose amendments to the draft served upon him, was presumed to consent to the settlement of the statement, as it now appears, without notice. My associates regard the failure to serve any part of the statement of the case except the specifications of error as a mere irregularity, and hold that "respondents have not been prejudiced by the irregularity, if any, in the trial court's settling the proposed statement of the case, and it would be extremely technical to grant this motion," and then proceed to a reversal of the judgment for error occurring upon the trial and shown, not by the judgment roll, but by those portions of the statement of the case which were not served on respondents' counsel and which they have moved to have stricken from the record.

In my opinion such holding is not only contrary to the express terms of the statute and inconsistent with every principle established by former rulings of this court in the matter of the settlement of a statement

of the case, but is in its character revolutionary. The initial step and the basis of all proceedings leading up to the settlement of a statement of the case is the preparation of the statement in a certain form and its service when so prepared upon counsel for the adverse party. This proposed statement must contain certain specifications of error without which it may, even when settled, be disregarded on motion for a new trial for appeal. But there is less reason for regarding the specification as the only essential part of the proposed statement than for holding that the body of the statement may be so considered without the specification. Both the statute and the rules of court provide what the proposed statement of the case shall contain, and it is apparent that, in cases of this class, its essential parts are a literal transcript of the testimony to which are attached all exhibits capable of physical attachment and the specification of error, which in this case consists simply of a declaration that the appellant desires a review of the entire case in the supreme court, all of which must be included in the draft or proposed statement and served on the adverse party. Reference to the statute shows that the district judge is given authority to settle only the proposed statement with the amendments, if any. A statement is proposed by serving it upon the other party. If it is not served, it is not proposed, and the district judge has no authority to settle it. If he settles it without service on the other party, or, in other words, without any authority whatever, this court is not authorized upon appeal to recognize it in any way whatever, and certainly is not in such case permitted to make it the basis for the reversal of a judgment of the district court.

From the affidavit of service made by appellants' counsel, and his action in applying for settlement without notice, it would seem that in serving the statement of the case he was acting under a misapprehension, and that the six pages of "exceptions," denominated by him "draft of statement of the case," was in his mind the draft of a statement such as is required by § 7058 to be served upon the adverse party. After serving this so-called "draft" and receiving no notice of amendment, he seems, from the certificate of the district judge, to have attached to it the transcript of testimony and the exhibits, and presented the entire mass of matter to the judge of the district court as the draft of the statement proposed by him. There is nothing in the certificate

of the district judge which indicates that the proposed statement when presented to him was imperfect in any way, and that in the exercise of his duty "to make the statement truly represent the case" he attached thereto the transcript and the exhibits. His certificate indicates conclusively, I think, that he supposed that the entire proposed statement of the case presented to him for settlement had been served on the adverse party; and, no amendment thereto being offered, he proceeded to settle it accordingly.

The point, therefore, of a statement revised, altered, or greatly enlarged by the district judge at the time of settlement is not presented by the facts of this case. It is apparently a case where the judge under a misunderstanding induced by appellants' counsel settled a statement that had not been proposed. Upon the state of fact shown here, in my opinion appellants have entirely failed to produce a record showing any error whatever of the district court in the entry of this judgment. A purported record of which this court cannot take legal cognizance should be stricken out without hesitation. To hold that respondent is not prejudiced by the consideration of an abortive statement of the case, because he does not demonstrate to this court that it fails to truly show the facts, serves to deprive a judgment of all presumptive correctness and verity, and to lay upon a respondent upon appeal the burden of sustaining it in these particulars by an extrinsic showing. This court has held in a recent decision that a statement of the case admitted to be true in all particulars and properly served could not be considered on appeal, because there was not at the time of settlement a specification of error attached. McLaughlin v. Thompson, 19 N. D. 34, 120 N. W. 554. Is it now intended to establish the precedent that, if a detached specification of error is served, the statement will be considered when settled, even though the entire body of it has not been proposed? In a decision still more recent this court has held that a statement of the case admitted to be true in all particulars served in its entirety on the adverse party, and to which a proper specification of error was attached, will be stricken out because it was served after the statutory time allowed by § 7058 for such service. Folsom v. Norton (N. D.) 125 N. W. 310. Is it now to be established as a rule of practice that a statement served neither within the statutory time nor in fact at all and settled by a district judge under an evident mis-

apprehension of fact will be considered over the objection of respondent as the basis for the reversal of a judgment? It seems to me that the precedent of the majority opinion in this case must necessarily operate to revolutionize the entire practice of the courts of the state with reference to the preparation and settlement of statements of the case.

The authority given the district court in settling a statement of the case "to strike out all redundant and useless matter, and to make the statement truly represent the case," can mean nothing more than that the proposed statement of the case presented for settlement may be reduced in amount, or in case of clerical error, or mistake in the substance of the matter proposed, be corrected, so as to truly show the facts. The evident intent of the statute is that the appellant shall prepare the statement of the case and give notice to the adverse party of all facts that he desires settled and certified by the district judge. The service upon the adverse party of a statement of the facts to be settled is at least of equal, and in my opinion of vastly greater, importance than that it should be served within a certain time after notice of entry of judgment. The reason stated in the majority opinion as a ground for the denial of respondents' motion to strike out, that "plaintiffs' attorneys knew that the trial court had no authority to settle the proposed statement of the case served upon them. They served no amendments, and, when the proposed statement was presented to the trial court, it was settled in the only way in which the trial court could have settled it," is, I believe, entirely inadequate. The only possible inference from this language is that, when respondent was served with a specification of error or demand for a retrial, it became his duty to at once procure a transcript of the testimony and all the exhibits, and within the twenty days allowed him for that purpose propose this mass of matter as an amendment to the insignificant fragment served by appellant, and that he must do this at the peril that unless done at the end of twenty days a statement which he has had no opportunity to examine may be settled without notice, and he be concluded to question its correctness. I cannot understand how under any reasonable construction the statute can be so read. The statement that the trial court "settled it in the only way in which it could have been settled" seems to imply that, when application is made, the trial

court must settle a statement whether or not one has been proposed. The district court is always at liberty if it knows that a copy has not been served upon respondent's counsel to refuse to settle any statement whatever, and to require appellant to present for settlement a proper proposed statement.

I believe that the district court was entirely without authority to settle such a statement as is here presented, and that this court is without authority to consider it for the purpose of reversing the judgment. Whether or not a judgment of reversal might be properly based upon the judgment roll is not necessary for me to consider, as the majority opinion proceeds entirely upon the facts as shown by the statement of the case.

SPALDING, J. (dissenting in part). Under the terms of the Code relating to the service of a proposed statement of the case, it is contemplated that something will be served containing some semblance of what transpired upon the trial, at least, enough of the proceedings to advise the court as to the merits of the exceptions taken and allowed. In the case at bar the proposed statement served bore no more resemblance to the statement contemplated by the Code of Procedure than as though it had been a blank piece of paper indorsed on the back "Proposed Statement of the Case." In fact, no service was made of anything bearing any resemblance to the required statement. Without service of the proposed statement, I apprehend that the trial court has no power to settle a statement of the case, and, under the facts of this case relating to the settlement of the statement, the court was in the same position that it would have been had a blank piece of paper been served with a proper indorsement on the back of it. I am of the opinion that the district court had under the circumstances no power to settle this statement, and that it ought to be stricken out on motion.

The majority of the court being of the contrary opinion as to the statement of the case, a few words are necessary regarding its conclusions on the merits. I concur in the result arrived at, but do not wish to assent to anything said in the opinion from which it may be inferred that the respondents have any rights as mortgagees in possession. They have never claimed any. Plaintiffs in their complaint

refer to the mortgage as evidencing a lien at some time claimed by the defendants, and not as title. The answer as served sets up a claim under the mortgage, but on the trial respondents asked, and were granted, leave to strike out the allegation of their answer relating to the mortgage.

This left no issue as to the mortgage except that at some time defendants had claimed a lien by virtue thereof. Appellants introduced the mortgage in evidence for the sole purpose, as stated, of showing that respondents were precluded by reason of holding the mortgage and under its terms from obtaining a tax title. Under such circumstances, I think no intimation should be made that respondents are mortgagees in possession. Further, I cannot assent to any statements in the majority opinion to the effect that respondents took possession of the land in controversy in June, 1896, and have held possession continuously ever since. I think such statement is not supported by the evidence. Another sentence in the majority opinion, if taken literally, may lead to confusion on a new trial. It is said that the plaintiffs must reimburse defendant Turcotte for all taxes paid by him, the mortgage debt, interest, etc., before they are entitled to the relief prayed for. In my opinion all that is necessary on the part of respondents is for them to offer to pay the balance, if any, found due Turcotte on a complete accounting between them.

ROBERT COCHRANE v. NATIONAL ELEVATOR COMPANY.

(127 N. W. 725.)

Trover and Conversion — Evidence — Admissibility.

1. In an action to recover for the alleged conversion of certain grain claimed to have been delivered by plaintiff to defendant elevator company, evidence as to the delivery of such grain examined, and *held* both competent and sufficient to establish the quantity of grain so delivered.

Note.—It has been said, in speaking of the comparison of handwritings, that there is perhaps no branch of the law which has given rise to such contrariety of adjudications in this country. The question is discussed at length and all the authorities reviewed in an elaborate note in 62 L.R.A. 817; and it is also the subject of a note in 6 Am. Dec. 171. As shown by the cases reviewed in these notes,

Trover and Conversion — Highest Market Value — Evidence.

2. Evidence as to the highest market value of the grain between the date of the alleged conversion and the date of the trial examined, and *held* both competent and amply sufficient to support the verdict.

Appeal and Error — Exceptions Not Taken Below — Evidence.

3. Certain assignments predicated upon rulings of the trial court relating to offered testimony as to the system and manner of transacting business adopted by defendant in its elevator at Grand Harbor held without merit. Furthermore, the rulings thus complained of were not excepted to, and cannot be noticed. *Held*, further, that the appellant's assumption that it was not permitted to show payment for this grain is not justified by the record,—the exact reverse being true,—but, on the contrary, no competent evidence was offered to prove such payment.

Principal and Agent — Undisclosed Instructions to Agent — Evidence.

4. The issues being as to whether plaintiff delivered the grain to defendant as alleged, and, if so, whether defendant has paid plaintiff for the same, the trial court properly excluded offered testimony relative to private instructions given by defendant to its local agent, and not communicated to plaintiff, regarding the receipt of grain at its elevator and also evidence tending to show violations of such instructions.

Appeal and Error — Harmless Error — Custom and Usage — Evidence.

5. Plaintiff was permitted over objection to show the custom and usage at Grand Harbor in receiving grain at defendant's elevator and issuing the tickets therefor at a later date. *Held*, nonprejudicial.

Appeal and Error — Evidence — Comparison of Handwriting — Nonprejudicial Ruling.

6. Defendant offered in evidence solely for the purpose of comparison of handwritings a certain exhibit admittedly bearing plaintiff's genuine signature. The purpose of this testimony was to aid the jury in determining the disputed question of fact as to whether certain other exhibits purporting to bear plaintiff's signature to receipts for the payment of his identical grain were his genuine signatures or mere forgeries. The trial court excluded such

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several states have established a liberal common-law rule allowing comparison with writings which are irrelevant to any issue in the case, the test of their admissibility as standards of comparison being merely proof, to the satisfaction of the court, of their genuineness. Many other states, as well as England and Canada, have adopted the same rule by statute.

The question of the competency of handwriting as a standard for comparison is the subject of another note in 63 L.R.A. 428. The competency of expert witnesses for comparison is treated in a note in 63 L.R.A. 937, while the competency of witnesses to handwriting generally is considered in 63 L.R.A. 964.

offered exhibit. Held, that such ruling was erroneous, but nonprejudicial, for reasons stated in the opinion.

Evidence — Comparison of Handwriting — Standards Allowed.

7. Irrelevant papers are not admissible in evidence for the sole purpose of furnishing a standard of comparison, but exceptions to this rule are made in those cases where the papers offered are conceded by the opposite party to be genuine, or are such as he is estopped to deny, or where for other reasons no collateral issues can be raised by their introduction.

Appeal and Error —Unchallenged Instructions the Law of the Case.

8. The trial court instructed the jury that the conversion took place, if at all, on September 25th. No exception was taken thereto, and the correctness of such instruction was in no manner challenged in the trial court. It therefore became and is the law of the case. In view of this, appellant's contention in this court that the conversion took place during the latter part of October, and that there is no evidence showing the highest market value or any value of the grain after such date, is untenable.

Opinion filed May 27, 1910. Rehearing denied August 31, 1910.

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

Action by Robert Cochrane against the National Elevator Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Affirmed.

Van Derlip & Lum (*Guy C. H. Corliss*, of counsel), for appellant.

Newspaper reports of market prices are not competent. Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Nelson, Morris & Co. v. Columbian Iron Works & Dry Dock Co. 76 Md. 354, 17 L.R.A. 851, 25 Atl. 417; Texas & P. R. Co. v. Slator (Tex. Civ. App.) 102 S. W. 156.

Appellant's habit or system of doing business may be shown. Adams v. Coulliard, 102 Mass. 167; Wigmore, Ev. ¶¶ 92, 93, 375, et seq.; 11 Am. & Eng. Enc. Law, p. 512.

Appellant should have been allowed to show its agent's instructions, and evidence of business with him contrary thereto should not have been received. Columbia Mill Co. v. National Bank, 52 Minn. 229, 53 N. W. 1061; 1 Am. & Eng. Enc. Law, pp. 965, 989, 999, 1002, and notes; Mechanics' Bank v. New York & N. H. R. Co. 13 N. Y. 632; Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 829; Jackson v. Mutual Ben. L. Ins. Co. 79 Minn. 46, 81 N. W. 545, 82 N. W. 366;

Brown v. Massachusetts Mut. L. Ins. Co. 59 N. H. 298, 47 Am. Rep. 205; Murray v. C. N. Nelson Lumber Co. 143 Mass. 250, 9 N. E. 634; Eckart v. Roehm, 43 Minn. 271, 45 N. W. 443; Mechem, Agency, § 276.

Local custom must be so general and long existing as to warrant the presumption that parties dealt with reference to it. The Paragon, 1 Ware, 322, Fed. Cas. No. 10,708; 2 Jones, Ev. 469, et seq.; 29 Am. & Eng. Enc. Law, pp. 412, 414; Porter v. Hills, 114 Mass. 110.

For purpose of comparing handwriting, an admittedly genuine signature should be received. University of Illinois v. Spalding, 62 L.R.A. 817, note; Wigmore, Ev. §§ 1994, 2001, et seq. 2016; Morrison v. Porter, 35 Minn. 425, 59 Am. Rep. 331, 29 N. W. 54; Mississippi Lumber & Coal Co. v. Kelly, 19 S. D. 577, 104 N. W. 265, 9 A. & E. Ann. Cas. 449; Dietz v. Fourth Nat. Bank, 69 Mich. 287, 37 N. W. 220; Cannon v. Sweet (Tex. Civ. App.) 28 S. W. 718; Moore v. Palmer, 14 Wash. 134, 44 Pac. 142.

Burke, Middaugh, & Cuthbert, for respondent.

Witness may testify from inquiries made, as to market values. 2 Elliott, Ev. § 1302; Dooley v. Gladiator Consol. Gold Mines & Mill. Co. 134 Iowa, 468, 109 N. W. 864, 13 A. & E. Ann. Cas. 297; 26 Cyc. Law & Proc. p. 819; Murray v. Stanton, 99 Mass. 345; Humphreys v. Minnesota Clay Co. 94 Minn. 469, 103 N. W. 338.

An agent binds his principal when he acts within his apparent and ostensible authority. Nebraska Bridge Supply & Lumber Co. v. Conway, 127 Iowa, 237, 103 N. W. 122; Kilborn v. Prudential Ins. Co. 99 Minn. 176, 108 N. W. 861; Farmer v. Bank of Graettinger, 130 Iowa, 469, 107 N. W. 170; Meyer v. Doherty, 133 Wis. 398, 13 L.R.A.(N.S.) 249, 126 Am. St. Rep. 967, 113 N. W. 667; Merz v. Croxen, 102 Minn. 69, 112 N. W. 890; Herrick v. Humphrey Hardware Co. 73 Neb. 809, 119 Am. St. Rep. 917, 103 N. W. 687, 11 A. & E. Ann. Cas. 201; Oleson v. Merrill, 20 Wis. 463, 91 Am. Dec. 428, Rev. Codes 1905, §§ 5769–5771, 5784.

If property comes into one's hands without a valid contract and he converts it, he is liable. Cutter v. Fanning, 2 Iowa, 580; Wildey v. Cox, 25 Mich. 116; 26 Am. & Eng. Enc. Law, p. 724; Myers v.

Meinrath, 101 Mass. 366, 3 Am. Rep. 370; Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 137.

Where a custom is so general and well settled that parties are presumed to have dealt with reference to it, it is a part of the contract. 1 Elliott, Ev. §§ 172, 607; 1 Greenl. Ev. § 14 J.

A paper otherwise irrelevant cannot be admitted for the purpose of comparison of handwriting. Smyth v. Caswell, 67 Tex. 567, 4 S. W. 848; Kennedy v. Upshaw, 64 Tex. 411; Cook v. First Nat. Bank (Tex. Civ. App.) 33 S. W. 998; Merritt v. Campbell, 79 N. Y. 625; Hynes v. McDermott, 82 N. Y. 51, 37 Am. Rep. 538; United States v. Jones, 10 Fed. 469; Randolph v. Loughlin, 48 N. Y. 456; People v. Parker, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720; Vinton v. Peck, 14 Mich. 287; First Nat. Bank v. Robert, 41 Mich. 709, 3 N. W. 199; Weidman v. Symes, 116 Mich. 619, 74 N. W. 1008.

FISK, J. Plaintiff sues to recover for the alleged conversion by defendant of 84 bushels of flax, 265 bushels of No. 1 hard wheat, and 307 bushels of Durham wheat which he claims to have delivered to defendant at its elevator at Grand Harbor, this state, between the 7th and the 11th days of July, 1907. The defense amounts to a general denial with a counterclaim for a small sum for elevator charges for handling the grain. The trial resulted in a verdict in plaintiff's favor for $615.80. A motion for a new trial was made and denied, and judgment entered on such verdict. The appeal is both from the final judgment, and from the order denying the new trial.

The assignments of error number 65, but they are grouped and discussed in the brief of appellant's counsel under eight subdivisions or points. These will be noticed in the order presented.

1. Error is alleged in the admission of certain evidence as to the quantity of grain delivered by respondent to appellant, and the sufficiency of the evidence to show the quantity of grain, if any, so delivered is challenged. We discover no merit in either contention. Plaintiff was not restricted to the contents of defendant's books in proving the delivery of the grain. He testified positively that he knew the amount of grain that he delivered at defendant's elevator, that he delivered it personally, and saw it weighed, and he detailed the exact number of bushels of each kind of grain so delivered, which

testimony corresponds exactly with the allegations of the complaint. That such evidence was both competent and amply sufficient to support the verdict we entertain no doubt.

2. It is next contended that the evidence as to the value of the grain was improperly received, and that the evidence to show the market price thereof is insufficient. The evidence objected to is in brief as follows: Plaintiff testified that he knew the highest market prices of grain at Grand Harbor between September 25, 1907, and the date of the trial, and he details such prices at $1.06½ for No. 1 hard wheat, 88 cents for No. 1 Durham wheat, and $1.24 for flax. He says the highest market price was in October, but cannot fix the exact date. His knowledge regarding prices is based on inquiries made at Grand Harbor and other places in that vicinity, also from general information obtained from the Minneapolis Journal and other newspapers. He testified that he watched the markets generally and read the market reports every day. He also testified: "I have kept track of the price from time to time—inquired the price and read the papers and seen the market reports. I have made inquiries at different places, at Grand Harbor and Devils Lake. I am interested in the market, being a considerable grower of grain. . . . I had 10,000 bushels of wheat, 1,000 bushels of flax, 4,000 bushels of barley, and 2,200 or 2,300 bushels of oats. I marketed the major part of that grain at Grand Harbor, and I was interested in the price of grain because I had grain to sell. . . . I have inquired at the elevators the highest prices between October and the present time, and read the Journal, and found what month it was the highest and what the highest price was." Witness Emigh was shown qualified to testify as to prices at Grand Harbor in the month of October, and he fully corroborates plaintiff as to the highest price of wheat during that month. Witness Ness, agent for the Farmers' Grain Company at Grand Harbor during the fall of 1907, fully corroborates plaintiff's testimony as to prices at that time. There can be no doubt that this witness was shown to be fully qualified to testify upon the subject of prices.

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. That the evidence of plaintiff and his witnesses upon the question of the market prices of the grain was both competent and sufficient is, we think, entirely clear.

3. It is next contended that "appellant should have been permitted to show its system and manner of transacting business at Grand Harbor, and that it had actually paid for the grain claimed to have been delivered to it by respondent." We are unable to discover any merit to such contention. The rulings complained of relative to the admission of evidence regarding the system and manner of transacting business in defendant's elevator at Grand Harbor, so far as they were adverse to appellant, were not excepted to, and there is nothing in the record, so far as we are able to discover, to justify appellant's assumption that it was not permitted to show, if it could, that it had actually paid plaintiff for this grain. In fact, the exact reverse is true, but no competent evidence was offered to prove such payment, and there is not a scintilla of evidence of such payment in the record.

4. Appellant complains of the ruling of the court below in excluding offered testimony as to instructions given by defendant to its agent at Grand Harbor; and it also contends that certain evidence was erroneously received relative to certain methods of doing business adopted by its agent contrary to defendant's instructions. A great deal of this class of testimony was introduced, but we are at a loss to see how it was in any manner material to the issues involved. Private instructions from the principal to the agent not brought to the knowledge of plaintiff were clearly inadmissible, and in no way binding upon him. Furthermore, the cause of action is for conversion of this grain, the issues being whether, as a fact, such grain was delivered by plaintiff into defendant's elevator, and, if so, whether defendant thereafter and prior to the commencement of the action wrongfully converted the same to its own use. If the grain was, in fact, delivered to defendant, the fact that the agent violated his principal's instructions in any respect could in no manner exonerate the principal from liability, even though plaintiff had knowledge of such instructions. The

citation of authorities upon propositions so elementary is wholly unnecessary. The authorities cited by appellant's counsel dealing with the subjects of the scope of an agent's authority, either actual or ostensible, and with the question of the principal's ratification of his agent's acts, have no application to the case at bar. If defendant received plaintiff's grain, it is guilty of the conversion thereof if it has refused to account therefor by payment for the same or delivery thereof on demand.

5. Under point 5 of appellant's brief, counsel challenges the ruling of the trial court in admitting evidence of custom and usage at Grand Harbor relative to the matter of receiving grain at elevators by agents, and accounting therefor by the issuance of tickets later. We think such evidence was admissible, so far at least, as it related to the custom at defendant's elevator at that place as it tended to explain and account for the fact that tickets were not issued nor demanded by plaintiff for each load of grain when delivered. Such evidence tended, for what it was worth, to corroborate plaintiff's testimony that no tickets were in fact issued and delivered to him for the grain in question, but even conceding, for the sake of argument, that such evidence was inadmissible, we fail to see how its introduction was prejudicial to appellant. That plaintiff in fact delivered the grain at the defendant's elevator as claimed by him is not seriously controverted. In fact, no evidence was offered by defendant to refute plaintiff's testimony on this point. We are agreed that no prejudicial error was committed by the trial court in admitting this class of testimony. Hence the assignments of error based on the admission thereof must be overruled.

6. It is appellant's sixth contention that Exhibits 4, 5, 6, and 7 offered in evidence by appellant should have been received. These exhibits are wheat tickets issued or purporting on their face to have been issued to plaintiff in June preceding the delivery of the grain in question, and representing other grain delivered at this elevator by plaintiff, about which there is no controversy. Plaintiff admitted that his name signed to the receipt on Exhibit 4 is his genuine signature. It is appellant's contention, in brief, that at least Exhibit 4 was competent for the purpose of showing the system of appellant, its method of doing business, and the manner in which these parties had transacted business in the past to plaintiff's knowledge, also as tending to

refute plaintiff's testimony as to custom and usage in receiving grain at Grand Harbor. We fail to see how such exhibit would tend in any way to discredit plaintiff's testimony or to disprove the facts sworn to by him. While such ticket apparently represents but a single load of wheat, it does not appear that other wheat was delivered at such elevator by plaintiff either immediately prior or subsequent to June 5th, the date thereof. Exhibits 5, 6, and 7, on the contrary, affirmatively disclose that they must have represented several distinct loads, Exhibit 7 having been issued for 875½ bushels. But, in any event, for reasons above stated we do not see how the exclusion of such exhibits could have resulted prejudicially to defendant.

It is also earnestly insisted both in appellant's brief and in oral argument, that Exhibit 4 was admissible for another reason, to wit, to aid the jury in determining whether Exhibits 8, 9, 10, and 11, which purport to represent the grain in question and which also contain receipts for payment of such grain purporting to have been signed by plaintiff, are genuine or mere forgeries. Thus we have fairly presented for decision the question whether an instrument concededly bearing the genuine signature of a party is admissible solely for the purpose of comparison of handwritings in order to prove the genuineness of a disputed signature. It is contended by respondent's counsel that such testimony was merely cumulative and therefore its rejection not prejudicial, as two other instruments were in evidence, concededly bearing plaintiff's genuine signature. For the purpose of settling in this jurisdiction a much mooted and important question of practice, we shall assume, without deciding, that respondent's contention as above stated is not tenable.

Upon the question here raised the authorities are in irreconcilable conflict. It would serve no useful purpose to review at length in this opinion the many cases upon the subject. They may be found collated in the valuable notes to the cases of Mississippi Lumber & Coal Co. v. Kelly, 19 S. D. 577, 104 N. W. 265, 9 A. & E. Ann. Cas. 449, and University of Illinois v. Spalding, 71 N. H. 163, 62 L.R.A. 817, 51 Atl. 731. See also 15 Am. & Eng. Enc. Law, 2d ed. pp. 267, 268, and 3 Supp. thereto, p. 382, and cases cited; 6 Enc. Ev. p. 410; 2 Elliott, Ev. § 1105; 3 Wigmore, Ev. §§ 1994, 2001–2016. Three distinct rules seem to prevail under the authorities. As stated in 2

Elliott on Evidence, § 1105: "In a few jurisdictions, the rule is that the opinions of experts based on any comparison is improper; in other jurisdictions, the rule is that opinions are admissible in case the writings to be compared are in evidence for another purpose and admitted to be genuine; and the third rule is that opinions of experts are admissible as in the rule immediately preceding and in addition on writings whose genuineness has been proved on the trial for the express purpose of comparison. The reason given for holding that the only papers that can be used in such an examination of an expert are those which have been brought into the case for another purpose is that such a limitation is necessary in order to avoid the evil of collateral issues, the danger of fraud in selecting specimens, and the danger of misleading the jury. But it is said, on the other hand, with much reason, that when the writings are admitted to be genuine these objections are of no force, that in either case the result so depends upon skill and judgment in making the comparison and discovering the resemblances and differences that there is little danger of misleading the jury, and that policy and necessity require that such a comparison should be permitted." The rule which we deem the more sound and better rule and the one which we shall adopt is that stated in 15 Am. & Eng. Enc. Law, 2d ed. p. 268, as follows: "Irrelevant papers are not admissible in evidence for the sole purpose of furnishing a standard of comparison, but that to this rule exceptions are made in those cases . . . where the papers offered are conceded by the opposite party to be genuine, or are such as he is estopped to deny, or where for other reasons no collateral issues can be raised by their introduction." That the court is in no way fettered in adopting a rule upon the subject by any statute seems not to have been questioned, either by this court or the South Dakota court, in the cases of Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003, and Mississippi Lumber & Coal Co. v. Kelly, 19 S. D. 577, 104 N. W. 265, 9 A. & E. Ann. Cas. 449. Until such time as the legislature sees fit to prescribe a rule upon the subject, there can be no doubt as to our power to adopt such rule as we deem just and proper.

Applying the above rule to the case at bar, it follows that it was error to exclude Exhibit 4, but not Exhibits 5, 6, or 7. The ruling, however, was not prejudicial. We have made a personal comparison

of Exhibits 8, 9, 10, and 11 with Exhibit 4 and the two other exhibits in evidence bearing plaintiff's genuine signatures, and we feel justified in saying that the disputed signatures bear strong, if not conclusive, evidence of having been forged, and we unhesitatingly conclude that, had Exhibit 4 been received, there is no reasonable likelihood or probability that the verdict would have been different. We are convinced from an examination of the record that justice has been done between the parties; hence the verdict ought not to be disturbed. 2 Thomp. Trials, 2402, 2403.

The remaining assignments are wholly devoid of merit, and require no discussion. The instructions of the court to the jury were very full and fair, and we think stated the law correctly.

One other matter remains to be noticed. While not mentioned in the printed brief, the distinguished counsel who argued the case orally for appellant in this court earnestly contended that, if any conversion of the grain was proved, it was shown to have occurred in the latter part of October, and not in September, and that the evidence wholly fails to establish the highest market price of such grain thereafter, but merely tends, at the most, to show that the highest market price thereof was some time in October. A sufficient answer to such contention is the fact that such question was not raised in the court below. Furthermore, the learned trial court expressly instructed the jury that such conversion took place, if at all, on September 25, 1907, and no exception was saved thereto. Such instruction, therefore, whether right or wrong, is now the law of the case.

We find no prejudicial error in the record. The judgment and order are accordingly affirmed.

STATE OF NORTH DAKOTA EX REL. ANDREW MILLER, Attorney General, and Thos. Connell, A. E. Thacker, O. H. Johnson, M. H. Miller, G. G. Thompson, F. M. King, August Short and C. W. Shumaker, Relators, v. ADAM NORTON, John K. Olafson, Wm. Bigwood, Jos. Morin, and F. C. Myrick, Members of the Board of County Commissioners of the County of Pembina, State of North Dakota, and as Such Members of Said Board of County Commissioners of Pembina County, North Dakota.

(127 N. W. 717.)

Opinion filed September 23, 1910.

Application by the State for the issuance by the Supreme Court of a prerogative writ to enjoin County Commissioners of Pembina County from submitting to the electors of such county the question of the removal of the county seat from the City of Pembina to the city of Cavalier.

Writ denied, and order to show cause quashed.

Ball, Watson, Young & Lawrence, for appellants.

D. J. Laxdahl and *George A. Bangs,* for respondents.

PER CURIAM. Relators have petitioned this court to assume jurisdiction in this proceeding for the purpose of issuing its prerogative writ enjoining defendants, as county commissioners of Pembina county, from submitting to the electors of such county at the ensuing general election the question of the removal of the county seat of such county from the city of Pembina to the city of Cavalier. An order to show cause was issued returnable on September 22d, at which time counsel for defendants, in effect, stated that they did not desire to raise any objection to the exercise by this court of its original jurisdic-

Note.—As to original jurisdiction of court of last resort in cases that do not involve exercise of superintending control, see State ex rel. Goodwin v. Nelson County, 8 L.R.A. 283; People ex rel. Bentley v. McClees, 26 L.R.A. 646; State ex rel. Adams County v. Cunningham, 15 L.R.A. 561; People ex rel. Kocourek v. Chicago, 58 L.R.A. 833; People ex rel. Miller v. Tool, 6 L.R.A.(N.S.) 822; State ex rel. Rinder v. Goff, 9 L.R.A.(N.S.) 916; People ex rel. Graves v. District Ct. 13 L.R.A.(N.S.) 768; State v. Pacific Exp. Co. 18 L.R.A.(N.S.) 664; State ex rel. McCue v. Blaisdell, 24 L.R.A.(N.S.) 465.

tion, and that they joined with relators' counsel in requesting that this court exercise its discretion in favor of assuming jurisdiction and disposing of the controversy upon its merits. As we view the matter, there is an insurmountable obstacle which prevents us from complying with counsel's request. The Constitution of this state, which defines and limits the jurisdiction of this court, confers on us the exercise of no discretion in the premises. As repeatedly held by us, our jurisdiction to issue original writs (except those writs necessary to the proper exercise of appellate jurisdiction and to aid this court in its supervisory control over inferior courts) extends only to prerogative writs, and that such writs will issue only in cases publici juris wherein are directly involved the sovereignty of the state, its franchises or prerogatives, or the liberties of the citizens. State ex rel. McDonald v. Holmes, 16 N. D. 457, 114 N. W. 367, and cases cited; State ex rel. Steel v. Fabrick, 17 N. D. 532, 117 N. W. 860; and State ex rel. Murphy v. Gottbreht, 17 N. D. 543, 117 N. W. 864, and cases cited. Only in rare instances has this court deviated from the above rule. The case of State ex rel. Steel v. Fabrick affords such an instance. There exceptional circumstances were presented creating an exigency or emergency imperatively demanding the exercise of original jurisdiction by this court in order to obviate a great injustice. The facts presented a question *publici juris,* but affecting directly the citizens of a county merely, and the court, following intimations to that effect in certain prior decisions, held that such a situation may justify the issuance of the prerogative writ. In State ex rel. Murphy v. Gottbreht, which involved a controversy over an attempt to remove a county seat, the court expressly declined to exercise original jurisdiction. Whether the facts of a particular case bring it within the rule or the exception as above stated so as to warrant the issuance of a prerogative writ is not a matter calling for the exercise of a discretion. The rule is inflexible, and will be applied as the test to the facts in each case. If the facts present a case permitting the exercise of original jurisdiction, then the court is clothed with a discretion, and, as held in State ex rel. McDonald v. Holmes, supra, "whether the court will exercise its extraordinary jurisdiction . . . is a matter within its sound judicial discretion depending on the particular facts in each case."

Applying these rules to the facts presented in relators' application,

we are agreed that this court is without jurisdiction to issue the writ prayed for, and therefore there is no room for the exercise of any discretion. We are unable to concur in the views of counsel that this case may be differentiated on principle from State ex rel. Murphy v. Gottbreht, supra.

Writ denied, and order to show cause quashed.

KENMARE HARD COAL, BRICK, & TILE COMPANY v. ANNA T. RILEY, T. L. Beiseker, and Beiseker & Company.

(126 N. W. 241.)

Mortgage Foreclosure — Redemption — Promise to Extend Time to Redeem.

1. The right to redeem from a sale on foreclosure of a real estate mortgage after the year allowed by law for a redemption, under a claim of relying on a promise by the purchaser to accept payment at redemptioner's convenience, will not be upheld unless it appears by clear and convincing evidence that such promise was made and in good faith relied on.

Same — Estoppel.

2. If a promise to allow a redemption after the year has expired is made and relied on to the redemptioner's detriment, the purchaser is estopped from denying the right to redeem.

Mortgage Foreclosure — Redemption — Estoppel — Evidence.

3. In a letter from the purchaser at such foreclosure sale to the owner of said land, the following language was used: "We will also say that if you do not care to pay up this matter now, let it go to suit your convenience, as the matter is drawing interest at the rate of 12 per cent." *Held*, in view of the indefinite character of the statement and the evidence in relation to the intention of the owner to redeem within the year, that the right to redeem after the year expired was not shown by that clear and convincing evidence required in this class of cases.

Opinion filed April 11, 1910.

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

Action to redeem from sheriff's deed on the foreclosure of a mortgage. Judgment for plaintiff. Defendant appealed.

Reversed.

Bessesen & Berry (*Turner, Wright, & Lewis,* of counsel), for appellant.

Authority to collect a mortgage debt, foreclose such mortgage, and receive money upon redemption, does not authorize extension of period to redeem. Karcher v. Gans, 13 S. D. 383, 79 Am. St. Rep. 893, 83 N. W. 431; Wilken v. Voss, 120 Iowa, 500, 94 N. W. 1123; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724; Gilbert v. Garber, 62 Neb. 464, 87 N. W. 179; Western White Bronze Co. v. Portrey, 50 Neb. 801, 70 N. W. 383; Union School Furniture Co. v. Mason, 3 S. D. 147, 52 N. W. 671; National Bank v. Johnson, 6 N. D. 180, 69 N. W. 49; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362.

Acts amounting, in legal effect, to a redemption must be shown. Dunn v. Hunt, 63 Minn. 484, 65 N. W. 948; Dawson v. Overmyer, 141 Ind. 438, 40 N. E. 1065; Hoopes v. Bailey, 28 Miss. 328; Hyman v. Bogue, 135 Ill. 9, 26 N. E. 40; Chielovich v. Krauss; Brown v. Smith, 13 N. D. 580, 102 N. W. 171.

Robert H. Bosard and *G. W. Twiford,* for respondent.

In an equitable action to redeem, tender is unnecessary. Casserly v. Witherbee, 119 N. Y. 522, 23 N. E. 1000.

MORGAN, Ch. J. This is an action to redeem from a sale of real estate under a power of sale contained in a mortgage. The owner of the land was Malcolm McBride, who mortgaged it to Clara A. Beiseker on December 8th, 1900, to secure the payment of the sum of $250, with 12 per cent interest thereon. This mortgage was assigned to the defendant Anna T. Riley on January 7th, 1901. On the 3d day of June, 1905, it was foreclosed by advertisement, and the land bid in at the sale by said Anna T. Riley, for the amount of said mortgage and interest at 12 per cent from date, and costs and taxes, being in all the sum of $496.21. The foreclosure of the mortgage is conceded to have been regular. The issue raised by the pleadings is whether the defendant T. L. Beiseker, as agent for the defendant Riley, extended the time during which a redemption might be made from the sale.

The plaintiff was the owner of the land at the time of the foreclosure. In reference to the right of the plaintiff to redeem, the complaint contains the following allegations: "That thereafter, to wit, on or about November 25th, 1905, said Beiseker & Company, by T. L. Beiseker,

in writing informed said plaintiff that in case that plaintiff did not desire to pay the amount due on said mortgage at that time, or within the time allowed by law for the redemption of the said foreclosure, that said company might have such further time as suited its convenience to make such payment, provided, that said company pay interest on said amount at the rate of 12 per cent per annum until paid." This allegation of the complaint is denied by the answer.

What transpired between J. A. Wright, the agent for the plaintiff, and T. L. Beiseker, agent for the defendant, in reference to the alleged extension of the time during which a redemption might be made, was through letters. Some of these letters are in evidence, and are, so far as material, as follows: The foreclosure sale was made on June 3, 1905, and the one year allowed for redemption therefrom expired on June 4th, 1906, being Sunday. On November 14th, 1905, Wright wrote Beiseker & Company at Fessenden, North Dakota, and inclosed a check for $315 as payment in full for said mortgage. On November 21st, Beiseker answered this letter and informed Wright that said mortgage had been foreclosed and that the amount necessary to redeem from the foreclosure was $529.38, and that upon receipt of $214.38 in addition to the $315, he would have the sheriff issue to him a redemption certificate. On November 23, 1905, Wright wrote Beiseker in answer to the letter of November 21st, and complained of the charges for costs and interest; and asked for a detailed statement of the amount necessary to redeem. On November 25th, Beiseker sent a detailed statement of the taxes paid, interest since the execution of the mortgage at 12 per cent, attorney's, printer's, sheriff's fees, and recording fees, making the amount due at the date of the writing said letter, $529.38. In that letter is contained the following statement: "There is no use of our getting into abortive argument over this matter, but we feel that the present holder of that mortgage has carried you beyond reason, and if it is true that you were ready to pay this matter years ago, we exclaim, why didn't you? We will also say that if you do not care to pay up this matter now, let it go to suit your convenience, as the matter is drawing interest at the rate of 12 per cent." The $315 was returned to Wright in this letter.

This letter was never answered by Wright, and there was no further communication between the parties in reference to the mortgage until

June 6th, 1906, after the deed had been issued, when Wright wrote from Kenmare, North Dakota, to Beiseker & Company, at Fessenden, North Dakota, as follows: "My Dear Sir: Kindly drop me a line by return mail and let me know how soon the McBride mortgage, that was foreclosed, has to be redeemed, and greatly oblige. Also let me know the amount needed, and would you discount the attorney's fees if paid at once?"

On June 11th, Beiseker & Company answered Wright's letter, as follows: "Mr. J. A. Wright, Kenmare, North Dakota, Dear Sir: Replying to yours of June 6th relative to the McBride foreclosure, will say that this property went to sheriff's deed on June 5th." On June 14th Wright wrote Beiseker & Company as follows: Gentlemen: I sent you a letter on June 1st, asking for the exact amount necessary for the redemption of a certain mortgage given by Malcolm McBride, covering lots. . . . I have received no answer. No doubt the letter has been lost, as it was an important letter which you would certainly have replied to had you received it. I think, from my memory of your former letters, that this should be sent you some time in June. Hence I will not wait longer for reply, and will inclose herewith a check for the sum of $560. No doubt that will be sufficient to cover the entire cost, and if it is more than necessary you can return the balance and also the certificate of redemption. If this amount is not correct, kindly notify me at once, and I will remit if more is needed." On June 16th Beiseker & Company answered this letter, returning the check for $560, and informed Wright that a sheriff's deed was issued on June 5th, 1906.

The complaint in substance alleges that Beiseker fraudulently agreed to an extension of the redemption period, and thereby induced the plaintiff to allow one year to expire without redeeming, in reliance on such promise. The answer denies making of the promise, and denies all of the allegations of the complaint in regard to the extension of time and the reliance thereon after the period of one year had expired, and alleges the foreclosure of the mortgage and the purchase of the premises at the foreclosure sale by the defendant Riley, who thereby became the absolute owner thereof, and that she thereafter conveyed the same to the defendant T. L. Beiseker, who is now the absolute owner thereof.

The trial court made findings of fact and conclusions of law favorable to the plaintiff, and adjudged that it is entitled to redeem from the sale. There was no finding of fraudulent intent on defendants' part. The defendants have appealed from that judgment, and demand a trial *de novo* in this court, under the provisions of § 7229, Rev. Codes 1905. The findings of fact of the trial court are attacked, and defendants claim that the evidence does not sustain them. The appellants especially challenge the finding of the district court to the effect that the plaintiff relied upon the statement contained in the letter of November 25th, 1905, and claim that the evidence does not sustain it.

It clearly appears from the evidence that Beiseker did not intend to mislead the plaintiff in any way as to the time when the redemption period expired, and that he did not intend to lead Wright to believe that payment at any time in the future would be satisfactory. The only questions remaining, then, are, Did the language of the letter of November 25th justify Wright in relying upon it as an unconditional promise to accept payment at any time in the future; and if he was justified in doing so, Did Wright actually rely on what was there said, and, in consequence thereof, did not redeem within the year?

Whereas the language of the letter is extremely indefinite, it may be sufficient, considered alone, to have led Wright to believe that he had a right to redeem after the year expired. However that may be, we do not think that there is any reasonable support for the contention that it was actually relied on as such by Wright. We reach the opposite conclusion as to this matter, which is that Wright did not rely upon that letter until he found that the time for redemption had expired. After the letter of November 25, there was no correspondence between the parties until June 6th. Wright's conduct after the letter of November 25th and his letters in June, 1906, clearly show that he intended to redeem during the year. In his letter of June 6th, he asks: "How soon the McBride mortgage, that was foreclosed, has to be redeemed, etc. Also let me know the amount needed, and would you discount the attorney's fees if paid at once?" If he was relying on an unlimited extension, he would not naturally have asked concerning anything except the amount due. It was utterly immaterial when a redemption must be made if he was relying upon the letter of

November 25th, and he would not naturally have asked for a reduction of the amount of the attorney's fees if he deemed himself to be redeeming in pursuance of the letter.

In his letter of June 14th, Wright states: "I think, from my memory of your former letters, that this should be sent you some time in June. Hence, I will not wait longer for reply, but inclose herewith a check for the sum of $560." If he was relying upon the right to redeem from the mortgage at any time in the future, why should he be under the impression from memory that the redemption money should be sent in June? There was nothing in the letter from which he had a right to conclude that the so-called extension was at all limited to a payment in June. In his evidence Wright testifies that he started for Fessenden (Beiseker's residence) to redeem from the foreclosure sale, but that he did not stop over there because his ticket did not permit a stop-over at that time, and that he went on to Kenmare. He arrived at Kenmare before the time for a redemption had expired.

The statement in the letter is so very general that it may well be doubted whether either of the parties thought at the time that it could refer to time beyond the year. There is nothing in the letter expressly relative to the expiration of the period of redemption. What he meant by this indefinite language is explained by Beiseker, and he expressly denies that he intended an extension at Wright's option, indefinitely. He states that the broad language referred to was used in view of the fact of the long time before the redemption period expired, and with the knowledge that the assignee was satisfied to allow the matter to continue at 12 per cent interest until the redemption expired. It seems incredible that a man of Wright's extensive business experience would deliberately rely on such general and indefinite language made by one between whom and himself existed no relations of trust or friendship. On the other hand it seems incredible that a business man of Beiseker's experience would consent to such an indefinite extension beyond the period of redemption, without making any provision for the payment of the interest on which his principal relied. If such a promise or proposition had been made at about the time the redemption period was to expire, there would be some force in the contention that it was relied upon. These considerations, together with the letters and other evidence, convince us that Wright did not rely upon the

statement in the letter. Unless he relied upon it in good faith, and was influenced or lulled thereby into not redeeming within the year, he cannot now bring the letter into the case, claiming that he relied upon it at that time. The reliance upon it must have been actual and in good faith from time of receiving it. The burden is upon him to prove that fact.

In view of these facts and the exceedingly general language of the letter and the time when made, and that the letter did not unequivocally refer to accepting payment after the year, we are convinced that redemption should not be allowed, as there is no right shown thereto by that clear and convincing evidence required in this class of cases.

There is no dispute as to the legal principles applicable. There is no claim of a contract right of redemption. The only claim is that plaintiff was led to forego a redemption within the year by the statement or promise contained in the letter, which he relied on, and that the defendant is therefore estopped from now denying that right.

As in all equitable actions of a similar character, the right to redeem as against a deed would not be upheld except on evidence of a clear and convincing nature. Measured by that standard, the showing in this case fails. Granting a redemption on the vague, unsatisfactory, and contradictory evidence in the record, would expressly jeopardize titles by deeds and render them of no practical value, although based on regular, satisfactory proceedings.

The judgment of the District Court is reversed and the action dismissed. All concur.

COLEAN MANUFACTURING COMPANY v. M. L. FECKLER, J. J. Feckler, Copartners as Feckler Bros., Leroy A. Wheeler, and Robert Moffat.

(126 N. W. 1019.)

Sales — Acceptance — Waiver of Defects.

1. The note sued on was given for the purchase price of a threshing

Note.—The question of the right of a buyer to retain goods and defeat an action for the price, on discovering that the goods do not comply with the requirements of the contract, is considered in a note in 4 L.R.A.(N.S.) 1167.

machine sold by plaintiff to the defendants, Wheeler & Moffat, upon a written order or contract. The order given by defendants Wheeler & Moffat contained a provision that, should any part of the machinery be defective, it should be returned immediately by Wheeler & Moffat to the place where it was received. Also the following provision: "If inside of six days after the date of its first use it shall fail in any respect to fill the warranty, written notice to be given immediately by the purchaser to the plaintiff at its office in Peoria, Illinois, by registered letter, stating particularly in said letter and notice, what and wherein it failed to fill the warranty." Also the following provision: "No agent or any other person shall be authorized to make any different warranty or vary or modify any of its terms or waive any of the conditions of this one, and any attempt to do so shall not bind the company or affect this contract." At the time of the receipt of the machinery at Wimbledon, and before it was unloaded from the car, it was discovered that certain belts belonging to the separator were water-soaked so as to be unfit for use. It was also discovered that some other parts of the threshing machine were missing. Defendants allege in their answer that Wheeler & Moffat were induced to execute and deliver to the plaintiff this note and two others, and did so execute and deliver said notes, solely upon the representation of the plaintiff's agents that the missing parts should be immediately furnished, and that they accepted the said threshing machine upon the condition that all the missing parts should be immediately furnished and delivered to the defendant Wheeler & Moffat, and upon no other condition, and that the defendants Wheeler & Moffat took the threshing machine, believing in and relying upon the said representations of the plaintiff's agents and kept the same for a few days. But that, notwithstanding such representations, the articles were never furnished and delivered by the said plaintiff, and the defendants Wheeler & Moffat returned the threshing machine to plaintiff's agents. As a matter of fact they kept the machine for about 30 days. At the close of the evidence, on motion of plaintiff's counsel, the district court directed a verdict for plaintiff for the amount due on the note.

Sales — Acceptance — Waiver of Defects.

2. The trial court by its order set aside such verdict, upon the ground that the motion to direct a verdict was not properly granted. *Held*, that the order setting aside the verdict and granting a new trial is erroneous.

Sales — Delivery — Evidence.

3. *Held*, that there was a delivery of the threshing machine under the written order.

Opinion filed April 11, 1910. Rehearing denied June 21, 1910.

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

Action by the Colean Manufacturing Company against M. L. Feck-

ler and others. Verdict directed for plaintiff, and, from an order granting a new trial, plaintiff appeals.

Reversed with directions.

J. W. Tilly and *Turner, Wright & Lewis,* for appellant.

Parks & Olsberg, for respondent.

CARMODY, J. This is an action upon a promissory note of which the defendants Wheeler & Moffat are makers. At the time of the execution and delivery of the note, defendants Feckler Brothers indorsed thereon their written guarantee of the payment of the note at maturity or at any time thereafter, waiving protest, etc. This note was given as part of the purchase price of certain threshing machinery purchased by the defendants Wheeler & Moffat from the plaintiff, under a written order or contract. This is an ordinary order commonly used in the sale and purchase of threshing machinery in this country. The order was given through Feckler Brothers, who were local agents at Wimbledon for the plaintiff. The authority of these agents was evidenced by a written agency contract, and was limited to receive orders for machinery and forwarding them to the plaintiff for approval, to receiving and delivering machinery and making settlement thereof in accordance with the terms of the order given for such machinery. The order given by defendants Wheeler & Moffat contained a provision that, should any part of the machinery be defective, it should be returned immediately by Wheeler & Moffat to the place where it was received. Also the following provisions: If, inside of six days after the date of its first use, it shall fail in any respect to fill the warranty, written notice to be given immediately by the purchaser to plaintiff, at its office in Peoria, Illinois, by registered letter, stating particularly in said letter and notice, what and wherein it failed to fill the warranty. Also the following provisions: "No agent or any other person shall be authorized to make any different warranty or vary or modify any of its terms, or waive any of the conditions of this one, and any attempt to do so shall not bind the company nor affect this contract." At the time of the receipt of the machinery at Wimbledon and before it was unloaded from the car, it was discovered that certain belts belonging to the separator were water soaked, so as to be unfit for use. It was discovered that the rig was short in the following

items, to wit: One northwest belt guide, one flax sieve, one truck, wagon and tank, double trees and neckyoke for the separator, screen for shoe and straw grates for the engine. Feckler Brothers at once notified the plaintiff by letter of the water-soaked condition of the belts and of the missing parts, and notified the plaintiff that they would return the belts to it by freight, and that they, Feckler Brothers, could furnish the buyers new belts, which they did. The tank and truck came a few days after; the other parts, the sieve and grates, did not come until after the defendants, Wheeler & Moffat, returned the machine to Wimbledon, which was about thirty days after they took it out; the northwest belt guide was never furnished. Defendants alleged in their answer that Wheeler & Moffat were induced to execute and deliver to the plaintiff this note and two others, and did so execute and deliver said notes solely upon the representations of the plaintiff's agents that the missing parts, hereinbefore referred to, would be immediately furnished to said Wheeler & Moffat, and that they accepted the said threshing machine upon the condition that all the articles, hereinbefore referred to, should be immediately furnished and delivered to the defendants Wheeler & Moffat, and upon no other condition, and that defendants Wheeler & Moffat took the threshing machine, believing in and relying upon the said representations of the plaintiff's agent, and kept the same for a few days. But that, notwithstanding such representations, the articles were never furnished and delivered by the said plaintiff, and the defendants Wheeler & Moffat, returned the threshing machine to plaintiff's agents, and that plaintiff afterwards appropriated such machine to its own use. In January after the return of the machinery, the plaintiff foreclosed its mortgage thereon, and, having duly credited the proceeds of the sale, brought this action on the note remaining unpaid. There was a jury trial, which resulted in a decided verdict and judgment for the plaintiff, for the entire amount of the note and interest.

The defendants afterwards, on a settled case, moved for a new trial, which was granted. This appeal is from such ruling.

The only error assigned in this court is that the court erred in granting defendants' motion for a new trial.

At the trial, after introducing the note and the notary's certificate of protest of said note in evidence, plaintiff rested its case, and in

rebuttal introduced in evidence Exhibit G, the chattel mortgage given by defendants Wheeler & Moffat to plaintiff, and Exhibit H, the report of sale under the foreclosure of such chattel mortgage. During the cross-examination of defendants' witnesses, plaintiff introduced in evidence Exhibits C, D, E, and F. Exhibit C is a letter written by Feckler Brothers to George Edgerton, the plaintiff's manager at Fargo, of date November 23, 1905, inclosing a bill of $23.79, part of which was in connection with the sale of the threshing machine to Wheeler & Moffat. Exhibit D is the itemized bill inclosed in Exhibit C. Exhibit E is a letter dated August 30, 1905, by Feckler Brothers to plaintiff, inclosing the note sued on and two others, an original and duplicate mortgage, an original and duplicate copy of earning contract, all given by Wheeler & Moffat in settlement for the threshing machinery. Exhibit F is a letter dated July 5, 1905, by Feckler Brothers to plaintiff, at Fargo, inclosing order of Wheeler & Moffat for the threshing machine.

Defendant M. L. Feckler testified that when they unpacked the threshing machine in the latter part of August, 1905, they found the belts, thereinbefore mentioned, rotten and water soaked and the other parts, hereinbefore mentioned, missing. They immediately notified the company by letter, Exhibit 3, introduced in evidence by defendants, which is as follows: "On unloading and unpacking the rig you shipped us for Messrs. Wheeler & Moffat we find the following belts that were packed in the blower are badly soaked and rotted, and the purchasers have refused to accept them as they are unfit for use; *viz.*, one 20 ft.-6″ leather belt, one 19 ft.-4″ leather belt, two 12 ft.-2″ leather belt. These belts we will return to you by freight, so that you can see the condition they are in. If acceptable we can furnish the buyers with new belts, as we carry a stock of leather belting, but it is possible that you would prefer to furnish them yourself. If this is the case we would ask you to ship us the above-described belts as soon as possible by freight; in either case we would ask you to advise us what to do with them. We also find the rig is short of the following items specified in the order, *viz.:* one northwest belt guide, one flax sieve, one truck wagon and tank, double trees and neck yoke for separator, screen for shoe, and straw grates for the engine. As we

must have these parts at once, we would ask you to make an immediate shipment of the same and follow with tracer."

He also testified that Wheeler & Moffat were present, refused to take the machinery for the reason that it was incomplete, but finally took it on being promised by Feckler Brothers that the missing parts would be furnished immediately. The tank and truck came about five days after they took the machine; the other parts, except the northwest belt guide, after the machine was returned. The rotten belts were furnished by Feckler Brothers. The machine was pulled in and left in Feckler Brothers yard, but they exercised no control over it except to see that it was all there. They sent J. J. Feckler to Fargo to see the head man there. They, Feckler Brothers, furnished defendants, Wheeler & Moffat, with old flues to make grates. One of the company's experts came out and endeavored to make a grate and fix the machine, but that it was a failure. That defendants Wheeler & Moffat attempted to operate the threshing machine for a period of about thirty days, and threshed for three different persons.

J. J. Feckler testified to about the same thing, and in addition that he telephoned the agent at Fargo with whom they had all their dealings, about the parts; that the machine was refused until they were furnished; and that the agent at Fargo said to go ahead and have them take out the machine, and he would furnish the missing parts forthwith. That he, Feckler, went down to Fargo and saw Edgerton, the agent, about sending out experts, and Edgerton said to have the purchasers take out the machine, and get along the best they could until the company could get it in order. That plaintiff would do everything in its power to get the machine in running order, and furnished these parts to keep the machine out.

Defendant Robert Moffat, testified that he was an expert thresher, that Wheeler took the machine out but could not make it work. That plaintiff's expert was there and could not make it work. That when they took the machine out he knew they could not thresh without grates, knew some of the parts were gone. Feckler Brothers induced them, Wheeler & Moffat, to settle for the machine by promising that the defective and missing parts would be furnished. The defendants introduced in evidence Exhibit 1—the agency contract—and Exhibit 2—

the order given by defendants Wheeler & Moffat for the threshing machine.

The evidence further shows that the defendants Wheeler & Moffat took the threshing machine and settled for it the same day it arrived in Wimbledon. The defendants Wheeler & Moffat knew when they settled for the threshing machine that the belts were so water soaked as to be unfit for use, and knew which parts were missing; they may have had the right to refuse to receive the machinery, but this they did not do. They received and settled for it, knowing the condition that it was in. The belts were replaced by new ones, and the tank and truck were received by them shortly after making the settlement. The purchasers, by taking the threshing machine and settling for it in its then condition, elected to rely upon their contract with plaintiff. Defendants Wheeler & Moffat had the right to expect plaintiff to furnish all the missing parts. Plaintiff not having done so, Wheeler & Moffat may have had an action against plaintiff for damages, but by receiving and settling for the machinery, with knowledge of its defective condition, they waived their right to rescind the contract on that ground. There is no fraud set up as a reason for rescinding the contract. Neither is there any claim that defendants Wheeler & Moffat made any attempt to comply with the provisions of the contract. The promise, if any, made by Feckler Brothers, or by Edgerton to defendants Wheeler & Moffat, that plaintiff would furnish the missing parts and replace the belts, did not constitute a new contract, as the contract already existing between the plaintiff and the defendants Wheeler & Moffat required the plaintiff to furnish all the missing and defective parts and put the threshing machine in running order. The same contract required defendants Wheeler & Moffat to give plaintiff notice by registered letter and otherwise, of the failure of the threshing machine to properly perform the work for which they purchased it, but they never gave such notice. Neither was the plaintiff ever notified that Wheeler & Moffat refused to take the machine or that Feckler Brothers or Edgerton made Wheeler & Moffat any promises to induce them to take the machinery. The defendants contend that the buyers refused to accept the machinery and make settlement under the written order, and, by so refusing to take the threshing machine, their contractual relations under the written contract were terminated. That

the subsequent conditional taking of the machinery and the signing of the notes were not under the terms of the written contract but were under a new and different contract. In this contention they are in error. The case of Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136 and the case of the Coleman Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614, cited by defendants, are not in point. In the case of Nichols & S. Co. v. Paulson, one Spearing gave a written order to the general agent of plaintiff for the purchase of a steam threshing outfit. As part of the consideration, Spearing was to deliver to plaintiff a second-hand engine. Spearing signed one of the printed contracts, of the character generally used by machine companies. Spearing claimed that the printed contract and the notes he was to execute for the balance of the purchase price of the threshing machine, aside from the second-hand engine, were to be placed in the First National Bank of Hillsboro, and left there until he had an opportunity to try the machine for ten days, and if, upon such trial, it proved satisfactory, then the contract and notes should be delivered. If the trial was unsatisfactory, Spearing should return the outfit. When the machinery came to Hillsboro, Spearing refused to receive it, except conditionally upon trial, in accordance with what he testified was the oral contract with the general agent, and did not receive the machine until the notes and contract were placed in the First National Bank of Hillsboro, not to be delivered until both parties so directed. Spearing returned the rig and purchased another rig from John E. Paulson and Brother, for part payment of which he delivered them the second-hand engine in controversy. Nichols & Shepard then brought an action to recover possession of the engine from Paulson. The court says: "When the machinery forwarded by plaintiff for Spearing reached Hillsboro, Spearing refused to received the same, except conditionally upon trial, in accordance with what he swears was the oral contract with the general agent. Plaintiff claims that the general agent had no authority to make such contract, as Spearing well knew, by direction to agents printed upon the contract which he signed. We may grant that to be true. Nevertheless, the fact remains that Spearing refused to receive the outfit upon any other terms than upon trial. If the contract that he had signed and left with the general agent had been in fact delivered, so as to become operative, then this refusal

was a direct breach of such contract. Such contract was executory, and no title to the property passed until the buyer accepted it. Rev. Codes, § 3553. The refusal to accept may have given plaintiff a right to recover damages, but the property remained the property of the seller, and the title to the second-hand engine that was to be given in part payment remained in the buyer. These conditions existing, the local agents delivered the outfit to Spearing upon trial, in accordance with what he insisted was the contract. Such delivery was, of course, conditional, and passed no title. Plaintiff insists that the local agents were, to the knowledge of Spearing, unauthorized to make such conditional delivery. This may be granted. It may be true that plaintiff might have retaken the outfit immediately upon such delivery. But that fact could not convert the conditional delivery which was made, into an unconditional delivery that was not made. It could not cast upon the buyer title to property that he refused to accept. The title both to the threshing outfit and the second-hand engine remained just as it was prior to such conditional delivery."

See also Nichols & S. Co. v. First Nat. Bank, 6 N. D. 404, 71 N. W. 135.

In Colean Mfg. Co. v. Blanchett, which was an action for the foreclosure of a chattel mortgage, the defendant signed an order for the purchase of a threshing machine and attachments from the plaintiff. The order was an absolute one, and contained no conditions except the conditions connected with the warranty provisions. The machine was shipped to Grand Forks. Prior to the delivery to the defendant he claimed that a new contract was entered into between him and plaintiff through its agents. The new contract was oral, and provided for a sale on the same terms as the written order, except that he had a right to try the machine and return it if it did not do satisfactory work. He testified that the notes and mortgage were signed on this express condition, and that they were not to be delivered to plaintiff at all until after a satisfactory trial, but were to be placed in some bank in Grank Forks for final delivery to plaintiff or defendant dependent upon the result of the trial. Plaintiff claimed that a written contract could not be changed by an oral agreement, unless the agreement was wholly executed. That the plaintiff was not bound by any oral agreement or understanding made by its salesman at the time of the delivery

of the machinery, in conflict with the terms of the written order, not brought to the knowledge of the plaintiff and agreed to by it. That a written contract cannot be varied by parol, unless executed by the parties after its terms had been varied by agreement. The court held that those principles had no application, as the machine was delivered for trial only under the oral contract. As hereinbefore stated, defendants Wheeler and Moffat might have refused to accept the machinery, but, having accepted it, knowing its condition, they have no remedy except under the terms of the written contract. See Reeves v. Lewis (S. D.) 29 L.R.A.(N.S.) 82, 125 N. W. 289.

Finding no error in directing a verdict for the plaintiff, the order setting aside such verdict and granting a new trial is reversed, and the District Court directed to enter judgment for the plaintiff upon the verdict. All concur.

NORTHERN PACIFIC RAILWAY COMPANY v. HARRIET A. BARLOW.

(126 N. W. 233.)

Appeal and Error — Appealable Orders — "Involves Merits."

1. In November, 1903, at the instance and request of plaintiff's counsel, a stipulation was entered into embracing the facts relevant to all the issues except one. Such stipulation was entered into in good faith, without fraud or any attempt to deceive plaintiff's counsel, and after most careful consideration. Defendant's counsel in good faith relied upon such stipulation for nearly six years. In March, 1908, the cause was tried and submitted upon such stipulated facts and certain testimony relevant to the issue not covered by the stipulation. In May following the trial court made its findings of fact and conclusions of law favorable to plaintiff, and ordered judgment accordingly, which was entered pursuant thereto on May 14, 1908. Defendant's counsel thereafter took steps to settle a statement of the case preparatory to appealing to this court, and on July 25, 1908, on application of plaintiff's counsel, an order was made requiring defendant to show cause why an order should not be made vacating and setting aside such findings of fact, conclusions of law,

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Note.—On appealable and nonappealable orders, see note to Olson v. Mattson & Storby, 16 N. D. 233.

order for judgment, and judgment, and also why plaintiff should not be relieved from a portion of such stipulation of facts, or why such stipulation of facts should not be modified by eliminating such portion, or why the parties should not be relieved *in toto* from such stipulation. Upon the return of such order to show cause, and after the due hearing, the order complained of was made vacating the findings, conclusions, order for judgment, and judgment.

Held (1) that such order, in so far as it vacates the findings of fact and relieves the parties from such stipulation, is appealable under subd. 4, § 7225, R. C. 1905, upon the ground that it " 'involves the merits' of the action or some part thereof."

Grant of New Trial.

2. Whether such order, in effect, grants a new trial, and therefore is appealable under the provisions of subdivision 3 of said section, not determined.

Appeal and Error — Setting Aside Stipulation — Discretion of Trial Court.

3. While trial courts may, in the exercise of a sound judicial discretion, and in furtherance of justice, relieve parties from stipulations which they have entered into in the course of judicial proceedings, and while this court, sitting as a court of review, will not interfere with nor control the exercise of such discretion thus vested in trial courts, except in cases of a clear abuse of such discretion, the facts presented disclose a manifest abuse of discretion in granting the order appealed from.

Stipulation — Grounds of Vacating.

4. The making of such stipulations should be encouraged rather than discouraged by the courts, and enforced unless good cause is shown to the contrary, and applications to be relieved from stipulations should be seasonably made. Parties will not be relieved from such stipulations in the absence of a clear showing that the fact or facts stipulated are untrue, and then only when the application for such relief is seasonably made, and good cause is shown for the granting of such relief. The facts in the case at bar do not bring the application within these requirements.

Opinion filed April 15, 1910.

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

Action by the Northern Pacific Railway Company against Harriet A. Barlow. Judgment for plaintiff, and defendant appeals.

Reversed.

John Knauf, for appellant.

A stipulation of facts between litigants has the force of a contract, or a verdict of a jury, and requires the same, or as strong reasons, to set it aside or vacate it. Bingham v. Winona County, 6 Minn. 136,

Gil. 87; Rogers v. Greenwood, 14 Minn. 333, Gil. 256; 1 Greenl. Ev. 206; Gresley, Eq. Ev. 457, 460.

Stipulations are encouraged by courts. Lewis v. Sumner, 13 Met. 269; Burbank v. Rockingham Mut. F. Ins. Co. 24 N. H. 550, 57 Am. Dec. 300.

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

Stipulations have no particular sanctity on account of being made in judicial proceedings, and may be set aside when made under mistake of fact. Beaumont Pasture Co. v. Preston, 65 Tex. 448; Cent. Dig. col. 3122; McClure v. Sheek, 68 Tex. 426, 4 S. W. 552; Sperb v. Metropolitan Elev. R. Co. 57 Hun, 588, 32 N. Y. S. R. 934, 10 N. Y. Supp. 865; Levy v. Sheehan, 3 Wash. 420, 28 Pac. 748; Wells v. American Exp. Co. 49 Wis. 224, 5 N. W. 333; Barry v. Mut. L. Ins. Co. 53 N. Y. 536.

Relief will be granted when prejudice will result if the stipulation is allowed to stand. 20 Enc. Pl. & Pr. pp. 607, 664; Sperb v. Metropolitan Elev. R. Co. supra.

This action was commenced in September, 1902, for the purpose of quieting title to a certain strip of land used as a right of way by plaintiff Railway Company. The complaint is in the statutory form. In November of said year issue was joined by answer, in which defendant claims title to the land in controversy as the widow, sole heir, and devisee of one Frederick G. Barlow, deceased.

The other facts necessary to a proper understanding of the case are embraced in the following stipulation of facts which was entered into by counsel on November 8, 1903:

Stipulation of Facts.

The following facts are hereby stipulated to be true:

1st. That at all times since the 17th day of September, A. D. 1881, the Jamestown & Northern Railroad Company was, and now is, a railroad corporation, organized under and existing by virtue of the laws of the Territory of Dakota, now state of North Dakota, and chartered to build a line of railroad from Jamestown, North Dakota, in a northwesterly direction through Stutsman, Foster, Eddy, and Ben-

son counties to the west end of Devil's Lake. After its organization, as aforesaid, the said Jamestown & Northern Railroad Company authorized and directed the survey of a line of route for a railroad from a point near the city of Jamestown, in a northwesterly direction through the counties of Stutsman and Foster, in said territory of Dakota; said survey was commenced on the 1st day of September, 1881, and completed on the 30th day of October, 1881, and in its course passed across the land described in the complaint herein. A map or plat representing such survey was prepared, and on the 5th day of October, 1882, said company by resolution of its board of directors adopted said line of route so surveyed and as represented on said map as the definite location of a section of its line of route between the points mentioned.

2d. Thereafter said Jamestown & Northern Railroad Company transmitted to the Secretary of the Interior a copy of its articles of incorporation, certified by the secretary of Dakota territory; also a certificate of its organization, under the law of the said territory of Dakota, made by its secretary, and an affidavit of its president, designating the officers of said corporation, all of which papers were received in the Department of the Interior on January 26th, 1883.

3d. The land in controversy in this action is situated in the land district of the United States land office at Fargo, and has been so situated at all times. On June 7th, 1893, the records of the United States land office at Fargo, North Dakota, were destroyed by fire. At this time the records of the land office do not contain any profile or map of plaintiff's railroad over the land in question. Tract book No. 15, of said land office, is a copy of the original tract book which was destroyed by fire on June 7th, 1893, which said copy now contained in the land office at Fargo, was furnished to said office by the General Land Office of the United States, and was made up from the records there kept. Upon such tract book No. 15, and in the plat therein contained relating to township 147, range 66, there is traced across said plat in red-ink marking, a line extending through said township, which line running upon said course bears small cross marks such as is generally used in map making, to indicate a railroad, and which line also has connected with it in red ink the words "Jamestown Northern," with a red-ink arrow pointing north parallel with said line. In the same tract book No. 15, the other plats of townships, both north and

south of the one last referred to, are found similar lines with similar markings, and it all put together shows a continuous line of something apparently indicating a railroad and which is called "Jamestown Northern." In the operation of United States land offices, all original documents such as homestead entries and homestead and pre-emption proofs, are regularly forwarded by the local land office to the General Land Office at Washington, where the same are kept as original records.

A profile and map were made containing the following indorsements, and no others, namely: "Part of map of definite location of Jamestown & Northern Railroad from junction with Northern Pacific Railroad to north line of Foster county, Dakota territory, Brainard, December 30th, 1882. P. H."

State of Minnesota, } ss.
County of Crow Wing. }

A. Anderson, of Brainard, in said county and state, being duly sworn, says that he is the engineer in chief of the Jamestown & Northern Railroad Company; that the survey of the line or route of said road from its junction with the Northern Pacific Railroad to the north line of Foster county, and territory of Dakota, was made under his direction as engineer in chief of the company, and under its authority, commencing the 1st day of September, 1881, and ending on the 30th day of October, 1881, that such survey is accurately represented on the accompanying map. A. Anderson, Engineer in Chief.

Subscribed and sworn to before me this 28th day of December, 1882.

Rich Relf, Notary Public.

I, George Adams, do hereby certify that I am the president of the Jamestown & Northern Railroad Company: that A. Anderson, of Brainard, who subscribed the foregoing affidavit, is the chief engineer of the company; that the survey of the line of route of the company's road as accurately represented on this map, was adopted by the company by resolution of its board of directors, on the 5th day of October, 1882, as the definite location of the road, from its junction with the Northern Pacific Railroad to the north line of Foster county, in Dakota territory, and that the map has been prepared to be filed for the approval of the Secretary of the Interior in order that the company may obtain the benefit of the act of Congress, approved March 3d,

1875, entitled, "An Act Granting to Railroads the Right of Way through the Public Lands of the United States."

Geo. H. Adams, President of the Jamestown & Northern Railroad Company.

Attest: Sidney Starbuck,
Secretary.

[Seal.]

Z. B. S., Department of the Interior, June 26th, 1883, J. K. McC. Approved subject to any existing rights of the Northern Pacific Railroad Company.

Department of the Interior, General Land Office, Washington, D. C., April 29th, 1897.

I, Binger Herman, Commissioner of the General Land Office, do hereby certify that the annexed tracing is a true and literal exemplification of a part of a map of definite location of the Jamestown & Northern Railroad, approved by the Secretary of the Interior, on June 26, 1883, and now on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year first above written.

Binger Herman,
Commissioner of General Land Office.

[Seal.]

That the map of definite location above referred to, and approved by the Secretary of the Interior on June 26, 1883, was filed in the United States land office at Fargo, sometime during the month of August, 1883.

4th. By deed of conveyance properly executed and delivered, the said Jamestown & Northern Railroad Company duly conveyed to the plaintiff herein, on April 21st, 1898, the line of railroad of the said Jamestown & Northern Railroad Company, including the road as constructed over the land described in the complaint herein, and including all of the right, title, and interest of the said Jamestown & Northern Railroad Company, in and to the right of way occupied by it over the land described in the complaint, and that thereafter said deed of conveyance was duly recorded in the office of the secretary of the state of North Dakota, and that the plaintiff herein has succeeded to all the

rights of the said Jamestown & Northern Railroad Company, if any it had, in and to the right of way occupied by the defendant over the land mentioned in the complaint; that the southwest quarter (S. W. ¼) of section six (6), township one hundred and forty-seven (147), range sixty-six (66), Foster county, Dakota territory, was public land of the United States; said tract was surveyed by the government sometime prior to October 2d, 1884, and on said last-mentioned date the plat of survey thereof and of the township in which said quarter section is situated, was recorded in the United States land office at Fargo, North Dakota.

5th. Plaintiff has not, nor did its predecessor in interest at any time institute proceedings or resort to any process whatever under the state or Federal laws, to condemn a right of way across said land, or to divest defendant or her predecessors in interest of her or their title, or any predecessor claim that she or they might have to said land, other than the filing of the map of definite location, as hereinbefore set forth. Plaintiff and its predecessor in interest, the Jamestown & Northern Railroad Company, have taken for use as a right of way upon said land, a strip 200 feet wide, being 100 feet on each side of the center line of its said railroad, and extending across said land, and which strip includes ———— acres; defendant and her predecessors in interest have not at any time consented to the taking or use of said land by plaintiff, and has not received any compensation for said taking or for the injury and damage, if any, inflicted thereby.

6th. On and prior to the 22d day of July, A. D. 1883, the land in controversy, to wit: southwest quarter (S. W. ¼) of section six (6) in township one hundred and forty-seven (147) north of range sixty-six (66), west of the fifth principal meridian, was unsurveyed public land of the United States, agricultural in character, not reserved from sale and was subject to settlement under the pre-emption law of the United States then in force. On said 22d day of July, A. D. 1883, Frederick G. Barlow was a citizen of the United States, over the age of twenty-one years, had never had the benefit of the pre-emption laws of the United States, was not the proprietor of 320 acres of land in any state or territory, had not quit or abandoned his own land or his residence thereon to reside on the said land above described, and was, in all respects, legally qualified to initiate proceedings under the pre-emption

laws of the United States to obtain title to 160 acres of land agricultural in character from the public lands of the United States.

7th. On said 22d day of July, A. D. 1883, intending to make entry of the said land herein described when the same was surveyed, and to acquire title to the same by virtue of compliance with the pre-emption laws of the United States, said Frederick G. Barlow settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track laid or line of railroad in operation across said land at any place, nor had plat or profile of the section of railroad extending across said land hereinbefore referred to been filed in the United States district land office at Fargo.

8th. From the date of his said settlement, said Frederick G. Barlow continuously resided on said land, and made the same his home, and cultivated and improved the same, until a survey thereof was made; and on the 8th day of October, A. D. 1884, and within ninety days after the receipt at said district land office of the approved plat of the township embracing his said pre-emption settlement, said Frederick G. Barlow filed in said district land office at Fargo, a written statement describing the said land so settled upon him and declaring his intention to claim the same in accordance with the pre-emption laws of the United States, alleging settlement upon said tract as of the 22d day of July, A. D. 1883, as aforesaid.

9th. Thereafter, having continued his residence upon and improvement of said land, according to law, on or about the 6th day of July, A. D. 1885, after due notice of his intention so to do, said Frederick G. Barlow made final proof of his entry, settlement, residence upon, and improvement of said land as aforesaid, and the payment required by law, and submitted the same to the register and receiver of said district land office at Fargo; and on said 6th day of July, A. D. 1885, received from said district land office a final certificate of entry of said land. Thereafter, pursuant to the said settlement, entry, and final proof of said Frederick G. Barlow upon said land, as aforesaid, there was issued and delivered to him by the government of the United States, a patent, dated November 7th, A. D. 1888, granting and conveying to him in absolute fee simple the said land by the description hereinbefore given, without limit, reservation, or deduction of any kind or to any extent whatever.

10th. Said Frederick G. Barlow continued to hold the said land under the grant and title thereto acquired by him as hereinbefore set forth, until the time of his death, in or about the year 1901; at which time he was, with the defendant herein, occupying said land as a homestead under the law of this state. The defendant is the widow and sole heir and devisee of said Frederick G. Barlow, and is still occupying said land as her homestead, and is invested with all estate and title thereto acquired and held by said Frederick G. Barlow at the time of his decease.

Dated November 8, A. D. 1903.

Ball, Watson, & Maclay,
Attorneys for plaintiff.
S. E. Ellsworth,
Attorney for defendant.

The cause was not brought to trial until March, 1908, at which time the same was tried upon the above stipulation and certain testimony relative to the date when the railway company constructed its grade and roadbed over the land in question. On May 11, 1908, the trial court made findings of fact and conclusions of law favorable to plaintiff, and ordered judgment accordingly, and judgment was rendered pursuant thereto on May 14, 1908.

Thereafter, and on July 25, 1908, an order was made requiring defendant to show cause why an order should not be made vacating and setting aside such findings of fact, conclusion of law, order for judgment and judgment, and also why plaintiff should not be relieved from the last clause of the 7th paragraph of the stipulation of facts; and why said stipulation of facts should not be modified by excluding and striking therefrom said clause; or at the opinion of the defendant why all of said stipulation should not be vacated and set aside and both parties relieved therefrom. Such order to show cause was issued upon the affidavit of J. S. Watson, one of plaintiff's attorneys, and on the return thereof defendant's attorney submitted his affidavit in opposition to the granting of the relief prayed for. These affidavits are quite lengthy and need not be set out at length. The affidavit of plaintiff's counsel is to the effect that such stipulation was entered into, containing the clause aforesaid, through mistake, inadvertence, and excusable

negligence, and that the clause thus incorporated in the stipulation is not according to the facts. The affidavit of defendant's counsel sets out, in detail, the correspondence between the respective counsel had prior to entering into such stipulation, and tends to refute the contention that such stipulation was entered into through mistake or inadvertence on the part of plaintiff's counsel. Such affidavit also contains the following recitals:

"At all times since the beginning of the above-entitled action affiant has proceeded upon the theory that, at the time of the settlement of Mr. Barlow upon the land involved, the map of definite location of the railway extending across the land had not been filed in the United States district land office at Fargo. The defense to said action was prepared upon that theory, and had it been shown by any satisfactory proof that this map or profile had been filed in the United States district land office at Fargo prior to July 22d, 1883, affiant would have advised against any defense to the action. He believed at all of the times hereinbefore mentioned that the point at issue in this case was identical with that in the Doughty Case, and was induced to bring the case to trial in March, 1908, solely upon that consideration. For a period of about five years he has acted upon the belief that the clause contained in the latter part of the 7th paragraph of the stipulation of fact was executed, and intended to be executed, in good faith by counsel for plaintiff, and has based his entire action in the case largely, if not entirely, upon this important and material element of the stipulation of fact.

"The admission by plaintiff of the matter contained in this clause of the stipulation of fact was an inducement to affiant to execute this stipulation on his part, and that if said clause had not been included in the stipulation of fact it would not have been executed on the part of affiant. Affiant has at all times during the continuance of said action relied and acted upon the truth of the matter contained in this clause, and, if a stipulation of fact had not been made, could have supplied proof upon the trial of the facts in said clause contained."

Thereafter, and on August 29, 1908, the trial judge made an order vacating and setting aside the findings of fact, conclusions of law, order for judgment, and judgment, and also vacating and setting aside *in toto* the stipulation of facts aforesaid, and relieving both parties from the

same. From such order this appeal is prosecuted. Appellant complains of that portion of the order merely which vacates the stipulation of facts and relieves the parties from the force and effect thereof.

FISK, J. (After stating the facts as above). It is strenuously insisted by respondent's counsel that the order complained of is not appealable. As to that portion of the order vacating the judgment, such contention is no doubt sound. The judgment was adverse to defendant, hence she was not aggrieved by the order vacating the same, but the order goes much farther than a mere vacation of the judgment; it sets aside the findings of fact and, in fact, grants a new trial. Not only this, but it goes farther and nullifies and destroys a solemn stipulation entered into between the parties covering most of the facts relevant to the issues involved and relegates the parties to the original positions in the action at the time the answer was served nearly six years prior thereto. If permitted to stand, such order necessitates, not only a retrial of the case from the beginning, but deprives defendant of the benefit of such stipulation, compelling her to entail expense and trouble incident to procuring evidence covering the issue disposed of by the stipulation. We deem it reasonably clear that such order "involves the merits of the action or some part thereof" within the meaning of subd. 4, § 7225, Rev. Codes 1905, and is therefore appealable. It would, indeed, be strange if the rule was otherwise, as it would result in depriving defendant of the right to have such order reviewed. Important and substantial legal rights of defendant are destroyed by such order, and no redress is afforded her unless she may appeal therefrom. Manifestly no right of review is afforded her under the provisions of § 7226, Rev. Codes. That section reads: "Upon an appeal from a judgment the supreme court may review any intermediate order or determination of the court below, which involves the merits *and necessarily affects the judgment.*" Such order may or may not affect the ultimate judgment to be rendered, and under the plain wording of said section the order is not reviewable on an appeal from the final judgment, unless it necessarily affects such judgment. The case of Bolton v. Donavan, 9 N. D. 575, 84 N. W. 357, is in point upon the last proposition and also sustains our views above expressed to the effect that the order complained of is appealable. Subdivision 4 of

§ 7225, supra, is there construed, and it is held that the phrase "involves the merits" must be interpreted so as to embrace orders which pass upon the substantial legal rights of the suitor, whether such rights do, or do not relate directly to the cause of action or subject-matter in controversy, and authorities are therein cited from the states of Wisconsin, South Dakota, and Minnesota in support of the rule of construction thus announced. In addition to the authorities cited in Bolton v. Donavan, see the recent case of Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124, to the same effect and which cites with approval the two early Minnesota cases criticized by respondent's counsel in their brief.

The authorities relied upon by respondent's counsel in support of their contention that the order, in so far as it vacates the stipulation of facts, is merely an interlocutory order, and not appealable, are not in point under a statute like ours, and it would serve no useful purpose to review them here.

In support of our view that the order is appealable, see 20 Enc. Pl. & Pr. p. 669, and cases cited under notes 10 and 11. It will be noticed that the cases therein cited are all from the states of New York, Minnesota, and Wisconsin, each of which have a statute the same as subd. 4, § 7225, supra.

Our conclusion upon this feature of the appeal is that the order, in so far as it vacates and sets aside the findings of fact and relieves the plaintiff of the force and effect of the stipulation, is appealable upon the ground that it involves the merits within the meaning of subd. 4, § 7225, aforesaid. In view of this conclusion we need not determine whether it is also reviewable under the last clause of subdivision 3 of said section, upon the ground that it, in effect, grants a new trial.

This brings us to the merits. That trial courts may, in the exercise of a sound judicial discretion for good cause shown and in furtherance of justice, relieve parties from stipulations which they have entered into in the course of judicial proceedings, is elementary. It is equally well settled that an appellate court, sitting as a court of review, will not interfere with nor control the exercise of such discretion thus vested in the trial court, except in cases of a clear abuse of such discretion. Authorities need not be cited upon propositions so well established. A number of authorities are cited and relied on by respond-

ent's counsel in support of their contention that the stipulation was properly vacated. We have examined such authorities, and find nothing therein contained which furnishes much light or assistance under the facts here presented. They merely announce in a general way the principle that trial courts possess the power to relieve and will, in the exercise of a sound discretion, relieve a party from the effects of stipulations of facts, not true, if, as stated in Richardson v. Musser, 54 Cal. 196, "the application is made in proper time;" or, as stated in Keens v. Robertson, 46 Neb. 837, 65 N. W. 897, "when their enforcement would result in serious injury to one of the parties, and the other party would not be prejudiced by their being set aside."

We take it, however, to be reasonably well settled that the making of such stipulations should be encouraged by the courts, rather than discouraged, and enforced by them unless good cause is shown to the contrary. Lewis v. Summer, 13 Met. 269; Lincoln v. Lincoln Street R. Co. 67 Neb. 469, 93 N. W. 766. See also 20 Enc. Pl. & Pr. p. 668, and cases cited. The case of Lincoln v. Lincoln Street R. Co. supra, is particularly in point under a state of facts quite analogous to those in the case at bar. There, a stipulation had been entered into embracing thirty-eight paragraphs covering most of the issues. At the trial plaintiff asked to be relieved from a portion of such stipulation upon the ground that the facts stipulated were not true, and counsel claimed to have been misled in agreeing to and signing the same. In sustaining the ruling of the trial court in refusing to relieve plaintiff therefrom, the court, among other things, said: "It would also seem that the application came too late to be entertained by the court. The plaintiff had made its case and rested. It had put in evidence all of the stipulation, except that portion of it which defendants were then attempting to introduce, and it would have been unjust at that stage of the proceedings to deny the defendants the benefit of these paragraphs. Yet counsel insist that the court, in the exercise of its discretion, ought to have sustained the objection and granted their request. We cannot assent to this proposition. Paragraph 15 fixed the time when the bonds and mortgage in question were delivered to the New York Security & Trust Company, and stipulated that they were sold to bona fide purchasers for value, without knowledge or notice of any of the matters mentioned in the stipulation, except such

constructive notice, if any, as was imparted by the corporate records of the Street Railway Company, and of the city of Lincoln and the laws of this state. Paragraph 16 contains practically the same statements as to the bonds and mortgage executed and delivered to the New York Guaranty & Indemnity Company. . . . If the court had sustained the objection and granted the request, the result would have been a mistrial. It would have rendered it necessary to retry the whole case, and to require this to be done would have been an abuse of discretion. Stipulations and agreements like the one in question should be encouraged and sustained by the court." Citing numerous authorities, including Van Horn v. Burlington, C. R. & N. R. Co. 69 Iowa, 239, 28 N. W. 547, from which case they quote with approval the following language: Where a party to a suit has entered into a written stipulation admitting that a town ordinance was valid and in full effect at the time of an accident, he cannot be relieved from it simply on the ground that he was ignorant when he entered into it, and that the ordinance was invalid for want of publication. Ryan v. New York, 154 N. Y. 331, 48 N. E. 512, is also quoted from with approval.

Parties should not be relieved from stipulations except for good cause shown, and the application should be seasonably made. Delay in asking for relief may defeat the application. 20 Enc. Pl. & Pr. pp. 662, 666, and cases cited.

Applying these fundamental and well-established rules to the facts in the case at bar forces us to the conclusion that the making of the order was a gross abuse of discretion. The application to be relieved from the stipulation was made nearly five years after the stipulation was entered into. Such stipulation was entered into at the solicitation of respondent's counsel, in the utmost good faith, without the least attempt to mislead, or taking undue advantage of respondent's counsel by counsel for defendant, and after mature deliberation by both counsel. For nearly five years defendant's counsel relied in good faith upon such stipulation as stating the true facts, and the cause was tried, submitted, and decided without any intimation whatsoever that such stipulation did not recite the true facts. Not only this, but the showing on which such order was granted nowhere makes it appear that the facts thus stipulated are untrue. On the contrary it is stated in the affidavit of plaintiff's counsel that there is no evidence available to show what

the true facts are. Opposed to this is the affidavit of defendant's counsel, positively stating, in effect, that the facts thus stipulated are true, and that it was definitely understood and agreed that the sole question left open for determination in the trial was the date on which the Railway Company constructed its grade or roadbed over said land, and the only evidence offered in the trial, aside from the stipulation, related to such issue. Counsel for plaintiff do not contend that, if relieved from such stipulation, they will be able, upon another trial, to establish the fact to be other or different than as stipulated. They merely contend, in fact, that they are entitled to have such fact rest on a mere presumption or inference, but there is no reasonable probability that the fact thus stipulated can be shown to be untrue.

In view of the showing made, we are entirely clear that the granting of the order complained of, in so far as it relieved plaintiff from the stipulation of facts, was an abuse of discretion.

For these reasons the order is reversed. All concur.

ELLSWORTH, J., being disqualified, did not participate; HONORABLE W. C. CRAWFORD, of the tenth judicial district, sitting in his place by request.

THOMAS CASEY v. FIRST BANK OF NOME.

(126 N. W. 1011.)

Appeal and Error — Appellate Court Adheres to Theory upon Which Case was Tried Below.

1. Action to recover damages for the conversion of certain grain. The undisputed facts disclose that the grain was raised by one A under the ordinary cropper's contract entered into with plaintiff, the owner of the land, by the terms of which the title to all crops was reserved in plaintiff as security for the performance by A of the terms of the contract and until a division of the grain. Prior to such division defendant, with the consent of A, took and appropriated 405 bushels of wheat which, upon full compliance with the contract by A and the payment of all advances made by plaintiff to him, would belong to A. Counsel upon both sides tried the case upon the theory that plaintiff could not recover if the equitable title to said wheat was in A. In other

words, that the test of plaintiff's right to recover should be whether anything was owing by A to plaintiff under the contract. *Held*, that such theory must prevail in this court, and the questions presented on the appeal determined in accordance therewith.

Appeal and Error — Verdict — Conflicting Evidence — New Trial — Finding of Jury Sustained.

2. Evidence examined, and *held* that there is a substantial conflict upon the issue as to whether, at the date of the alleged conversion, A was indebted under the contract to plaintiff in any sum. The verdict of the jury having substantial support in the evidence, this court will not weigh the conflicting evidence nor disturb the order of the trial court denying plaintiff's motion for a new trial.

Appeal and Error — New Trial — Discretion of Court — Abuse of Discretion.

3. The application for a new trial upon the ground of alleged insufficiency of the evidence to support the verdict is addressed to the sound discretion of the trial court, and the order of that court denying such new trial will not be reversed unless the record discloses a case of abuse of discretion. No abuse of discretion is shown.

Trial — Instructions — Burden of Proof.

4. Certain instructions of the court to the jury relative to the burden of proof, and also as to certain matters which the jury should consider in determining the status of the account between plaintiff and A, considered, and *held*, for reasons stated in the opinion, not erroneous.

Opinion filed May 14, 1910.

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

From a judgment in defendant's favor and from an order denying a motion for a new trial, plaintiff appeals.

Affirmed.

A. P. Paulson, for appellant.

Page & Englert, for respondent.

FISK, J. Plaintiff sues to recover damages for the conversion by defendant of 405 bushels of wheat, alleged to have been the property of plaintiff at the date of such alleged conversion. The answer amounts to a general denial. The issues were tried to a jury, and a verdict in defendant's favor was returned, upon which verdict a judgment was entered accordingly. Thereafter a motion for a new trial

was made and denied, and the appeal is both from the judgment and from the order denying the motion for a new trial.

The grain in controversy was grown, during the season of 1906, upon land owned by the plaintiff. One Abrahamson raised said grain under the usual cropper's contract theretofore entered into between himself and plaintiff, by the terms of which plaintiff was to furnish the seed and pay one half of the threshing-machine bill. Abrahamson was to farm the land at his own expense and to pay all bills except as above stated, and he was to plow back a certain portion of the land in the fall. The title of all grain was to remain in plaintiff until such plowing was done and a settlement made, when Abrahamson was to receive one half of all crops thus raised.

It is an undisputed fact in the case that defendant bank took and appropriated, by Abrahamson's consent, 405 bushels of the wheat, applying the proceeds upon certain indebtedness due by Abrahamson to the bank. At the time said wheat was appropriated no division had been made of the grain, nor had any settlement between plaintiff and Arbahamson been effected. The case was tried in the court below by both parties, upon the theory that no recovery could be had by plaintiff if, at the time this grain was appropriated by the defendant, Abrahamson was equitably entitled to such grain. Such theory must prevail in this court in disposing of the questions presented. Counsel, in adopting such theory, were, no doubt, attempting to follow the rule in such cases as announced by this court in Aronson v. Oppegard, 16 N. D. 595, 114 N. W. 377; but in that case it was held merely that it is proper to show in mitigation of damages the extent of plaintiff's interest in the grain, and to this end defendant may show the status of the account between plaintiff and the cropper under the contract between them. Manifestly, as against defendant, plaintiff should recover no more damages than he has suffered by reason of the taking and appropriating of the grain as aforesaid. The extent of his interest measures the extent of the detriment suffered by him by reason of the taking and appropriating of such grain, with the exception of any special damages which are alleged and shown. The theory adopted by counsel is but another way of invoking the principle above stated.

The first nine assignments of error are mere duplicates of the so-called specifications of error in the abstract. Assignments 1 to 6 in-

clusive relate to the question of the sufficiency of the evidence to support the verdict. It is urged by respondent's counsel that such assignments constitute mere statements of what the ultimate facts show, and that they are insufficient in that they fail to point out the particulars wherein the evidence does not sustain the verdict. Such criticism is not wholly without merit; but it is unnecessary to pass upon such objections, as the question of the sufficiency of the evidence to support the verdict is properly raised under other assignments.

Assignment numbered 11 predicates error upon the denial of the motion of defendant for a new trial. Such assignment requires a review of such specifications as are properly made and incorporated in the settlement of case, and we think that the so-called specifications numbered 5 and 6, incorporated in the statement of case, are sufficient to raise such question.

Our first inquiry, therefore, is as to whether there is any sufficient evidence to warrant the jury in returning the verdict complained of. Practically, the only contested issue of fact in the case was whether, at the date the alleged conversion took place, Abrahamson was indebted to plaintiff in any sum for advances made or otherwise by the latter to him under the cropper's contract aforesaid. We are agreed that this question must be answered in the negative. It would serve no good purpose to review the testimony at length. Suffice it to say that, after due consideration of the record as presented to this court, we are entirely satisfied that the verdict has substantial support in the evidence. This being true, such verdict will not be disturbed by this court. The rule is firmly settled that this court will not weigh conflicting evidence, nor disturb the order of a trial court granting or denying a new trial, where there is a substantial conflict in the testimony. The application for a new trial upon the ground of the alleged insufficiency of the evidence to support the verdict is addressed to the sound discretion of the trial court, and the order of that court will not be reversed unless the record discloses a case of abuse of discretion. Gull River Lumber Co. v. Osbrone-McMillan Elevator Co. 6 N. D. 276, 69 N. W. 691; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Libby v. Barry, 15 N. D. 286, 107 N. W. 972; Bristol & S. Co. v. Skapple, 17 N. D. 271, 115 N. W. 841.

The only other assignments which are discussed in appellant's brief relate to the correctness of certain instructions of the court to the jury. The portion of the instruction first complained of is as follows: "The burden is on Mr. Casey to show that he is the owner of the wheat; if he cannot show that, your judgment will be for the State Bank of Nome. As I told you, the burden is on Mr. Casey to show the facts that he has alleged, by a fair preponderance of the evidence." The other instruction complained of is the following: "In order that there may be no misunderstanding, you will take into consideration all of the evidence as was admitted here between Mr. Abrahamson and Mr. Casey; that is, regarding the wheat, flax, oats, and barley, and board and hiring of the horses and wagons; you will take these items all into consideration and arrive at a standing of account between Mr. Casey and Mr. Abrahamson, and determine whether or not Mr. Casey was entitled to this particular wheat which was taken."

The instruction first complained of is, we think, not subject to criticism. It, in a general way, stated the law correctly. If plaintiff desired specific instructions relative to the burden of proof as to matters in mitigation of damages, or, in other words, as to the nature and extent of plaintiff's special interest in the property, if any, under the cropper's contract, he should have requested such instructions. Failing to do so, he is not in a position to complain.

Regarding the other portion of the instruction complained of, we discover no error. In the first place, the alleged error in the giving of such instruction is not specified with sufficient particularity. The instruction is challenged solely on the ground that it includes within the matters which are to be taken into consideration by the jury the question of the board bill, but this feature of the instruction was not particularly called to the attention of the trial court by the specification of error contained in the settled statement of case. Furthermore, the witness Abrahamson, near the close of the trial, was permitted to testify without objection that Casey owed him a balance of $239.50 for board, and in the light of this testimony the instruction aforesaid was entirely proper.

Finding no error in the record, the judgment and order appealed from are affirmed. All concur.

THE STATE OF NORTH DAKOTA v. WILLIAM WRIGHT.

(126 N. W. 1023.)

Appeal and Error — Trial — Criminal Law — Directing Acquittal.

1. Error cannot be predicated upon the refusal of the court at the close of the state's case to advise an acquittal as the jury is not bound by such advice, and the court cannot, on such application, say, as a matter of law, that the evidence is insufficient to support a conviction, nor prevent the jury from giving a verdict, but such question may be disposed of by the court on motion for new trial in case of conviction.

Criminal Law — Briefs — Rules of Court.

2. Assignments of error not supported in appellant's brief by argument or citation of authorities will not be noticed by this court. Rule 14 (10 N. D. xlvi) which is applicable to the preparation of briefs in criminal causes, among other things provides: "In the body of his brief appellant shall present his reasons in support of each error assigned, with a concise statement of the principles of law applicable thereto with authorities supporting the same, treating each assignment relied upon separately, and such errors as are merely assigned and not supported in the body of the brief by reasons or authorities will be deemed to have been abandoned." Such rule will be adhered to and enforced unless exceptional reasons appear why the same should be relaxed. No such reasons appear in the case at bar.

Criminal Law — Appeal and Error — Record Presumed Free from Error.

3. The presumption obtains in criminal as well as civil appeals that the record is free from error, and the appellant has the burden of affirmatively showing the existence of error.

Criminal Law — Motion in Arrest of Judgment — Sufficiency of Information.

4. Following the rule announced in State v. Johnson, 17 N. D. 554, 118 N. W. 230, *held*, that when the sufficiency of the allegations in an information is first challenged by motion in arrest of judgment, the same will be construed with less strictness than when the sufficiency thereof is raised by demurrer; and where the information states facts constituting an offense in general words and substantially in the language of the statute defining the offense, the information will be *held* sufficient as against attack by motion in arrest of judgment.

Opinion filed May 14, 1910.

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

From a conviction of the crime of escaping from prison, defendant appeals.

Affirmed.

W. L. Smith, for appellant.

Andrew Miller, Attorney General, *R. N. Stevens*, and *H. R. Berndt*, for respondent.

FISK, J. Appellant was convicted in the district court of Burleigh county of the crime of escaping from prison. He thereafter moved for a new trial and in arrest of judgment, which motions were denied, and he has appealed from the judgment of conviction and from the orders denying such motions.

Numerous alleged errors are assigned in appellant's brief, but it will be unnecessary to notice them all in detail. Prior to noticing the various assignments of error, we will briefly refer to the facts.

Appellant, at the time of the alleged offense, was serving a term in the penitentiary pursuant to a judgment of the district court of Grand Forks county. He and others had been working in a hay field connected with the penitentiary grounds during the day under the supervision of one of the penitentiary guards, and, in the evening, as the guard and others were leaving such field to return to such penitentiary, appellant and another were ordered by the guard to remain in the field for a short time for the purpose of raking up a little hay, after which they were to follow the guard to the penitentiary. Instead of doing as thus directed, they ran away, and were thereafter captured some distance away.

It is claimed, first, that the trial court erred in denying defendant's motion made at the close of the state's case to advise a verdict of acquittal, the contention being that the state had failed to establish its case by showing that the escape was accomplished by means of fraud as alleged. A sufficient answer to such contention is that error cannot be predicated upon such a ruling. Section 10017, Revised Code, which is the same as § 1118 of the Penal Code of California, provides: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice," nor can the court, for any cause, prevent the jury from giv-

ing a verdict. The supreme court of California has decided, and we think correctly, that an exception to the refusal of the court to advise an acquittal is not authorized. People v. Lewis, 124 Cal. 551, 553, 45 L.R.A. 783, 57 Pac. 470. See also People v. Daniels, 105 Cal. 262, 38 Pac. 720; People v. Stoll, 143 Cal. 689, 77 Pac. 818.

In People v. Lewis, Temple, J., in delivering the opinion of the court said: "I think no exception is authorized to a refusal of the court to give such advice. Had it been given, the jury would not be bound to obey it. If the defense was satisfied that there was a total lack of evidence upon some essential issue, it could have submitted the case upon the evidence of the prosecution. But, as it did not do so, it was proper for the court on just terms to allow the defect to be supplied at any time before the final submission of the case."

In People v. Daniels, supra, it was held that "the obvious effect of this provision of the Penal Code is to take from the court the power to determine, as a matter of law, at the close of the evidence for the prosecution, that the evidence is insufficient."

We do not overlook the fact that in the later case of People v. Ward, 145 Cal. 736, 79 Pac. 448, the rule announced in People v. Lewis, supra, was disapproved. The decision is, however, by a divided court; but two of the judges concurred generally with the writer of the opinion, while Judge Angellotti, McFarland, and Van Dyke merely concurred in the judgment, and Shaw, J., dissented. We deem the rule announced by Temple, J., in People v. Lewis, both sound and supported by the weight of authority. It is entirely clear that under the provisions of § 10017, Rev. Codes 1905, the court is powerless to take the case from the jury for any cause. "It may advise the jury to acquit the defendant. But the jury are not bound by the advice, nor can the court, for any cause, prevent the jury from giving a verdict." In the light of this statutory language, it would seem plain that error cannot be predicated upon such adverse ruling. By said statute the legislature has vested in the court the power, in its discretion, to advise an acquittal, but no legal duty to give such advice is thereby imposed. Hence, error cannot be assigned upon a refusal to so advise the jury. The following authorities lend support to these views: McCray v. State, 45 Fla. 80, 34 So. 5; Goldman v.

State, 75 Md. 621, 23 Atl. 1097; State v. Lynn, 3 Penn. (Del.) 316, 51 Atl. 878; State v. Brown, 72 N. J. L. 354, 60 Atl. 1117.

In McGray v. State it was said: "While the trial judge would have the right, after all the evidence in a criminal case had been submitted, if he was clearly satisfied that all of said evidence would not warrant or support a verdict of guilty, to instruct the jury to acquit, this is a matter resting entirely within the discretion of the trial judge, and no error can be predicated upon his failure or refusal so to do."

From the opinion in Goldman v. State we quote as follows: "The second exception, which we shall consider with the first, was taken to the refusal of the court to instruct the jury to render a verdict of not guilty as to John Murphy, on the ground that the evidence was insufficient to convict him. Now, it is too well established in this state to be seriously questioned that 'in the trial of the criminal cases the jury shall be the judges of law as well as of fact' . . . (Citing numerous cases). In all of these cases it was held that a jury would not be bound by any instructions given by the court, but could disregard them. The court may, in its discretion, advise the jury as to the law and legal effect of the evidence, but is not bound to do so, and, being a matter entirely within its discretion, its refusal to do so cannot be reviewed by this court."

In State v. Lynn defendant asked the court, at the conclusion of the state's evidence, to instruct the jury to acquit the defendant, and in refusing an exception to an adverse ruling the court said: "You cannot note an exception to this. . . . You can reach this in another way. When we come to charge the jury, you can then ask the court to direct the jury to return a verdict of not guilty. Then you can except properly. But this is not the place nor the time."

In State v. Brown, supra, we find the following language: "The seventh cause for reversal is that the trial court refused to direct a verdict for the defendant, notwithstanding a motion was made therefor. The direction of a verdict in a criminal case is a matter resting in the discretion of the court, and the refusal of the court to so direct is not reviewable on error."

It is next contended that the court erred in denying defendant's motion for a new trial. Counsel for appellant, in support of his con-

tention, merely refers us to the several alleged errors set out in his motion, without in any manner supporting by argument or citation of authorities, and he assumes it to be the duty of this court to search the record to ascertain whether any or all of such alleged errors are well founded. We quote from counsel's brief: "We take it to be the duty of the attorneys appearing in the trial of a criminal case, on behalf of the state as well as of the defendant, who are officers of the court, and also the duty of the court, to see that an accused has a fair trial, and that he is not deprived of his personal liberty without due process of law. So that, if the record in this case as presented to this court in any portion of it discloses that some part or parts of the procedure by which the judgment appealed from was reached was contrary to the law governing such matters, then this court will rectify such error by reversing the decision, whether or not we in our brief present reasons and authorities for so doing. Pursuant to this thought we invite the court's particular attention to the record in this case and the assignment of errors on pages 18 and 19 of this brief." We do not understand the rule to be as thus stated by counsel. By rule 20 of this court the preparation of briefs in criminal cases is governed (with certain modifications not here material) by the rules regulating the preparation of briefs in civil causes, and rule 14 relating to briefs in civil causes not to be tried anew on appeal provides, among other things: "In the body of his brief appellant shall present his reasons in support of each error assigned, with a concise statement of the principles of law applicable thereto with authorities supporting the same, treating each assignment relied upon separately, and such errors as are merely assigned and not supported in the body of the brief by reasons or authorities will be deemed to have been abandoned." We know of no reason why such rule should be relaxed in favor of the appellant in the case at bar. The presumption always obtains in criminal as well as civil appeals, that the record is free from error, and the appellant, who alleges the existence of error, has the burden of affirmatively showing that such error exists. Appellant has signally failed in this regard.

In his brief counsel for appellant has stated numerous abstract propositions of law, citing authorities in support thereof, but he fails to point out whether they are applicable to the state of the record on this appeal.

The only remaining assignment requiring notice relates to the ruling of the court in denying defendant's motion in arrest of judgment. This is apparently the chief ground relied on for a reversal, and the contention, in brief, is that the information being in the language of the statute merely is not sufficient. The sufficiency of the information was first challenged by the motion in arrest of judgment. This being true, it is a settled rule of this court that the sufficiency of the allegations will be construed with less strictness than when raised by demurrer. State v. Johnson, 17 N. D. 554, 118 N. W. 230. It was also settled in said case that "where an information states facts constituting an offense in general words, and in the language of the statute defining the offense, the information is sufficient as against a motion in arrest of judgment, although some of the necessary allegations are stated or appear by inference, and not by positive allegation." The allegations of the information in the case at bar are substantially in the language of the statute and follow the rule above announced, we must hold the information sufficient. By what is above stated, we do not intend to intimate that the information would not be held sufficient, even as against an attack by demurrer. Upon this question no opinion is expressed, but see Com. v. Malloy, 119 Mass. 347; 2 McClain, Crim. Law, § 934.

No prejudicial error having been called to our attention, the judgment and orders appealed from are affirmed.

All concur, except ELLSWORTH and SPALDING, JJ., dissenting.

ELLSWORTH, J. (dissenting). The defendant was prosecuted under § 8678, Revised Codes 1905, the text of which is as follows: "Every person who, being confined in the penitentiary or other prison, or being in the lawful custody of an officer or other person, *by force or fraud escapes* from such prison or custody, is guilty of a felony," etc. Upon the trial the only evidence introduced in any manner bearing upon the means by which the escape was effected is that of the warden of the state penitentiary and of the defendant himself. The warden testified: "I saw the defendant, after the noon hour, go out from the penitentiary in charge of a guard by the name of Chas. Warner. He was sent out to work in the hay field. The rules of the penitentiary are that the men working in the field are to start to return to

the penitentiary at half-past 5. The defendant did not return that day till between 1 and 2 o'clock the next morning. When he did return he was in charge of the officers of the penitentiary. He asked me not to be too hard on him in punishment. He said he was left behind by officer Warner, to rake up a little hay they had just cut, and he was to follow right in; it would only take a few minutes; and that his desire for liberty got the best of his judgment, and he ran away and was sorry for it." The guard, Warner, did not testify, and the defendant stated: "We were at work in the hay field under a guard by the name of Warner. We started to return to the penitentiary in the evening, but the guard sent us back to rake up some hay. When the guard told us to go back we told him that we would probably 'go over the hill,' meaning we would go away; and he said if we could get away without taking the horses, we were welcome to try it. By we, I mean me and John Wade. We didn't take the horses, we just walked off."

At the close of the testimony of the State, the defendant moved the court "to advise the jury to return a verdict of not guilty in this case, for the reason that the State has wholly failed to show that any crime has been committed; has entirely failed to make out a case against this defendant." This motion was denied by the court, an exception taken, and the ruling assigned as error in the statement of the case and upon the brief of defendant's counsel. A motion for a new trial was afterward made upon the ground, among others, "that the verdict of the jury is contrary to law and clearly against the evidence." The motion for a new trial was denied by the court, and its ruling in this particular is also in the same manner assigned as error.

While under rule 14 "such errors as are merely assigned and not supported in the body of the brief by reasons or authoritiees will be deemed to have been abandoned," I do not think such rule should apply to a criminal case, in which the defendant cannot be presumed to have waived any substantial right, and in which he urges upon the attention of this court, as in this case, that the evidence introduced by the State is insufficient to support a conviction of the offense charged. A simple examination of the evidence, without argument or citation of authority, is all that is necessary to satisfy an impartial mind that there is not even slight evidence of an essential element of the public

offense charged. While it is undisputed that the defendant escaped from the penitentiary in the sense that for a time he placed himself beyond the custody of its officers, it is equally apparent that he did not effect his escape by force or fraud, but simply "walked off" when, through negligence or incompetence of the guard, he was left wholly unguarded. The gist of the offense as expressed by the statute is that the defendant should free himself from the restraint imposed by the prison walls or of the persons holding him in custody *"by force or fraud."* The conviction can be sustained only by disregarding defendant's attempt to bring the merits of his contention before us. To hold that he may be convicted under this statute upon proof merely of the fact that he passed out of the penitentiary or from the custody of a guard, without any showing whatever that such escape was effected by force or fraud, is of course nothing better than judicial legislation of the most objectionable kind. On the other hand, to hold that the evidence quoted above, which includes all that was introduced on this point by the State, shows an escape effected by force or fraud, requires a stretch of the imagination of which I confess I am incapable.

In my opinion the point of the insufficiency of this evidence to support a verdict was brought to the attention of the trial court by the motion made at the close of the State's case and by defendant's motion for a new trial, and cannot be disregarded on appeal. I cannot agree with that portion of the majority opinion which holds that error cannot be predicated upon the refusal of a trial court in a criminal case to advise a jury to render a verdict of not guilty.

It is true that the court is not authorized to direct the jury to find in the defendant's favor as in civil cases, or to compel the jury to so find if it refuses to follow the court's advice. It is, however, none the less the duty of the court to so advise the jury if at the close of the testimony for the prosecution it appears that the evidence introduced by the State does not show, prima facie at least, the essential elements of a public offense. The California cases cited in the majority opinion not only do not sustain the holding that an exception cannot be predicated upon the refusal of a court to advise a verdict of not guilty when the evidence is insufficient to warrant a conviction, but expressly disclaim such holding. In the case of People v. Lewis, 124 Cal. 551, 45 L.R.A. 783, 57 Pac. 470, it is plainly indicated

that, in the opinion of the court, a review upon appeal of the refusal of a trial court to advise a verdict of not guilty may properly "go to the extent of determining whether there was an absence of any substantial evidence as to some fact that the prosecution was bound to prove." In the subsequent case of People v. Ward, 145 Cal. 736, 79 Pac. 449, it was held in express terms that when the court at the close of the State's evidence is requested to "instruct" the jury to return a verdict of not guilty, it is not justified in denying the motion because it can only *advise* an acquittal. To so hold, as the court states, "is to sacrifice substantial justice to mere form." The court then finds that the true rule that had never been expressly disapproved in California was announced in People v. Jones, 31 Cal. 571, to the effect that in a case where the *corpus delicti* was not proven, the court should instruct the jury to return a verdict of not guilty. Afterwards, as the opinion states, "in People v. Lewis, 124 Cal. 553, 45 L.R.A. 783, 57 Pac. 470, Justice Temple, in a case of conflicting evidence, and where the evidence was amply sufficient to sustain the conviction, expressed the opinion that the refusal of the judge to advise an acquittal was not the subject of an exception; but that statement was not necessary to his conclusion, and was not the ground of decision. We approve the doctrine of People v. Jones, 31 Cal. 571, that when there is a clear failure of proof upon a material allegation of the charge, the defendant has a right to demand an instruction to the jury that there has been such failure of proof, and the fact that he moves for an instruction to *acquit* does not relieve the court of the duty of doing what the court in such case may do, *i. e.*, *advise* an acquittal." The holding of this case, which has not been overruled in any subsequent opinion, and which is the settled practice of California to-day, is peculiarly applicable to the case at bar. Our statute making it the duty of a district court to advise an acquittal in cases in which the evidence will not warrant a conviction is taken *verbatim* from the California Penal Code. The ruling in People v. Jones, above referred to, was made in 1867 at a time prior to that at which this statute was incorporated into our Code. Consequently, the prior holdings of the supreme court of California have a binding force that cannot be disregarded unless we can deliberately say that they violate sound prin-

ciple; and certainly not because they seem to be at variance with cases in other states having statutes on the subject materially different.

In a criminal case in which, as in this, the evidence is so plainly insufficient to show the necessary elements of a public offense, and the point is presented as it is in accordance with the rules of a well-settled practice, I think there should be no hesitation in reversing the judgment of conviction even though appellant's counsel may not, in some technical particulars, have complied with the letter of the rules of this court.

SPALDING, J. I concur with the opinion of Judge Ellsworth.

MICHAEL J. BORDEN v. PATRICK H. McNAMARA, Robert Rowan, Sr., and Martha A. Graves, Defendants, Martha A. Graves, alone Appellant.

(127 N. W. 104.)

Foreclosure of Mortgages — Instalments.

1. The right of foreclosure of a mortgage upon real estate, payable in instalments and containing a power of sale, is not exhausted by a foreclosure for the amount due upon one or more of the instalments. Under the law of this state each of the instalments mentioned in the mortgage shall be taken and held to be a separate and independent mortgage, and the mortgage for each of such instalments may be foreclosed in the same manner and with like effect as if a separate mortgage was given for each of such separate instalments.

Foreclosure of Mortgages — Successive Foreclosures — Instalments — Jurisdiction.

2. A district court having rendered a decree of foreclosure for a portion of the mortgage debt due upon one or more instalments has jurisdiction to maintain another suit for the foreclosure of the mortgage for the amount due upon other instalments not included in the first foreclosure.

Note.—By the weight of authority, as shown by the note in 37 L.R.A. 737, a foreclosure of a mortgage for part of the mortgage debt exhausts the lien, and the purchaser takes the property entirely discharged from the mortgage. But the statute under which BORDEN v. McNAMARA was decided takes that case out of the general rule.

Same — Judgment — Collateral Attack.

3. Where it appears that a district court has unquestioned jurisdiction of persons and subject-matter in a foreclosure action, error of the court in determining the effect to be given certain evidence introduced does not vitiate the judgment so as to render it void upon collateral attack. The remedy of the party aggrieved in such case is by appeal, and, if an appeal is not taken or prosecuted with effect, the conclusiveness of the decree upon points properly adjudicated in a subsequent suit between the same parties will not be affected.

Same — Judgments — Conclusiveness — Estoppel.

4. In order that the estoppel of a judgment may become operative and effective, a party claiming its benefits must plead the adjudication in bar of a subsequent action and on the trial establish it by competent proof; and a failure to do either will be held to be a waiver of the rights depending on such estoppel.

Judgments — Pleading Same as Bar — Proof of Judgments.

5. When the bar of a judgment rendered in a prior action between the same parties is properly pleaded, and proof of the issues involved in the prior action and the judgment rendered therein is made by competent evidence, such proof is to be received as conclusive of all facts adjudicated in the prior action; and it is error of the court trying the last action to disregard the legal effect of the facts adjudicated by, or necessarily involved in the rendition of the former judgment.

Conclusiveness of Judgments — Res Adjudicata.

6. Where more than one action involving the same facts has been tried between the same parties, the last judgment rendered in point of time by a court having jurisdiction to render it prevails over any rendered prior thereto, on all points properly adjudicated.

Notice of Lis Pendens — Persons Bound Thereby.

7. An action involving title to real estate having been brought, and a notice of *lis pendens* containing a true description of the real property involved filed in the office of the register of deeds in the county in which the land is situated, any party purchasing the title after the record of such notice is bound and concluded by all points thereafter adjudicated against his grantor by the decree, to the same extent to which the grantor is bound.

Opinion filed May 14, 1910.

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

Action in statutory form by Michael J. Borden, against Martha A. Graves and others, to determine adverse claims to real property.

Plaintiff had judgment, defendant Graves appeals.

Judgment reversed and District Court directed to enter a decree quieting title in appellant.

Burke, Middaugh, & Cuthbert, for appellant.

Rowan did not own the coupons and could not foreclose the mort-

gage securing them. State Finance Co. v. Commonwealth Title Ins. & T. Co. 69 Minn. 219, 72 N. W. 68; Jones, Mortg. § 476; Kellogg v. Smith, 26 N. Y. 18; Brown v. Blydenburgh, 7 N. Y. 141, 57 Am. Dec. 506; Gates v. Kelley, 15 N. D. 639, 110 N. W. 770.

Transfer of the incident of a thing does not transfer the thing itself. Rev. Codes 1905, 4966. Ord v. McKee, 5 Cal. 515; Mack v. Wetzlar, 39 Cal. 247.

Assignment of one of a series of notes secured by a mortgage is the assignment, *pro tanto,* of the mortgage. Jones, Mortg. § 822; Whitney v. Lowe, 59 Neb. 87, 80 N. W. 266; Studebaker Bros. Mfg. Co. v. McCargur, 20 Neb. 500, 30 N. W. 686; Todd v. Cremer, 36 Neb. 430, 54 N. W. 674; New England Loan & T. Co. v. Robinson, 56 Neb. 50, 71 Am. St. Rep. 657, 76 N. W. 415; 27 Cyc. Law & Proc. p. 1289.

Judgment against a party named in a notice of *lis pendens* binds those deriving title from him. Rev. Codes 1905, 6837; Freeman, Judgm. §§ 162, 191, 249; 23 Cyc. Law & Proc. p. 1253; Hart v. Moulton, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599.

M. J. Barrett, L. W. Gammons, and *John E. Greene,* for respondent.

One who has asserted a judgment cannot later attack it. Jeffers v. Jeffers, 139 Ill. 368, 28 N. E. 913; State ex rel. Western Constr. Co. v. Clinton County, 166 Ind. 162, 76 N. E. 1001; Abbot v. Wilbur, 22 La. Ann. 368; 2 Herman, Estoppel & Res Judicata, 1061.

One foreclosure exhausts the mortgage. Freeman, Judgm. 398; Curtis v. Cutler, 37 L.R.A. 737, 22 C. C. A. 16, 40 U. S. App. 233, 76 Fed. 16; Grattan v. Wiggins, 23 Cal. 28; Poweshiek County v. Dennison, 36 Iowa, 244, 14 Am. Rep. 521; Dick v. Moon, 26 Minn. 309, 4 N. W. 39.

ELLSWORTH, J. This appeal arises in an action brought in statutory form to determine adverse claim to certain real property situated in the city of Minot. On June 23d, 1890, one Peter Funk was the owner in fee of the property the title to which is in controversy, and on that date made a mortgage of the same to bank of Minot to secure the payment of a principal note for $1,200 due in five years, with interest at 8 per cent per annum. With this note were given ten interest coupons for $48 each, the first maturing on December 23d, 1890, and the others at intervals of six months thereafter until the maturity of the principal note.

It seems to be undisputed that at some date in the year 1890 the appellant, Mrs. Graves, who was a resident of New Britain, Connecticut, and an acquaintance of E. A. Mears, then president of Bank of Minot, sent to Mears for investment the sum of $1,250, and that shortly after the receipt of this money Mr. Mears sent to her the Funk note for $1,200, and the ten interest coupons indorsed without recourse by Bank of Minot. The mortgage securing these notes was sent with them, but no formal assignment in writing of the same seems to have been made. Mrs. Graves received and retained these notes and the mortgage until early in January, 1893, when her husband, who was acting as her agent, detached the first five interest coupons, all of which were then due, and sent them, together with the mortgage, to Mears for collection. These coupons were intrusted for this purpose to Mears personally, and not to Bank of Minot. He did not at once make the collection, however, but placed all the papers for safe keeping in the vault of the Mortgage Bank & Investment Company, an institution kindred to the bank in which he was interested, at Fargo, North Dakota. Both Bank of Minot and Mortgage Bank & Investment Company were at this time in financial difficulties, and on May 23d, 1893, a receiver of the property of both corporations was appointed, who, in taking possession of their assets in the absence of Mears, among other property seized upon the contents of the vault at Fargo, including the five notes and mortgage belonging to Mrs. Graves. Thereafter the receiver made a sale of these assets at which the five coupon notes were purchased by one B. S. Brynjolfson, and on February 14th, 1898, by an assignment in writing, the receiver transferred to Brynjolfson such interest as he had in these notes and the mortgage securing them. On March 21st, 1900, Brynjolfson sold and assigned these coupons and his interest in the mortgage to Robert Rowan, Sr. On or about May 8th, 1900, Rowan began an action in the district court of Ward county for the foreclosure of this mortgage. Funk, the mortgagee, was not then living, and his wife was his sole heir. The parties named as defendants to the suit were Molly Funk, wife of Peter Funk, deceased, Bank of Minot and several others with whose claims we are not now concerned. Mrs. Graves was not named as a party to this action and claims to have had no notice of its pendency.

The Bank of Minot was personally served in this action,—which,

for convenience, will hereinafter be referred to as the Rowan suit,—but did not answer. Such service as was made upon Molly Funk was by publication. Appellant claims that the publication failed to comply with statutory requirements in several vital particulars, and that Mrs. Funk was not in fact served in this action. In our view of the controlling features of the case, it will not be necessary, however, to give any special consideration to the irregularities which, it is claimed, rendered this service void and inoperative. None of the defendants made answer in the case, and on August 10th, 1900, a judgment of foreclosure was entered by default in Rowan's favor, for the satisfaction of the sum then shown to be due upon the five coupon notes and the further sum of $176.35, paid by Rowan as taxes on the property. On this appeal, appellant contends that this was not entered in the judgment book as required by law, and is therefore a nullity. No action has at any time been taken to secure its vacation on this ground, and it seems to have been treated uniformly by both parties as a valid and existing judgment according to its import. We will therefore so regard it, without expression of opinion as to our view of its status, if properly brought in question by a direct attack. On August 13th, 1900, execution was issued upon this judgment, and on September 22d, 1900, at a sale made thereunder, the property was sold to Rowan for $691.58. This sale was confirmed by the district court on January 28th, 1901.

On September 19, 1901, Mrs. Graves commenced suit in the district court of Ward county, naming as parties defendant Molly Funk, Robert Rowan, W. J. Carroll as sheriff of Ward county, and all others mentioned in the Rowan suit. The complaint in this action, which will be hereinafter referred to as the Graves suit, in substance alleged the giving of the principal and coupon notes by Funk to Bank of Minot and the assignment of all by the bank to Mrs. Graves; that Peter Funk was deceased, and that under the law of succession Molly Funk, his wife, was the owner of the equity of redemption in the premises described in the mortgage; that the defendant Rowan claimed some interest in or lien upon the real property in question under a writing executed by the receiver of the mortgagee, Bank of Minot, purporting to assign to one B. S. Brynjolfson five of the coupon notes attached to the principal note secured by said mortgage, which interest and lien so acquired said Brynjolfson thereafter pretended to assign to said

Rowan; that on August 11th, 1900, in a suit brought in the district court of Ward county, wherein said Rowan was plaintiff, and Molly Funk, Bank of Minot, and others defendants, a decree was entered, which, among other things, directed the sale of the mortgaged real property for the satisfaction of the amount due on said five coupon notes, and that the proceeds of the sale of said premises be paid to the defendant Rowan; that thereafter, on September 12th, 1900, the defendant Carroll, as sheriff of Ward county, acting pursuant to the mandate of an execution issued on said decree, sold the said premises to the defendant Rowan for the sum of $691.58, and executed and delivered to him a sheriff's certificate of sale bearing date September 22d, 1900; that at all said times five coupon notes alleged as cause of action in the Rowan suit were the property of the plaintiff, and not of the mortgagee, Bank of Minot, and that neither the unlawful possession of said notes nor the purported assignment by the receiver of the said Bank of Minot to said Brynjolfson and by him to said Rowan, operated to convey to said Rowan any title to said notes or any interest in said mortgage, and that the said decree in his favor for the foreclosure of said mortgage, the execution issued thereon, the sale thereunder, and the sheriff's certificate issued to said Rowan, did not convey to or vest in him any right, title, or interest to or lien upon the said mortgaged premises. The plaintiff then prayed for a decree in her favor foreclosing the mortgage against said premises for the principal sum due upon the note secured thereby, and the interest thereon from June 23d, 1890, as evidenced by all of said coupon notes.

The defendant Rowan was served personally with the summons and complaint in the Graves suit, and made answer, traversing the allegations, that he was not the owner of the five coupon notes mentioned in his decree of foreclosure and of an interest in the mortgage under the assignment of the receiver of Bank of Minot. He admitted the bringing of the Rowan suit, in which there was entered in his favor as plaintiff a decree of foreclosure as alleged in plaintiff's complaint, the issuance of execution, the sale under the same, and the delivery to him of a sheriff's certificate as purchaser at said sale of said premises. He alleged that the assignment to him by the receiver of Bank of Minot of an interest in said mortgage was valid, and that he, by the delivery of the same, became the owner of an estate and interest in and lien

upon said real property, authorizing the Rowan suit and the decree of foreclosure entered therein in his favor; and that by the purchase at said foreclosure sale and the issuance to him of the sheriff's certificate aforesaid, he became the equitable owner in fee of said premises and entitled to a sheriff's deed thereto; that by virtue of the facts alleged the interest of the plaintiff, Mrs. Graves, in said mortgage and her lien upon said real property was foreclosed, and she was barred and concluded from any claim upon or proceeding against the same; and prayed for a dismissal of her action as to him.

Preliminary to the Graves suit, on application of the plaintiff to the district court, a temporary injunctional order was issued restraining the defendant Carroll, as sheriff of Ward county, from issuing to the defendant Rowan a sheriff's deed of the real property in question pursuant to the execution sale made on September 12th, 1900, which injunctional order was on September 28th, 1901, made permanent during the pendency of the action.

On the issues presented by the answer of defendant Rowan, the Graves suit was tried on February 14th, 1903, and after an unexplained delay of more than two years, on April 8th, 1905, a judgment was entered in favor of Mrs. Graves, as plaintiff, for the foreclosure of her mortgage. The findings of the district court in awarding this judgment were "that, at the time the said five coupon interest notes came into the hands of the receiver of Bank of Minot, the said interest coupon notes were the property of plaintiff, and not the property of Bank of Minot; and the said receiver of Bank of Minot could not convey any title to the said coupon notes, and did not convey any title by the sale thereof to B. S. Brynjolfson, and the said B. S. Brynjolfson did not convey any title to the defendant Robert Rowan, Sr., and the said Robert Rowan, Sr., did not have any title to the said five interest coupon notes nor to the mortgage that secured the payment of the same at the time he instituted proceedings to foreclose said mortgage. That said mortgage was foreclosed without authority of law, and the certificate of sale thereof is void as against the plaintiff, Martha A. Graves, and not binding on said plaintiff. That the taxes paid upon said mortgaged premises by the said Robert Rowan, Sr., were voluntarily paid, and are not the subject of counterclaim as against this plaintiff, and

were more than reimbursed to said Robert Rowan, Sr., by the rents and profits of said mortgaged premises."

The injunction restraining the sheriff from issuing a deed to Rowan was thereupon made permanent, and a decree was entered authorizing the sale under foreclosure of the premises. Notice of entry of this judgment was duly served upon the attorneys of Rowan on April 22d, 1905. A special execution in conformity to the decree was issued out of the district court on April 27th, 1905, and under this execution the premises were sold on June 3d, 1905, to Mrs. Graves, for $3,517.88, and a sheriff's certificate of such sale issued to her. A report of sale was made to the district court of Ward county on June 10th, 1905, and, after due notice to Rowan's attorneys, an order was entered on June 24th, 1905, confirming such sale. No redemption being made within a year thereafter, on September 10th, 1906, a sheriff's deed of the property was made to Mrs. Graves.

A notice of *lis pendens,* setting out the pendency of the Graves suit for the foreclosure of the mortgage given by Peter Funk and to restrain the sheriff of Ward county during the pendency of the action from issuing a sheriff's deed to Rowan and correctly describing the mortgaged property, was recorded in the office of the register of deeds of Ward county on September 23d, 1901. On June 23d, 1905, Michael J. Borden, the plaintiff in the action in which this appeal is taken, entered into a contract with Rowan for the purchase of the premises involved in the Funk mortgage. On April 11th, 1906, a notice and undertaking on appeal from the decree in the Graves suit was served upon the attorneys for Mrs. Graves by Rowan's attorney. No statement of the case or other proceedings necessarily preliminary to an appeal had been taken, however, and on September 18th, 19th, 1906. appellant moved in the supreme court of North Dakota to dismiss the appeal for failure to properly prosecute the same. This motion was resisted by Borden, who claimed to be the real party in interest, having purchased the property in question from Rowan. The motion to dismiss was heard in the supreme court and on November 2d, 1906, an order was made dismissing the appeal. The record and the remittitur of the supreme court were returned to the district court of Ward county, which on May 14th, 1907, entered a judgment in conformity with that of the supreme court.

The action now considered was brought by Borden against Mrs. Graves on March 12th, 1907, to determine adverse claims to the real property covered by the Funk mortgage. The evidence consists almost entirely of the court records in the Rowan suit and the Graves suit. The question presented to the district court by this suit was that of the priority of title acquired respectively by Borden as the successor in interest of Rowan, or by Mrs. Graves by virtue of the determinative features of these suits. Both claim title under the proceedings of an execution sale made in foreclosure of the Funk mortgage, and each claims that the other is barred and concluded from asserting title by reason of the decree in the Rowan suit and Graves suit respectively. The action was tried on May 16th, 1908, and the district court directed judgment in favor of the plaintiff, Borden. Its conclusions of law are to the effect "that the judgment and decree entered in said action wherein Robert Rowan, Sr., was plaintiff and Molly Funk, Bank of Minot, and others were defendants, entered on the 10th day of August, A. D. 1900, wherein and whereby it was adjudged and decreed that the plaintiff in said action, Robert Rowan, Sr., was the owner of said interest coupon notes from one to five inclusive, and the assignee and owner of said mortgage, and that he paid taxes in the sum of $176.35,—was and is a valid judgment and a valid foreclosure of said mortgage. That the said sale thereunder was a valid sale. That said sale was duly confirmed by said court. That said Rowan was the purchaser at said sale. That no redemption of the premises under said sale was made. That said Rowan was entitled to a sheriff's deed for said premises under said certificate of sale, and that said judgment and decree is still in full force and effect and binding upon defendant, Martha A. Graves. That the said foreclosure and sale of said mortgaged premises exhausted the lien of said mortgage, and the purchaser, said Robert Rowan, Sr., took the property entirely discharged from the said mortgage. That the judgment and decree in said action, in which Martha A. Graves was plaintiff and Molly Funk, Robert Rowan, Sr., W. J. Carroll, and others were defendants, and entered the 22d day of April, 1906, in no manner affects the former judgment nor the title to the said property obtained by Rowan thereunder. That the plaintiff, Borden, is the owner in fee of said premises, and entitled to a judgment and decree of this court to operate as a conveyance to him of the said

property (described), and forever barring and foreclosing defendants from ever asserting or claiming any right, title, or interest or lien upon the said premises or any part thereof."

In appealing from said judgment the defendant desires a review of the entire case in this court. The principal contentions are: (1) That the judgment in the Rowan Case is irregular, abortive, and void; (2) even though a valid and existing judgment, it is not binding in any way upon Mrs. Graves, she not being a party to, and having no notice of, the pendency of the action in which the same was entered; and (3) whatever rights Borden as the successor of Rowan might claim as the assignee of the Funk mortgage or under the decree in the Rowan suit, he is barred and concluded from asserting by the decree in the Graves Case.

The theory of the district court in holding that appellant was bound by the decree in the Rowan suit proceeds, evidently, from an application to this case of the following rule of the Code of Civil Procedure: "In an action to foreclose a mortgage or other lien upon real property, no person holding a conveyance from or under the mortgagor of the property mortgaged, or other owner thereof, or person having a lien upon such property, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered and the proceedings therein had are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action." Revised Codes 1905, § 6817. There is no claim made that Mrs. Graves was named as a party to the Rowan suit, or that she had notice of the pendency of that action. She, however, had a lien upon the mortgaged property by reason of the transfer to her of the mortgage note and interest coupons. As her assignment was not in writing or recorded, a party holding a prior recorded lien or conveyance of the property might treat her in an action to foreclose his lien as a party to the action, and the decree would be as binding upon her as though she had been actually so named. Is she bound in the same manner on the suit of an assignee of other instalments of the same debt upon which her lien is based; and if such is the case, would the right to foreclose this mortgage as to another part of the debt secured thereby, and not involved in the Rowan suit, be exhausted by the decree in that

suit so completely as to operate as a discharge of the entire mortgage?

Upon principle and with a satisfactory support of authority, both questions might be answered in the negative. The rule that a foreclosure and sale under a mortgage exhausts the lien of the mortgage so that a second action cannot be maintained as to instalments of the mortgage debt which were not included in the first suit does not apply "where the first foreclosure was for interest only, or where there are concurrent mortgages to different persons on the same land, or the several obligations secured are distributed among and held by different creditors." 27 Cyc. Law & Proc. p. 1791. It is only the holder of a subsequent lien whose rights are concluded by the foreclosure of a mortgage and the expiration of the period for redemption, even when he is made a party to the foreclosure action and duly served. A prior lien or one having a concurrent standing still retains its pristine force, and the holder thereof, unless the question of priority is raised and expressly determined against him in the first suit, may, it would seem, assert it in another foreclosure action. Rowan's foreclosure did not purport to be made for any larger sum than that due upon the notes he claimed to hold and certain taxes actually paid out by him while in possession of the property. He sought merely to realize from the sale such part of the mortgage debt as was represented by the portion of the notes held by him. The complaint in his foreclosure action alleges the giving by Funk of a principal note for $1,200, with ten interest coupons attached, all of which were alike secured by the mortgage, but the five only in which he claimed title. The decree provided that "all persons having liens *subsequent* to the mortgage" should be barred by the foreclosure. It is not apparent, therefore, that this decree, by its terms, even purported to bind or conclude a party holding a concurrent lien or the owner of the principal note and the interest coupons not claimed by Rowan, even though such person may be regarded as a party to the suit and duly served. If the question of the respective priorities between Rowan and the party holding the remainder of the mortgage debt had been brought in question and determined in his favor by the decree, a different consideration would be now presented. That the entire right of foreclosure of the mortgage was not exhausted by the decree in the Rowan suit further appears from an examination of the instrument itself, which provides that in case of default of payment of any sum

due upon the mortgage, whether it be in principal, interest, or taxes, the full amount secured may, at the option of the mortgagor, be declared to be due, or upon each separate default a foreclosure may be had. Such provision is not, however, necessary to authorize separate foreclosure by instalments, as the law in force at the time this mortgage was given provides that "in case of mortgages given to secure the payment of money by instalments, each of the instalments mentioned in the mortgage shall be taken and deemed to be a separate and independent mortgage, and the mortgage for each of such instalments may be foreclosed in the same manner and with like effect as if a separate mortgage was given for each of such instalments." Code of Civ. Proc. 1877, § 599; Rev. Codes, 1905, § 7458. This clearly contemplates that the right of foreclosure shall retain full vitality until the last note given is paid. Assuming, therefore, without deciding, that Mrs. Graves should be considered a party to the Rowan suit, the power of the district court to decree a second foreclosure of the mortgage in her favor is not exhausted, and the court had unquestioned jurisdiction of the subject-matter of her suit.

It will be contended, however, that the title of Rowan to the five coupon notes pleaded as cause of action in his foreclosure suit is a fact necessarily determined in his favor by the decree, and that this became *res adjudicata* as to Mrs. Graves. Conceding this, Mrs. Graves would not be concluded upon this point in her subsequent suit unless Rowan availed himself of the bar of his decree by proper pleading and proof. "A party claiming prior adjudication as a bar must set it up; but if he fails to present that objection, or, if presented, it is overruled, he cannot afterward rely upon that fact as a ground of collateral attack." Semple v. Wright, 32 Cal. 668. The estoppel of a judgment may be waived by the failure of the party claiming its benefits to properly plead or prove it. Black, Judgm. 786.

Recognizing the obligation that lay upon him to establish the adjudged facts of his decree by proper pleading and proof, Rowan set it up in his answer in the Graves suit, and on the trial seems to have offered some evidence in support of the facts alleged in the answer. It is now urged that proof of the existence of the judgment was, in itself, conclusive of the bar against Mrs. Graves on the point of title to the five coupon notes, and that the district court should have so held in the decree in the

Graves suit. It may be admitted that, if the proof of the judgment was full and competent, it should have been received as conclusive, and that in holding as it did that Rowan was not the owner of the five notes in question the district court was in error. As justly observed, however, by counsel in his brief, a court having jurisdiction of the subject-matter of an action has jurisdiction to commit error. In other words, the erroneous action of a court having jurisdiction in a matter of practice or procedure is an irregularity that can usually be remedied only by appeal. Rowan had full opportunity to take advantage of his right of appeal, and made an abortive attempt so to do. The dismissal of this appeal had the effect of affirming and making final the judgment of the district court. All presumption is in favor of the regularity of this judgment, and after the dismissal of the appeal it became practically unassailable either directly or collaterally. Being rendered by a court having jurisdiction as the last judgment in point of time between Rowan and Mrs. Graves, on all adjudicated points it prevails over the decree in the Rowan suit. I Freeman, Judgm. 4th ed. § 332; Cooley v. Brayton, 16 Iowa, 10. When the judgment in the Graves suit became final it concluded against Rowan the question of ownership of the five coupon notes and title to the mortgage in all judicial matters thereafter arising in which the bar of this adjudication was properly presented.

The respondent, Borden, became a purchaser from Rowan long after the Graves suit was commenced and a notice of *lis pendens* containing a true description of the real property involved in the suit placed of record. His purchase was made several months after judgment against Rowan had been entered in that suit. During the year allowed for appeal, by his own admission he had actual notice of the decree and attempted to appeal from it. Whether or not a conveyance to him by Rowan during the time the property was in litigation is inoperative and void as claimed by appellant, it is unquestionable that he is bound and concluded by all that in like manner affects his grantor Rowan.

Upon the bringing by Borden of the action in which this appeal is taken, Mrs. Graves interposed by answer the bar of the decree in the Graves suit. Upon the trial she offered full and competent proof of the decree in the former suit. There can be no question but that by this decree all questions upon which Rowan rests his claim of title to

the property involved were adjudicated against him. Upon proof of the rendition of this judgment by a court of competent jurisdiction, the bar interposed to Borden's action became conclusive, and the action of the district court in otherwise holding and decreeing is clearly erroneous. It should have given the decree in the Graves suit full effect in determining the conflicting titles of Borden and Mrs. Graves.

The judgment of the District Court is therefore reversed, and it is directed to enter a decree in favor of appellant, declaring her to be the owner in fee simple of the premises in controversy, and quieting her title to the same against any claims of the plaintiff and respondent.

All concur, FISK and CARMODY, J.J., concurring specially.

FISK, J. I concur in the conclusion above announced, but express no opinion as to any point in the case other than the last proposition treated in the opinion. As I view it, such proposition is controlling and decisive, and renders a consideration or decision of the other questions unnecessary.

CARMODY, J. I concur in the views expressed by Judge FISK.

CATHERINE MEIGHEN v. WILLIAM E. CHANDLER, Substituted for Josephine Chandler, Deceased, and D. F. Chandler.

(126 N. W. 992.)

Husband and Wife — Fraudulent Conveyance — Claim of Wife — Evidence.

1. Where the contest is between the husband's creditors and the wife over property which the wife claims, but which there are probable grounds for be-

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Note.—Since the marital relation affords a convenient cover to protect the property of a debtor from his creditors, courts scrutinize closely transfers from a husband to a wife when they come in conflict with the claims of creditors. There are several diametrically opposed rules as to the effect of the relationship of husband and wife between the parties to an alleged fraudulent transfer, as shown by a review of all the authorities in a note in 56 L.R.A. 817, on the question of burden of proof of husband's debt to wife on account of property received from her. The courts of a number of states have adopted the rule that fraud in a conveyance or transfer from husband to wife will not be presumed, but must be affirmatively established by him who alleges it. But a large majority of the cases hold that, as

lieving belongs to the husband, it is incumbent on the wife to show by satisfactory evidence that she purchased and paid for the property from her separate estate.

Same — Evidence.

2. Evidence reviewed, and *held* to establish that the conveyances in the case at bar were fraudulent as to plaintiff.

Opinion filed May 19, 1910.

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

Action by Catherine Meighen against William E. Chandler, substituted for Josephine Chandler and D. F. Chandler.

From a judgment in favor of the defendants, plaintiff appeals.

Reversed.

Wells & Hopp and *Newton & Dullam*, for appellant.

As between the husband's creditors and the wife, contesting over property claimed by her and with probable grounds to believe it his, the wife must show by satisfactory evidence that she owns it. Smith v. Tosini, 1 S. D. 632, 48 N. W. 299; Horton v. Dewey, 53 Wis. 410, 10 N. W. 599; Gettelmann v. Gitz, 78 Wis. 439, 47 N. W. 660; 20 Cyc. Law & Proc. p. 396 and cases cited; Minneapolis Stock-Yards & Packing Co. v. Halonen, 56 Minn. 469, 57 N. W. 1135; Stevens v. Carson, 30 Neb. 544, 9 L.R.A. 523, 46 N. W. 655; Leonard v. Green, 34 Minn. 137, 24 N. W. 915; Shea v. Hynes, 89 Minn. 423, 95 N. W. 214.

Henry M. Lamberton and *Hyland & Nuesle*, for respondents.

The presumption is against a wife's gift of her principal property to her husband, and he who asserts it must prove it. Stickney v. Stickney, 131 U. S. 227, 33 L. ed. 136, 9 Sup. Ct. Rep. 677; Grabill v.

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between the rights of a wife and creditors of her husband, with respect to property transferred from the husband to the wife, there is a presumption against her, and, as stated in MEIGHEN v. CHANDLER, there must be clear and satisfactory proof of her claim against her husband.

The question when creditors may avoid conveyances from a husband to a wife is also treated in a note in 90 Am. St. Rep. 497. And the validity of a gift of a husband's services to his wife as against creditors is the subject of a note in 21 L.R.A. 623.

The effect generally of a conveyance from a husband to a wife is considered in notes in 69 L.R.A. 353, 88 Am. Dec. 54, and 99 Am. Dec. 599.

Moyer, 45 Pa. 533; Sykes v. City Sav. Bank, 115 Mich. 321, 69 Am. St. Rep. 562, 73 N. W. 369; Hauer's Estate, 140 Pa. 420, 23 Am. St. Rep. 245, 21 Atl. 445; Cole v. Lee, 45 N. J. Eq. 779, 18 Atl. 856; Chadbourn v. Williams, 45 Minn. 294, 47 N. W. 812.

Whether property is in the husband or wife is determined by a preponderance of evidence as in other cases. Chadbourn v. Williams, 45 Minn. 297, 47 N. W. 812; Stickney v. Stickney, supra; Laib v. Brandenburg, 34 Minn. 369, 25 N. W. 803; Bergey's Appeal, 60 Pa. 408, 100 Am. Dec. 578.

CARMODY, J. On July 18th, 1898, defendant D. F. Chandler executed his promissory note to William M. Meighen, payable on or before two years after date, for $2,458.40, with interest at 7 per cent per annum. Meighen, who was the husband of appellant, died before the maturity of said note, which was transferred to appellant. Defendant Josephine Chandler was the wife of D. F. Chandler and sister of appellant. On the 18th day of February, 1905, action was commenced to recover on said note. On the 9th day of May, 1906, defendant D. F. Chandler stipulated to allow judgment to be entered against him for the sum of $3,837.89, which judgment was docketed in Winona county, Minnesota. Execution was issued thereon and returned wholly unsatisfied, and that said judgment has not been paid. It is to recover the amount due on this judgment that this action, which was commenced February 18, 1907, was brought. Defendants appeared in said action and served separate answers. Judgment on the pleadings was ordered in favor of the plaintiff and against D. F. Chandler, for the sum of $4,196.05. Besides the recovery of this judgment against D. F. Chandler, the object of this action was to adjudge that certain lands situate in the county of McLean, of which the defendant Josephine Chandler held the record title,—to wit, the west one half of section thirteen (13), township one hundred forty-four (144), range eighty-one (81), and all of section one (1), township one hundred forty-five (145), range eighty-four (84); and the east one-half of section thirty-five (35), township one hundred forty-six (146), range eighty-four (84),—to be held in trust for the said defendant D. F. Chandler, and that the judgment recovered against him be adjudged

a lien against said real estate, and for such other and further relief as to the court should seem just and equitable. Defendant Josephine Chandler died on January 20, 1908, leaving surviving her, her husband, D. F. Chandler, two sons, Wm. E. Chandler and George A. B. Chandler, and one grandchild. On the 5th day of August, 1907, during the pendency of this action, defendants Josephine and D. F. Chandler by deed of warranty, conveyed to Wm. E. Chandler all the real estate above described, which deed at the time of the trial of this action had not been placed on record. No consideration was paid for said deed. It was stipulated that Wm. E. Chandler should be substituted for Josephine Chandler as the real party in interest. This action was tried to the court without a jury, and resulted in a judgment in favor of William E. Chandler, from which judgment plaintiff appeals, and specifies that she desires a review of the entire case in this court.

August 24, 1903, D. F. Chandler, Josephine Chandler, Wm. E. Chandler, and George A. B. Chandler executed articles of incorporation of the D. F. Chandler Milling Company, capitalized at $25,000, divided into 250 shares of $100 each, fully paid up. On the same day the same parties, who were the officers and directors of said corporation, executed a certificate of shareholders, the object of which was to publish to the world the names of the shareholders and the amount held by each. It was therein certified under oath of all the Chandlers above named, that they owned all the stock of said corporation as follows: D. F. Chandler, 247 shares; Josephine, William, and George, each one share. This certificate was sworn to before a notary public, and recorded in the office of the register of deeds in and for Winona county, Minnesota. The property of the corporation consisted of a flouring mill and appurtenances in the city of St. Charles, in said Winona county. Thereafter, on the 11th day of August, 1905, an agreement was made with the Traverse Land Company to exchange the property of the milling company for the land in controversy, and 160 acres in Burleigh county, North Dakota, and 160 acres in McLean county, North Dakota, 1600 acres in all. On the 5th day of September, 1905, the Traverse Land Company executed a warranty deed, conveying said land to Josephine Chandler. Respondent attempts to uphold the conveyance to Josephine, upon the theory that she was in fact the owner of all property of the milling company, and bases his conten-

tion as follows: That as heir-at-law of James Riddle, her grandfather, Josephine inherited the sum of $366.98, most of which she deposited in a bank in Minneapolis, Minnesota. This money was paid her between April 1, 1880, and November 18, 1889. On December 12, 1886, she inherited from her father an undivided one-twelfth interest in 80 acres of land in Pembina County, Dakota territory, now state of North Dakota, and that she subsequently purchased the other interests with the money she inherited from her grandfather. On July 11, 1890, she borrowed $1,000 from Wm. M. Meighen, the payment of which she secured by mortgage on the 80 acres in Pembina county. She afterwards sold that land for the sum of $1,000, and repaid the mortgage. She claims to have on or about July 11, 1890, invested the $1,000 in the Osakis Milling Company. The incorporators in the Osakis Milling Company were D. F. Chandler, Josephine Chandler, George Tileston, and Anna F. Tileston, wife of George Tileston. The stock was divided into 200 shares, the par value of which does not appear in the evidence. D. F. Chandler testified that the whole amount invested in the Milling Company was $5,000, of which he was to have one half and Tileston one half. He and Tileston each took 99 shares, and their wives had one share each. It is contended by respondent that there was an oral understanding between D. F. Chandler and Josephine, that she should receive whatever the $1,000 represented in the capital and earnings. There is no evidence to show where the Chandlers got the other $1,500, which D. F. Chandler claims they invested in the milling company, except that William Meighen, son of appellant, testified that the note on which the judgment in Winona county, Minnesota, was obtained, started with $1,500, loaned by Wm. M. Meighen, father of the witness, to D. F. Chandler. The Chandlers remained with the Osakis Milling Company until March 13, 1895, when they sold their interest therein to the Tilestons for $4,887.28, which sum the Chandlers claim was paid to Josephine as follows: $887.28 in cash, and the balance in four promissory notes of $1,000 each, given to Josephine. These notes were discounted, and the money received by D. F. Chandler, acting as the alleged agent of his wife. The respondent claims that Josephine Chandler loaned to her husband, D. F. Chandler, the sum of $4,887.28, which he agreed to repay with 8 per cent interest. No notes or any evidence of such indebtedness was

given, and the evidence does not show that any time was fixed for the repayment of the same. Defendant D. F. Chandler claimed that this money was used in the support of his family, and in losses by speculation in wheat. In October, 1899, D. F. Chandler engaged himself with King Brothers Lanesboro Milling Company as manager of their mill at a salary of $75 per month, payable in advance, and one fourth of the net profits. This contract was oral and was reduced to writing August 29, 1900. On July 14, 1900, there was also signed the following:

We hereby agree to pay to Josephine Chandler all profits as per agreement made with D. F. Chandler, in connection with his services with the Lanesboro Milling Company, excepting $465, which has already been paid.

The Lanesboro Milling Company,
L. A. King.

Chandler remained with the Lanesboro Milling Company until about July 7th, 1903. It is claimed by respondent that the Lanesboro Milling Company paid Josephine Chandler the sum of $5,500, and that this money Josephine invested in the D. F. Chandler Milling Company and was used in purchasing and refitting the mill. D. F. Chandler was an expert miller and manager. The Chandlers were engaged in no business during the time from March, 1895, until October, 1899; lived from the money received from the Tilestons by the sale of their interest in the Osakis Milling Company. The money for the support of the Chandler family, as well as what he put in the D. F. Chandler Milling Company, was earned by the skill and industry of D. F. Chandler while with the Lanesboro Milling Company. D. F. Chandler and Josephine both claimed that the 247 shares of stock in the D. F. Chandler Milling Company was placed in the name of D. F. Chandler (he being well known in the milling business) so as to give the concern credit. They also claimed that the 247 shares were transferred from him to her on the 3d day of December, 1904, but the evidence conclusively shows that the transfer was actually made on the 7th day of April, 1905, during the pendency of the action, on which the judgment sued on in the case at bar was recovered by appellant

against D. F. Chandler. They gave as a reason why the shares were not actually transferred on December 3, 1904, that they were up as collateral security in a bank in St. Charles, Minnesota. Wm. E. Chandler, who was twenty-five years old on the 6th day of January, 1905, testified that he was in Platteville, Wisconsin, and his mother sent him the deed of the land, hereinbefore mentioned. He received the deed on the 14th day of August, 1907. The consideration in the deed was placed at $20,000. Never paid any consideration. Sole consideration love and affection. Made no provision for any other member of the family. Never paid any taxes on the land. Did not know whether they were paid or not. Mr. Lamberton, attorney for the Chandlers, had been taking care of it. Never left any money with Mr. Lamberton. Neither Josephine nor Wm. E. Chandler saw the land in question.

Thus it will be seen that, as far as the public was concerned, D. F. Chandler was solvent from July, 1890, until March, 1895, the entire time he was connected with the Osakis Milling Company. Also from the time of the organization of the D. F. Chandler Milling Company, in August, 1903, until April 7, 1905, but by a secret understanding between himself and his wife, he was wholly insolvent. The testimony of Josephine Chandler was taken by deposition at a time when she was sick. Most of the questions were read to her from a typewritten memorandum, and her answers were also given by her reading from a typewritten memorandum. She did not seem to be positive, except as to the fact that she loaned the $4,887.28 to defendant, D. F. Chandler. There was no time stated when it was to be repaid. The testimony shows that during all the time herein mentioned D. F. Chandler transacted all the business, used and handled the money and the property as if it was his own, signed receipts, signed checks, drew the money from the Lanesboro Milling Company when he wished, sometimes overdrew his salary account for living expenses. He paid part, if not all, of the expenses of this law suit. Said he did it at the request of his boy. O. C. Neuman, president of the Traverse Land Company, testified that he made all arrangements for the exchange of the land with D. F. Chandler, at no time represented that he was acting as the agent of any person. Neuman further testified that when the deed was executed no grantee was named therein. He took the

deed to St. Charles, Minnesota, for the purpose of closing the deal, but Chandler suggested that he be permitted to take the deed to his attorney, Henry M. Lamberton, of Winona, for the purpose of examination only. This was the last Neuman saw of the deed. If this testimony be true, the name of Josephine Chandler was inserted in the deed as grantee after it was given to D. F. Chandler for the purpose of having it examined by his attorney. O. L. King testified that he never had any business relations with Josephine Chandler. That defendant D. F. Chandler told him that he, D. F. Chandler, wanted his share of the profits in the mill turned over to his wife on account of the indebtedness he owed Meighen, and that that is why the notes for part of the profits were executed to Josephine Chandler, and the agreement made to pay her the profits.

L. A. King, the active manager of the mill, testified to practically the same thing. It is true that this testimony is contradicted by D. F. Chandler, and that Mrs. Chandler testified that the agreement to pay her the money was made at her house. In regard to the writing by which the Lanesboro Milling Company agreed to pay to Josephine Chandler a share of the profits in the milling company, she testified, from a memorandum, as follows: "L. A. King then and there wrote out and handed to me this piece of paper in the presence of my husband, D. F. Chandler, William E. Chandler and Geo. A. B. Chandler, my sons." In regard to the matter, D. F. Chandler testified as follows: "On the 14th day of July he (meaning King) brought that paper and delivered it to Josephine Chandler in the presence of myself, Wm. E. Chandler, and Geo. A. B. Chandler."

The testimony of Geo. A. B. Chandler and William E. Chandler on this point is vague and unsatisfactory.

Josephine Chandler testified that she did not know as she could give a reason why the 247 shares of stock held by D. F. Chandler in the D. F. Chandler Milling Company were transferred to her. They talked it over and planned it that way. That is, the two boys, D. F. Chandler and herself, when they went into the St. Charles mill.

It will be observed that while they purchased the St. Charles mill for $2,500, and put $3,000 more in for repairs, they capitalized it at $25,000, all paid up, of which D. F. Chandler owned 247 shares, showing to the public that he was worth the sum of $24,700. But even

if Josephine Chandler had loaned the money to her husband, as testified to by her, the law will not permit them to use it successfully as a shield, merely in the perpetration of a fraud upon the creditors of her husband. Wake v. Griffin, 9 Neb. 47, 2 N. W. 461.

Where the contest is between the husband's creditors and the wife, over property which the wife claims, but which there are probable grounds for believing belongs to the husband, it is incumbent on the wife to show by satisfactory evidence that she purchased and paid for the property from her separate estate. Gettelmann v. Gitz, 78 Wis. 439, 47 N. W. 660; Horton v. Dewey, 53 Wis. 410, 10 N. W. 599; Smith v. Tosini, 1 S. D. 632, 48 N. W. 299.

Clear and satisfactory proof of a wife's claim against her husband is exacted where the wife asserts that he transferred property to her in payment thereof. Note in 56 L.R.A. 830, and cases cited; Le Saulnier v. Krueger, 85 Wis. 214, 54 N. W. 774; Minneapolis Stock-Yards & Packing Co. v. Halonen, 56 Minn. 469, 57 N. W. 1135.

During the entire time that defendant D. F. Chandler was in business at Osakis and St. Charles, with the exception of the last few months at St. Charles, from April, 1905, until August, 1905, public records showed that he was a man of property and solvent. While she may have invested some money in the Osakis Milling Company, and afterwards loaned the proceeds of her interest therein to her husband, and while there may have been some understanding between them that he would repay her, yet we do not think it was such a definite understanding or agreement as should, under the circumstances, be held to be a contract between husband and wife, as against the creditors of the former. Clark v. Rosenkrans, 31 N. J. Eq. 665; Frank v. King, 121 Ill. 250, 12 N. E. 720; Hanson v. Manley, 72 Iowa, 48, 33 N. W. 357; Wake v. Griffin, 9 Neb. 47, 2 N. W. 461.

The circumstances point conclusively to the fact that the property was transferred to Josephine Chandler for the purpose of placing it beyond the reach of her husband's creditors and was transferred by her to defendant Wm. E. Chandler for the same purpose. No other conclusion can be reached from a review of the whole of the evidence. The deeds were therefore fraudulent so far as plaintiff's judgment was concerned.

The judgment appealed from is reversed, and the District Court is directed to enter judgment for the plaintiff for the relief prayed for in her complaint. All concur.

NORTHERN PACIFIC RAILWAY COMPANY v. S. S. AAS.

(126 N. W. 1016.)

Public Lands — Grant to Railroads — Right of Way.

1. The grant of right of way over the public lands made to Northern Pacific Railroad Company by act of Congress passed July 2, 1864, chap. 217, 13 Stat. at L. 365, is a present, absolute grant subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Upon such construction and its acceptance by the United States under the terms of the act, the Northern Pacific Railway Company became vested with title to a strip of land 400 feet wide for right of way purposes from the date of the act.

Public Lands — Grant to Railroads — Right of Way — Rights of Settlers.

2. All parties acquiring rights in the public lands crossed by the line of route adopted by the Northern Pacific Railroad Company initiated subsequent to July 2, 1864, the date of the passage and approval of the act, take the same subject to the right of way granted to the Northern Pacific Railroad Company by the terms of the act.

Public Lands — Right of Way — Forfeiture — Right to Assert.

3. A forfeiture resulting from the failure of the grantee to perform certain conditions required of it by the act of July 2, 1864, within the period limited by the terms of the act, cannot be asserted by a private party or by any party except the United States.

Public Lands — Grant to Railroads — Right of Way — Performance of Conditions.

4. The plaintiff having shown with reasonable certainty that its predecessor

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Note.—For cases holding, in harmony with NORTHERN P. R. Co. v. AAS, that no one but the grantor can raise the question of breach of condition in a grant of public lands, see Burlington & M. River R. Co. v. Mills County, 154 U. S. 568, and 19 L. ed. 565, 14 Sup. Ct. Rep. 1197; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; and United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152.

The general subject of public land grants to railroads is treated in a note in 28 L. ed. U. S. 794.

and grantor, Northern Pacific Railroad Company, had generally complied with the requirements of the act of July 2, 1864, in the construction and maintenance of a railroad and telegraph line as provided by the terms of the act, it is to be regarded as the owner for right of way purposes of a strip of land 200 feet wide on each side of the medium line of the line of route of said railroad over lands that at the date of the passage of the act were part of the public domain.

Opinion filed May 25, 1910.

Appeal from District Court, Stark County; *W. H. Winchester,* J.

Action by Northern Pacific Railway Company against S. S. Aas, to determine adverse claims to a right of way over certain lands in Stark County. Plaintiff had judgment and defendant appeals.

Judgment affirmed.

M. A. Hildreth, for appellant.

When a railroad company claims a right of way by congressional grant it must establish (1) that it has complied with the acts of Congress in every respect; (2) that it has filed its map of definite location; (3) that it has commenced the construction of its road within the terms of the grant; (4) that the land was thus segregated from the public domain of the United States; and (5) that no homestead or other possessory rights attached to the land prior to the railroad company's filing the map of definite location, commencing the construction of the road, and performing the conditions of the grant. Doughty v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 290, 107 N. W. 971; Washington & I. R. Co. v. Osborn, 160 U. S. 103, 40 L. ed. 356, 16 Sup. Ct. Rep. 219; Kansas P. R. Co v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; United States v. McLaughlin, 127 U. S. 428, 32 L. ed. 213, 8 Sup. Ct. Rep. 1177; United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; Northern P. R. Co. v. McCormick, 19 C. C. A. 165, 44 U. S. App. 396, 72 Fed. 736; Jamestown & N. R. Co. v. Jones, 7 N. D. 619, 76 N. W. 227; 177 U. S. 128, 44 L. ed. 699, 20 Sup. Ct. Rep. 568; Northern Lumber Co. v. O'Brien, 204 U. S. 192, 51 L. ed. 439, 27 Sup. Ct. Rep. 249; Red River & L. of W. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 229; Lilienthal v. Southern California R. Co. 56 Fed. 701; Spokane Falls & N. R. Co. v. Ziegler, 9 C. C. A. 548, 15 U. S. App. 472,

61 Fed. 392; Larsen v. Oregon R. & Nav. Co. 19 Or. 240, 23 Pac. 974; Hamilton v. Spokane & P. R. Co. 3 Idaho, 164, 28 Pac. 408; Enoch v. Spokane Falls & N. R. Co. 6 Wash. 393, 33 Pac. 966; Chicago, K. & N. R. Co. v. Van Cleave, 52 Kan. 665, 33 Pac. 472; Reidt v. Spokane Falls & N. R. Co. 6 Wash. 623, 34 Pac. 150.

Ball, Watson, Young & Lawrence for respondent.

Filing of map is only required to determine the land grant. St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Northern P. R. Co. v. Hasse, 197 U. S. 9, 49 L. ed. 642, 25 Sup. Ct. Rep. 305.

Individuals cannot assail the government's grant upon grantee's failure to comply with the terms of the grant. Government alone can act. Bybee v. Oregon & C. R. Co. 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641, and cases cited; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551.

Grant of right of way is effective from date of the act, July 4, 1864, Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302; Northern P. R. Co. v. Hasse, 197 U. S. 9, 49 L. ed. 642, 25 Sup. Ct. Rep. 305; Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794.

ELLSWORTH, J. The action in which this appeal is taken is one to determine adverse claims to the title of a railroad right of way 400 feet wide across two tracts of land in Stark county. The respondent, Northern Pacific Railway Company, claims title to this right of way as the legal successor of the Northern Pacific Railroad Company, under an act of Congress passed July 2, 1864, granting lands to aid in the construction of a railroad and telegraph line from Superior to Puget Sound. 13 Stat. at L. 365, chap. 217. The substance of the act so far as material to the facts of this case, is found in §§ 2, 3, 8, and 9. Section 2 enacts "that the right of way through the public lands be and the same is hereby granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph [line] as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent

to the line of said road, material or earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of 200 feet in width on each side of said railroad where it may pass through the public domain," etc. Section 3 of the act contains a further grant, for the purpose of aiding in the construction of this railroad, of every alternate section of public lands to the amount of twenty such sections per mile, on each side of such railroad line as the Northern Pacific Railroad Company may adopt, through any of the territories of the United States, to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office." Section 8 provides that the company shall commence the work of construction of its railroad within two years after the approval of the act by the president, and shall complete not less than 50 miles per year after the second year, and the whole road by July 4th, 1876. Section 9 requires as a prerequisite to all grants made under the act that the company accept the same under the condition that if any breach of the requirements of the act is made and continues for upward of one year, Congress may do all acts needful and necessary to a speedy completion of the road.

The contention of respondent is that, under and pursuant to this act and certain subsequent acts and joint resolutions of Congress relating to the same subject-matter, the Northern Pacific Railroad Company built and caused to be put into operation a continuous line of railroad and telegraph, extending from the waters of Lake Superior westwardly across the state of Minnesota and territory of Dakota, of the character and material specified in the act of Congress above referred to; that in the year 1881 it duly located, constructed, and placed in operation that part of its railroad extending over the lands in Stark county involved in this action; that long prior to the year 1881 the Northern Pacific Railroad Company made and filed with the Secretary of the Interior of the United States a map of definite location of its line of railroad over and across the land in question, which map of definite location was duly approved by the Secretary of the Interior; that at such times and at all times until after the completion of the line of railroad through the same and the placing of the lines of railroad and telegraph

in operation, the said land and all thereof was public land to which the United States had full title not reserved, sold, granted, or otherwise appropriated; and that by reason of said facts said respondent is the owner and entitled to full possession for railroad purposes of a strip of land 400 feet wide, to wit 200 feet on each side of the entire line of its railroad as the same is now and has been at all times since 1881 located, constructed, and in operation over and across the tracts of land involved.

The appellant, who was defendant in the district court, denies the facts which serve as the basis of plaintiff's claim of title, ownership, and right of possession. He specially denies that plaintiff complied with the provisions of the act of July 2, 1864, in that the lands claimed by plaintiff had been selected or definitely located or the selection approved as required by the terms and conditions of the act by the Secretary of the Interior of the United States at any time, so that the same became the land and property of Northern Pacific Railroad Company. He denies that plaintiff at any time filed a map of definite location as required by the provisions of the act covering any part or portion of said land and premises to which the plaintiff now claims to be entitled; and specifically denies that said line of railway was completed within the time prescribed by the act of Congress or in the mode and manner pointed out by said act and supplementary acts of Congress relating thereto. Both parties claim title in fee simple, and pray judgment that title to the strip of land in question be quieted against the claim of the other. The defendant's claim of title is based upon homestead entries made on part of the land by one Ellison, on July 8, 1884, and on another part by one Hughes, on May 22, 1885. Final proof was made under each of these entries, and patent issued to Ellison on September 6, 1890, and to Hughes on June 4, 1890, without mention of any reservation whether of any interest in the land to Northern Pacific Railroad Company or to any person other than the entryman.

On the trial plaintiff offered in evidence a certified copy of a map of definite location of the line of route of Northern Pacific Railroad Company from the Missouri river in Dakota territory to the crossing of the Little Missouri river, the line and right of way of which section of railroad crosses on its course to lands claimed by the defendant. It also introduced a deposition of its chief engineer, who testified that he was

employed in the Northern Pacific engineering department in 1880, and knew that the railroad was at that time constructed on the line and to the point shown upon the map, and that it had been maintained and operated in the same location ever since. It also offered a certified copy of the report of the commissioners appointed under provisions of the act of July 2, 1864, to examine the section of railroad shown on the map, on which is noted an acceptance approved by the President of the United States. Having offered this evidence, plaintiff rested its case, and defendant moved for a dismissal of its cause of action on the ground that "plaintiff has failed to establish a cause of action against the defendant in that the plaintiff has failed to show, first, that it is the owner in fee of the lands described in the complaint: second, that plaintiff has acquired title to the land described in the complaint by virtue of the act of Congress providing for a grant to Northern Pacific Railroad Company for the construction of a railroad,—in that it appears on the face of the evidence that the Northern Pacific Railroad Company did not comply with the general provisions of said act and especially with §§ 8 and 9 of said act in that, (1) it did not survey the lands for its projected line of railroad; (2) that said lands were not at any time surveyed by the government as provided for in said act; (3) that it did not definitely locate its line of railroad within the time prescribed in the act; (4) that there is a total failure of proof that it commenced the construction of its road within the time provided by the act; (5) that the evidence shows plaintiff did not have a road in operation on the 16th day of August, 1880, at the time the report was made by the commissioners appointed by the President; and (6) on the additional ground that it has failed to establish that the defendant is holding adversely to the right, title, interest, claim, or demand of the plaintiff to the lands in question, and has failed to establish that it had constructed and was operating a railroad pursuant to the terms of the act of July 2, 1864, across the lands involved in the suit. This motion was not acted upon by the court, and defendants then submitted certain evidence showing the filings and final proof upon the lands in question by Ellison and Hughes respectively, and the conveyance of the same through several grantors until the title so acquired by Hughes and Ellison was vested in defendant. The evidence then being closed, defendant renewed his motion to dismiss the action on the grounds before urged. The district

court, however, rendered its decree holding that plaintiff was owner of the strip of land in controversy, for railroad right-of-way purposes, and quieting title thereto as against appellant's claims.

Upon this appeal, defendant contends that plaintiff has wholly failed to acquit itself of the burden assumed by its cause of action, upon the principle that the railroad company, claiming as it does under a grant made by act of Congress, must show affirmatively that it has complied with each and every condition of the act; and that, having failed to do this, it has wholly failed to establish its title to any part of the premises claimed by it.

It will be noted that the grant of right of way over the public lands and of certain lands adjoining the right of way to assist in the construction and maintenance of the railroad is made by separate and independent sections of the act of July 2, 1864. The grant of right of way is made by § 2 of the act, and is throughout by its terms absolute and of present operation. Certain limitations and reservations are placed upon the grant of lands made by § 3, but none of these reservations extend to the right of way. The lands were to be first selected contiguous to the line of route as shown by a map of definite location, and the selections approved by the Secretary of the Interior before the title passed to the railroad company. As from its nature and use the strip of land constituting the right of way must extend in an uninterrupted course between the termini of the road, it could not be selected in segments, or the railroad company indemnified by selections elsewhere for any break in the continuity of the line occasioned by the withholding of a part. It is apparent, therefore, as said by the Supreme Court of the United States in the case of Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568, that in this case and peculiarly under the terms of this act, "different considerations apply to the grant of lands than to the grant of the right of way."

The rights respectively of the parties to this action, depending as they do upon an act of Congress, are in all cases determined conclusively and finally by the holdings of the Supreme Court of the United States. That court has decided that under an act whose clause granting a railroad right of way is almost *verbatim* the same as that contained in this act, "that it is a present, absolute grant, subject to no conditions except these necessarily implied, such as that the road shall be constructed and

used for the purpose designed." The court then holds: "We are of the opinion, therefore, that all persons acquiring any portions of the public lands after the passage of the act in question took the same subject to the right of way conferred by it for the proposed road." St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578. The principle announced in this decision applies with peculiar force to the facts of the case at bar. All contentions based upon a failure to survey the lands over which the right of way passed, or to file a map of definite location, become immaterial, as plaintiff was not required to do either in order to become entitled to the grant of right of way made by § 2. So far as this grant is concerned the conditions were fully met when the railroad was constructed and in use for the purposes named in the act. It is shown, we think, with sufficient certainty, that it was so constructed in the year 1880, four and five years before appellant's grantors made their homestead entries and acquired possessory rights in the public lands, and has been maintained in the same location since that time. Even had settlements under these entries been made. Prior to the construction of the road, it seems apparent from the rule announced in the Baldwin Case that any rights acquired by settlers on the public lands subsequent to July 2, 1864, were taken subject to the claim of the railroad company when it constructed its railroad under the terms of the act. In that case the settler who was claiming against the railroad company had made his entry two years before the construction of the road, but after the passage of the act containing the grant.

It appearing that plaintiff has succeeded to the rights of Northern Pacific Railroad Company which, pursuant to the terms of the act of July 2, 1864, constructed and maintained a line of railroad between the terminal points named in the act, it will be presumed that the conditions required of the company were performed within the times prescribed by the act itself or by amendatory or supplementary provisions. In any event a private party cannot raise the question of a failure of performance, within a limited time, of conditions required of the grantee under an act of Congress. Such question can be raised only by the United States; and until it sees fit to assert a forfeiture the rights of the grantee remain undisturbed. Bybee v. Oregon & C. R. Co. 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641.

The act of July 2, 1864, is in certain of its terms and provisions very

different from the act of March 3, 1875, granting right of way over public lands to railroad companies generally. In the act of 1864 a specific grantee is named, and the grant of right of way, being present in terms and without limitation, takes effect immediately upon the passage and approval of the act. By the act of March 3, 1875, any railroad company may avail itself of a like grant upon compliance with certain conditions, one of which is its identification as grantee, the other a definite location of its line of route; or, in other words, fixity of grantee must concur with fixity of location before the grant becomes operative. It was held in the case of Jamestown & N. R. Co. v. Jones, supra, that the first condition having been complied with, the second might be attained by actual construction and operation of the railroad. Under all construction of the act of 1875, however, it is held that both of these conditions must be complied with in one way or the other before the grant takes effect. There being no such limitation imposed upon the railroad company by the act of July 2, 1864, it is apparent that construction of this act is much more simple, and that the cases passing upon the requirements of the act of 1875 have little or no application to rights claimed under this act.

The evidence introduced by plaintiff, while vague in some particulars, shows with reasonable certainty that its predecessor and grantor has generally complied with the requirements of the act of 1864, by constructing a line of railroad from a point on Lake Superior to a place beyond that at which it crossed the lands owned by appellant. This, as we view it, is sufficient as against any claim that may be asserted by appellant to bring into operation the terms of the grant and vest title to the right of way to that point in plaintiff. Being the owner for right-of-way purposes of the strip in question, it is entitled to have its title quieted as decreed by the district court.

The judgment of the District Court is accordingly affirmed. All concur.

PAGE FARMERS' ELEVATOR COMPANY v. W. J. THOMPSON.

(126 N. W. 1009.)

Fraud — Measure of Damages.

1. The measure of damages for misrepresenting the price paid for an article by the vendor, in a contract for the sale thereof, wherein he agreed to sell for the price at which he purchased, and thereby induced the purchaser to pay a greater sum than was paid by the vendor, is the difference between the price which he paid and that which he represented he paid and received from his vendee.

Pleading — Demurrer.

2. The complaint examined, and it is *held* that the general demurrer thereto was properly sustained by the trial court.

Opinion filed May 26, 1910. Rehearing denied June 21, 1910.

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

Action by the Page Farmers' Elevator Company against W. J. Thompson. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

W. J. Courtney, for appellant.

Where corporate officers purchase property and resell it to the corporation, and, by false representations as to its cost, receive from the corporation a sum in excess of the purchase price, secretly keeping the difference, they are liable to such corporation for such difference. 21 Am. & Eng. Enc. Law, p. 903, note 2; Aldrich v. Scribner, 154 Mich. 23, 18 L.R.A.(N.S.) 379, 117 N. W. 581.

If defendant offered to sell property for what it cost him, and by false representations induced plaintiff to pay $1,000 in excess of that cost, that sum is the measure of damages. First Ave. Land Co. v. Hildebrand, 103 Wis. 530, 79 N. W. 753; Teachout v. Van Hoesen, 76 Iowa, 113, 1 L.R.A. 664, 14 Am. St. Rep. 206, 40 N. W. 96; Davenport v. Buchanan, 6 S. D. 376, 61 N. W. 47; Martin v. Veana Food Co. 153 Mich. 282, 116 N. W. 978; Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 A. & E. Ann. Cas. 1057; Pitts-

burg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, 17 Mor. Min. Rep. 226.

V. R. Lovell, for respondent.

One who seeks damages for deceit must prove false representations and the amount of damages that he suffered thereby. Brandom v. McCausland, 96 C. C. A. 358, 171 Fed. 403; Smith v. Bolles, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39, 16 Mor. Min. Rep. 159; Rockefeller v. Merritt, 35 L.R.A. 633, 22 C. C. A. 608, 40 U. S. App. 666, 76 Fed. 909; Sigafus v. Porter, 179 U. S. 116, 45 L. ed. 113, 21 Sup. Ct. Rep. 34.

Deceit and injury must concur. Nelson v. Grondahl, 12 N. D. 131, 96 N. W. 299; Alden v. Wright, 47 Minn. 225, 49 N. W. 767.

SPALDING, J. The complaint in this case is as follows:

"(1) Plaintiff for a cause of action herein alleges that it is a corporation organized and existing under and by virtue of the laws of the state of North Dakota, with its office and place of business in the village of Page, in the county of Cass and state of North Dakota.

"(2) That the defendant was a director and the duly elected, qualified, and acting vice president of the said corporation from July 1, 1906 until July 1, 1907.

"(3) That on or about the last day of June, A. D. 1907, while acting as vice president and director of the above-named corporation, this defendant represented to the plaintiff that he had purchased the Minnesota & Western Elevator, located in the village of Page, county of Cass and state of North Dakota, for $6,100; and the said defendant, to induce the plaintiff to purchase said elevator, falsely and knowingly represented to the plaintiff that he had recently purchased this elevator for $6,100, and offered to sell the same to the plaintiff for exactly what it cost him; and to induce the plaintiff to pay this price, falsely and knowingly, and with intent to deceive, represented to the plaintiff at the annual meeting of the directors of the said corporation, that he had purchased the said elevator for the above amount; that said representations were made by the defendant for no other purpose than to induce the plaintiff to pay $6,100 for said elevator; that the plaintiff through its directors, relying upon said false representations of the defendant, believing that his statement was true, agreed to purchase the

said elevator for the price which the defendant had represented he paid. That the defendant paid only $5,100 for said elevator, and by his fraud and misrepresentation induced this plaintiff to pay $1,000 more than the property was actually worth, and the plaintiff, through its directors, would not have paid more than $5,100 except the defendant had fraudulently and falsely, and with intent to deceive, misrepresented the price which he had paid for said elevator.

"Wherefore, the plaintiff demands judgment against the defendant in the sum of one thousand dollars ($1,000), with interest therefrom and since the 1st day of June, A. D. 1907, besides the costs and disbursements of this action."

To this complaint, the defendant demurred "upon the ground and for the reason that the same does not state sufficient facts to constitute a cause of action." The demurrer was sustained and plaintiff appeals. In the order sustaining it the learned judge who passed upon it gave his reasons for so doing. In substance, they were to the effect that plaintiff had proceeded upon a wrong theory as to the measure of damages, if any, in that on plaintiff's theory it was damaged the difference between what the defendant actually paid for the property and what he represented to plaintiff that he paid for it; and the court held that, notwithstanding the representations made might have been false, the plaintiff should have shown that by the false representations it was induced to pay more than the property was worth; that if it paid $6,100 and the property was worth that sum, it suffered no damage.

It is possible that a cause of action might be spelled out of the complaint, but, if so, we must confess that we are afflicted with the present-day deficiency said to so generally prevail in the art of spelling. While we are of the opinion that the decision of the district court was correct, it was unquestionably based upon an incorrect reason. Had the plaintiff stated facts showing an agreement to sell at the actual price paid by the defendant, and a purchase at that price, and a misrepresentation amounting to $1,000 in the price, at which defendant was overpaid $1,000, there can be no question that the complaint would have stated a cause of action for the recovery of the amount of the overpayment; but after carefully considering the various allegations of the complaint, we are impressed with the conviction that it fails to

state facts warranting a recovery, either on the theory that the measure of damages is the difference between what the defendant paid and what he represented he paid, or between what plaintiff agreed to pay and its worth. As to the measure of damages, the authorities cited by respondent are not in point, but see Hedgen v. Koeffler, 97 Wis. 313, 72 N. W. 745; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, 17 Mor. Min. Rep. 226; Teachout v. Van Hoesen, 76 Iowa, 113, 1 L.R.A. 664, 14 Am. St. Rep. 206, 40 N. W. 96; Aldrich v. Scribner, 154 Mich. 23, 18 L.R.A.(N.S.) 379, 117 N. W. 581; Barnard v. Colwell, 39 Mich. 215.

It is essential that a complaint in an action for the recovery of money state facts from which can be determined the amount the pleader is entitled to recover, if anything. An analysis of this complaint results as follows: It alleges that defendant agreed to sell the elevator to plaintiff for what it cost him, representing that it cost him $6,100; that plaintiff, relying on his representations as to cost, agreed to purchase for that price; that in fact defendant had only paid $5,100, and by his fraud and misrepresentations plaintiff was induced to pay $1,000 more than the elevator was worth, and that plaintiff would not have more than $5,100 except for the misrepresentations of defendant. The allegations of paragraph 3 are fitting for a complaint in an action to rescind the contract to purchase on the ground of fraudulent representations, but it will be observed that that paragraph only states an agreement to purchase for $6,100. Paragraph 4 does not aid plaintiff's pleading, because, while it alleges inferentially that plaintiff paid for the elevator, it does not state the sum paid, and if resort be had to the allegations that the misrepresentations induced the plaintiff to pay $1,000 more than the property was worth, we have no allegations as to its worth. It follows, taking either horn of the dilemma, that the complaint does not state facts from which the court, in case of default, could determine the amount of the damage. The demurrer admits all the facts well pleaded. It therefore admits defendant agreed to sell to plaintiff for what the elevator cost him, and that plaintiff agreed to purchase at that figure, but that defendant in fact only paid $5,100 instead of $6,100 as represented, and thereby induced plaintiff to pay $1,000 more than the property was worth. But what did plaintiff pay? Or, on the theory of the trial court, what was the property worth?

Can a court infer that the property was worth only $5,100? The allegation is only that appellant entered into an agreement to pay $6,100. The trial court gave appellant permission to amend, but it declined to do so. It is apparent from the reasons for sustaining the demurrer given by the court, that it would have been useless for plaintiff to have amended by stating the omitted facts showing damage amounting to the difference between what it agreed to pay and what, from the briefs and oral arguments, we assume it did pay. In view of this fact, we suggest the propriety of permitting an amendment on the case being remanded.

The order of the District Court is affirmed.

All concur, except FISK, J., dissenting.

FISK, J. (dissenting). I feel compelled to differ with the views above expressed. It is perfectly apparent to my mind that the facts alleged in the complaint are amply sufficient to sustain a recovery upon either one of separate and distinct theories. I think the facts alleged are sufficient to support a recovery for damages for the fraud and deceit practised on plaintiff by defendant, and also as for money had and received by defendant to plaintiff's use. That a recovery may be had under the latter theory was expressly held by the Michigan court under facts precisely like those in the case at bar. Barnard v. Colwell, 39 Mich. 215.

By the allegations of the complaint the defendant is sufficiently apprised of the fact that plaintiff claims the right to recover the sum of $1,000 as an excess payment which it was induced to make to defendant through his false representations as to the amount he had actually paid for the elevator. I think the necessary and sole implication to be drawn from the allegations of the complaint is that plaintiff was not only induced by such false representation to agree to pay $6,100 for the elevator, but that it in fact consummated such agreement by the payment of said sum. An agreement to purchase at $6,100 is alleged, and also the fact that plaintiff thereafter actually paid defendant the purchase price. The reasonable inference deducible therefrom is that plaintiff paid the price which it had therefore agreed to pay. The order appealed from should be reversed.

F. A. PATRICK & CO., Corporation, v. JAMES N. AUSTIN, Executor of the Estate of Kate Austin Angell, Deceased.

(127 N. W. 109.)

Verdict — Conclusiveness.

1. The jury having found a verdict in favor of the plaintiff, and the trial court having refused to set it aside, a verdict will not be disturbed, where it appears there is substantial conflict in the evidence.

Executors and Administrators — Claims against Decedent — Second Presentation — Estoppel.

2. If a party makes an attempt to present a claim to an administrator or executor for allowance, but from some cause fails to properly do so, he is not estopped from again presenting it in due form if within the proper time.

Same — Verification of Claims.

3. The verification of the claim presented to the executor on September 11, 1906, substantially complied with § 8100, Rev. Codes 1905.

Trial — Order of Proof.

4. The mere fact that testimony, which constitutes a part of the plaintiff's original case, was admitted in rebuttal after the testimony of the defendant had been closed, does not constitute error.

Opinion filed June 3, 1910.

Appeal from District Court, Dickey county; *Honorable Frank P. Allen,* J.

Action by F. A. Patrick & Co. a corporation, against James M. Austin, executor of the estate of Kate Austin Angell, deceased. From judgment in favor of plaintiff, defendant appeals.

Affirmed.

S. G. Roberts, for appellant.

There can be but one claim presented. Boyd v. Von Neida, 9 N. D. 337, 83 N. W. 329; Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558; Gillespie v. Wright, 93 Cal. 169, 28 Pac. 862.

Administrator cannot extend time to present claims against the estate of decedent. Winter v. Winter, 101 Wis. 494, 77 N. W. 883; Fields v. Mundy, 106 Wis. 383, 80 Am. St. Rep. 39, 82 N. W. 343; Boyd v. Von Neida, 9 N. D. 337, 83 N. W. 329; Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558; Re Smith, 13 N. D. 513, 101 N. W. 890; Janin

v. Browne, 59 Cal. 37; Ricketson v. Richardson, 19 Cal. 330; Gillespie v. Wright, 93 Cal. 169, 28 Pac. 862.

Geo. T. Webb, for respondent.

Affidavit commencing with deponent's name need not be signed by him. Stevens v. Central Nat. Bank, 69 Hun, 460, 24 N. Y. Supp. 222.

The claim, as presented, must be verified according to law. Anderson v. Cochran, 93 Tex. 583, 57 S. W. 29; Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024; Gillmore v. Dunson, 35 Tex. 435; Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Warren v. McGill, 103 Cal. 153, 37 Pac. 144.

Order of admission of proofs is in the sound discretion of the court. Burt v. State, 38 Tex. Crim. Rep. 397, 39 L.R.A. 305, 330, 40 S. W. 1000, 43 S. W. 344; Priest v. Union Canal Co. 6 Cal. 170, 4 Mor. Min. Rep. 515; Rheinhart v. State, 14 Kan. 318; State v. Webb, 18 Utah, 441, 56 Pac. 159; Brooks v. Crosby, 22 Cal. 43.

CARMODY, J. This action was brought by the plaintiff to recover judgment against the estate of Kate Austin Angell, deceased. Kate Austin Angell died on or about the 9th day of February, 1905, testate, and was at the time of her death a resident of Ellendale, North Dakota. The last will and testament of said deceased was duly admitted to probate on or about the 16th day of August, 1905. One Thomas Sefton was appointed administrator with the will annexed, and duly qualified and entered upon the duties of such administrator, and continued to act as administrator with the will annexed until about the 28th day of February, 1906, when the defendant herein, who was named as executor in said will, was duly appointed as such executor, and entered upon the duties of his trust on or about the 26th day of March, 1906, and has ever since been acting as such executor. In the month of September or October, 1905, the plaintiff by George T. Webb, its attorney, presented its claim against said estate to Thomas Sefton, the administrator as aforesaid, for allowance. The administrator neglected to act upon the same, either to allow or reject it, but kept it, in his possession until after he ceased to act as such administrator, and then returned it to plaintiff. In the month of April or May, 1906, plaintiff, through its said attorney, presented the claim to this defendant for

allowance, who neglected to allow or reject it. On or about the 11th day of September, 1906, the plaintiff again presented its claim to this defendant, as such executor, who did not act upon the same, either to allow or reject it. This action was commenced on the 21st day of December, 1906, the plaintiff alleging in its complaint that it presented its said claim duly verified to the defendant on the 11th of September, 1906. Plaintiff's contention is that the claim presented to Thomas Sefton in September or October, 1905, and again presented to defendant in April or May, 1906, was not a duly verified claim, and that the only duly verified claim was presented against the estate on the 11th day of September, 1906. The defendant contends that the claim presented to the administrator with the will annexed in September or October, 1905, and to this defendant in the month of April or May, 1906, is the same claim that plaintiff claims to have presented to this defendant on September 11th, 1906, and that the statute of limitations commenced to run on the expiration of the ten-day period after its presentation to said administrator in the month of September or October, 1905.

At the close of all the evidence, defendant moved the court to direct a verdict in his favor on all the issues, for the reason that the plaintiff has failed to make out a case by competent legal evidence, and that the action was not commenced within three months after the lapse of the ten-day period in which the claim became rejected. This motion was overruled by the court, and the case submitted to the jury, which returned a verdict in favor of plaintiff and against the defendant for the sum of $231.10, with interest from the 11th day of September, 1906.

In due time the defendant moved for judgment notwithstanding the verdict, or for a new trial, which motion was denied and judgment entered on the verdict, from which judgment defendant appeals to this court.

Appellant assigns numerous errors, but in our view of the case the only errors necessary to consider is whether the evidence is sufficient to sustain the verdict, whether when a claim is presented it is necessary that it be verified in accordance with the provisions of § 8100, Rev. Codes of 1905, to set the statute of limitation running, and whether it was error to admit the evidence introduced by plaintiff in rebuttal. It is admitted that, if the plaintiff is entitled to recover, the amount of

the verdict is correct. On the 11th day of September, 1905, the defendant signed the following receipt:

I have this day received of George T. Webb claims against the estate of Kate Austin Angell, deceased, as follows:

F. Vogel & Sons,	vs.	K. A.	Angell	Estate	Amount $ 84.02
Butler Bros.,	"	"	"	"	48.02
F. E. Case,	"	"	"	"	25.88
Newman, Roth Co.,	"	"	"	"	51.39
Theo. Acsher Co.,	"	"	"	"	86.17
Frank W. Norton & Co.,	"	"	"	"	87.83
A. T. McDonald Co.,	"	"	"	"	57.65
F. A. Patrick Co.,	"	"	"	"	260.41
B. Painter,	"	"	"	"	52.04
Leslie Paper Co.,					

And filed the same this day.

Dated at Ellendale, N. D., this 11th day of September, 1906.

(Signed) James M. Austin,
Administrator.

The claim alleged to be presented to defendant on September 11, 1906, and on which this action is brought, is as follows:

In the Matter of the Estate of Kate Austin Angell, Deceased.

F. A. Patrick & Co., Claimant, Respondent.

Creditor's Claim, $———.

....., the undersigned, a creditor of said Kate Austin Angell, deceased, presents his claim against the estate of said deceased, with the necessary vouchers, to Thos. Sefton, administrator, and to the said county court, for allowance and approval, as follows, to wit:

Estate of Kate Austin Angell, Deceased,

To F. A. Patrick & Co.

	Dr.	Cr.
As per attached account Exhibit A.		$260.41.

Oath of Claimant.

State of Minnesota,
County of St. Louis. } ss.

Geo C. Stone, Treas. of F. A. Patrick & Co., a corporation of the city of Duluth, being duly sworn, doth say that the within and foregoing claim against the estate of Kate Austin Angell, late of the village of Ellendale, in said county of Dickey, deceased, is justly due and owing to the said F. A. Patrick & Co.; that the amount thereof, to wit, the sum of two hundred sixty and 61-100 dollars ($260.61), is justly due to said claimant; that no payments have been made thereon, except such as are credited upon said claim, and that there are no offsets or counterclaims against the same to the knowledge of deponent.

(Signed) F. A. Patrick & Co.,
By George C. Stone.

Subscribed and sworn to.

Defendant, called as a witness for the plaintiff, testified that he signed receipt marked Exhibit A. Does not know whether plaintiff's claim was presented at the date of the receipt or not. Cannot say it was not. The receipt is not right but does not know whether it is right as to the claim of the plaintiff. Cannot specify individual claims but knows that it is right as to all the claims mentioned therein.

Thomas Sefton, on behalf of the defendant, testified that there were several claims presented to him while he was acting as administrator with the will annexed, of the estate of Kate Austin Angell, deceased. That this claim was presented to him in September or October, 1905, by George T. Webb, plaintiff's attorney. That he did not take any action on it. That he was under the impression the claim was verified. That he could not call to mind particularly the wording of the claim. That it is his impression that the claim was sworn to and signed, just exactly how he could not say. The paper marked Exhibit C may have been the paper presented to him. He filed all claims away in an envelope, and when he ceased to be administrator he returned all claims to the parties presenting them.

George T. Webb, attorney, testified for plaintiff in rebuttal that in

the fall of 1905 he presented a statement of plaintiff's claim to Thomas Sefton, the administrator with the will annexed. That he has no independent recollection of this particular claim, as he presented eight or ten claims at the same time. Did not think these bills or claims were verified under the statute; to the best of his knowledge they were not. That he presented the claim to defendant in the spring. That he does not believe the statment was duly verified when first presented to defendant. That the claim as presented September 11th, 1906, is in his handwriting, although he has no independent recollection of making it out. That he remembers getting blank affidavits from the county judge for the presentation of claims.

The evidence of the witness Webb was objected to by defendant as incompetent, irrelevant, and immaterial, and not in rebuttal of any evidence introduced by the defendant. It will be noticed that the claim sued on was verified in Duluth on the 25th day of September, 1905. While the evidence is not very satisfactory, we think the court did not commit any error in refusing to direct a verdict in favor of the defendant, and the jury having found a verdict in favor of plaintiff, and the trial court having refused to set it aside, we cannot disturb the verdict. Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Muri v. White, 8 N. D. 58, 76 N. W. 503; Howland v. Ink, 8 N. D. 63, 76 N. W. 992; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Magnusson v. Linwell, 9 N. D. 157, 82 N. W. 743; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724.

Plaintiff insists that the rejection of a claim not properly verified does not set in motion the statute of limitation as to actions on such rejected claim. There being no satisfactory evidence of the verification of the claim as presented to the administrator with the will annexed, or to the executor previous to September 21, 1906, and the jury having found that the claim was not verified at the time of the two first presentations, we hold that the statute of limitations did not commence to run until September 21, 1906. True, the claim was not in terms rejected either by Sefton or defendant, but, under our statute, if the executor or administrator or the judge refuses or neglects to indorse his

allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day.

In the case at bar neither the administrator nor the executor rejected the claim, but keeping a claim for ten days is equivalent to a rejection. If a party makes an attempt to present a claim to an administrator or executor for allowance, but from some cause fails to properly do so, he is not estopped from again presenting it in due form if within the proper time. Warren v. McGill, 103 Cal. 153, 37 Pac. 144; Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Crosby v. McWillie, 11 Tex. 94.

We think the verification of the claim presented on September 11th, 1906, substantially complied with § 8100, Revised Codes, 1905.

The claimant being a corporation, the verification would necessarily have to be made by an officer; in the case at bar it was made by the treasurer.

Section 8101, Rev. Codes of 1905, provides: "When it shall appear, upon the settlement of the accounts of any executor or administrator, that debts against the deceased have been paid without the affidavit and allowance prescribed by the preceding section, and shall be proven by competent evidence to the satisfaction of the county court that such debts were justly due, were paid in good faith, that the amount paid was a true amount of such indebtedness over and above all payments and set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said account."

This section, we think, is for the protection of the executor or administrator when he has in good faith paid a claim without its being verified, and has no application to the facts of the case at bar. Most of the cases cited by appellant are not in point. They hold that where a claimant presents his claim to the executor or administrator before a notice to creditors is published, that the statute of limitations commences to run from the time of presentation, without regard to the publication of the notice to creditors.

In Gillespie v. Wright, 98 Cal. 169, 28 Pac. 862, the claim was presented twice and rejected each time. The plaintiff's attorney believing that it was not sufficiently formal the first time, again, at a later day, presented it to the attorney of the defendant for action by the

executrix. It does not appear in what manner it was defective, if any. The supreme court of California held that the statute of limitations began to run from the first presentation. This case was decided in 1892, and in the later case of Westbay v. Gray, decided in 1897, the supreme court of California there held that if a party makes an improper attempt to present a claim to an administrator he is not estopped from presenting it, if within the proper time.

The objection of the defendant to the testimony of the witness Webb, called after the defendant rested, is not well taken. It was a matter within the discretion of the trial court, and we cannot say that he abused his discretion. The mere fact that testimony which constitutes a part of the plaintiff's original case was admitted in rebuttal after the testimony of the defendant had been closed, does not constitute error. Madson v. Rutten, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872; State v. Werner, 16 N. D. 83, 112 N. W. 60; Pease v. Magill, 17 N. D. 167, 115 N. W. 260.

Finding no prejudicial error in the record, the judgment appealed from is affirmed. All concur.

HENRY WIEMER v. ALLIE DIVELBESS WIEMER.

(126 N. W. 1009.)

Appeal and Error — Acceptance of Benefits — Divorce — Motion to Dismiss.

1. A motion was made in the lower court to vacate a judgment granting plaintiff a divorce. From an order denying such motion, defendant appealed to this court. A motion is made to dismiss the appeal on the ground that appellant accepted benefits under such judgment prior to the date such motion to vacate was made. No claim is made that appellant has accepted benefits under the order appealed from. *Held*, that the motion to dismiss is without merit, and must be denied.

Motion to Dismiss — Adjudication on Merits.

2. The rule contended for by respondent, and which was recently announced by this court in Tuttle v. Tuttle, 124 N. W. 429, and other cases therein cited, has no application to the motion in the case at bar. A favorable ruling on respondent's motion to dismiss the appeal would deprive appellant of the right

to an adjudication on the merits as to the correctness of the order refusing to vacate the judgment. This would be manifestly improper.

Opinion filed June 22, 1910.

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

From an order denying defendant's motion to vacate a judgment of divorce in plaintiff's favor, defendant appeals. Respondent moves to dismiss such appeal.

Motion denied.

Stevens & Berndt, for the motion.

Engerud, Holt, and Frame, contra.

FISK, J. Plaintiff had judgment in the court below for a divorce from defendant. Thereafter defendant made a motion in that court for an order vacating such judgment, alleging fraud as ground for relief. Such motion was denied on October 5, 1909, and from the order denying the same she appeals.

A motion has been made in this court to dismiss such appeal upon the ground that, after the entry of such judgment and prior to defendant's motion to vacate the same, she accepted benefits thereunder, and the rule recently announced by this court in Tuttle v. Tuttle, and other cases cited therein, is invoked by respondent's counsel in support of their motions to dismiss the appeal. We are agreed that such rule is inapplicable and that the motion must be denied. It is not contended that any benefits have been received by appellant under the order appealed from, and we know of no reason why she should be deprived of the right to have such order reviewed on the merits. Manifestly, it would be improper on a motion to dismiss the appeal, to review upon the merits the question of the correctness of the order appealed from. Whether correct or erroneous, appellant is entitled to have the order appealed from reviewed by this court upon the merits. Such order granted her no benefits, therefore it is obvious that she has received none thereunder.

Motion denied. All concur except MORGAN, Ch. J., not participating.

ELLSWORTH, J. I concur in the result, without expression of opinion as to whether the rule announced in Tuttle v. Tuttle is applicable to this case.

EMERADO FARMERS ELEVATOR COMPANY v. THE FARMERS BANK OF EMERADO, a Corporation.

(29 L.R.A.(N.S.) 567, 127 N. W. 522.)

Corporations — Officer of Two Companies — Defalcation — Officer's Intent to Conceal.

1. In case the treasurer of an elevator company, also acting as cashier of a bank in which the elevator company has money on deposit, and authorized to draw checks in the name of the elevator company upon its bank account for the purpose of paying debts and obligations of the elevator company, misappropriates funds of the bank and for the purpose of covering up a shortage in the bank's funds until such time as he expects to be able to replace the same, draws checks of the elevator company payable to the bank, and charges these checks against the elevator company on the books of the bank, without intention to transfer funds from one corporation to the other, but only for the purpose of temporarily concealing his defalcation, such checks create no liability in favor of the bank against the elevator company.

Banks and Banking — Cashier's Authority — Notice — Officer of Bank Representing Depositor — Defalcation.

2. In case the cashier of the bank having misappropriated funds of the bank or become in some manner indebted thereto, as treasurer of the elevator company draws checks upon it payable to the bank and uses the same to pay his personal indebtedness to the bank, such checks, by their form, of themselves operate as notice to the bank of a misappropriation of the funds of the elevator company, and the bank, after accepting them with such notice, cannot predicate upon them a claim of liability against the elevator company.

Note.—The authorities are not entirely agreed as to whether managing officers of a corporation, through whom alone the corporation can act, are within the exception to the general rule charging a principal with knowledge acquired by its agent, which obtains when the agent is engaged in committing an independent, fraudulent act on his own account. Many cases have applied the exception even when the officer committing the wrongful act was a director, president, or other managing officer. But there is good authority, if not the weight of authority, in favor of a qualification of the exception, so as to exclude therefrom and bring within the general rule which charges the principal with knowledge possessed by the agent, cases where the officer, though acting for himself of a third person, is, as in the case of EMERADO FARMERS' ELEV. CO. v. FARMERS' BANK, intrusted with the entire management of the business, or acts as sole representative of the corporation in the transaction in question. The authorities on this question are reviewed at length in notes in 2 L.R.A.(N.S.) 993, and 29 L.R.A.(N.S.) 558. The doctrine is also discussed in a valuable article by Professor Mechem in 7 Mich. L. Rev. 137, et seq.

Banks and Banking — Principal and Agent — Ratification — Agent's Acts.

3. In case the cashier of a bank who has misappropriated its funds or otherwise become indebted to it, in order to conceal his defalcation or pay his indebtedness transfers funds of an elevator company of which he is treasurer, to the bank, and in order to account for such transfer draws checks upon the elevator company payable to the bank, and charges the amount of the same against the elevator company upon the books of the bank, the bank having accepted such payment through its cashier, cannot retain the benefits of his act without accepting the consequences of his knowledge. After receiving funds under such a state of fact, the bank can retain them only through ratification of the fraudulent act of its agent, the cashier; and in doing this it becomes *particeps criminis* with the cashier and liable at the suit of the elevator company to the amount of the fund so fraudulently transferred.

Banks and Banking — Payment of Trust Funds with Notice of Intended Misappropriation.

4. A banking institution is not authorized to pay out funds intrusted to it on deposit to a person known by it to stand in a trust relation to the depositor, when it has notice that such person intends to misappropriate and divert the fund received to his own uses when paid over; and in case such payment is made the amount so paid may be recovered at the suit of the depositor.

Banks and Banking — Cashier's Authority — Notice of Bank — Embezzlement.

5. In case the cashier of a banking institution who has the entire management, control, and conduct of its affairs, and stands as sole representative of the bank in all transactions relating to the receipt and disbursement of the funds of depositors, who, while so acting, draws checks of an elevator company of which he is treasurer, payable to the bank, presents such checks as treasurer to himself as cashier, takes the sum of money paid over thereon and misappropriates it, the bank of which he is acting will be held to knowledge of his fraudulent purpose at the time of presenting the checks, and cannot base thereon a claim of liability in its favor against the elevator company.

Opinion filed June 28, 1910.

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

Action by Emerado Farmers Elevator Company against The Farmers Bank of Emerado, to recover a balance alleged to have been received by it upon deposit. Plaintiff had judgment, and defendant appeals.

Affirmed.

Eangs, Cooley, and *Hamilton,* for appellant.

When an agent has been guilty of fraud for his own benefit by which he intended to and did defraud his principal, and possibly others, and the perpetration necessarily involved concealment from his principal, the latter is not chargeable with constructive notice of facts so concealed. 2 Pom. Eq. Jur. § 675; United Secur. L. Ins. & T. Co. v. Central Nat. Bank, 185 Pa. 586, 40 Atl. 97; Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326; Produce Exch. & T. Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162; Knobelock v. Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962; National Bank v. Munger, 36 C. C. A. 659, 95 Fed. 87.

The determination of this case should be controlled by Gunster v. Scranton Illuminating, H. & P. Co. 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550.

Scott Rex, for the respondent.

Bank's knowledge that money paid by it was to be misappropriated would prevent a recovery. Zane, Banks & Bkg. §§ 136, 143; First Nat. Bank v. New Milford, 36 Conn. 93; Manhattan Bank v. Walker, 130 U. S. 267, 32 L. ed. 959, 9 Sup. Ct. Rep. 519; Lamson v. Beard, 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 30.

Notice to its cashier is notice to the bank. Chase v. Redfield Creamery Co. 12 S. D. 529, 81 N. W. 951; Willard v. Monarch Elevator Co. 10 N. D. 400, 82 N. W. 996; Sykes v. First Nat. Bank, 2 S. D. 242, 49 N. W. 1058; Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837; Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847; Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 211, 73 N. W. 527; Farmers' & T. Bank v. Kimball Mill. Co. 1 S. D. 388, 36 Am. St. Rep. 739, 47 N. W. 402.

Where the cashier is the sole managing agent, his knowledge is the knowledge of the bank that he represents. First Nat. Bank v. New Milford, 36 Conn. 93; Morris v. Georgia Loan, Sav. & Bkg. Co. 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378; Wiggins v. Stevens, 33 App. Div. 83, 53 N. Y. Supp. 90; Daniels v. Empire State Sav. Bank, 92 Hun, 450, 38 N. Y. Supp. 580; National Bank v. Munger, 36 C. C. A. 659, 95 Fed. 87; Holden v. New York & E. Bank, 72 N. Y. 286; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; First Nat. Bank v. Dunbar, 118 Ill. 625, 9 N. E. 186; First Nat. Bank v. Blake, 60 Fed. 78; Niblack v. Cosler,

74 Fed. 1000; Bolles, Bkg. § 14, pp. 416 & 422; Hobbs v. Boatright, 195 Mo. 693, 5 L.R.A.(N.S.) 906, 113 Am. St. Rep. 709, 93 S. W. 934; Cook v. American Tubing Co. 28 R. I. 41, 9 L.R.A.(N.S.) 193, 65 Atl. 653.

ELLSWORTH, J. The complaint in the action in which this appeal is taken alleges that respondent, who is a corporation engaged in the grain elevator business at the village of Emerado, North Dakota, had carried for two years and more prior to the beginning of the action, an open account on deposit with appellant, which was, during that period, engaged in a general banking business at the same place; that during said period appellant had paid out for respondent on checks drawn on its said account portions of its moneys, and that at the beginning of the action there still remained to respondent's credit the sum of $3,044.02, which balance was payable on demand; that demand had been duly made and payment refused. The answer of appellant admits the allegation of an open account on deposit by respondent, but denies that there remains a balance of such deposit to respondent's credit in any sum whatever; and further alleges, as a counterclaim, that during the continuance of the account between appellant and respondent as aforesaid, appellant honored checks of respondent duly issued by it to an aggregate amount of $3,257.97 in excess of all sums received from respondent, by deposit or otherwise; and prays judgment for the recovery of the amount of such overdraft in the sum alleged.

By undisputed facts shown upon the trial, it appears that on June 19th, 1907, there stood to respondent's credit on the books of appellant bank a balance of $6,660.98; that between that date and October 3d, 1908, there were further sums deposited by appellant, which, including such balance, aggregated the sum of $146,682.49; and that during said period there was paid out for respondent upon checks duly drawn and presented to appellant sums aggregating $143,638.47, leaving a balance of $3,044.02, the sum for which suit is brought.

It further appeared that at all times from the fall of the year 1905 until his death by suicide, on or about the first day of October, 1908, one John Hempstead was secretary and treasurer of respondent corporation, and as such had authority, and it was a part of his official

duties, to receive its moneys and deposit them with appellant to respondent's credit. It also was his duty as treasurer of respondent upon presentation to him of proper vouchers therefor to pay its debts and obligations, and he was duly authorized to draw checks upon respondent's bank account with appellant for that purpose.

It also appeared that from December, 1902, until the time of his death, Hempstead was one of the directors and cashier of appellant bank. On August 15th, 1907, Hempstead, as treasurer of respondent Elevator Company, drew two certain checks, one in the sum of $2,000 and the other in the sum of $1,768, on which checks appellant, under the designation of "Farmer's Bank," was named as payee, and on August 17th, 1907, charged the amount of said checks against respondent's account on the books of the bank. On May 8th, 1908, Hempstead, as treasurer, drew another check for the sum of $2,333.99, in which also appellant was the payee named, and on May 9th charged that sum against respondent upon the books of the bank. All three of these checks bear the bank's stamp, "paid" upon their face as of the date of their issuance. On the quality of these three checks depends the entire issue between appellant and respondent in this case. If they were properly chargeable against respondent's account, then the claim of the Elevator Company against appellant is fully paid, and appellant is entitled to recover as an overdraft the amount prayed for in its counterclaim. On the other hand, if the checks are worthless and their aggregate amount is not a legitimate charge against respondent, appellant concededly is indebted to it in the amount claimed in its complaint.

It was shown to have been the usual practice of Hempstead during the period that he was acting as treasurer for respondent to receive over the counter of the bank grain tickets issued by the operating agent of the Elevator Company at Emerado, and to pay them in cash with the moneys of the bank. During these seasons of the year when grain was being marketed in considerable quantity, a number of such tickets would be presented in the course of a day; and at the close of the day's business in order to adjust accounts between the Elevator Company and the bank, Hempstead would draw a check for the aggregate amount of the tickets issued during the day, payable to the bank, and sign the same as treasurer of the Elevator Company. A large number of

checks drawn in this manner were shown upon the trial. It appears, however, that the three checks in question, although drawn in the same form as the others, were not placed by Hempstead with the checks of the Elevator Company, but were kept in a separate drawer, and were not noted by him in any manner upon respondent's books of account. The existence of these checks was therefore unknown to the Elevator Company until after Hempstead's death and a consequent examination of the bank's books and papers.

It further appeared at the trial that at the time the three checks in question were drawn, marked paid and charged against the Elevator Company upon the books of the bank, there was no indebtedness due from the Elevator Company to the bank in that sum or in any sum whatever. It also appeared that after the time of Hempstead's death, upon an examination of his account with the bank, there was a cash shortage of $800 or more; that false certificates of deposit aggregating several hundred dollars had been issued by Hempstead to certain depositors. Shortages and irregularities also appeared in the accounts with other banks during the period in which Hempstead was cashier, and in his account with a school district, of which he was treasurer. During his lifetime these shortages were covered by false entries or by some means not clearly shown, which prevented their disclosure upon the books of the bank. It seems apparent from the facts shown that for a period of at least two years before his death, Hempstead had dealt fraudulently with several of the different funds intrusted to him, and manipulated his accounts in such manner as to present a fair showing while he misappropriated and used for his own benefit very considerable sums.

Upon the trial appellant introduced the testimony of Hempstead's successor, as cashier, to the effect that so far as shown by the books and papers of the bank it had received no benefit from the three checks issued by Hempstead and charged against respondent's account upon its books; that the books of the bank, at the dates on which these entries were made, balanced exactly, a status that would not have existed if the cash account of the bank was intact at those dates and had been increased by the receipt of the amount of money shown by the checks or of any sum whatever. It also appeared that at all times prior to October 1st, 1908, the books of the bank at such times as a balance was

taken gave no indication of any irregularity or shortage in the bank's funds. An expert accountant who examined the books of the Elevator Company in October, 1908, testified that the Elevator Company had received no consideration or value whatever for the three checks in question. There was also some testimony that, according to a business custom prevalent in business circles in Emerado, checks drawn in the name of the bank were paid to those presenting them in cash and charged upon the books in the same manner as checks drawn by depositors to the order of cash.

The trial court found the facts generally as hereinbefore narrated, and deduced therefrom a conclusion of law that appellant was indebted to respondent in the sum of $3,044.02, for which sum judgment was entered accordingly. Appellant's principal assignments of error are directed against the findings of the trial court, holding that a balance upon deposit was still due respondent.

Therefore, aside from certain objections made upon the trial to the introduction of evidence, which will be referred to hereafter, the point upon which the entire controversy hinges is whether or not the three checks aggregating $6,101.99 were properly chargeable against respondent. If it be held that these checks are a valid charge against respondent, then it is quite apparent not only that respondent's entire deposit had been paid out to it, or on its order, but that it is liable to appellant for the sum paid in excess of such deposit as shown by the counterclaim.

The dual relation of Hempstead to this transaction in its various incidents is, of course, the only factor which complicates and renders at all uncertain or doubtful the determination of the controlling points of this appeal. If respondent and appellant in their dealings had been represented by different agents, the solution of the question of liability by the application of well-recognized principles would be direct and simple. The meager showing of the evidence throws little light upon the ultimate actual disposition by Hempstead of the sum of money represented by the aggregate amount of the three checks or the fund from which it was drawn; so that these facts are left almost entirely to speculation and surmise. It would seem that neither appellant nor respondent received any benefit whatever from whatever transfer of funds is represented by the passage of these checks. The most

probable view is that the money was misappropriated and used by Hempstead for his personal benefit. It is suggested by appellant's counsel that the capacity in which Hempstead was acting at the time of the misappropriation is the determining factor of the question presented. It is doubtless true that this is a point deserving consideration. However, it rests almost wholly in inference from the facts shown. The inferences that may legitimately be drawn from these facts are somewhat various, but, as we view it, any state of fact that may reasonably be said to exist under the proofs produced comes necessarily within the limits of one or the other of the following hypotheses: (1) Hempstead, having applied to his own use funds of the bank in his hands as cashier in the aggregate amount shown by the three checks, drew the checks and charged them against the Elevator Company on the bank's books, for the purpose of covering up the shortage in the bank's funds until such time as he expected to be able to replace the funds so used by him; (2) Hempstead, being indebted to the bank in the aggregate sum shown by the amount of the checks, gave to it in payment of his personal debts checks signed by him as treasurer upon funds belonging to the Elevator Company; (3) Hempstead, as cashier of the bank, having misappropriated at different times its funds to the aggregate amount of these checks, actually transferred to the funds of the bank those of the Elevator Company in his charge as treasurer, and in order to account for such transfer drew and charged the three checks as shown by the evidence; and (4) Hempstead as treasurer of the Elevator Company, at a time when the Elevator Company owed no indebtedness to the bank, as treasurer of the Elevator Company drew checks payable to the bank, presented these checks to the bank through himself as cashier, received the money in cash and misappropriated it.

From the fact that all moneys belonging to the Elevator Company, under the control of Hempstead, were at all times involved in this transaction on deposit with appellant, it follows that only under the last hypothesis could he be said to have actually misapplied these funds while acting as treasurer of the Elevator Company. His opportunities for fraudulent manipulation of these funds as cashier of the bank were, therefore, more numerous than when acting in the other capacity, and the consequent temptation to misappropriation much stronger. While,

under the conditions of the hypothesis 4, it is possible that when handling the funds as treasurer of the Elevator Company he may have made the actual misappropriation, still it seems to us that the occurrence of such condition is less probable than any of the three others.

If, under the conditions of hypothesis 1, the checks were issued and used by Hempstead merely as a temporary fraudulent cover for the misappropriation of bank funds, it seems quite clear that the bank can make no claim to any benefit from a contract based upon the checks. In preparing the checks with such purpose in view, it cannot reasonably be claimed that Hempstead had any intention that they should in fact operate as a transfer of the funds of the Elevator Company to the bank. As he acted only as treasurer of the Elevator Company in preparing and handling the checks, there was no meeting of minds between it and the bank in a contract operating to transfer the funds. In such state of fact, there is no support to a claim of liability in favor of the bank against the Elevator Company for any of the sums of money designated in the checks. First Nat. Bank v. New Milford, 36 Conn. 93.

Under hypothesis 2, it is readily apparent that a transfer by means of such checks and the application of the funds of the Elevator Company to the payment of the private debt of Hempstead would, of itself, operate as notice to the bank of a misappropriation. The bank, taking the checks under such conditions and with such notice on principles so elementary that demonstration is superfluous, could not predicate upon them a claim of liability against the Elevator Company.

The facts of hypothesis 3 are analogous in every way to those presented in cases where one person takes the property of another and uses it as a means of liquidating his debt to a third person. In such case, the third party, taking the benefit with notice of the fraud out of which it proceeds, cannot retain it without becoming *particeps criminis* with the person committing the fraud. Whether the transfer of funds from the Elevator Company to the bank was made simply upon the books of account or by manual transfer of bills, notes, or coin, the benefit conferred thereby must necessarily have been accepted for the bank by Hempstead, its cashier. "It must be deemed to have known what he knew, and it cannot retain the benefit of his act without accepting the consequences of his knowledge. . . . [It] cannot obtain greater

rights from his act than if it did the thing itself, knowing what he knew." Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496. Therefore, the bank, in receiving the funds under a state of fact such as this, acquired no title to them, and can retain them only by rectifying the fraudulent act of its agent. In doing this it would, of course, become liable at the suit of the Elevator Company, to which the fund fraudulently transferred, belonged.

Hypothesis 4, the last in order and the one which, as we have noticed, is most improbable of occurrence, is also the most difficult of determination. The controlling principle is that a banking institution is not authorized to pay out funds intrusted to it by deposit to a person standing in a trust relation to the depositor when it knows such person intends to misappropriate and devote the fund to his own uses when paid over. It is argued by respondent that, if Hempstead as treasurer of the Elevator Company presented these checks to Hempstead as cashier of the bank, and he, acting in the latter capacity, paid over the money to Hempstead as treasurer, who thereupon misappropriated it, the party paying the money, being the same person who received it, must necessarily have knowledge of what he intended to do with it in his other capacity; and therefore that the cashier of the bank knew at the time he paid out the Elevator Company's money that the agent to whom he paid it meant to turn it to his personal uses. The general principle underlying this proposition of law is formulated by our Code as follows: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought in good faith and the exercise of ordinary care and diligence to communicate to the other." Rev. Codes 1905, § 5782. But, appellant contends that Hempstead, being merely the agent of the bank and engaged in a fraudulent transaction which rendered it against his interest to disclose his knowledge as treasurer of the Elevator Company to the executive officers of the bank, could not be presumed to have made known these facts. Cases are cited in which the principle is so applied to facts that are very closely analogous to those of the case at bar. Inerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; Gunster v. Scranton Illuminating, H. & P. Co. 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550. These cases, however, are

distinguished from the case at bar in that the officers of the bank, having knowledge of an intended fraudulent diversion of the funds intrusted to it, did not control its action. Such control was exercised by other persons representing the corporation with equal or greater authority, to whom the knowledge of the person who intended to make the misappropriation was not conveyed. In the case at bar the evidence shows quite satisfactorily that none of the stockholders of the bank except Hempstead was resident in the territory adjacent or tributary to the village in which the bank was located. The entire management, control, and conduct of the affairs of the bank was committed to Hempstead. He had an assistant whom he himself employed, but who was unknown to the officers of the bank and who had not the slightest control of the bank's affairs. There was not the slightest oversight or control over Hempstead exercised by any officer of the corporation. This, as we view it, places the bank under plenary responsibility for the acts of Hempstead, and binds it entirely to notice of any fact that he had in mind when he performed any of the acts committed to him in disbursing the funds of the bank. In any event, the rule above referred to, that the principal cannot take the benefit of the transaction conducted by its agent ostensibly on its behalf without assuming full responsibility, not only for his acts, but his knowledge, applies with all its force. Niblack v. Cosler, 74 Fed. 1000. Under the facts of hypothesis 4, therefore, Hempstead, as principal and sole agent of the bank, necessarily had knowledge at the time he paid the three checks drawn in the name of the Elevator Company, that the agent of the Elevator Company to whom it was paid meant to use the cash for his own benefit. In other words, the bank had full knowledge of the fraud which the agent of the Elevator Company intended to perpetrate, and in paying out the money it was *particeps criminis* in the fraud, and could not recover upon the checks received by it in such transaction. In any practicable view of the circumstances attending the misappropriation of funds by Hempstead in any capacity in which it was possible that he should have acted, there was no liability of the Elevator Company to the bank on any of the three checks in question, and the conclusions of the trial court are fully sustained.

The evidence received by the trial court under objection was all directed to the point that the Elevator Company had no knowledge of or

notice of any irregularities on the part of Hempstead in his dealings with its funds, and on the other hand had every reason to believe that he was at all times conducting the business of the Elevator Company in a regular and methodical manner. While such evidence is not very material, we cannot say that its reception was in any manner prejudicial to appellant. It seems to have been offered in an attempt to forestall certain matters of defense that were not afterward presented, to the effect that certain questionable acts of Hempstead were ratified and approved by tacit acquiescence on the part of the Elevator Company. The objections to these items of evidence were, we think, properly overruled.

As our conclusion upon the legal principles governing the case agree in result with the findings of the trial court, the judgment is affirmed.

All concur, except MORGAN, Ch. J., not participating.

THE STATE OF NORTH DAKOTA v. ROBERT S. NOAH.

(124 N. W. 1121.)

Homicide — Murder — Degrees.

1. The crime of murder is divided into two degrees in this state, dependent on the facts attending the killing; that is, the absence or presence of premeditation and deliberation. These degrees do not constitute distinct crimes, but degrees of the crime of murder.

Criminal Law — Murder — Degree — Form of Plea.

2. Section 8807, Rev. Codes 1905, providing that, whenever a person prosecuted for murder pleads guilty, he shall designate in his plea whether he pleads guilty of murder in the first or second degree, is not complied with by a plea that he pleads "guilty as charged in the information." A plea in compliance with said section should be positive and definite as to the degree, and any indefiniteness in respect to the degree of crime is not remedied by a reference to the information in cases where the offense is divided into degrees.

Criminal Law — Murder in First Degree — Plea Where Two Offenses are Included in Information — Sufficiency.

3. Under an information charging murder in the first degree by express aver-

ments, and designating that degree by name, a plea that defendant is "guilty as charged in the information" is indefinite as to the degree to which he pleads guilty, as murder in the second degree is also charged in such information.

Homicide — Murder — Form of Information — Plea — Degree.

4. The fact that the information designates the offense as murder in the first degree does not control as to the degree, as that depends upon the facts alleged, and not upon the conclusion of the pleader or grand jury.

Same — Designation of Degree — Surplusage.

5. The fact that the offense is so designated is mere surplusage, and does not subject the information to attack on that ground.

Same — Instructions — Demeanor of Accused.

6. In cases where a jury is impaneled to determine the punishment to be inflicted upon a plea of guilty in murder cases, it is improper to instruct the jury that they may consider the demeanor of the defendant while in court, where he is not called as a witness.

Homicide — Murder — Jury — Fixing Penalty on Plea of Guilty.

7. It is improper to charge the jury, under such circumstances, that the court has the power to reduce the penalty inflicted by the jury, if they imposed the death penalty, as it tended to give the jury to understand that the whole responsibility was not on them.

Opinion filed February 3, 1910.

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

Defendant was informed against for murder in the first degree. He pleaded "guilty as charged in the information." The court submitted the question of punishment to a jury, and it determined that the death penalty should be inflicted. Sentence of death was pronounced pursuant to verdict. Defendant appeals.

Reversed.

Purcell & Divitt, for appellant.

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

MORGAN, Ch. J. On the 3d day of April, 1908, the state's attorney of Ward county informed against the defendant and filed an information against him, in which he was charged with murder in the first degree. On the 7th day of April, he was arraigned under such information, and plead "guilty as charged in the information." The trial court

impaneled a jury for the purpose of determining the punishment to be inflicted upon the defendant. After taking the testimony of witnesses, and the jury being charged by the court, they found that the defendant should be punished by the infliction of the death penalty. On the 14th day of April, 1908, the district court sentenced him to death, pursuant to the verdict. After the death sentence was pronounced upon the defendant, on April 14th, 1908, he appealed from such judgment to this court on the 23d day of October, 1908.

Defendant assigns four errors. These assignments of error relate to the insufficiency of the plea and errors of law in giving instructions to the jury in reference to the punishment to be inflicted.

In reference to the plea, the appellant's principal contention is that the same was a nullity for the reason that he was not required to designate therein whether he plead guilty of murder in the first degree or murder in the second degree, as provided by § 8807, Rev. Codes 1905. The appellant contends that the same rule should be applied in reference to the sufficiency of the plea in this case as is applied to the sufficiency of verdicts in similar terms in cases of crimes divided into degrees, or crimes that include offenses of a lower degree.

If the statute in reference to pleas and the statute in reference to verdicts in such cases were the same, the same rule would undoubtedly be applicable. In order to determine whether the same rule is necessarily applicable in this state, we will briefly consider the statutes applicable to verdicts. The appellant cites many cases holding that verdicts of "guilty" or verdicts of "guilty as charged" are insufficient, and it is his contention that the authorities holding such verdicts insufficient are in great majority.

We do not pass upon this question as applied to verdicts, as the same is not before us. We are called upon to give effect only to § 8807, as there is no other section of the Code bearing expressly upon plea of guilty in homicide cases. In cases of verdicts, there are other sections applicable, and they are the following: Section 8803, Rev. Codes 1905, provides that "the jury before whom any person prosecuted for murder is tried shall, if they find such person guilty thereof, determine by their verdict whether it is of murder in the first degree or of murder in the second degree."

Section 8804 provides that the jury in trials for murder shall deter-

mine the punishment to be inflicted, if the accused is found guilty, and in case of guilt of murder in the first degree, the jury must designate in the verdict whether the defendant shall be punished by death or by imprisonment in the penitentiary for life. If found guilty of murder in the second degree, the verdict must determine what the imprisonment shall be,—between not less than ten years in the penitentiary and not more than thirty years.

Section 8806 provides that in trials for murder the jury may, according to the facts and circumstances disclosed by the evidence, find the accused guilty of manslaughter. And when found guilty of manslaughter, the jury must designate whether the offense is manslaughter in the first or second degree, and shall determine the term of imprisonment within the limits prescribed by law.

Section 10051 provides that when the crime is distinguished into degrees, the jury must determine the degree of the crime if they find a verdict of guilty, and as to homicide cases the jury must find the degree of the homicide.

Section 10053 provides that the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the information or indictment, or of any attempt to commit the offense.

If these sections alone were to be considered, the decisions based on verdicts rendered in homicide cases would be applicable, to some extent, to the case under consideration, although the language is not identical with that of § 8807, supra, nor is the meaning of words synonymous. There are other sections, however, which make it apparent that the same construction is not applicable to pleas as to verdicts, if any force is to be given to the sections now referred to.

Section 10026 provides that the trial judge must charge the jury, before it retires to consider the verdict, upon all matters of law which may be deemed necessary to be submitted to the jury. In prosecutions for murder, this section devolves upon the trial court the duty of stating the law applicable to crimes divided into degrees, and with reference to offenses included within the offense charged in the information or indictment. It becomes necessary, under this section, for the judge to charge in reference to the elements of the crime in general, and each degree into which the crime charged may be divided, and the

punishment for each of such degrees in homicide cases. Further than this, § 10043 provides that a verdict may be either oral or in writing, unless the court requires that it be rendered in writing. If rendered in writing under instructions from the court, the jury must be provided with blank verdicts of suitable form for any verdict the jury may return, and such blank verdicts shall be taken by the jury when it retires. Compliance with this section renders it necessary for the jury to expressly designate the degree of the offense of which they find the defendant guilty.

Furthermore, § 10044 provides: "A general verdict upon a plea of not guilty is either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the information or indictment," etc. Reading these two sections last mentioned, together, it is apparent that if a verdict of "guilty" is rendered by the jury in such a case, it is equivalent to an express statement that the jury find the accused guilty of the highest degree of the crime charged in the information. Taking the charge of the court to the jury and the blank forms of verdicts submitted to the jury, and considering them in connection with the verdict of guilty in such a case, there is no room for speculation as to the crime or grade of the offense of which the defendant is found guilty. By this construction, every section of the Code pertaining to verdicts is given effect to, and no one of them is rendered inoperative or meaningless.

In People v. Rugg, 98 N. Y. 537, 5 Am. Crim. Rep. 247, the court considered the effect of a verdict of guilty, found under statutes like our own. Section 10 of the Penal Code of New York is the same as § 10051, supra, and § 436 of the Code of Criminal Procedure is the same as § 10043 of our Code, and § 437 of the New York Code is the same as § 10044 of our Code. In that case the jury found the defendant guilty under an indictment containing four counts, each of which charged murder in the first degree. The court also found that there was no error in the charge of the court, in which it was stated that the indictment charged murder in the first degree and under it the jury could find the defendant guilty of any degree of murder or manslaughter which make up the general designation of the crime of homicide. The jury was further instructed that if they found the defendant guilty of any other crime than murder in the first degree, they must specify what that crime was. In determining the sufficiency of the ver-

dict as a verdict of murder in the first degree under such circumstances, the court said: "Taking these provisions together, it is apparent that § 10 of the Penal Code must be construed with the qualifications and restrictions contained in §§ 436 and 437, supra, of the Code of Criminal Procedure; and where, as in this case, the indictment charges the degree of the crime, and the verdict is a general one 'guilty,' it is not essential that such degree should be specified in the verdict. Any other interpretation would render the provisions contained in the last two provisions cited inoperative and of no avail. The object and intention of § 10 of the Penal Code evidently was to guard and protect the rights of the defendant, so that the court, in inflicting the punishment, might be advised of the exact nature of the crime of which he was convicted. That object is fully accomplished where the indictment specifies the degree of the offense charged, and the verdict is a general one of 'guilty.' The finding of the jury of a general verdict of 'guilty' was, under the circumstances, equivalent to, and in fact a verdict of, guilty of murder in the first degree, in view of the fact, especially, of the instruction of the court that if they found the defendant guilty of any other degree, they should so state in their verdict."

This construction of these provisions is, to us, conclusive, that a different question is before us than the consideration of a verdict of guilty under the provisions of the Code of Criminal Procedure.

In this case there is nothing from which the intention of the accused can be gathered, except the plea and the information. In cases of verdicts, the court has before it the charge to the jury, the penalty found by the verdict, and other matters showing, to a certainty, what was intended by the jury. We therefore conclude that the same rule is not necessarily applicable to verdict as to pleas.

As stated before, we do not intend to now determine what would be the legal effect of a verdict by a jury of guilty as charged in the information under similar circumstances, as the question is not before us. We will now proceed to determine what was the legal effect of the plea of "guilty as charged in the information," under the undisputed fact that the information charged murder in the first degree, by proper averments and also designated by name that degree of murder.

Section 8807, Rev. Codes, 1905, is as follows: "Whenever any person prosecuted for murder or manslaughter pleads guilty, he shall,

in his plea, designate whether he is guilty of murder in the first degree or in the second degree, or of manslaughter in the first degree or in the second degree; and the court shall, if said plea is accepted, determine the punishment to be inflicted therefor within the limits prescribed by law, and enter judgment against such person in accordance with such determination. But the court may, in its discretion, examine witnesses to aid in the determination of the punishment to be inflicted, or submit the same to a jury to determine the punishment, or, at its discretion, may refuse to receive a plea of guilty and submit the whole case to a jury."

This section first appeared in our Code in the Revision of 1895. Nothing similar to this section has been found in any other state, in respect to pleas in criminal cases. The object of the statute undoubtedly was to make it certain what degree of murder or manslaughter the defendant was pleading guilty of, in view of the fact that the death penalty might be inflicted. The terms of the statute are positive that the accused, whenever he pleads guilty, shall designate what degree he pleads guilty of. Thee word "designate" means to point out or specify. The language used seems to negative the theory that it was intended to be left to deduction, or that the terms of the statute are complied with if words are used that may apply to either degree of murder. Murder is divided into two degrees, by the statute, according to the facts and circumstances attending the killing, depending upon the presence or absence of deliberation and premeditation. These degrees are not distinct crimes under the statute, but are simply degrees of murder, dependent upon the facts attending the killing. There are no degrees of murder of the first degree. The elements of murder in the second degree are necessarily included in the charge of murder in the first degree.

The information in this case charges murder in the first degree, perpetrated by shooting with an unlawful, wilful, and premeditated and deliberate intent to kill. It does not charge murder perpetrated by poison or lying in wait, or by torture, or murder while committing or attempting to commit any of the felonies specified in § 8796., Rev. Codes 1905. Hence what is here decided is solely in reference to the plea made in this case to the crime charged in this information by express averments. These allegations of the information include a

charge of murder in the second degree as well as a charge of murder in the first degree. If the killing was wilful and unlawful, but done without deliberation or premeditation, the offense would be murder in the second degree. In view of these facts, a plea of guilty as charged in the information was uncertain. What was the intent of the defendant or what his understanding of the crime charged was, we do not know from the record, and the statute precludes the right of the trial court to speculate or make inferences in respect to such intent or understanding. Said § 8807 was passed to make certainty and definiteness beyond question in this respect. Prior to the enactment of that section, the plea in this case would have been sufficient and legal under the statute in force at that time. The statute then in force was as follows: "Every plea must be oral, and must be entered upon the minutes of the court in substantially the following form: (1) If the defendant pleads guilty: 'The defendant pleads that he is guilty of the offense charged in this information (or indictment); (2) if he pleads not guilty: 'The defendant pleads that he is not guilty of the offense charged in this information (or indictment).'" Sec. 9910, Rev. Codes 1905.

The enactment of said § 8807, supra, was an implied repeal of said § 9909, as to pleas in murder cases. It would be nullifying the section without warrant to hold that the plea is sufficient in the face of § 8807 declaring, in mandatory terms, that the plea must be specific. We cannot ignore this statute passed under such circumstances. It would be ignoring the evident intent of the legislature that pleas must be made in terms positive and specific, and not in general terms.

In 2 Bishop, Crim. Proc. 3d ed. § 595, it is said: "The view sustained by most of the authorities, and probably best in accord with the reason of the thing, is that the legislature meant by this provision to make sure of the jury's taking into their special consideration the distinguishing features of the degrees, and passing thereon. Hence this provision is in the full sense mandatory, and unless they find the degree in a manner patent on the face of the verdict, without help from the particular terms of the indictment, it is void. No judgment can be rendered thereon, but a second trial must be ordered." Wharton on Crim. Pl. & Pr. 8th ed. § 752, says: "Where a statute requires in the verdict a designation of a degree, or the specific assessment of a punishment, a general verdict, without such designation or assessment will be a nullity."

There are many decisions of other states on verdicts in homicide cases that have a close bearing upon the question here under consideration. Such decisions are not based upon statutes like our own in reference to verdicts above referred to, so far as we are able to gather from such decisions. In general, it may be said that these decisions deal with statutes requiring the verdict to specify what degree the accused is found guilty of whenever the crime for which he is on trial is divided into degrees. We will briefly refer to some of these cases as sustaining our construction of said § 8807.

In McLane v. Territory, 8 Ariz. 150, 71 Pac. 938, the defendant was convicted of larceny from the person by a verdict finding the defendant "guilty as charged in the indictment." In that territory the Code provides that whenever a jury convicts of a crime divided into degrees, it must find the degree of which he is guilty. In that case the court said: "We think, under the statute, the jury must by their verdict find the degree of the crime, where the crime is divided into degrees, and that, in the absence of such finding, the judgment of the court based thereon is not warranted. The law contemplates that the jury shall decide upon the degree, and that they shall unequivocally so express themselves in their verdict. It is not sufficient to say that the indictment specifies the degree of crime, and that by reference to it the court can ascertain the degree which the jury found; nor can it be assumed, in spite of the clear instructions of the court on that point, that the jury did pass upon the value of the property taken, or take into consideration the language of the indictment. The intent and purpose of the act is to require the jury to pass upon the degree of the crime and to register their action definitely in their verdict, and not leave it to be inferred, from reference to the indictment or any other proceeding in the case, what their action in that respect was, and in the absence of such finding in their verdict, the verdict is fatally defective."

That principle was adhered to by the same court in Buffehr v. Territory, 11 Ariz. 165, 89 Pac. 415.

In People v. O'Neil, 78 Cal. 388, 20 Pac. 705, the jury found a verdict as follows: "We—find the defendant—guilty as charged, the penalty to be imprisonment for life." The information charged murder, and the statute of the state provides that when a crime is dis-

tinguished into degrees, the jury must find the degree, if they convict. The court said: "It has been uniformly held that failure to specify the degree of murder under that section vitiates the verdict."

In State v. May, 62 W. Va. 129, 57 S. E. 366, the defendant was indicted for murder in the first degree, and the jury found her "guilty as charged in the within indictment." The court said: "In this state, where homicide is proven, the presumption is that it is murder in the second degree. . . . . This being so, the statute makes it clear that the prisoner was entitled to have the jury say by their verdict whether, if guilty, he was guilty in that degree of murder which authorized the court to pronounce judgment of death upon him. . . . Although the fatal defect of the verdict in this case thus plainly appears, and the point was saved by the motion in arrest of judgment, it has not been noticed or argued in this court. In so important a case, involving the life of the prisoner, the court does not feel warranted in shutting its eyes to so fatal a defect in the verdict."

In Waddle v. State, 112 Tenn. 556, 82 S. W. 827, the defendant was charged with and convicted of murder. The verdict was "guilty, as charged in the indictment, with mitigating circumstances." Under the statutes of Tennessee it becomes the province of the jury to ascertain in their verdict whether they find the defendant guilty of murder in the first or second degree. In that case it was argued by the appellant that the words, "with mitigating circumstances," indicated that the prisoner was found guilty of murder in the first degree. The court said: "But in the face of the positive mandates of the statute, there is no room for intendment or legal implication, for it imperatively requires that the jury shall ascertain in their verdict whether it is murder in the first or second degree."

In State v. Pettys, 61 Kan. 860, 60 Pac. 735, the defendant was charged with assault and shooting with a deadly weapon with intent to kill. The jury found the defendant "guilty, as charged in the information, of assault with intent to kill." The court said: "Included in the offense charged are others of a lower degree, and, as the Criminal Code requires the jury to specify in their verdict the degree of the offense of which they find the defendant guilty, it must be held that the verdict in question is fatally defective."

In State v. O'Shea, 59 Kan. 593, 53 Pac. 876, the defendant was

charged with an assault with intent to kill. The jury found him guilty of an assault with a deadly weapon with intent to kill, as charged and set forth in the information. The court said: "The requirement of § 239 of the Criminal Code, that the jury shall specify in their verdict of what degree of the offense they find the defendant guilty, has caused very nice and embarrassing questions to arise in a number of cases, but it may now be deemed the law of this state, well settled by a line of decisions, that the degree of offense of which the conviction is had must be determined from the verdict itself, and that the addition of the words, 'as charged and set forth in the information,' is insufficient to show that the jury intended to find the defendant guilty of every element of the principal crime charged in the information."

In Allen v. State, 85 Wis. 22, 54 N. W. 999, the defendant was charged with murder, and under that charge might have been found guilty of murder in either of the first, second or third degree. The jury found him guilty as charged in the information. The court said: "A general verdict of guilty upon such an information does not authorize the court to pronounce judgment, because the degree of the crime is not determined. These propositions must be considered as settled in this court."

In Hembree v. State, — Ark. —, 58 S. W. 350, the defendant was indicted for murder in the first degree. The jury found him "guilty, as charged in the indictment." Under the statutes of Arkansas, the jury must find, by their verdict, in case of guilty, whether the defendant is guilty of murder in the first or second degree. The court said: "Following this statute, it has been several times decided by this court that a verdict upon an indictment for murder, which does not find the degree of murder, is so defective that no judgment can be entered upon it." In People v. Campbell, 40 Cal. 136, the defendant was indicted for murder. The jury found him "guilty of the crime charged in the indictment." The statutes of California provide that juries in murder cases must find whether the guilt is of murder in the first or second degree. In that case the court said: "This injunction of the statute is not limited to any particular class of prosecutions for murder. On the contrary, it is made obligatory on all juries 'before whom any person indicted for murder shall be tried.' It establishes a rule to which there is to be no exception, and the courts have no authority to

create an exception when the statute makes none. We have no right to disregard a positive requirement of the statute, as it is not our province to make laws, but to expound them. . . . The word 'designate,' as here employed, does not imply that it will be sufficient for the jury to intimate or give some vague hint as to the degree of murder of which the defendant is found guilty; but it is equivalent to the words 'express' or 'declare,' and it was evidently intended that the jury should expressly state the degree of murder in the verdict, so that nothing should be left to implication on that point. If it be sufficient for the verdict to 'designate' the degree of the crime only by reference to the indictment, it would be equally good in such a case to simply find the defendant 'guilty,' without any express reference to the indictment; for a verdict of 'guilty,' without other words, would, in such case, be held to mean that he was guilty as charged in the indictment."

The fact that the information in this case specifies the degree of the murder to be murder in the first degree has no controlling effect. It was not essential to so characterize or specify the degree in the information. It is the averments of the information that control as to degree, and not the name given to the crime by the pleader or by the grand jury. The fact that it is named in the information, however, does not subject it to attack on that ground, but it is an irregularity only, and is considered surplusage. People v. Vance, 21 Cal. 400; People v. King, 27 Cal. 507, 87 Am. Dec. 95; People v. Nichol, 34 Cal. 211; Wharton, Homicide, 3d ed. § 557, and cases cited; Camp v. State, 25 Ga. 689; 10 Enc. Pl. & Pr. p. 151, and cases cited.

It is the fact that the information includes within its allegations all the necessary allegations for charging murder in the second degree that renders the plea uncertain, and that fact is not rendered less uncertain, as a matter of law, by reason of the fact that the offense is named as murder in the first degree. The following authorities are also in point: State v. Cleveland, 58 Me. 564; State v. Moran, 7 Iowa, 236; State v. Montgomery, 98 Mo. 339, 11 S. W. 1012; State v. Treadwell, 54 Kan. 513, 38 Pac. 813; State v. Reddick, 7 Kan. 143; State v. Jackson, 90 Mo. 156, 2 S. W. 128; Kirby v. State, 7 Yerg. 259.

The attorney general argues with force and plausibility that the information in this case became incorporated in the plea, and that the plea and the information must be construed together. What we have

said disposes of that contention, however. If so construed together, the plea would not be rendered certain as to the defendant's understanding as to the degree that he was pleading guilty of, nor would it be a less palpable disregard of a plain statutory provision passed to obviate the uncertainty that followed a literal compliance with the statute as it existed before the enactment of § 8807, supra.

Errors in giving instructions to the jury are also assigned. In view of the fact that the conviction must be set aside, we will briefly indicate our conclusion as to the propriety of such instructions, as further proceedings must be taken in the case.

The defendant was not a witness at the proceedings under which the question of punishment was submitted to the jury. He was present, necessarily, in court, however. The court stated to the jury what the punishment must be under the charge of murder in the first degree; that is, that it must be either the death penalty or imprisonment in the penitentiary for life.

The court also instructed the jury as to the credibility of witnesses, and gave the usual caution in regard to considering the testimony of witnesses, and the manner of determining as to their credibility, and stated further: "And in this connection you may consider the demeanor of the defendant in this case while he has been in the court room before you, in open court, as an element in the proof, should you see fit to consider the same." From this instruction as to the demeanor of the defendant, the jury were told that such demeanor could be considered by them an element of the crime. Unexplained, this instruction must have been taken to mean that the demeanor or conduct of the defendant in the court room might be taken as evidence, or as a test to determine whether the death penalty or life imprisonment should be imposed. We do not think it was proper under such circumstances. His demeanor might appear to indicate guilt or atrocity of character, whereas the reverse might be the truth.

The court also gave this instruction: "The question of the determination by you of which penalty shall be inflicted as a punishment for this crime is a question that you have to determine under all the evidence, and your verdict must be for one or the other of these penalties. Our statute under which you are acting contemplates that you act

as advisory board to the court, and this is the only crime known to the law in which a jury acts in such capacity. But your verdict is legally binding upon the court, whichever it may be, except that, should you return a verdict of the death penalty, the court, in its discretion, should it thereafter see fit to do so, might change the punishment to imprisonment for life; but the court could, under no circumstances, increase the punishment to death penalty after a verdict by you of life imprisonment."

The objection principally urged against this instruction is that it does not leave the question of punishment to the jury unequivocally. The jury was told that under certain circumstances the verdict could be changed by the court in its discretion. The statute provides absolutely that the jury is "to determine the punishment to be inflicted when that question is submitted to them in homicide cases." In this case we need not determine whether the verdict is advisory or binding upon the court. In other words, we need not determine whether § 10056, Rev. Codes 1905, applies in cases of verdicts as to punishment only under pleas of guilty. We are satisfied, however, that the question of punishment should be unconditionally submitted to the jury without any intimation that the whole responsibility as to punishment does not rest with the jury. The jury should not be told that the verdict might be changed by the court in case it deemed necessary to do so in the discretion of the court. The statement of the court was an indirect invasion of the province of the jury as to the determination of the punishment, and the court should have said nothing that interfered in the least with the discretion and judgment reposed in the jury as to that matter.

The following authorities tend to support the conclusion reached by us as to these instructions: People v. Harris, 77 Mich. 568, 43 N. W. 1060; McBean v. State, 83 Wis. 206, 53 N. W. 497; Territory v. Griego, 8 N. M. 133, 42 Pac. 81; Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835; People v. Ross, 134 Cal. 256, 66 Pac. 230; Cohen v. State, 116 Ga. 573, 42 S. E. 781; People v. Murback, 64 Cal. 369, 30 Pac. 608.

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

C. B. S. GOSS v. HENRY HERMAN, Leopold Jochem, James F. Trottman, S. N. Putman, E. S. Severtson, Frederick T. Day, Melvin Grigsby, and All Other Persons Unknown, Claiming Any Right, Estate or Interest in, or Lien or Encumbrance upon the Property Described in the Complaint, and All Unknown Heirs, Defendants. Melvin Grigsby and Frederick T. Day, Appellants.

(127 N. W. 78.)

Taxation — Tax Deeds — State, Not County, the Grantor.

1. A tax deed executed in the name of the county of Eddy by the county auditor of said county, instead of in the name of the state of North Dakota, is void, and conveys no title.

Adverse Claims — Action to Determine — Counterclaims.

2. In an action to determine adverse claims, where a defendant named in the summons and complaint pleads a counterclaim asserting title in himself adverse and superior to that of the plaintiff, such defendant becomes, as to his claim of title, in effect, a plaintiff, and may maintain his counterclaim in the name of his grantor in the same manner as though he had been the party initiating the suit.

Evidence — Judicial Notice.

3. Courts of the state cannot take judicial notice of the assignment or bankruptcy laws of another state.

Recording Transfers — Evidence.

4. A copy of a deed of assignment for the benefit of creditors, certified to be a copy by a court commissioner of a circuit court of Wisconsin, and containing no original acknowledgment by the grantor therein named, is not entitled to record in the office of the register of deeds in the county in this state wherein the lands are situated, which are claimed to be conveyed by such deed of assignment.

Acknowledgment — Recording of Copies — Evidence.

5. Notwithstanding a copy of a deed of assignment as described in paragraph 4 was in fact recorded in the office of such register of deeds, the record thereof is not competent evidence of title to land therein described.

Note.—On the question of judicial notice of the laws of another state, there are numberless authorities holding, in harmony with Goss v. HERMAN, that courts of one state will not, in the absence of an express statute of the forum to that effect, take judicial notice of the laws of another state, the several states of the Union being regarded as foreign to each other. Many of these authorities are reviewed in a note in 67 L.R.A. 34, on the subject, "How a case is determined when proper foreign law is not proved."

Acknowledgment — Officers Entitled to Take — Execution out of the State — Admissibility to Record — Evidence.

6. Section 5013, Rev. Codes, 1905, contains provisions relating to the acknowledgment of an instrument taken without this state, and prescribes the necessary requirements to entitle it to record, and among such requirements is one that it shall be acknowledged before one of certain officers named therein. A court commissioner is not among those so named, and the record of an instrument purporting to be acknowledged before a court commissioner of another state is not competent evidence in the absence of proof that he was authorized by the laws of such state to take acknowledgments.

Evidence — Proceedings of Foreign Courts — Exemplification of Foreign Records.

7. Records of proceedings and decrees of foreign courts not exemplified, but only certified as correct copies or transcripts by a court commissioner of such court, not under seal, are incompetent as evidence in courts of this state on the trial of actions therein.

Question Not Decided.

8. Whether a deed by a foreign assignee for the benefit of creditors, which has annexed and as part of it a decree of a foreign court confirming the sale which such deed purports to have been made to carry out, and ordering the execution and delivery thereof, such decree containing recitals to the effect that it is granted on the petition of the assignee, conveys title to the land in this state, wherein no assignment was in fact made and no proceedings ancillary to the foreign assignment have taken place, in the absence of proof that it was under a voluntary assignment, is not determined.

Quieting Title — Presumption of Possession — Nature.

9. While the possession of real property furnishes a presumption of title, it does not preclude the adverse party from showing a want of title in the party claiming it through possession.

Quieting Title — Laches.

10. On the principle that knowledge is an essential element of laches, defendants in an action to determine adverse claims to real property, who allege title in themselves, are not precluded from maintaining a defense by lapse of time, while such defendants were ignorant of the claim of the adverse party, prior to the bringing of the action.

Case Remanded for New Trial.

11. Under the facts disclosed by the record in this case, although it is in the supreme court for trial *de novo*, and particularly in view of the lack of evidence on some material questions relative to the title of both appellants and respondents, it is remanded to the district court for a new trial.

Opinion filed May 6, 1910. On Petition for Rehearing June 25, 1910.

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

Action to determine adverse claims to real property. From a judgment quieting title in plaintiffs, defendants Grigsby and Day appeal.

Judgment of district court vacated and the action remanded for a new trial.

Maddux & Rinker and *Grigsby & Grigsby,* for appellant.

There must be statutory authority to make the record of a certified copy of an instrument notice or evidence. Devlin, Deeds, § 665; Lund v. Rice, 9 Minn. 230, Gil. 215; Central Trust Co. v. Georgia P. R. Co. 83 Fed. 397; Porter v. Dement, 35 Ill. 478.

The law of a foreign state is presumed to be the same as that of the forum; Hickman v. Alpaugh, 21 Cal. 225; Brown v. Wright, 21 L.R.A. 467 and notes, 58 Ark. 20, 22 S. W. 1022.

Where the statute requires a schedule of property to accompany an assignment for the benefit of creditors, its absence is fatal to the assignment. Farmer v. Cobban, 4 Dak. 425, 29 N. W. 12; Landauer v. Conklin, 3 S. D. 462, 54 N. W. 322; Cannon v. Deming, 3 S. D. 421, 53 N. W. 863; Juliand v. Rathbone, 39 N. Y. 369.

Judicial proceedings of a foreign state have no extraterritorial force. Robertson v. Pickrell, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407; Wells, F. & Co. v. Walsh, 87 Wis. 67, 57 N. W. 969; Segnitz v. Garden City Bkg. & T. Co. 107 Wis. 171, 50 L.R.A. 327, 81 Am. St. Rep. 830, 83 N. W. 327; Security Trust Co. v. Dodd, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545; Hutcheson v. Peshine, 16 N. J. Eq. 170; Osborn v. Adams, 18 Pick. 247; Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677.

Sale of land in this state under assignment proceedings of a foreign jurisdiction is void. Story, Confl. L. §§ 428, 448, 551 & 555; Burrill, Assignm. § 204; Williams v. Maus, 6 Watts, 278, 31 Am. Dec. 465; Osborn v. Adams, 18 Pick. 247; City Ins. Co. v. Commercial Bank, 68 Ill. 348; Rhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691; 3 Am. & Eng. Enc. Law, 2d ed. p. 53; Hutcheson v. Peshine, 16 N. J. Eq. 170; Loving v. Pairo, 10 Iowa, 282, 77 Am. Dec. 108; Munson v. Frazer, 73 Iowa, 177, 34 N. W. 804; Rogers v. Allen, 3 Ohio, 489; Rockwell v. Brown, 42 How. Pr. 226; Heyer v. Alexander, 108 Ill. 385; Gardner v. Commercial Nat. Bank, 95 Ill. 298; McCormick v.

Sullivant, 10 Wheat. 194, 6 L. ed. 301; United States v. Crosby, 7 Cranch, 115, 3 L. ed. 287; Kerr v. Moon, 9 Wheat. 565, 6 L. ed. 161.

Estoppels must be pleaded. Sutton v. Consolidated Apex Min. Co. 15 S. D. 410, 89 N. W. 1020; McQueen v. Bank of Edgemont, 20 S. D. 378, 107 N. W. 209; State v. Mellette, 16 S. D. 297, 92 N. W. 395; Bigelow, Estoppel, 5th ed. 507, 16 Cyc. Law & Proc. pp. 811, 812; Hall v. Henderson, 126 Ala. 449, 61 L.R.A. 621, 85 Am. St. Rep. 62, 28 So. 531; Beals v. Cohen, 27 Colo. 473, 83 Am. St. Rep. 96, 62 Pac. 948, 20 Mor. Min. Rep. 591; Martin v. Zelerbach, 38 Cal. 300, 99 Am. Dec. 365.

George W. Thorpe and *Edward H. Wright,* for respondents.

The law of a foreign state is presumed to be the same as the common law. Rev. Codes 1905, § 7317, subdiv. 41; Leonard v. Fleming, 13 N. D. 629, 102 N. W. 309.

A voluntary assignment by a citizen of a foreign state passes title to property in this state. Sexton v. Wheaton, 8 Wheat. 229, 242, 5 L. ed. 603, 607; Burrill, Assignm. § 9.

An assignment for the benefit of creditors is good whether an inventory is made or not. Ely v. Hair, 16 B. Mon. 239; Clark v. Mix, 15 Conn. 177; Woodward v. Marshall, 22 Pick. 473; Keyes v. Brush, 2 Paige, 311; Hollister v. Loud, 2 Mich. 310; Nye v. Van Husan, 6 Mich. 329, 74 Am. Dec. 690.

SPALDING, J. This action was brought by C. B. S. Goss against Henry Herman, Leopold Jochem, James F. Trottman, S. N. Putman, E. S. Severtson, Frederick T. Day, Melvin Grigsby, and other persons unknown claiming any estate or interest in the Northwest ¼ of section 32, Township 148 north, of range 66 west, in Eddy county, North Dakota. The complaint, in general, is for the determination of adverse claims, although it contains some allegations not included in the statutory form. It is unnecessary to set it out in full, or the answers, as the usual allegations will be sufficiently stated wherever necessary when considering the legal questions.

The defendant Grigsby answered, claiming title in himself and generally denying the allegations of the complaint, though admitting some, and he sets forth a counterclaim in the usual form and asks that the title be quieted in him. The defendant Day answers individually and in behalf of and as trustee for his grantee, the defendant Grigsby.

Plaintiff had judgment, and the defendant Grigsby and Day appeal. The record discloses that on the 24th day of May, 1893, appellant Day was the owner in fee simple of the land described, and that on the 18th day of November, 1904, he executed and delivered to the appellant Grigsby, for a valuable consideration, consisting largely in the settlement or partial payment and settlement of indebtedness of said Day to Grigsby owing at that time in a large amount, a deed whereby he granted to Grigsby such land. This deed was filed for record in the office of the register of deeds in Eddy county on the 26th day of November, 1904.

The question in this case is whether, as against the respondent, appellants have any title or interest in the described premises. The chain of title through which respondent claims, in brief, is as follows: A quitclaim deed from Day and wife delivered to the Plankington Bank May 24, 1893, which is shown, without conflict in the evidence, to have been delivered with deeds of a large amount of other property as security for indebtedness owing by Day to the bank, amounting to approximately, $200,000. This deed was recorded in the office of the register of deeds of Eddy county on the 3d day of July, 1893. A deed of assignment by the Plankington Bank, executed on the 1st day of June, 1893, to William Plankington, as assignee, in trust for the benefit of its creditors, which deed recites that it was made as provided by chapter 80 of the Revised Statutes of the state of Wisconsin and the acts amendatory thereto, and that it conveys, among other things, all and singular, the lands, tenements, and hereditaments and appurtenances, property, and effects of every kind and description, real and personal and mixed, belonging to said bank, or in which it has any right or interest, the same being more fully described in an inventory, under oath, of the officers of said bank, to be filed by it in the office of the clerk of the circuit court of the county of Milwaukee, in the state of Wisconsin, within twenty days after the execution thereof. A copy certified by a commissioner of the circuit court of Milwaukee county, Wisconsin, is the only record of this deed shown by the record, and this was recorded in the office of the register of deeds of Eddy county June 22, 1900. A quitclaim deed from Plankington, as assignee, to Irving M. Bean, as assignee of the Plankington Bank and successor to the said Plankington, dated August 28, 1899, recorded June 23, 1900. An order of the circuit court of Milwaukee county, Wisconsin, certified to by the clerk of that court

as a correct copy, and dated June 18, 1899, wherein it is recited that proceedings were had on the 10th day of May, 1899, accepting the resignation of Plankington as assignee and, among other things, appointing Irving M. Bean as his successor in trust. A copy of an order of said circuit court, certified by the clerk thereof on the 2d of June, 1900, and bearing date December 20, 1899, and filed for record in Eddy county, June 22, 1900, wherein the court vacates and sets aside the order of June 18, 1899, appointing Bean as assignee, and appoints Henry Herman as assignee to succeed Plankington and Bean. A quitclaim deed from Bean as assignee to Herman as assignee, dated December 29, 1899, and recorded June 23, 1900. A copy certified by the clerk of the circuit court of Milwaukee county, Wisconsin, of a decree of that court bearing date May 28, 1900, and recorded in the office of the register of deeds of Eddy county June 23, 1900, wherein it is recited that Herman, as assignee, had on April 14, 1900, and April 25, 1900, petitioned that court for instructions and a decree relative to the land in question among other tracts, and that proof of service on the Plankington Bank had been made, and finding that on May 23, 1893, Day was the owner in fee and in possession of the land in question, and on that date conveyed the same to the Plankington Bank, and that the offer of Leopold E. Jochem for the land in question was a fair price therefor, and that it would be to the best interest of the assigned estate that his offer be accepted, and ordering, adjudging, and decreeing that the sale thereof to Jochem be confirmed, and Herman, as assignee, authorized and instructed to execute and deliver, as assignee, to Jochem a deed thereof, and that a certified copy of the findings and decree be annexed to such assignee's deed. This decree does not show service of the application or notice, or of any of the proceedings upon Day, or upon any person claiming under him except the Plankington Bank. A deed from Herman, as assignee, dated June 18, 1900, to Jochem, reciting that it is executed in compliance with the order of the circuit court of Milwaukee county, Wisconsin, dated May 28, 1900, conveying the land in question "to the same extent as owned and held by the Plankington Bank of Milwaukee, Wisconsin, previous to this assignment described in said order annexed, and since which its assignee in said assignment proceedings, and otherwise acquired, . . . and also the estate, right, title, interest, claim, and demand whatsoever, both in law

and in equity, which the Plankington Bank aforesaid had at the time of said assignment, and in which the party of the first part and his predecessors in said trust, hath or acquired by virtue of said assignment or otherwise." This deed was recorded June 23, 1900. A warranty deed from Jochem to defendants Putman and Severtson, dated August 27, 1902, recorded September 1, 1902. A tax deed between the county of Eddy by James Hackney, auditor of said county, and James F. Trottman, dated December 10, 1900, and recorded the same day. A quitclaim deed from Trottman to Putman and Severtson, dated June 16, 1902, recorded September 1, 1902. A warranty deed from Putnam and Severtson to Goss, the plaintiff, dated August 5, 1903, recorded August 22, 1903.

It will thus be seen that the respondent claims title from two sources; First, through the assignment for the benefit of the creditors of the Plankington Bank; and, second, through the tax deed. We may eliminate at once from our consideration the tax deed, as it is drawn in the name of the county of Eddy instead of in the name of the state of North Dakota. This is fatal to its validity. Such a deed has been held absolutely void in State Finance Co. v. Mulberger, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322. The respondent claims that inasmuch as the deed from Day to Grigsby was given when Day was not in possession, and it is assumed that he had not been for more than one year theretofore, that it is void. His argument is based on the assumption that Day could not inject himself as a party defendant into the action and defend in behalf of Grigsby, and that Grigsby cannot defend in the name of Day, his grantor, when setting up a counterclaim. This rests on a mistaken assumption of fact that Day was not an original party defendant to the action, and is doubtless an oversight on the part of counsel. As we have shown, Day was one of the original defendants, and when a defendant pleads a counterclaim setting up title in himself, and asking that title be quieted in him, he becomes, as to his own title or claim of title, a plaintiff, and we see no reason why the defense, as it relates to the counterclaim, may not be conducted by the holder of a deed given when the grantor was out of possession, in the name of the grantee, precisely the same as though he had been the actual plaintiff in the proceeding.

In fact no contention is made that he cannot do so if Day was a party defendant, as he was. It is contended on the part of appellants that the assignment of the Plankington Bank having been made under the statute of Wisconsin, which this court held in Adams v. Hartzell, 18 N. D. 221, 119 N. W. 635, was in effect a bankruptcy law, has no effect on real property outside the limits of the state of Wisconsin. We are limited to a consideration of the evidence found in the record, and the defendant failed to introduce any evidence of the Wisconsin statute. We cannot take judicial notice of it, and hence cannot pass on this question.

Several interesting questions might be predicated on the effect of the disclosure in the pleadings and evidence that this assignment was made pursuant to the Wisconsin statutes, as to whether the record discloses that these statutes do not provide for a common-law assignment, and, if not, what presumption arises from the allegations of the pleadings and the proof relating to the nature of the assignment, but we shall not determine them. If the respondent's chain of title is perfect, and the record does not disclose that he had knowledge or notice of the fact that Day's deed to the bank was a mortgage, then the judgment of the trial court must be affirmed. Without going into details as to the different objections offered by the appellants to the reception of the various deeds and orders and decrees of the circuit court of Wisconsin, it is sufficient to say that these orders and decrees are not exemplified copies, and are not entitled to admission in evidence in this state. Section 7297, Rev. Codes 1905. Their offer in evidence was met by timely objections. Considerable stress is laid upon the fact that the schedule is not attached to the deed of assignment as recorded in the office of the register of deeds of Eddy county, and it is argued that therefore the land in question is not described so as to show that the deed of assignment works a conveyance thereof. We need not pass upon this question. The objection made to the record of the deed of assignment as evidence is fatal to the respondent's claim of a perfect chain of title, regardless of objections to other incompetent evidence. The deed of assignment was not entitled to record in the office of the register of deeds. The original was not recorded in that office. The only record made was that of a certified copy, certified by a party claiming to be a court commissioner in Wisconsin, without any seal of office or certifi-

cation; and such a document is not entitled to record, and, when offered in evidence as a part of the records of the register of deeds office of Eddy county, is incompetent, as our statute nowhere provides for the admission of such evidence. It is incompetent for another reason. It was acknowledged before a court commissioner of Wisconsin. Section 5013, Rev. Codes 1905, contains the provisions of our Code relating to the acknowledgments taken without this state necessary to entitle them to record herein, and provides that, when made without this state and within the United States and within the jurisdiction of the officer before whom the acknowledgment is taken, such acknowledgment may be taken:

"1. By a justice, judge, or clerk of any court of record of the United States.

"2. A justice, judge, or clerk of any court of record of any state or territory; or

"3. A notary public; or

"4. Any other officer of the state or territory where the acknowledgment is made, authorized by its laws to take such proof or acknowledgment.

"5. A commissioner appointed for the purpose by the governor of this state pursuant to the Political Code."

It will be seen that the court commissioner of the circuit court of Wisconsin is not one of the officers named unless included within the provisions of paragraph 4. No proof was submitted showing that a court commissioner of the circuit court of Wisconsin is authorized by the laws of that state to take acknowledgments, and it is elementary that such proof is necessary to entitle an instrument so acknowledged to record. 1 Cyc. Law & Proc. pp. 551, 613, 856. Section 5002, Rev. Codes, 1905, prescribed the requirements necessary to entitle an instrument to record, and is to the effect that it must be acknowledged by the person executing it or proved by a subscribing witness and the acknowledgment or proof certified in the manner prescribed by article 3, chapter 39, Rev. Codes 1905, having particular reference to § 5013, supra. The deed not being entitled to record in that office of the register of deeds, its record in that office, which was the only proof of the deed or of its execution submitted, is incompetent as evidence of a conveyance of title. It may be claimed, although not referred to in respond-

ent's brief or argument, that this defect has been cured by § 5024, Rev. Codes 1905. This section was enacted in 1901, and provides that the acknowledgments of all deeds, mortgages, or other instruments in writing taken and certified previous to July 1, 1901, and which had been duly recorded in the proper counties of this state, are hereby declared to be legal and valid in all courts of law and equity in this state or elsewhere, anything in the laws of this state in regard to acknowledgment to the contrary notwithstanding, with certain exceptions not necessary to be mentioned. From what we have stated with reference to this acknowledgment, it is clear that the record contains no proof of acknowledgment, and only a certified copy made by an officer, so far as disclosed by the record, without power to certify, or what purports only to be a copy instead of a certification. We further have grave doubts of the curative statute covering acknowledgments of this character. The act of which § 5024 is a copy is entitled, "An Act to Cure Defective Acknowledgments," and its effect may only be to cure defects in form or substance without going to the extent of making a certificate an acknowledgment which was not so in the first instance, because not certified by an officer shown to be qualified to take acknowledgments. No showing is made of either Day or Grigsby having actual knowledge of any conveyance of this land by any of the assignees or the Wisconsin court when the deed from Day to Grigsby was delivered. All the appellant Grigsby claims is the title subject to the deed given by Day to the Plankington Bank as a mortgage; but no issue was made with reference to the amount due on the mortgage or the amount necessary to redeem, and no evidence was submitted on these or any collateral questions, and the question of Goss being an equitable assignee of the mortgagee or of any interest in it, is not raised. A serious doubt of respondent's title would arise if we were to assume that the deed of assignment and the other deeds and the orders and decrees of Wisconsin court properly in evidence. It appears that the deed from Herman, as assignee, to Jochem, has annexed to and as a part of it, the decree of the Wisconsin court confirming the sale and ordering the execution and delivery of such deed. This, in connection with the recitals contained in such decree, to the effect that it is granted upon the petition of the assignee for instructions relative to the sale, would indicate that it was a judicial sale, or that the deed

to Jochem was only ancillary to the decree of the court and in aid thereof. It has been held that the deed of an assignee under similar circumstances is void outside the jurisdiction of the court. Osborn v. Adams, 18 Pick. 245.

Plaintiff devotes considerable space in his supplemental brief to his right to have title quieted in him by reason of possession. Possession does not constitute title, at least not until it has ripened into title, or adverse actions are barred by the statute of limitations. The fact that possession furnishes a presumption of title does not preclude the adverse party from showing a lack of title. It does qualify, under our statute, the possessor to maintain an action to determine adverse claims, but when he brings such action, if he relies solely on possession, it must have continued for the length of time required by the statute, and there is no pretense in this case that respondent had been in possession more than a trifle over three years when this action was brought, and, including the possession of his grantors, claiming to hold under the assignee's deed, if they were ever in possession, about six years and four months. While he was in possession under color of title, the very instruments through which he claims to derive title disclose on their face their invalidity for that purpose in this state. Finally, it is claimed that the appellants Day and Grigsby have been guilty of such delay in asserting their claims to the premises as to defeat them. It appears as to appellant Grigsby that he had held the deed from Day only two years when this action was commenced. It does not appear that he had any knowledge of the claims of respondent or any of his grantors or predecessors subsequent to the Plankington Bank, prior to the bringing of this action. The same is true as to appellant Day. Knowledge is an essential element of laches. 18 Am. & Eng. Enc. Law, p. 102. The original assignee of the bank, and the one who administered its affairs for some years, was the vice president of the bank, into whose hands the deed from Day to the bank, shown to be a mortgage, was delivered. It can hardly be assumed that Day should be charged with knowledge of any purpose on the part of Plankington, while such assignee, to fraudulently dispose of Day's equity in the land, and, in the absence of service of any notice on him of the proposed action of the court or the application made to it for leave to sell or to confirm the sale, he should not be charged with knowledge that a sale was about

to be or was made; and we find no affirmative act on the part of either Day or Grigsby tending to prejudice the rights of respondent, and nothing to bring the case within the authorities cited by him in support of his claim. In the matter of laches, each case is governed, generally, by its own circumstances. Equity is said to exact no more than fair dealing with an adversary. We are unable to discover how, in the absence of knowledge that they had an adversary, appellants could be required to even contemplate such dealings. The Supreme Court of the United States states the doctrine thus:

"In cases of actual fraud or want of knowledge of the facts, the law is very tolerant of delay." Hoyt v. Latham, 143 U. S. 553, 36 L. ed. 259, 12 Sup. Ct. Rep. 568. It is held in the same case that the question as to whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale. The Federal courts extend the doctrine of laches much farther than it is applied by state courts, which are generally guided by the statute of limitation. Absence from the state is considered in determining the question of laches. Day was at all times a resident of Wisconsin, and Grigsby, of South Dakota. Day was president of the Plankington Bank at the time the assignment was made, and Plankington was its vice president and executive officer. Their relations were confidential. Day was not charged with any laches in not suspecting Plankington, while assignee, of any design to defraud him of his equity in the property, and it does not appear that he attempted to do so, but the attempt to sell was made shortly after Plankington's retirement, by a successor, and it is held that, as one cannot acquiesce in the performance of an act of which he is ignorant, so "one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been been invaded, excepting, always that his want of knowledge is not the result of his own culpable negligence." 5 Pom. Eq. Jur. §§ 26 & 27. The record of the certified copy of the deed of assignment from Herman to Jochem furnished no notice to either Day or Grigsby, but if they did serve as constructive or actual notice to the world, then Goss was charged with notice or knowledge of the contents, showing that neither Plankington, Bean, nor Herman assumed to convey any greater title than that held by the bank.

After long and careful consideration of this case, we have arrived at

the conclusion that, in view of all the circumstances, an injustice would be done to finally determine it on the record before us, and that it should be remanded to the district court for a new trial.

The judgment of the District Court is vacated and the case remanded for the purpose stated. All concur.

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

EDWARD SOLBERG v. GEORGE SCHLOSSER.

(30 L.R.A.(N.S.) 1111, 127 N. W. 91.)

Negligence — Defective Highways — Degree of Care of User.

1. It is not negligence, as a matter of law, for a person to drive upon a dangerous or defective highway, knowing it to be such, unless the dangerous or defective condition is such that a person of ordinary prudence would not attempt to drive over it.

Same.

2. Knowledge of the dangerous condition of a highway, however, imposes a duty upon a traveler to exercise such care as the circumstances demand.

Note.—That the rule stated in SOLBERG v. SCHLOSSER, that it is not *per se* negligent to use a highway known to be defective, if it is not so dangerous that no prudent person would attempt to use it, is the general rule universally applied, as shown by a review of the authorities in an elaborate note in 21 L.R.A.(N.S.) 614, in which the whole question of contributory negligence as affecting liability for defects and obstructions in streets is considered. This note assumes the existence of a defect or obstruction sufficient to impose liability, and considers only the effect on that liability of the contributory negligence of the person injured; while the question of the municipality's liability for creating or permitting defects or obstructions is treated at length in another note in 20 L.R.A.(N.S.) 513.

The question of liability for the act of an independent contractor affecting the safety of highways is treated in notes in 66 L.R.A. 126, and 17 L.R.A.(N.S.) 758, while the question, "Who are independent contractors," is the subject of a note in 65 L.R.A. 447.

As to law of streets and highways generally, see note to Heckman v. Evenson, 7 N. D. 173.

Defective Highways — Question for Jury.

3. In case of conflict in the evidence as to the condition of a highway at a point where it is claimed to have been dangerous for travel, it is a question for the jury to determine whether it was dangerous or not.

Negligence — Contributory Negligence — Question for Jury.

4. Where the evidence is such that different persons may reasonably reach different conclusions, the question of the negligence of the defendant and of the contributory negligence of the plaintiff is for the jury.

Pleading — Contract or Tort.

5. The complaint considered and held to set forth a cause of action for a violation of a duty not to render a highway dangerous by placing and leaving dirt thereon in a negligent manner, and not to state a cause of action on a breach of contract.

Master and Servant — Independent Contractor — Contract with Drainage Board.

6. A person contracting with a drainage board to construct a drain under plans and specifications where he has sole control of the work, and the board has no control or superintendence thereof, is an independent contractor, and not the agent of the board.

Highways — Obstruction — Liability for Damage.

7. Any person who wrongfully renders a public highway dangerous for travel by placing obstructions thereon must respond in damages to anyone injured in consequence of such obstruction.

Opinion filed May 14, 1910. Rehearing denied June 18, 1910.

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

Action for damages caused by a defective highway. Verdict and judgment for plaintiff. Defendant appeals.

Affirmed.

Skulason & Burtness, for appellant.

P. G. Swenson, for respondent.

MORGAN, Ch. J. Action for damages caused by defects in a highway through the alleged negligence of the defendant. The controlling facts are included in the following summary: In October and November, 1907, the defendant was engaged in constructing a drain in Traill county, under a contract with the county drainage board of said county. The drain was to be constructed in accordance with plans and specifications which were made a part of the contract. The drain extended

nearly north and south, and intersected a highway running east and west at the point where the injury occurred. At the point of intersection with the highway, a bridge had been built over the drain by the public authorities. The drain was about 11 feet deep at the bridge. The dirt from excavating the drain was dumped on the highway. The dirt was dumped on the highway at the east approach to the bridge, and to about 45 feet from the bridge.

The allegation of the complaint in reference to the condition of the highway at this point is as follows: "That between the 20th day of October, 1907, and the 10th day of November, 1907, the defendant, while engaged in excavating said ditch or drain, placed and deposited a large quantity of dirt scraped out of said ditch, in the roadbed of the public highway running east and west between said sections 5 and 8, and at a point where said highway crosses the said ditch near the southwest corner of section 5, in said township and range; that the defendant wholly failed and neglected to level down said dirt so placed in the roadbed of said highway, but left the same in an extremely rough and uneven condition, the dirt being deposited in mounds which had frozen solid, leaving depressions and holes in said road which rendered said public highway extremely unsafe and dangerous for public travel; that the defendant carelessly and negligently allowed the said dirt to remain in said highway and that portion thereof used by the public in traveling, without leveling or smoothing down the same; that the depressions or holes in said highway made by depositing dirt from said ditch were from 12 to 18 inches in depth, and the said highway at said point was carelessly and negligently allowed by defendant to remain in said condition, causing the said highway at that point to be dangerous and unsafe for public travel."

The complaint further alleges that on the 23d day of November, 1907, the plaintiff was driving along said highway in the exercise of due care, and was driving in the ordinary way, at a slow speed, and, while driving in that manner, one of the wheels of said wagon ran into a depression in said highway and partially overturned said wagon, and the plaintiff was thrown to the ground and injured, and was damaged in the sum of $5,000.

The answer is, in fact, general denial. The issues were submitted to a jury, and a verdict was found in favor of the plaintiff for the sum

of $1,000 and interest from the date of the injury. A motion for a new trial was made and denied. Judgment was entered on the verdict. The defendant appeals from this judgment, and presents the following contentions as a basis for the reversal of the judgment:

1. No privity of contract existed between the plaintiff and the defendant, therefore no duty was imposed upon the defendant to place the highway in proper condition.

2. The drainage board would not be liable for damages, as it was engaged in the performance of work of a public nature, as a state agency, therefore the defendant would not be liable for damages while engaged in that work as the agent of the drainage board.

3. The evidence fails to show that the highway was unsafe at that particular place at the time of the injury, and fails to show that the defendant ever caused it to become unsafe or dangerous for travelers.

4. The defendant was under no duty or obligation to keep the road in proper condition for travel, and his acts were not the proximate cause of the injury, and at most only the remote cause.

5. The plaintiff was guilty of negligence that contributed to the injury.

No exception was taken to the instructions to the jury, nor to the admission or rejection of evidence. The appellant's contentions are that the evidence does not justify a judgment in plaintiff's favor for the foregoing reasons. We will consider these questions in the order named.

The defendant claims that the action is one for damages growing out of a breach of a contract between the defendant and the drainage board, and that damages growing out of the failure on defendant's part to comply with the contract, cannot be recovered by the plaintiff, as he was not a party to that contract. In other words, no privity of contract existed between the plaintiff and the defendant.

We do not agree with the defendant's contention as to the cause of action set forth in the complaint. It is not a cause of action for damages growing out of a breach of contract. It is one for damages growing out of the defendant's tort in rendering the highway dangerous through his negligence in leaving the dirt thereon in piles, and not leveled off. The contract is not set forth in the complaint nor mentioned therein. It was not offered in evidence by the plaintiff, but by

the defendant. It is true, the complaint contains an allegation to the effect "that, in doing the work of excavating the said ditch or drain at the time hereinafter mentioned, the defendant placed and deposited a portion of the dirt taken from said ditch or drain in the roadbed of the public highway running east and west along the section line between section 5 and 8, in said township and range: that it was defendant's duty, when such dirt had been placed in the roadbed of said highway, to level down the dirt so placed there, so as to make a smooth and good road for public travel." Defendant contends that this clause shows that plaintiff claims damages for a breach of duty under the contract. We do not think that this contention can be upheld. There is no other fact or conclusion alleged in the complaint from which the inference that this refers to a duty arising from the contract can be drawn. The statement that defendant owed a duty to level the dirt, after placing it on the highway, harmonizes with what is a legal duty devolving upon every one not to obstruct or make the highway dangerous for travel. From the whole complaint, our conclusion is that the duty mentioned in this allegation of the complaint refers to a duty imposed by law, and not to the contract referred to in the evidence. Defendant relies upon Styles v. F. R. Long Co. 67 N. J. L. 413, 51 Atl. 710, as sustaining his contention in this regard. In that case it was held that the plaintiff was not entitled to bring the action for damages under the contract between the defendant and the board of chosen freeholders of the county of Passaic. In that case the following statement of the law in Appleby v. State, 45 N. J. Law, 165, was approved: "A duty, the breach of which is an actionable wrong, may arise from a contract, or be imposed by positive law, independent of contract. In the first case, the party to the contract only can sue; in the other case, any person injured may sue if he be one of the class of persons for whose benefit the duty is imposed."

The same principle was subsequently announced by the same court in the same case, reported in 70 N. J. L. 301, 57 Atl. 448. This case is therefore not in point, as the cause of action was based upon a contract alone. In this case, although there existed a contract between the drainage board and the defendant, still the liability as pleaded does not depend on the contract, but arises out of a legal duty devolving upon the defendant, as well as the public in general, not to obstruct or make the

highway dangerous for travel. Such a duty, being to the public generally, may be enforced by anyone, if damages occur on account of the failure to perform that duty. The liability in this case arises by reason of the fact that the defendant negligently placed a nuisance in the highway, which rendered it dangerous for travel, and a violation of § 6641, Rev. Codes 1905. Inasmuch as the liability pleaded is not based upon a contract, it is not necessary for us to determine whether there was a breach of the contract in this case.

In support of our conclusion that the complaint in this case properly alleged a cause of action growing out of a breach of duty on the part of the defendant, see Nye v. Dibley, 88 Minn. 465, 93 N. W. 524; Elzig v. Bales, 135 Iowa, 208, 112 N. W. 540.

In Evansville & T. H. R. Co. v. Crist, 116 Ind. 446, 2 L.R.A. 450, 9 Am. St. Rep. 865, 19 N. E. 310, the court said: "The right to interfere with a highway is coupled with the duty to make it as safe as it was before it was disturbed, or, at least, to use reasonable care and skill to do so. This duty is violated if there is a failure to restore it to its former condition in all cases where the exercise of reasonable care and skill can effect a restoration."

The defendant also urges that he was engaged in excavating the drain as the agent of the drainage board, and contends that no liability can be upheld against him as agent, as his principal would not be liable as a matter of law. So far as this case is concerned, it is immaterial whether the drainage board could be held for damages or not, as it clearly appears that the relation of principal and agent did not exist between the defendant and the drainage board by virtue of the contract. A reading of that contract shows that the defendant independently contracted to dig the drain in accordance with plans and specifications which were made a part of the contract. The drainage board exercised no control or supervision over the work or over the defendant while engaged in doing the work. Under the contract the drainage board reserved the right to terminate the contract in case the work was not being done in accordance with the plans and specifications, and the right to cause the drain to be completed by someone else in case the defendant failed to perform the contract. In the following cases, closely similar so far as the facts are concerned, the relation between the parties was held not to be that of principal and

agent: Atkins v. Field, 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375; Hilsdorf v. St. Louis, 45 Mo. 94, 100 Am. Dec. 352; Bennett v. Mt. Vernon, 124 Iowa, 537, 100 N. W. 349; Herrington v. Lansingburgh, 110 N. Y. 145, 6 Am. St. Rep. 348, 17 N. E. 728; Shute v. Princeton Twp. 58 Minn. 337, 59 N. W. 1050; see also 16 Am. & Eng. Enc. Law, 2d ed. p. 187.

The cases cited by the defendant are not in point, as the principals in those cases reserved authority, in themselves, while the work was being done.

It is next claimed that no negligence was shown on appellant's part. The question of his negligence was submitted to the jury under instructions which were not excepted to. It cannot be maintained or claimed as a matter of law, that no negligence was shown, or that contributory negligence was shown, as the testimony on that question is in conflict. In other words, there was such conflict in the testimony that rendered the question of negligence one for the jury. As to the condition of the road before and after placing and leaving of the dirt thereon, the witnesses differ in their testimony. The condition of the road is variously described. Some of the witnesses described it as "pretty rough," as "hilly and uneven," and as having "high and low places." Another witness states that he had extreme difficulty in driving over this road in safety about this time. The dirt from the drain was taken therefrom in scrapers and dumped on the road, and left in piles, and it was wet, and became hard by reason of becoming frozen. Some of the depressions or low places at this point were 8 or 10 inches deep. Before dumping the dirt there, the road was smooth and even, and there was no drop from the road to the bridge. After placing the dirt there, there was a drop of about 10 inches from the road to the bridge.

From this evidence we deem it too clear for debate or question that the verdict cannot be disturbed so far as the dangerous condition of road is concerned, and that this condition was caused by the defendant is also settled by the verdict, and cannot be disturbed for the same reason. As to both grounds the verdict is amply sustained.

The evidence is not definite as to the precise point on the road where the depression was that caused the load to tumble over. The trial court, at appellant's request, submitted a special question of fact to the jury bearing on this question, which was as follows: "Were both right-

hand wheels of the wagon on the bridge when the wagon upset?" The jury answered "No." Appellant now contends that this finding is not sustained by the evidence. There are facts which tend to indicate that a contrary finding might be justified. None of the witnesses, however, saw the wagon when it tipped over. Plaintiff is therefore better enabled to know what the truth was in this regard. His evidence shows that the wagon tipped over just as the right front wheel went on the bridge. The road and bridge were not at right angles with each other at this point; hence, one front wheel struck the bridge before the other did. The sudden drop from the road to the bridge would naturally cause the team and wagon to move ahead to some extent, after the load commenced to tip, or even after the plaintiff was thrown, with the straw, into the ditch.

The plaintiff also testifies that the right hind wheel went into one of these depressions, and right after that fact, the front wheel came upon the bridge and dropped, and caused the load to tip over. Whereas the testimony is contradictory as to where the wagon was after the accident happened, in reference to whether it was all on the bridge or not, it is beyond dispute that the cause of the tipping over of the wagon was a defect on the highway, which was struck just before the wagon went upon the bridge. We think the finding is sustained by the evidence, which shows that the wagon did not tip over after the two right-hand wheels were on the bridge, and that these wheels were not on the bridge when the plaintiff was thrown from the load, and this evidence is not necessarily inconsistent with the evidence that the wagon was wholly on the bridge when the witnesses first saw it after the accident.

It is forcibly urged that the plaintiff was guilty of contributory negligence that should defeat his right to recover damages. His testimony is not clear, and in some respects is contradictory, but the question of contributory negligence was submitted to the jury under instructions not objected to. He was driving on a wagon on which was a load of flax straw, 8 feet high, which was loaded in the usual manner. The alleged contributory negligence is based on the fact that the plaintiff drove over this rough road, knowing its dangerous condition. In other words, he testifies that he observed the rough condition of the road a long distance before he reached the bridge where the injury occurred, and drove over the same, notwithstanding that fact. His explanation for driving over

this rough road after seeing it, is that he could not turn around or otherwise avoid going over it after he saw it. The plaintiff was endeavoring to follow the tracks of those who had driven over this same road about this time. The evidence shows that he exercised the greatest care in driving the team.

It seems to be well sustained by the authorities that it was not incumbent upon him to stop and forego using the road because it looked rough or dangerous. In Elliott on Roads and Streets, 2d ed. § 636, the rule is stated as follows: "The fact that a traveler voluntarily attempts to pass, with knowledge of the defect or obstruction, is not ordinarily conclusive evidence of a want of due care, but if he has or ought to have notice thereof, he must exercise such care as the circumstances demand, and if an ordinarily prudent person would not attempt to pass, under the circumstances, he will be guilty of contributory negligence."

In McTiver v. Grant Twp. 131 Mich. 456, 91 N. W. 736, the court said: "But the true test is, Was the danger arising from the known defect obviously of such a character that no person in the exercise of ordinary prudence would attempt to pass over the highway at that point? If not, it is not negligence, as matter of law, for one to attempt to pass over a highway known to be defective."

In Evansville & T. H. R. Co. v. Crist, 116 Ind. 446, 2 L.R.A. 450, 9 Am. St. Rep. 865, 19 N. E. 310, the court said: "If it were granted that the plaintiff had knowledge that she would be exposed to some danger in attempting to ride along the highway made unsafe by the defendant's wrong, that fact, of itself, would not, in such a case as this, necessarily preclude a recovery. Knowledge is not always a bar to a recovery. It is not a bar in such a case as the present, for the plaintiff was not bound to refrain entirely from using the only highway which gave her access to her home or led from it. . . . It is quite clear it cannot be said in this case that the danger was one which the plaintiff was bound to shun, or assume, at her own peril, all the risk attending the attempt to pass it. The case is not one of a plaintiff casting himself upon a known danger which a prudent person would not have encountered." See also Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Overhouser v. American Cereal Co. 118 Iowa, 417, 92 N. W. 74.

Whether defendant was guilty of negligence was clearly a question for the jury, in this case, as in all cases, unless the evidence is so clear that reasonable men would not reach a different conclusion therefrom. The same is true as to the question of the contributory negligence of the plaintiff. This court has recently considered these questions with the result stated above. Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830.

It is further claimed that the board of drain commissioners should be held responsible, and not the defendant. The commissioners are not shown to have done, or caused to be done, any act that caused the injury. What the board authorized the defendant to do in reference to placing the dirt on the highway and leveling it, was not unlawful or prohibited, and could not render the highway dangerous to travelers; therefore no cause of action for violation of any duty is shown against the board.

This disposes of each assignment. It follows that the judgment must be affirmed, and it is so ordered. All concur.

JOHN LEISEN v. THE ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation.

(30 L.R.A.(N.S.) 539, 127 N. W. 837.)

Insurance — Waiver of Forfeiture — Estoppel — Invalidity at Inception — Principal and Agent.

1. Plaintiff, whose sole interest in the property insured was that of a holder of a sheriff's certificate under a mortgage foreclosure sale, applied for, and there

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Note.—As to effect of agent's insertion in application of false answers to questions correctly answered by the insured, see note in 4 L.R.A.(N.S.) 607.

As to effect of nonwaiver agreement on conditions existing at inception of insurance policy, see note in 13 L.R.A.(N.S.) 826.

As to parol evidence rule as to varying or contradicting written contracts, as affected by doctrine of waiver or estoppel, as applied to policies of insurance, see note in 16 L.R.A.(N.S.) 1165.

Estoppel by application made out by agent, see 9 Am. St. Rep. 229.

As to waiver of conditions requiring waivers, to be indorsed in writing, see note 42 Am. Rep. 621.

was issued to him, a fire insurance policy, the premium for which was paid to and retained by defendant company. The policy was the standard form adopted in this state, containing the following stipulations: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein. . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership. . . . This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

In applying for such insurance plaintiff acquainted defendant and its agent with the true facts regarding his interest in the property, but notwithstanding such information the defendant's agent carelessly and negligently omitted to state in the policy the nature of plaintiff's said interest. About three weeks after the policy was issued a loss occurred. In an action to recover on the policy, defendant seeks to escape liability upon the ground that such policy, by its terms, is and was void at its inception on account of the above facts.

Held, for reasons fully stated in the opinion, that defendant is estopped to urge such defense.

Fire Insurance — Policy Void at Inception — Waiver of Forfeiture — Cases Overruled.

2. Where a fire insurance company with full knowledge of facts which, under the stipulations contained in the application or policy, renders such policy void at its inception, issues and delivers the same and collects and retains the premium therefor, it will be deemed in law to have impliedly waived such forfeiture, and will not be permitted to urge the invalidity of the policy in an action to recover for a loss thereunder. Certain language contained in the opinions in Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799, and J. P. Lamb & Co. v Merchants' Nat. Mut. F. Ins. Co. 18 N. D. 253, 119 N. W. 1048, approving the Federal rule to the contrary, is disapproved.

Fire Insurance — Delivery of Policy and Collection of Premium as Waiver — Waiver of Stipulations.

3. Where a policy of insurance has been delivered and the premium collected

with full knowledge of all the facts, it would operate as a fraud upon the insured if the insurance company was permitted to avoid the policy after a loss, by urging the invalidity thereof at its inception on account of stipulations contained therein.

Fire Insurance — Restrictions in Policy upon Power of Agent — Waiver of Conditions by Agent — Construction.

4. Restrictions in a policy limiting the power of agents to waive conditions except in a certain manner cannot be held to apply to those conditions which relate to the inception of the contract, where the agent, with full knowledge of the facts, issues the policy and collects the premium, and the insured has acted in good faith.

Opinion filed May 28, 1910. Rehearing denied September 10, 1910.

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

Action by John Leisen against the St. Paul Fire & Marine Insurance Company. From an order overruling a demurrer to the complaint, defendant appeals.

Geo. A. Bangs, for appellant.

V. R. Lovell, for respondent.

FISK, J. This is an action to recover on an insurance policy. The complaint is in the usual form, alleging that, in consideration of $51 paid by the plaintiff to defendant, the latter issued its policy of insurance, a copy of which is annexed to and made a part of the complaint, whereby defendant insured the plaintiff against loss or damage by fire in the sum of $1,000 on a certain frame building situated on lots 9 and 10, block 21 of the village of Leonard, Cass county, for the term of one year from January 6, 1906. That plaintiff duly performed all of the terms of said contract of insurance on his part to be performed, and that on January 29, 1906, said building was totally destroyed by fire, which fire did not occur by reason of any of the causes enumerated in said policy exempting the Insurance Company from liability in case of fire or loss, and that plaintiff's loss by reason of such fire exceeded the sum of $1,500. That the destruction by fire, as aforesaid, was complete and the loss total, and that there was no disagreement between the plaintiff and defendant as to the amount of said loss, but that shortly after defendant was notified of the loss

it denied any liability under the policy on the ground that plaintiff's title to the property insured was not truly stated in the policy or the application therefor. Plaintiff, in his complaint, anticipates the defense that the policy never attached or became effective by reason of the fact that plaintiff's title to the property insured was not that of unconditional and sole ownership, etc., and in this respect alleges the following facts: "That at and during the said month of January, 1906, plaintiff was and still is the owner and holder of a certain sheriff's certificate of mortgage foreclosure sale of and upon the said frame building and the lot or parcel of land on which the same was situated, and at the time of the destruction of such building by fire hereinafter referred to, and there was due and unpaid on the said certificate of mortgage foreclosure sale an amount exceeding the total amount of such insurance, and that at the time of the plaintiff's application for the insurance aforesaid, and at the time of the execution and delivery of the policy aforesaid, the plaintiff notified and informed the defendant company and its agent the nature and character of plaintiff's insurable interest in the frame building aforesaid, and that plaintiff was the owner and holder of a sheriff's certificate of mortgage foreclosure sale as aforesaid, but the defendant and its said agent, though it then and there knew, as aforesaid, the character and extent of plaintiff's insurable interest in the frame building and premises aforesaid, carelessly and negligently stated and caused to be stated in the said policy of insurance and application therefor that plaintiff was the owner in fee simple of said premises and the whole thereof, and thereby waived the conditions of said policy of insurance exempting the defendant company from liability in case the plaintiff's interest in the premises insured be not truly stated in such policy or in the application therefor."

The policy is the standard form adopted in this state and contains, among others, the following stipulation: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated therein . . . this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than uncon-

ditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple. . . . .

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon, or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

A demurrer was interposed to the complaint upon the ground that the complaint fails to state facts sufficient to constitute a cause of action. Such demurrer was overruled and the appeal is from the order overruling the same.

In brief, appellant's contention on this appeal is that under the facts alleged in the complaint the policy is and was void at its inception, for the reason that the interest of the insured was not that of "unconditional and sole ownership," and the nature and extent of his interest in the property was not stated in, nor indorsed upon, the policy. In other words, notwithstanding the fact that plaintiff, in applying for the insurance and at the time of the execution and delivery of the policy, expressly notified and informed defendant and its agent of the nature and character of his interest in the property, and that defendant, with such notice and knowledge, executed and delivered to plaintiff such policy and collected the premium thereunder, defendant may, nevertheless, urge that such policy was void at its inception and no liability ever attached thereunder; that the doctrine of implied waiver and estoppel cannot be successfully invoked, because the parties, by their contract, have otherwise stipulated and the legislature by statute, in effect, otherwise declared.

If appellant's contention be sound, the result would be most harsh and inequitable. We cannot countenance such a doctrine unless imperatively required so to do by plainly established principles of law.

We are entirely clear that we are confronted with no such situation. On the contrary we are entirely clear that appellant's contention is without support on principle or reason, and is contrary to the overwhelming weight of authority in this country. In support of this broad assertion we proceed to give our reasons, but in the main shall adopt the reasoning of other courts upon the questions involved.

We will first notice the present status of the adjudications of this court and its predecessor, the territorial court, so far as material to the question here involved. In Lyon v. Insurance Co. 6 Dak. 67, 50 N. W. 483, the court unanimously held that defendant's agents had the power to waive the matter of encumbrances which were known to them at the time of negotiating and accepting the risk. In that case, as the case at bar, it was contended that the policy was never in force on account of the omission of the insured to comply with a condition requiring him to inform the company of encumbrances on the property. Such condition was as follows: "If the property hereby insured, either real or personal, or any part thereof, be or shall become encumbered by mortgage, judgment, or otherwise, and it be not so stated in the written application or indorsed in writing on the policy, this policy and every part thereof shall be void." The proof showed that the property was encumbered by mortgage at the time the application for insurance was made, and at the time the loss occurred, but that the agents of the insurance company knew such fact, but nevertheless issued the policy and collected the premium. Plaintiff contended there as here, that the stipulation in the policy above quoted had been waived, and such contention was sustained.

Again in the case of Waterbury v. Dakota F & M. Ins. Co. 6 Dak. 468, 43 N. W. 697, the territorial court in speaking on this point said: "It is too well settled to be now questioned that the company, or its agent acting within the scope of his authority, may waive any of the conditions of the policy, *and if at the time of issuing the policy the company or such agent knows the falsity of a representation made by the applicant in procuring the insurance, the company is estopped from asserting its falsity in order to avoid liability.*" Citing numerous cases.

During the early history of this court, and over twenty years ago, it was called upon to consider a similar question in the case of John-

son v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799. In speaking upon the question of estoppel the court, among other things, there said: "But it is further contended by respondent's counsel that defendant is estopped from claiming a forfeiture of the policy on account of the false answers as to encumbrances contained in the application, for the reason that such answers were wholly unauthorized by the plaintiff, and were falsely written into the application by E. E. Strong, the soliciting agent, despite the fact that he . . . was fully and truthfully informed by the plaintiff as to the encumbrances. The fact of deception practiced by the agent is not questioned; but who shall shoulder the consequences of such deception is a question much mooted in the adjudicated cases, and one which has given this court no little difficulty. For whom was Strong acting, and who was he representing, when soliciting and taking plaintiff's application for the insurance? The earlier cases held quite uniformly that, where the insured signed a written application as a basis for the contract of insurance, he adopted all of its contents and was bound by it, and that if by his request or permission the solicitor of the insurance acted for him in filling out the application, such solicitor was so far forth the agent of the insured, and not the agent of the company. Some courts still adhere to this holding, but the decided weight of authorities is to the contrary." The court here cited numerous cases among which is Kausal v. Minnesota Farmers' Mut. F. Ins. Asso. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430, from which it quotes approvingly the following very accurate statement of the rule: "Agents for an insurance company, authorized to procure applications for insurance and to forward them to the company for acceptance, must be deemed the agents of the insurers in all that they do in preparing the application, or in any representations they may make as to the character or effect of the statements therein contained. Hence, when such agent, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are stated to him by the applicant, the error is chargeable to the insurer, and not to the insured. This is the rule in case of 'mutual' as well as 'stock' or 'proprietary' companies. The rule is not affected or changed by a stipulation inserted in the policy subsequently issued that the acts of such agent in making out the application shall be deemed the acts of the insured, and not of the

insurer. Such stipulation does not convert acts done for the insurer into the acts of the insured. The admission of the verbal testimony to show that the application was filled up by the agent of the company, and that the facts were correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application, is not in violation of the rule that verbal testimony is not admissible to vary a written contract. It proceeds upon the ground that the contents of the paper was not the statement of the applicant, and that the insurance company by the act of their agents is estopped to set up that it is the representation of the insured." This court thereafter further said: "The defendant sent its policy direct to the plaintiff, and the latter had possession of it some months prior to the loss. A copy of the application containing the false answers, as written by the agent, was indorsed upon the back of the policy, but such indorsement was not referred to in the body of the policy. The trial court found that the plaintiff did not at any time object to the answers as stated in the application, or request the defendant to correct the same. The evidence, however, is conclusive that the plaintiff did not in fact know that a copy of the application was indorsed upon his policy, nor discover the errors in the application respecting the encumbrances until the day preceding the trial. Under these circumstances the question arises whether the plaintiff, despite the contrary fact, is not conclusively presumed to have read and become acquainted with the contents of the policy, including the copy of his application for insurance indorsed on the policy. If such is the presumption of law, then the further question arises whether the plaintiff is guilty of such laches in not seeking a correction or reformation of the contract as will defeat his recovery upon the policy. It is well settled that where an insurance policy is delivered to the applicant, he is presumed to know its contents, and cannot evade a forfeiture for a violation of its provisions, on the ground that he never read it." Here the court cites Smith v. Continental Ins. Co. 6 Dak. 433, 43 N. W. 810; Hankins v. Rockford Ins. Co. 70 Wis. 1, 35 N. W. 34; Cleaver v. Traders' Ins. Co. 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660, and other authorities. We do not question the soundness of these authorities, but in citing them the court evidently overlooked the very important fact that they do not involve forfeitures for breaches

of conditions existing at the inception of the contract, the facts creating such breaches being fully known to the agent and hence to the insurance company at the time the policy was delivered and the premium paid. In the case of Smith v. Continental Ins. Co. 6 Dak. 433, 43 N. W. 810, Judge Templeton wrote the opinion. He very clearly differentiates that case from a case like the one at bar. He says: "This is a very different case from that where a soliciting agent purposely or erroneously inserts false answers to questions in an application, the applicant stating the facts truthfully and being innocent of fraud. In such a case the subagent is acting within the scope of his powers and duties,—taking applications is his business,—and notice to him is notice to the principal, under well-settled rules of law. If Angell had been a general agent,— that is, if he had been authorized by the company to make contracts of insurance and issue policies,—he doubtless would have had implied authority to waive the effect of conditions in the policy inconsistent with existing facts."

The court in the Johnson Case thereafter quotes approvingly from the Federal rule, as announced in New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, and thereafter, among other things, says: "The application was made a part of the policy in express terms and a copy thereof was indorsed upon the policy. . . . Upon receiving the policy with copy indorsed thereon, the plaintiff is legally chargeable with notice and knowledge of the entire terms of the insurance contract and he is estopped from denying such knowledge. It was the plaintiff's duty to have taken steps at once upon receiving the policy to have the same corrected or rescinded. He did not do so, and by his silence when required to speak he became constructively a participant in the original fraud of the agent and thereby forfeited his right under the policy; and unless defendant has waived such forfeiture the plaintiff must fail to recover." The court thereafter held that such forfeiture had been waived.

As we shall hereafter see, the above rule is no doubt sound when properly applied, but as there applied it is clearly against the great weight of modern authority as well as reason, and we feel obliged to modify the rule thus announced, so that it will apply only to forfeitures for breaches of conditions subsequent, except in cases where

the assured has actual knowledge at the inception of the contract of facts and conditions creating a forfeiture or annulling the policy.

This court in the case of Thompson v. Travelers' Ins. Co. reported in 11 N. D. 274, 91 N. W. 75, and 13 N. D. 444, 101 N. W. 900, again recognized the doctrine of implied waiver and estoppel in clear and explicit language. The present chief justice, in differentiating that case from certain cases cited and relied on by respondent in support of a waiver of the forfeiture, said: "Not one of the numerous cases cited by respondent is in point on the facts of the case at bar. These cases are cases where premiums were paid, accepted, and retained with knowledge of the facts constituting the forfeiture, and of course it was held that the companies were thereafter estopped to plead the forfeiture claimed. With that doctrine this court fully concurs."

On the second appeal Chief Justice Young, in voicing the opinion of the court, clearly recognized the right of plaintiff to prove an estoppel by showing that when the policy was delivered, and the premium collected by defendant's agent, he had knowledge of the fact which the insurance company claimed avoided the policy, the entire opinion being devoted to the question of the insufficiency of the proof offered for such purpose. We quote from the syllabus as follows: "1. The life insurance policy upon which this action is brought contained this condition: 'This policy shall not take effect unless the first premium is actually paid while the assured is in good health.' Held, that *in the absence of an estoppel,* the liability of the insured depends upon the actual, and not mere apparent, good health of the assured when the first premium was paid. . . . 2. In order that the acceptance or retention of the premium may estop an insurer from relying upon a breach of condition in the policy, it must appear that it had knowledge of the facts constituting the breach."

Thus it will be seen that this court was, until the decision in J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co. 18 N. D. 253, 119 N. W. 1048, firmly committed to the doctrine that the insurer, by knowledge on the part of its agent, which knowledge is imputed to the company, of facts existing at the inception of the policy which, under its terms would avoid it, will be estopped to urge such invalidity. In denying a rehearing in the Lamb Case Judge Spalding used certain language which might be construed as approving a contrary rule, and

appellant's counsel in the case at bar quotes therefrom the following: "One point was, however, not referred to which we deem it advisable to mention at this time. The policy contained a provision reading as follows: 'No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as, by the terms of this policy, may be indorsed hereon or added hereto, and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached.' The authorities on similar provisions are in hopeless conflict, but the Supreme Court of the United States in 1901 had this identical provision under consideration in Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, and, after an exhaustive review of the conflicting authorities, sustained the provision in question as against the contention that it could be waived in some manner other than in writing indorsed on the policy. The opinion in that case is most instructive, as is also that in Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369, in which the opinion of the circuit court of appeals of the eighth circuit was delivered by Judge Sanborn."

As we shall hereafter see, the rule of the Federal court as announced in Northern Assur. Co. v. Grand View Bldg. Asso. supra, is opposed to the decisions of nearly every state in the union which has had occasion to pass upon the question, and to the extent that the opinion in J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co. supra, approves the rule thus announced by the Federal court the same is hereby disapproved.

We deem the correct rule to be as stated in the leading case of Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80, as follows: "The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premiums with full

knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts, and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party."

That court in a later case also said "that the agent of a fire insurance company may, by issuing a policy with knowledge of the facts, waive a condition that the policy shall be void if the property insured be encumbered, and a note of the encumbrance be not indorsed upon the policy, notwithstanding a provision in the policy that no agent of the company shall have power to waive any such condition, except by written endorsement." Skinner v. Norman, 165 N. Y. 565, 80 Am. St. Rep. 776, 59 N. E. 309. That the rule of the New York cases is supported by the overwhelming weight of authority must be conceded. We cite the following cases supporting the above rule: Welch v. Fire Asso. of Philadelphia, 120 Wis. 456, 98 N. W. 227; Home Ins. Co. v. Stone River Nat. Bank, 88 Tenn. 369, 12 S. W. 915; German-American Ins. Co. v. Yeagley, 163 Ind. 651, 71 N. E. 897, 2 A. & E. Ann. Cas. 275; King v. Council Bluffs Ins. Co. 72 Iowa, 310, 33 N. W. 690; McGonigle v. Susquehanna Mut. F. Ins. Co. 168 Pa. 1, 31 Atl. 868; Continental Fire Asso. v. Norris, 30 Tex. Civ. App. 299, 70 S. W. 769; Continental F. Ins. Co. v. Brooks, 131 Ala. 614, 30 So. 876; Phœnix Ins. Co. v. Fleming, 65 Ark. 54, 39 L.R.A. 789, 67 Am. St. Rep. 900, 44 S. W. 464; Rhode Island Underwriters' Asso. v. Monarch, 98 Ky. 305, 32 S. W. 959; Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499, 38 Atl. 29; Improved Match Co. v. Michigan Mut. F. Ins. Co. 122 Mich. 256, 80 N. W. 1088; Home Ins. Co. v. Gibson, 72 Miss. 58, 17 So. 13; Flournoy v. Traders' Ins. Co. 80 Mo. App. 655; Parsons v. Knoxville F. Ins. Co. 132 Mo. 583, 31 S. W. 117, affirmed in banc, 132 Mo. 600, 34 S. W. 476; Benjamin v. Palatine Ins. Co. 80 App. Div. 260, 80 N. Y. Supp. 256, affirmed in 177 N. Y. 588, 70 N. E. 1095; Grabbs v. Farmers' Mut. F. Ins. Asso. 125 N. C. 389, 34 S. E. 503; Gould v. Dwelling-House Ins. Co. 134 Pa. 570, 19 Am. St. Rep. 717, 19 Atl. 793; Gandy v. Orient Ins. Co. 52 S. C. 224, 29 S. E. 655; Virginia F. & M. Ins. Co. v. Richmond Mica Co. 102 Va. 429, 102 Am. St. Rep. 846, 46 S. E. 463; Wagner v. Westchester F. Ins. Co. 92 Tex.

549, 50 S. W. 569; Bartlett v. Fireman's Fund Ins. Co. 77 Iowa, 155, 41 N. W. 601; Medley v. German Alliance Ins. Co. 55 W. Va. 342, 47 S. E. 101, 2 A. & E. Ann. Cas. 99; Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339; German Ins. Co. v. Shader, 68 Neb. 1, 60 L.R.A. 918, 93 N. W. 972; Grand View Bldg. Asso. v. Northern Assur. Co. 73 Neb. 149, 102 N. W. 246.

Many of the foregoing cases were decided since the Supreme Court of the United States handed down the Northern Assurance Company decision, and they expressly disapprove the same. In Welch v. Fire Asso. of Philadelphia, 120 Wis. 456, 98 N. W. 227, Marshall, J., said: "It is well understood that the judicial rule here discussed is peculiar to insurance contracts, and significantly exceptional in that it ignores the familiar principle applied to written obligations generally, that he who becomes a party to such an obligation is presumed to have knowledge of its contents and is bound thereby, unless by some artifice resorted to by the other party thereto, reasonably calculated to prevent or deter him from obtaining such knowledge, he is so prevented, or deterred. Bostwick v. Mutual L. Ins. Co. 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246. As an original proposition it would be difficult to justify that special favor to policy holders in actions to recover losses sustained. The long line of decisions in this state supporting it, however, precludes any change thereof other than by legislative enactment. The authorities elsewhere are not all in harmony with it. A very few condemn it. Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, is a significant instance thereof. In that case the departure from general principles is most vigorously condemned in this language: 'It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais*, is a mere invasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with.' The court said further, in effect, the only exception to that is where, by fraud, a person is induced to accept a contract different from the one agreed upon, in excusable ignorance of the variance. The exception thus condemned has the sanction

of some forty years of our judicial history and of the general run of authorities. Under the circumstances we do not feel warranted in overturning it or seriously questioning the wisdom of it. The conclusion to which we have arrived is supported by the courts generally where a policy law exists. That is amply shown by citations in the brief of counsel for respondent, and the absence of authorities to the contrary in that of appellant, and our own inability to discover any. In the supporting authorities it appears that there was no judicial hesitation in holding that a policy like ours does not, in letter or in spirit, affect the established rule that an insurance company, barring fraud upon it, participated in by the assured and its agent (Koerts v. Grand Lodge, O. H. S. 119 Wis. 520, 97 N. W. 163), cannot avoid the effect of the law charging it with knowledge which its agent has at the time of delivering its policy of insurance, respecting the condition of the subject thereof. In all cases, or most of them, waiver is sharply distinguished from estoppel." Citing numerous cases.

In addition to the foregoing authorities, we cite the following very recent cases holding to the same effect: Fosmark v. Equitable Fire Asso. 23 S. D. 102, 120 N. W. 777; O'Neill v. Northern Assur. Co. 155 Mich. 564, 119 N. W. 911; Sharp v. Scottish Union & Nat. Ins. Co. 136 Cal. 542, 69 Pac. 253, 615; Allen v. Home Ins. Co. 133 Cal. 29, 65 Pac. 138; Loring v. Dutchess Ins. Co. 1 Cal. App. 186, 81 Pac. 1025; Springfield F. & M. Ins. Co. v. Price (1909) 132 Ga. 687, 64 S. E. 1074; Wisotzkey v. Niagara F. Ins. Co. 112 App. Div. 599, 98 N. Y. Supp. 760; Plunkett v. Piedmont Mut. F. Ins. Co. 80 S. C. 407, 61 S. E. 893; Westchester F. Ins. Co. v. Ocean View Pier Co. 106 Va. 633, 56 S. E. 584; Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 8 L.R.A. (N.S.) 708, 74 N. E. 964, 79 N. E. 905; People's F. Ins. Asso. v. Goyne, 79 Ark. 315, 16 L.R.A.(N.S.) 1180, 96 S. W. 365, 9 A. & E. Ann. Cas. 373; House v. Security F. Ins. Co. — Iowa, —, 121 N. W. 509; Capital F. Ins. Co. v. Montgomery, 81 Ark. 508, 99 S. W. 687; Parsons v. Lane (Re Millers' & Mfrs.' Ins. Co.) 97 Minn. 98, 4 L.R.A. (N.S.) 231, 106 N. W. 485, 7 A. &. E. Ann. Cas. 1144; 19 Cyc. Law & Proc. pp. 812–814 and cases cited; 16 Am. & Eng. Enc. Law, 2d ed. p. 949; 3 Cooley, Briefs on Insurance, 2650–2655; Clement, Fire Ins. 418; Ostrander, Fire Ins. § 265; Vance, Ins. pp. 304, 305.

In speaking on the question of waiver or estoppel under facts here

involved, Mr. Vance says: "Issue and delivery of a policy, with knowledge by the company or its agent of existing facts which by its terms or conditions would render it void, operates as a waiver or estoppel, preventing the company from claiming a forfeiture by reason of such facts. By the weight of authority this is true although the policy contains the usual limitation upon the agent's authority." Ostrander says [§ 356]: "When a person is employed to solicit risks and take applications to be forwarded to the company for approval, but has no authority to make a complete or binding contract of insurance, and has never been held out by his principal as having such power, he cannot waive any condition or requirement of the policy. It has, however, often been held that the soliciting agent is competent to do certain things in respect to his distinctive duties that will create estoppel. Any knowledge communicated to him in regard to the risk he solicits at the time of such solicitation will be imputed to the company. If the facts imparted to the solicitor are of such a cnaracter as under the terms of the policy will cause an avoidance, unless disclosed, such as other insurance, defective titles, encumbrances, etc., and such facts are by him withheld from the company, the latter will be estopped from insisting on the failure of the insured to give the required notice as a defense to an action on the policy." Vance says [p. 304]: "Again, a second incident of the relation of principal and agent is that any information material to the transaction, either possessed by the agent at the time of the transaction or acquired by him before its completion, is deemed to be the knowledge of the principal, at least so far as that transaction is concerned, even though in fact the knowledge is not communicated to the principal at all. It is here to be observed, and the importance of the principle is so great that it cannot be too strongly emphasized, that *these incidents of agency are created by law, and not by the parties.* The insurer is charged with the knowledge acquired by its agent in making or negotiating a contract of insurance, not because he has consented to be so charged, nor because he has authorized his agent so to bind him, but because, as a legal consequence of the relation he sustains to the agent, the latter's knowledge is imputed to him. *It therefore follows that this incident, created by the law, in response to the demand of public policy, irrespective of agreement, cannot be destroyed or altered by the agreement of the parties.* The parties cannot, by their contract, contravene the policy

of the law in this instance, any more than the husband, by contract, can escape his duty to support the wife, or the carrier can by contract exempt himself from liability for his negligent failure to carry safely his passenger. Those cases which ignore this principle and regard these legal incidents as powers conferred and subject to limitation are much to be deplored."

By the issuance and delivery of the policy, and the acceptance of the premium, with knowledge of the existing facts relative to plaintiff's interest in the property, the company, in effect, said to the plaintiff that, notwithstanding the stipulations and conditions in the policy to the contrary, we will treat the same as a valid and binding contract of indemnity. In other words we agree not to urge such conditions or stipulations to defeat such policy in the event plaintiff shall assert any rights thereunder. The company thereby, in effect, said to plaintiff, the policy is a valid policy of insurance. It would seem, therefore, on the plainest principles of equity and good conscience, that the company should be estopped by such conduct to assert the contrary. As said thirty-two years ago by Justice Walker of the Illinois supreme court: "This information given to the agent operated as notice to the company, and it having accepted the premium and assumed the risk, it must be held that the company has waived the condition, or if not, it is estopped from urging its breach as a defense. To permit such a defense, would be highly unjust and iniquitous. It would shock the sense of right and fair dealing to permit money to be obtained under such assurances, and to permit the company to say, we are not bound, and did not intend, on our part, to be bound for any loss that might occur; we misled and deceived you into paying the premium, and although we did not intend to be bound, and knew we were not, still we will keep the premium, and you must suffer the loss. This is the substance of the defense, and such a defense cannot be allowed to prevail." St. Paul F. & M. Ins. Co. v. Wells, 89 Ill. 82.

Appellant's counsel lays stress upon the fact that this is a standard policy prescribed by statute, and that the courts are therefore bound to give it effect. Such argument has repeatedly been made and as often repudiated by the courts as unsound. It is firmly established that a form of policy of fire insurance, although prescribed by law, is, when issued by the insurance company, none the less a contract and to be construed

as such by the courts, and that while it may affect a question of pure waiver it does not abrogate the doctrine of estoppel. In addition to the foregoing authorities, see Clement, on Fire Insurance, pp. 409, 451, and cases cited. Moreover, such rule is crystalized by statute in this state. Section 6058 Rev. Codes 1905, provides: "Policies of insurance in the form prescribed by the last section shall be in all respects subject to the same rules of construction as to their effect or the waiver of any of their provisions as if the form thereof had not been prescribed."

It is urged that by receiving and retaining the policy, plaintiff is conclusively deemed to have acquiesced in and agreed to its terms. Such contention has the support of many authorities, and no doubt is sound when properly applied. Aside from the case of Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, and the few other authorities adhering to the rule there announced, it is firmly settled that restrictions in a policy on the power of agents with respect to waiver have no application to those conditions relating to the inception of the contract. 3 Cooley, Briefs on Insurance pp. 2510 and 2511. Mr. Cooley states the reason for this doctrine to be that "the insured is not bound by restrictions and stipulations of which he has no knowledge. As an insured cannot be charged with constructive notice of the stipulations in a policy until he has accepted it, therefore a limitation in a policy on an agent's authority will not bind the insured with reference to matters occurring prior thereto. Until an insured has either actual or constructive notice of the limitations on an agent's authority, he may assume that the agent has the authority indicated by the apparent scope of his employment." At page 2619 the same author says: "Unquestionably, the weight of authority supports the doctrine that an insured cannot rely on waivers by parol prior to the issuing of a policy. *But this rule does not apply to implied waiver by the issuance of a policy, and receipt of the premiums thereon, with knowledge of matters vitiating the policy at its inception;* for a large majority of the cases, especially the more recent ones, support the rule that an insurance company will not be permitted to defeat a recovery upon a policy issued by it by proving the existence of facts which would render it void, where it had full knowledge of it when the policy was issued." As said by the Georgia court in City F. Ins. Co. v. Carrugi, 41 Ga. 660: "It would be a fraud to take a man's

money, with a full knowledge of the facts, and then set up that a particular mode of proving the fact, agreed upon by the parties, but not required by law, had not been resorted to. The receipt of the money and the issuing of the policy is a waiver of the indorsement; even if it be admitted that the parties may, by their contract, agree as to how any particular fact shall be proven." And in Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 4 L.R.A. 458, 11 S. W. 1016, the court said: "The issue of a policy by an insurance company, with a full knowledge or notice of all the facts affecting its validity, is tantamount to an assertion that the policy is valid at the time of its delivery, 'and is a waiver of the known ground of invalidity.'" See also 3 Cooley, Briefs on Insurance, pp. 2632, 2652, and authorities cited.

Of course, in order to successfully invoke the doctrine of estoppel against the insurer as above stated, the insured must be devoid of any taint of fraud on his part. If there is any collusion between him and the insurance company's agent, he cannot invoke the doctrine of implied waiver or estoppel. If, however, the insured in good faith informs the agent of the actual facts regarding the property insured, and makes truthful answers to the questions asked him by such agent, we know of no sound reason why the insurance company should be permitted, in a court of law, to urge in avoidance of the policy that answers or representations inserted in the application or policy by the agent, either through mistake, carelessness, or fraud, avoid such policy and exonerate the company from all liability thereunder. The few courts holding to the contrary base their decisions upon the untenable ground that to permit plaintiff to prove facts contrary to the written statements in the application and policy would violate the rule against the admission of parol testimony tending to vary the written contract. But, as will be seen by the foregoing authorities, the courts, with but few exceptions, hold "that to apply the doctrine as to parol testimony with the strictness demanded by the insurer would be to make a rule of evidence adopted as a protection against fraud an instrument of the very fraud it was intended to prevent." 3 Cooley, Briefs on Insurance, 2565, 2566, and cases cited.

For a correct statement of the rule regarding the subjects of waiver and estoppel as applied to the standard form of policy such as the one in the case at bar, see Clement on Fire Ins. pp. 405, 448, and cases

cited. At pp. 415 and 416 the rule is stated as follows: "The stipulation in a policy that no agent or other representative shall have power to waive any condition may be effective as against an alleged waiver by agreement or contract with an agent or representative, *but has no application when the law declares a waiver by estoppel because of the acts of the company through its agent or representative. Such estoppels do not rest upon the power or lack of power of the agent to change the provisions of the policy or waive any of its agreements, but arise in law because of the acts of the company through its agent acting in the scope of his apparent power as its representative.* . . . Restrictions in the policy upon the power of agents to waive its conditions, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract when it appears that company's agent delivered it and received the premium with full knowledge of the actual situation."

The above rule is supported by the great weight of authority. We shall not attempt here to cite the many cases. They are collated in the opinion of Mr. Justice Corson in the recent case from South Dakota,—Fosmark v. Equitable Fire Asso. 23 S. D. 102, 120 N. W. 777. Particular attention is called to the case of People's F. Ins. Asso. v. Goyne, 79 Ark. 315, 16 L.R.A.(N.S.) 1180, 96 S. W. 356, 9 A. & E. Ann. Cas. 373, from which we quote the following: "A fire insurance company may be estopped by the conduct of its agent, acting within the apparent scope of his authority, from availing itself of a false answer to a material question, or of a breach of warranty, or of a violation of the provisions of the application or policy, notwithstanding clauses in the application or policy to the effect that the company shall not be bound by any such conduct or representation of its agent; and such estoppel or waiver may be proved by parol evidence, though the policy or application contains clauses to the effect that no waiver shall be effective unless indorsed in writing on the policy at the home office of the company."

Appellant's counsel strenuously contends, in effect, that by force of certain statutory provisions in this state the rule of implied waiver or estoppel cannot be invoked. The particular sections of the statute relied on are §§ 5952 to 5956 and 5960 and 5961, Rev. Codes 1905. These sections merely deal with the subject of warranties in relation

to insurance contracts and the effect of a breach thereof. It is a sufficient answer to such contention to say that in our opinion it was not the legislative intent, by the enactment thereof, to do away with the well-settled and most equitable rule of implied waiver and estoppel *in pais*. It is inconceivable that it could have been the legislative intent to enable insurance companies, in effect, to take advantage of their own mistakes, carelessness, or fraud, or that of their agents. In other words, to repudiate all liability on account of a state of fact, involving misrepresentations, for which the company or its agent is alone to blame. Although like statutory provisions exist in California and South Dakota, the decisions in those states do not support counsel's contention. On the contrary, the courts of both states most emphatically recognize and enforce the doctrine of implied waiver and estoppel as announced so generally by nearly all courts in this country.

Counsel's criticism of certain of the New York cases shows that he apparently fails to distinguish between a waiver and an estoppel, and also fails to distinguish between conditions or warranties which are precedent and those which are subsequent to the formation of the contract.

Our conclusion leads to an affirmance of the order appealed from.

All concur, except SPALDING, J., dissenting.

SPALDING, J. (dissenting). The rule on the question involved in this case was established in Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799, in 1890. The Supreme Court of the United States in 1902, in Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, reviewed the authorities with great care and settled the question for the Federal courts in harmony with the views of this court expressed in the Johnson Case. The case of New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, also covers the same ground. I see no reason of sufficient weight to warrant this court in overruling the Johnson Case and disregarding the Federal authorities and thereby establishing two rules in this jurisdiction. It results in this: that foreign insurance companies who write large risks in this state and suffer losses in cases where this principle is in question are not liable, while foreign companies which write risks in this state of less than

$2,000, and all domestic companies are liable. In Dunham v. Peterson, 5 N. D. 414, 36 L.R.A. 232, 57 Am. St. Rep. 556, 67 N. W. 293, this court said: "What, in the absence of any statute on the subject, would be decisive with us, even if we were in that state of mind on this question described by the phrase 'halting between two opinions,' is the fact that in the Federal courts this more universally accepted rule has become the law by reason of the decision of the Federal Supreme Court. . . . There should be only one rule in this state whether the litigant resort to the Federal court or the state tribunals."

While the weight of authority seems to be in harmony with the majority opinion, yet on close examination many of the authorities which at first reading appear to be so, are distinguishable. This is shown by the opinion in Russell v. Prudential Ins. Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252. The policy under consideration in that case contained provisions similar to those in question in the case at bar, and the court held that the insurer was not liable where the waiver had not been indorsed on the policy, and distinguished Stewart v. Union Mut. L. Ins. Co. 155 N. Y. 257, 42 L.R.A. 147, 49 N. E. 876, and prior decisions which appeared to be in conflict with the Russell Case, on the ground that in the former decisions it was clear by inevitable inference that they had been based upon the fact that the policy had never been delivered to the insured and that consequently he could not be charged with knowledge of its contents, and the court says: "Is this contract to be enforced as clearly written, or is it to be ignored for the reason that men enter into contracts without reading them, and assume that a vague and unproven custom exists permitting a local agent to give life and validity to the policy without reference to the terms of the contract of insurance? The question may be put in another form. Can an insurance company enter into a contract with a person applying for insurance which can so fix the precise conditions under which the policy shall issue that the agent, in the absence of express authority, cannot abrogate it? It would seem that the statement of the foregoing questions would compel an answer in favor of the company without argument."

Mr. Freeman, in an exhaustive note on this subject contained in 107 Am. St. Rep. on page 123, states that the weight of more recent adjudications is in favor of the power of the insurer to limit the

authority of an agent, and that when brought to the actual knowledge of the insured, or when made a part of the terms of the contract of insurance, the insurer is bound thereby. The conflict of authority on the subject arises by reason of some courts emphasizing one and other courts another of several conflicting legal principles. As I read the opinion in the Johnson Case it, in effect, lays down the rule that the insured is charged with knowledge of the contents and conditions of the policy when he has had it in his possession for a sufficient length of time to enable him to acquaint himself with its contents and conditions. Now this length of time may be variable, depending upon circumstances and conditions. The complaint in the case at bar does not disclose whether the insured had any opportunity to read the policy or not, and I think, in the absence of allegations regarding this subject, unless it must be presumed that he did have, which I doubt, evidence on this question is necessary. Any attempt to review the authorities at any length would be useless. Their number is legion, and I rest my decision on the ground that the rule has been established and followed in this state for twenty years, that it is supported by a large number of state authorities and by the Supreme Court of the United States, and that two rules in the same state should be avoided unless there are reasons for establishing the second rule far more convincing and necessary than those presented in this instance.

THE STATE OF NORTH DAKOTA v. CHARLES F. MERRY.

(127 N. W. 83.)

Criminal Law — False Pretenses — Sufficiency of Information.

1. The defendant was tried, convicted, and sentenced upon an information

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Note.—Although the general rule is that, on the trial of a person accused of crime, proof of a distinct, independent offense is inadmissible, there are some well-recognized exceptions to the rule, as shown by a review of the authorities in an extensive note to the famous Molineux Case, in 62 L.R.A. 193. One of these exceptions is that applied in STATE v. MERRY, to the effect that whenever intent is an essential ingredient of the crime charged, evidence of other crimes tending to establish such intent is admissible. Nevertheless, the courts are not agreed, as shown by the note cited above, as to whether, when there is other evidence of intent, evidence of other crimes may be given.

charging in substance that he, with intent to cheat and defraud one John G. Johns out of his property and money, did falsely pretend to the said Johns that he, the said defendant, was a duly authorized agent of the Commercial Club of Dickinson, and was authorized to solicit and collect money for immediate use in paying for the work of a preliminary survey and other necessary work of organization in connection with building a proposed railroad from Williston to Dickinson and Hettinger, and that Johns, believing said false pretenses and representations, and being deceived thereby, did then and there deliver to said defendant a check of the value of $100, etc. *Held*, that the information states facts sufficient to constitute the crime of obtaining property by false pretenses.

Criminal Law — Intent — Proof of Other Offenses.

2. Whenever the intent or guilty knowledge of a party accused with crime is a material ingredient in the issue of the case, other acts and declarations of a similar character tending to establish such intent or knowledge are proper evidence to be admitted, provided they are not too remotely connected with the offense charged.

Criminal Law — False Pretenses — Elements — The False Representations Part of Moving Cause.

3. It is not necessary, to constitute the offense of obtaining property by false pretenses, that the owner has been induced to part with his property solely and entirely by pretenses which are false; nor that the pretenses be the paramount cause of delivery to defendant. It is sufficient, if they are a part of the moving cause, and, without them, the defrauded party would not have parted with his property.

Criminal Law — False Pretenses — Gist of Offense.

4. The mere fact that the money was to be used in paying the cost of a preliminary survey, and for the organization of the railroad company, would make no difference. It would not help defendant even though he used the money for these purposes. The fact that he obtained the check by false representations is the gist of the offense. The criminal character of the act is not determined by the subsequent use of the money, but by the means used in obtaining it.

Same.

5. Under § 9246, Rev. Codes 1905, the offense is complete when the defendant, with intent to cheat or defraud another, obtains from such person any money or property. The fraud is complete when such person parts with his property.

Appeal and Error — Leading Questions — Question First Raised on Appeal.

6. Objections on the ground that the questions were leading cannot be raised for the first time on appeal.

Evidence.

7. Evidence examined and held sufficient to sustain the verdict.

Criminal Law — Fine and Imprisonment — Imprisonment for Costs.

8. Appellant was sentenced to imprisonment in the county jail of Adams county for a period of eight months, to pay a fine of $200, and the costs of prosecution, taxed at the sum of $500, and in default of said fine and costs, to be imprisoned in the county jail of Adams county for a further period of two months. Sec. 10104, Rev. Codes 1905, provides for such a judgment. Hence no error was committed by the court in rendering such judgment.

Opinion filed May 29, 1910. Rehearing denied June 21, 1910.

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

Action by the state of North Dakota against Charles F. Merry.

From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals.

Affirmed.

M. A. Hildreth, for appellant.

False pretenses must not relate to future events. People v. Blanchard, 90 N. Y. 314; 5 Criminal Defenses, 366–371, and cases cited; People v. Wakely, 62 Mich. 297, 28 N. W. 871; Blum v. State, 20 Tex. App. 578, 54 Am. Rep. 530; 5 Criminal Defenses (Sup.) 1033, 1035–1038.

Knowledge of falsity of representation and intent must be shown as intent is shown in other criminal cases. 1 McClain, Crim. Law, § 691.

Other representations cannot be shown. State v. Church, 43 Conn. 471; Jackson v. People, 126 Ill. 139, 18 N. E. 286.

Andrew Miller, Attorney Gentral, *Alfred Zuger* and *C. L. Young,* Assistants, and *P. D. Norton,* State's Attorney, for respondent.

If a false statement of facts accompanies a false promise, the latter may be disregarded and defendant convicted on former. 19 Cyc. Law & Proc. p. 396; State v. Gordon, 56 Kan. 64, 42 Pac. 346; State v. Thaden, 43 Minn. 253, 45 N. W. 447, 43 Minn. 325, 45 N. W. 614; Pearce v. State, 115 Ala. 115, 22 So. 502; R. v. Jennison, 9 Cox, C. C. 158.

The false pretense need not have been the paramount cause of delivery; it is sufficient if it is a part. Re Snyder, 17 Kan. 542,

2 Am. Crim. Rep. 228; State v. King, 67 N. H. 219, 34 Atl. 461; People v. Herrick, 13 Wend. 87; Trogdon v. Com. 31 Gratt. 862.

Fraudulent intent may be inferred from falsity of pretense and attendant circumstances. Wharton, Crim. Law, § 1184; 4 Elliott, Ev. 2975; People v. Shulman, 80 N. Y. 373, note; Mayer v. People, 80 N. Y. 373.

All circumstances that throw any light upon the intent of accused or falsity of the representation are admissible. Underhill, Crim. Ev. § 437 and cases cited; State v. Garris, 98 N. C. 733, 4 S. E. 633; Wood v. United States, 16 Pet. 342, 10 L. ed. 987; State v. Cooper, 85 Mo. 256; Hersey v. Benedict, 15 Hun, 287; Mayer v. People, 80 N. Y. 364; State v. Briggs, 74 Kan. 377, 7 L.R.A.(N.S.) 278, 86 Pac. 447, 10 A. & E. Ann. Cas. 906.

CARMODY, J. The defendant was informed against by the state's attorney of Adams county, for the crime of obtaining property by false pretenses. The case was transferred from Adams county to Stark county, and tried before Judge Burr and a jury. The trial resulted in a conviction. A motion for a new trial was overruled, and he was sentenced to imprisonment in the county jail of Adams county for a period of eight months, to pay a fine of $200 and the costs of prosecution, taxed at the sum of $500, and in default of said fine and costs, to be imprisoned in the county jail of Adams county for a further period of two months. The defendant appeals from the judgment and from the order denying his motion for a new trial. The information charges in substance that the defendant on the 7th day of October, 1908, at the county of Adams, etc., did commit the crime of obtaining property by false pretenses, committed in the manner following, to wit:

That at said time and place the said Charles F. Merry wilfully, unlawfully, and feloniously contriving and intending, knowingly and designedly by false pretenses to cheat and defraud one John G. Johns of his property and money, did wilfully, unlawfully, feloniously, knowingly, and designedly falsely pretend to the said John G. Johns that he, the said Charles F. Merry, was a duly authorized agent and representative of the Commercial Club of Dickinson, North Dakota, and that, as said agent and representative, he was authorized to solicit and

collect money for immediate use in paying for the work of a preliminary survey and other necessary work of organization in connection with the building of a proposed railroad extending from the town of Williston to the towns of Dickinson and Hettinger in the state of North Dakota, and the said John G. Johns then and there believing the said false pretenses and representations so made as aforesaid by the said Charles F. Merry, and being then and there deceived thereby, was then and there induced by reason of the false pretenses and representations so made as aforesaid to deliver and then and there did deliver to the said Charles F. Merry, a certain check and order on the Adams county State Bank of Hettinger, North Dakota, for $100 and payable to the order of the said Charles F. Merry, and then and there of the value of $100, and then and there the property of him, the said John G. Johns, and then the said Charles F. Merry did then and there wilfully, unlawfully, feloniously, knowingly, and designedly receive and obtain the said property from the said John G. Johns by means of the said false pretenses and representations aforesaid, and with intent then and there to cheat and defraud the said John G. Johns of said property, which pretenses were specifically negatived to be false, to the knowledge of the defendant.

It will be observed that all the pretenses described in the informations, and alleged to be false, are: That the defendant represented that he was a duly authorized agent and representative of the Commercial Club of Dickinson, and that as said agent and representative he was authorized to solicit and collect money for immediate use in paying for the work of a preliminary survey and other necessary work of organization, in connection with the building of a proposed railroad, extending from the town of Williston to the towns of Dickinson and Hettinger, and the said John G. Johns, believing said false pretenses and representations, and being deceived thereby, was then and there induced by reason of the false pretenses and representations so made as aforesaid to deliver, and did deliver, to the defendant a check on the Adams County State Bank for $100 payable to the order of said defendant. The evidence on the part of the state, as far as material, is substantially as follows: A. G. Newman testified that he was a resident of Hettinger, vice president of the first National Bank of that place, first met defendant in the bank. He was brought in there and

introduced by a man named John Midland. Said he had some proposition he wanted to talk to witness about. Wanted to sell him some railroad stock. Was pretty busy at the time and took him down to Dr. Johns, who was president of the Commercial Club. Defendant said to witness that he had represented the Dickinson Club in Chicago and New York with trust companies, that he had already made provisions to dispose of this stock, and all he wanted was to get some local men residing in Hettinger to secure about $100 apiece so as to get the incorporation papers of record, etc. John G. Johns, complaining witness, a physician, testified that defendant was brought in by Mr. Newman and introduced as a gentleman from Dickinson, who was representing the Commercial Club in the interests of a railroad that was to be built by the Commercial Club of Dickinson from Williston to Dickinson and Hettinger, and possibly later from there southwest to Deadwood and on through to the coast. Was pretty busy told defendant that he, witness, had no interest in it. Defendant said he wanted a few representative men interested, and get them to take some stock. Witness told defendant he had no money to put in a railroad; that all the money he had would not build perhaps 6 inches of a railroad. Defendant said all he wanted was to get the amount of $100 or so for one share, so as to get the good will of the people, and secure the right of way between the two towns. That he, defendant, would only give at least one or two shares to any one individual, and he only wanted to place a matter of four or five in town, and said it was necessary, under the state laws, to get a few residents to get a charter for the railroad. That he had been to New York and Chicago, and had arranged to finance the road, and the road would be built in the course of a year or such a matter. Under these representations, witness took a share of stock and gave defendant his check for $100. Defendant said it would be necessary for witness to sign the articles of incorporation. Defendant and witness went across the street, and signed the articles of incorporation before a notary public. In the course of half an hour witness learned something that opened his eyes, and his railroad stock went down. Witness also testified as follows: "Q. Did the defendant tell you that he was an agent and represented the Dickinson Commercial Club? A. Yes, sir. Q. What did the defendant state to you regarding his relations with the Dickinson Commercial Club in the

matter of soliciting and collecting money for use in paying for the work of a preliminary survey and other necessary work of organizing in connection with the building of the railroad, if anything? (Objected to on the grounds of incompetent, irrelevant, and immaterial, leading, not within the issues of the allegations of the information. Overruled. Exception.) A. He stated he was an agent or representative of the Commercial Club of Dickinson, that he was there in the interest of that club to get money and interest the people along the line of the road. That this money was to be used in the preliminary survey of this road. Q. At that time, did the defendant show you any papers or written instructions purporting to be signed by the people from Dickinson, who belonged to the Commercial Club? (Objected to as not within the issues of the information. Overruled. Exception.) A. Yes, sir. Q. You may tell the jury what papers he did show you. (Same objection. Same ruling. Exception.) A. He showed me the articles of incorporation of the railroad, and a number of signatures of Dickinson people. (Defendant moves to strike out all this evidence as not responsive to the question. Overruled. Exception. Witness further testified that the check was cashed; that it was of the value of $100.) Q. Dr. Johns, when Merry told you that he was an agent or representative of the Commercial Club of Dickinson, North Dakota, and was at Hettinger in the interest of the Dickinson Commercial Club of Dickinson, North Dakota, in the matter of the promotion of a proposed railroad from Williston, North Dakota, to Dickinson, North Dakota, and to Hettinger, did you believe those representations? (Objected to as incompetent, irrelevant, and immaterial, calling for conclusions of the witness. Overruled. Exception.) A. Yes, sir. Q. At the time that you gave this check and order on the Adams County State Bank of Hettinger, North Dakota, to the defendant, Charles F. Merry, for $100, did you give it to him, believing and relying upon the statement made to you at that time by him that he was the agent and representative of the Dickinson Commercial Club of Dickinson, North Dakota, and authorized to solicit and collect money for use in the promotion and organization of a road and the preliminary survey. (Objected to as incompetent, irrelevant, and immaterial, calling for conclusions of the witness, and assuming matters not in proof. Overruled. Exception.) A. Yes,

sir. Q. Dr. Johns, had you read about or had it been brought to your notice before this time that the Dickinson Commercial Club, before meeting Merry had you read in the local newspapers or had it been in anyway brought to your attention before that time that the Dickinson Commercial Club proposed to promote a railroad similar to the representations made concerning that road to you at that time by Mr. Merry? (Objected to as incompetent, irrelevant, and immaterial, and not alleged as any of the inducements to the witness to give the check and part with his property as alleged in the information. Overruled. Exception.) A. I had. The Court: I think you can show the fact that he knew about it, if he did know anything about it, but you cannot go into the details, simply to show the condition of his mind at the time, but you cannot go into the details. Q. Would you have given the defendant at that time the check for $100 on the Adams County State Bank, payable to his order, if you had not believed that he was at that time representing the Dickinson Commercial Club in the promotion of the railroad which you were led to believe the Dickinson Commercial Club was behind? (Objected to as incompetent, irrelevant, and immaterial. Not embraced within the allegations of the information. Calling for the conclusion of the witness, and on the further ground that the witness has already testified as to what were the grounds or what the inducement was to part with his property, the property described in the information, and on the further ground that it anticipates a fact to be properly found by the jury. Overruled. Exception.) A. I would not. Never met Merry before this time. Did not know anything about him. He was an absolute stranger."

On a cross-examination witness testified that he was well acquainted with Newman, that his reputation and standing with the business men in the town were good; might not have entered into negotiations with defendant if Newman had not been with him. The fact that Newman introduced the defendant to witness entered into the inducement to take part in the transaction, and it certainly had some influence in inducing witness to take stock, as Newman was a man of good standing. The sole inducement was that the defendant stated that he was a representative of the Dickinson Commercial Club. If Newman had not been with him, witness would have had grave doubts about entering into the transaction. Witness believed the enterprise was going

to be a profitable proposition, and would boom the country. He had some busineess interests down there, and thought it was going to be a good thing. He subscribed for one share of stock, and paid for it. Defendant exhibited to witness at that time articles of incorporation of the proposed road. Supposed the stock was to be delivered to witness at any time he demanded it. Witness signed the articles, and there was to be a meeting at some future time. Remembered that there was some conversation as to witness being given ten shares of common stock of the preliminary organization of the company. The check was for treasury stock, and was to be used for the preliminary survey, and the incorporation of the railway company. The common stock was to be given after this. On redirect-examination witness testified as follows: "Q. Dr. Johns, the check for $100, the property that you gave the defendant at Hettinger on the 7th of October, 1908, was that given to be used in the organization and the necessary work incident to starting a railroad to be promoted by the Dickinson Commercial Club? (Objected to as already testified to. Overruled. Exception.) A. Yes. Q. Did you at that time intend or contemplate buying stock in any railroad other than a railroad that might be promoted by the Dickinson Commercial Club? (Objected to as incompetent, irrelevant, and immaterial. Leading.) A. No. Q. Would you at that time have purchased any stock or paid out or given any check or property to promoting any other railroad than the one to be promoted by the Dickinson Commercial Club at Dickinson, North Dakota, as represented to you by the defendant, Merry? (Objected to as incompetent, irrelevant, and immaterial, calling for conclusion of the witness, not proper redirect examination. Overruled. Exception.) A. No. Q. Then did I understand you that this property was given to Merry solely for the purpose of being put into the organization and the promotion of a railway to be promoted by the Dickinson Commercial Club, and none other? (Same objection, same ruling, exception.) A. Yes. Q. You stated that Mr. Newman introduced Merry to you as a member of or representative of the Dickinson Commercial Club, did that introduction on the part of Mr. Newman cause you to more readily believe the representations made to you by Mr. Merry? A. Yes, sir."

On recross-examination witness testified that he was not acquaint-

ed in Dickinson, and knew nothing of the *personnel* of the Commercial Club, only knew that there was a Commercial Club in town. Took it for granted that there was such a club in Dickinson, knew nothing of its membership. Did not know whether there was one or more.

L. M. Anderson, assistant cashier of the Adams County State Bank, testified as to cashing the check.

W. R. Everett testified that he was secretary of the Dickinson Commercial Club, knew the defendant; that the records of the proceedings of the Dickinson Commercial Club did not show that the defendant was at any time employed as agent and representative of the Dickinson Commercial Club, to solicit funds and collect money for the organization of the proposed railroad or authorized to act for the club. On cross-examination he testified that he did not attend all the meetings, there was some discussion at some of the meetings in regard to promoting and organizing a railroad running south from Dickinson. It was discussed at more than one meeting. Did not know whether the minutes showed all the discussions in regard to the railroad at the club.

John Vanderlass testified that he was president of the Dickinson Commercial Club from the fore part of May, 1908, to the fore part of May, 1909. That defendant was not employed or authorized on October 7, 1908, to act as agent and representative of the club, to solicit funds and collect money in connection with said proposed railroad. On cross-examination he testified that there were many matters discussed at the club of which no record was made.

F. A. Finch testified that he met defendant October 8, 1909, at Lemmon, South Dakota. That defendant represented that he was organizing a railroad from Williston to Dickinson and Hettinger, and wanted a few local stockholders on South Dakota, two or three, and would like to get them from Lemmon. That they needed two or three local men to help complete the organization in South Dakota territory. That the road would be built from Rapid City north through Dickinson and to Williston, and then probably a branch line from Dickinson to either Hettinger or Lemmon. In all probability to Lemmon. He presented witness with a document or paper, if witness remembered rightly, that had the commercial club heading of the Dick-

inson Commercial Club. Witness believed it was signed by an officer of the Dickinson Commercial Club, at least defendant represented that he came from the Dickinson Commercial Club. Witness thought it no more than right and proper that he should introduce defendant to some business men, and he, witness, took defendant out and introduced him to Payne, and he represented the same proposition to Payne, and Payne did not care for any investments of that kind, and as witness and defendant went back to the bank they met Ed. Delehan. Witness introduced defendant to Delehan, and left them talking. This was just before dinner. During the noon hour Delehan, Lemmon, and witness were talking the proposition over. After dinner defendant came in. Witness did not remember whether they carried on any conversation in the presence of defendant or not; at least defendant came in with his checks. He got a check from Lemmon and Delehan.

E. C. Barry testified that he knew defendant for a number of years. That defendant requested him not to say anything about defendant, and he would see him later. Defendant told witness that he, defendant, was agent and representative of the Dickinson Commercial Club, authorized to solicit and collect funds in the matter of the promotion of a railroad. Witness Newman, recalled, testified that later in the day of October 7, defendant tried to sell Newman some railroad stock. Witness Newman told defendant he did not know him, did not know what was back of the railroad, and did not want to put his money in until he knew what he was doing.

Elmer Tew testified that he was sheriff of Adams county, that defendant escaped from the jail. On cross-examination, however, he admitted that bail had been accepted by the justice, and an order given to witness to discharge defendant, but he, witness, did not discharge him.

Arthur J. Hancock testified that after Newman introduced defendant to Dr. Johns, he, defendant, told Dr. Johns that he, defendant, was a representative and agent of the Commercial Club of Dickinson, and had a railroad proposition to make to him, and Dr. Johns asked him if that was a joke or was it on the square. Defendant said it was on the square. On a cross-examination witness testified that he heard

the defendant tell that he wanted to sell shares at $100 a share, for the preliminary survey or something of that kind.

A. G. Brown, the magistrate before whom defendant had his preliminary examination, testified that the defendant was in a normal condition of mind, and talked freely and willingly at the examination. Said he was an agent and representative of the Dickinson Commercial Club on October 7, 1908. All the testimony of the witness Brown was objected to as incompetent, irrelevant, and immaterial, and inadmissible under the allegations of the information, and that the witness had not shown himself competent to testify as to the mental status and physical appearance.

P. D. Norton, state's attorney, testified that he had a talk with defendant a day or two before the preliminary examination, and defendant told him, Norton, that he need not bring any of the officers of the Commercial Club of Dickinson as witnesses, as he, defendant, would admit that he was not agent or representative of the Dickinson Commercial Club at any time, and did not claim to be. This evidence was admitted over the objection of the defendant. The evidence of Finch was admitted over the objection of the defendant.

John Rissback testified on the part of the defendant that he was county treasurer of Stark county, signed the articles of incorporation, and was associated with the defendant in the organizing of the company. Was a member of the Dickinson Commercial Club at that time. Articles of incorporation, signed by defendant, John G. Johns, and five others, admitted in evidence, are recorded in the office of the secretary of state of the state of South Dakota.

Defendant assigns numerous errors, which he has grouped under four general classes:

1. Errors relating to the sufficiency of the proof to sustain the allegations of the information;

2. Errors relating to the admission of proof to sustain the allegations of the information;

3. Errors in the information; and

4. Errors in the charge.

To constitute the offense described in the Code and set forth in this

information, four things must concur, and four distinct averments must be proved:

1. There must be an intent to defraud;

2. There must be an actual fraud committed;

3. False pretenses must be used for the purpose of perpetrating the fraud; and

4. The fraud must be accomplished by means of the false pretenses made use of for the purpose, *viz.*, they must be the cause which induced the owner to part with his property; that is, that the false pretenses, either with or without the co-operation of other causes, had a decisive influence upon the mind of the owner, so that, without their weight, he would not have parted with his property. Com. v. Drew, 19 Pick. 179; People v. Haynes, 11 Wend. 557; Re Snyder, 17 Kan. 542, 2 Am. Crim. Rep. 228; State v. King, 67 N. H. 219, 34 Atl. 461; People v. Herrick, 13 Wend. 87.

The defendant strenuously contends that there is no evidence of a fraudulent intent on the part of the defendant, no evidence that he did not know that he was not authorized to solicit subscriptions, and no evidence that Dr. Johns, the complaining witness, was in fact defrauded out of his money, no evidence that Dr. Johns, parted with his property or money upon any false pretenses. If the defendant is correct in his contentions then the judgment should be reversed. The question of intent is always one for the jury under proper instructions of the court. The jury may infer the intent from all the facts in the case. An intent on the part of the defendant to defraud is an essential element, sometimes said to be the gist of the offense, and the burden is upon the state to establish it beyond a reasonable doubt. As a general rule, all the relevant circumstances at the time of, and accompanying or surrounding the transaction in question, are proper to be shown in evidence. It is generally held that the fraudulent intent of the defendant may be inferred from the falsity of the pretenses and the attending circumstances. Elliott, Ev. § 2975; Mayer v. People, 80 N. Y. 364; People v. Herrick, 13 Wend. 87; People v. Baker, 96 N. Y. 340; Trogdon v. Com. 31 Gratt. 862.

Before a person can be convicted under our Code as to false pretenses, it must be proved that he intended to cheat or defraud; that he made the false pretenses designedly to obtain property and that he

did obtain property by means of such pretenses, so made, and all evidence, legitimately tending to prove these matters is competent. The intent, motive, and knowledge of the defendant are proper subjects of investigation, and they may be found by evidence of all the circumstances attending the criminal transaction or by the declarations and conduct of the defendant, both before and after. People v. Everhardt, 104 N. Y. 595, 11 N. E. 62.

In Wharton's American Criminal Law, 6th ed. 649, it is said: "Where the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute in law a distinct crime."

3 Greenleaf on Evidence, § 15, has the following: "In the proof of intention it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged, for the unlawful intent in the particular case may well be inferred from a similar intent proved to have existed in other transactions done before or after that time."

In Stephen's Digest of Evidence, May's ed. p. 56, the rule is laid down as follows: "When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is an issue or is deemed to be relevant to the issue."

See also 1 Greenl. Ev. § 53, and notes.

In Weyman's Case, 4 Hun, 511, Judge Daniels lays down the rule as follows: "Where goods have been obtained by means of fraudulent representations, it has been held that as the intent is a fact to be arrived at, it is competent to show that the party accused was engaged in other similar frauds about the same time; provided that the transactions are so connected as to time, and so similar in their other rela-

tions, that the same motive may reasonably be imputed to them all." See Elliott, Ev. § 2976, and cases cited; State v. Cooper, 85 Mo. 256.

The crime of false pretense is not made out by simply showing that the representations charged in the indictment were made, and that they were false, and that the defendant knew them to be false. The jury, from these facts and from all other facts, may infer the fraudulent intent; but the law does not presume the fraudulent intent; that is to be found as a fact by the jury, and is not an inference of law.

Trogdon v. Com. 31 Gratt. 862, contains a very full discussion of the reasons for the admission of evidence of other offenses of the same character as the one on trial, and says: "Now, upon a prosecution for obtaining goods by false pretenses, the indictment must aver the fraudulent intent, and the commonwealth must prove it. It is the very gist of the offense. . . . It is not sufficient that the accused knowingly states what is false. It must be shown his intent was to defraud. Such intent is not a presumption of law, but a matter of fact for the jury. Being a secret operation of the mind, it can only be ascertained by the acts and representations of the party. A single act or representation in many cases would not be decisive, especially where the accused has sustained a previous good character. But when it is shown that he made similar representations about the same time to other persons, and by means of such representations obtained goods, all of which were false, the presumption is greatly strengthened that he intended to defraud."

We think under the foregoing authorities the evidence of Finch, Barry, and Newman was properly admissible as to the intent of the defendant, and the question of defendant's intent under the evidence, were properly submitted to the jury. Evidence that defendant was not the agent or representative of the Dickinson Commercial Club, and was not authorized to solicit subscriptions for the preliminary survey and organization of the railroad, was introduced on the part of the state, and the question was submitted to the jury under proper instructions. The evidence of Brown and Norton was properly admitted as admissions by the defendant. The more serious question is: Did the alleged false pretenses have so material an effect in inducing the prosecutor to part with his property that without their influence upon his mind he would not have parted with it? The evi-

dence shows that the Dakota Southern Railway Company was incorporated under the laws of the state of South Dakota with an authorized capital of $90,000,000 divided into 900,000 shares of a par value of $100 each, $70,000,000 or 700,000 shares to be preferred stock, and $20,000,000 or 200,000 shares to be common stock. All stock to be issued in such an amount and at such time or times and paid in such manner and in such amounts as the board of directors might designate. The board of directors had authority to issue the stock of the company in payment of property or for compensation for services rendered the company. The articles of incorporation were signed by the complaining witness, Dr. Johns, and he was to receive for his $100 check, one share of treasury stock and expected to be given ten shares of common stock of the preliminary organization of the company. The common stock he expected to receive later.

As to the treasury stock he testified as follows:

Q. When was this stock to be delivered to you?

A. Well, it was supposed to be delivered at any time I suppose it was demanded; I signed the articles and there was to be a meeting at some time, at some further date, as really I did not invest so very strong.

It is plain to be seen that if he gave defendant the $100 check in payment for the stock, and that the alleged false representations that defendant was a representative of the Dickinson Commercial Club, and as such representative was authorized to solicit subscriptions, etc., was not the moving cause, and that he would have given the check without those representations, then the appellant cannot be convicted.

In State v. Green, 7 Wis. 676, cited by defendant, Green was indicted for defrauding Wright & Paine out of a check for the sum of $251.25. He was introduced to Mr. Wright in Madison, Wisconsin, by a man named DeForest, who was a man of standing in the community. Green stated that he was a wholesale grocery dealer in New Orleans; that he was traveling about the country partly for pleasure and partly on business, and that he was short of funds and wished to draw his draft on Clark, Dodge, & Company, bankers in New York city, for $250, and that he had money with Clark, Dodge, & Company sufficient to pay the $250. He drew the draft on Clark, Dodge, &

Company for $250, on which Wright & Paine allowed him ½ per cent premium, and gave him a check for $251.25. There were no allegations in the indictment that Wright & Paine relied upon the false representations of Green. Paine testified that he would not have given the check to Green had he not believed his representations that Green had money on deposit with Clark, Dodge, & Company, of New York, to the amount of $250. The court says: "The evidence satisfactorily shows that Wright & Paine were not induced to part with their draft chiefly upon the faith of the misrepresentations and false pretenses laid in the indictment." As hereinbefore stated, in this case there was no allegation in the indictment that Wright & Paine relied upon the false representations of Green, while in the case at bar the information alleges that Johns relied upon the false representations of appellant. The court instructed the jury on the question of what induced Johns to part with the check as follows: "Even if the defendant made such a statement to Dr. Johns, but Dr. Johns gave this check for $100 for some other reason, and this representation was not the effective cause and the material cause for giving up the check, then you must find for the defendant, as the state would not have shown that the property was obtained by means of this, but it is not necessary that this should have been the only thought in the mind of Dr. Johns. The mere fact that he may have thought the project would have been a benefit to the community, or that he might obtain some pecuniary benefit himself in the future, would not relieve the defendant from the effect of a false representation, provided that the false representation was the inducing cause. It is sufficient, however, if it had a material influence in inducing the owner to part with his property, although he was also influenced in part by other causes and representations." Appellant excepted to this, but did not request any different instruction.

In State v. Dexter, 115 Iowa, 678, 87 N. W. 417, the court says: "It may be, as suggested by appellant, that Brown & Son did not rely solely on the representations concerning the ownership of the stock. Other matters may have been taken into consideration. It was sufficient, however, if it appeared that but for such representations the sale would not have been made." See also 19 Cyc. Law & Proc. p. 407, and cases cited.

These instructions were not prejudicial. It is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner has been induced to part with his property solely and entirely by pretenses which are false; nor that the pretenses be the paramount cause of delivery to defendant. It is sufficient, if they are a part of the moving cause, and, without them, the defrauded party would not have parted with his property. Re Snyder, 17 Kan. 542, 2 Am. Crim. Rep. 228.

In the case at bar Dr. Johns testified that he believed the representations made by the defendant that he was a duly authorized agent and representative of the Commercial Club of Dickinson, and that as said agent and representative he was authorized to solicit and collect money, etc., and that he gave defendant the check in question, because of these representations, and would not have given it to him but for these representations. It is true that this testimony was given by Johns in answer to several leading questions, asked him by the state's attorney. None of these questions were objected to on the ground that they were leading, and appellant cannot raise this question for the first time in this court.

It is claimed by appellant's counsel that it was not sufficiently shown by the evidence offered by the state, that the prosecuting witness, Dr. Johns, was in fact defrauded. That the evidence does not show that he suffered any loss of property when he accepted, in payment of the check, stock in the proposed railroad. It is true that there is no evidence of the value of the stock. Neither is there any evidence that Johns could not have received the stock if he demanded it. In fact he testified that he supposed the treasury stock was to be delivered any time he demanded it, and that he was to receive ten shares of common stock later.

Under § 9246, Rev. Codes 1905, the offense is complete when the defendant, with intent to cheat or defraud another, obtains from such person any money or property.

The fraud is complete when such person parts with his property. Wharton, Crim. Law, 9th ed. § 1200; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507; Com. v. Coe, 115 Mass. 481; Com. v. Wilgus, 4 Pick. 178; State v. Jamison, 74 Iowa, 613, 38 N. W. 509; People v. Haynes, 11 Wend. 557; People v. Ward, 145 Cal. 736, 79 Pac. 448;

19 Cyc. Law & Proc. p. 411, and cases cited; People v. Cook, 41 Hun, 67.

Wharton, § 1200, supra, says: "When the goods have been obtained, only an intent to defraud need be proved, and not an actual defrauding; and hence it is not necessary to charge loss or damage to the prosecutor, the offense being complete when the goods are obtained by false pretenses, with intent to cheat and defraud."

People v. Wakely, 62 Mich. 297, 28 N. W. 871, relied upon by the appellant, is not in point. In that case the charge was that the defendant, Hudson J. Wakely, with intent to cheat and defraud one Margeret J. Schild, and fraudulently obtain from her one buggy, represented that he owned in fee simple, clear and free from all liens, 120 acres of good farming land, worth $6,000, and represented that his brother, John Q. Wakely, owned 160 acres of land, free and clear of all liens, and was worth at least $25,000, and that said representations were made to induce said Margeret Schild to take the promissory note for $150 of the two Wakelys in payment for said buggy. The testimony showed that the defendant owned the land, and that it was worth $6,000. The testimony did not show what John Q. Wakely was worth. No attempt had been made to collect the note. The court held that no actual fraud was shown, and that the defendant could not be convicted, as no person was defrauded.

Defendant contends that the essence of the crime of obtaining money or property by false pretenses is that the false pretenses should be of a past event, or of a fact having a present existence, and not of something to happen in the future. This is unquestionably good law, but does not apply to the facts in the case at bar. The offense—the false pretenses charged in the case at bar—is that the defendant represented himself as the agent and representative of the Dickinson Commercial Club, and as such agent and representative he was authorized to collect money, etc. The mere fact that it was to be used in paying the cost of a preliminary survey, and for the organization of the railroad company, would make no difference. It would not help defendant even though he used the money to pay the cost of the preliminary survey, and the organization of the company. The fact that he obtained the check by false representations is the gist of the offense.

In People v. Lennox, 106 Mich. 625, 64 N. W. 488, in the second

paragraph of the syllabus, the court says: "The fact that money obtained by false pretenses is devoted to the object for which it was given, which is a meritorious one, will not constitute a defense to a criminal prosecution, such fact being immaterial upon the question of intent to defraud." In this case the defendant was soliciting money to establish a school. He represented to the prosecutor that another person had subscribed $10, when, as a matter of fact, he had only subscribed $1. The court says: "The proofs fully sustain the charge, and conclusively show that the respondent represented to Shank that Newton had subscribed and paid $10, whereas in fact he had subscribed and paid but $1. It is, however, insisted that no criminal intent necessary to the offense is shown, because the respondent used the money obtained for the purpose of establishing the school, and had purchased articles necessary to start it. What he did with the money is immaterial. The law does not sanction the obtaining of money under false pretenses, though the object to which it is devoted be meritorious. The criminal character of the act is not determined by the subsequent use of the money, but by the means used in obtaining it." See also 19 Cyc. Law & Proc. p. 396, and cases cited; State v. Gordon, 56 Kan. 64, 42 Pac. 346; State v. Thaden, 43 Minn. 325, 45 N. W. 614; Pearce v. State, 115 Ala. 115, 22 So. 502.

The witness Barry, hereinbefore mentioned, who was sheriff of Adams county at the time of the arrest of defendant, testified to an alleged attempt of defendant to escape. This testimony, and the testimony of the witness Tew, was objected to by the defendant, and the objection overruled. This evidence was properly admitted. Elliott, Ev. 4th ed. § 2724.

The evidence of the witness Hancock was properly admitted. He testified he overheard the conversation between Dr. Johns and the defendant, and his testimony tended to corroborate the evidence of Dr. Johns.

From what we have hereinbefore stated, it follows that the court did not err in denying the motion made by the defendant at the close of the state's case, to advise the jury to return a verdict for defendant. Sec. 10104, Rev. Codes 1905, provides a judgment that the defendant pay a fine and costs, may also direct that he be imprisoned until both the fine and costs are satisfied, specifying the extent of the im-

prisonment, which must not exceed one day for every $2 of the fine and costs. Hence, the court did not err in adjudging that defendant, in default of said fine and costs, be imprisoned in the county jail of Adams county for a period of two months. The record shows that the costs of prosecution were taxed at the sum of $500. Hence it is presumed that they were properly taxed.

Finding no prejudicial error in the record, the judgment and order appealed from are affirmed. All concur.

STATE OF NORTH DAKOTA v. WILLIAM HEISER and Daniel Heidt, Defendants, and Daniel Heidt, Defendant and Appellant.

(127 N. W. 72.)

Criminal Contempt.

1. Appellant was convicted in the district court of Stark county of a criminal contempt for violating an injunctional order enjoining him from maintaining a liquor nuisance in the city of Dickinson. He was sentenced to imprisonment in the county jail for the period of five months, and fined in the aggregate sum of $650, with a proviso that in the event of his failure to pay such fine he be imprisoned for the additional period of 100 days. Judge Burr, of the ninth judicial district, presided at the hearing of such contempt proceeding pursuant to the written request of Judge Crawford, of the tenth judicial district. Such request, omitting title and formal parts, is as follows: "You are hereby requested to act as district judge and take full charge of the above-entitled action, including all matters and contempt proceedings therein which are now in issue or which may hereafter be brought before you by any person, authority, or officer lawfully entitled to do so, or otherwise as law and justice may require. By the Court. W. C. Crawford, Judge."

The assignments of error challenge: (1) The jurisdiction of Judge Burr to hear and determine such contempt proceeding; (2) the sufficiency of the affidavits upon which the warrant of attachment was issued; (3) the authority of F. C. Heffron, as assistant attorney general, to institute and prosecute the proceeding; and (4) the validity of the judgment and sentence of the court.

Held, for reasons stated in the opinion, that each of such assignments are untenable.

Note.—On the question whether contempt for violating an injunction is civil or criminal, see note in 13 L.R.A.(N.S.) 591.

Contempt — Jurisdiction of Outside Judge — "Proceeding Pending" — Contempt Proceedings Founded upon Main Action — Proceedings to Punish.

2. While a criminal contempt proceeding in which a warrant of attachment is issued is an original special proceeding under the provisions of § 7555, Rev. Codes 1905, it is not, strictly speaking, an independent proceeding, as it grows out of and is, to a certain extent, connected with the proceeding in the main action. Such contempt proceeding is dependent, for its foundation, upon the proceedings in the main action and the violation of the injunctional order therein issued. The written request of Judge Burr is sufficiently broad to confer authority upon him to assume and exercise jurisdiction, not only in the main action wherein the injunctional order was issued, but in any contempt proceeding arising out of a violation of such injunctional order, and this, whether the contempt proceeding was pending or not pending at the date such request was made.

Jurisdiction of Judges — Judge Sitting upon Written Request — Words and Phrases — "In Which Such Action or Proceeding Is at the Time Pending."

3. Sec. 6765, Rev. Codes 1905, provides: "No judge of the district court shall hear or determine any action, special proceeding, motion or application, or make any order or give any judgment in any action or proceeding not pending in the judicial district for which he is elected, except in the following cases: 1. Upon the written request of the judge of the district in which such action or proceeding is at the time pending." *Held*, construing said statute, that it was not the legislative intent thereby to restrict the jurisdiction of the judge thus requested to act in a district other than his own, to causes only which were then pending. The words "in which such action or proceeding is at the time pending," as used in the above section, were employed merely to designate the judge who could legally make such a request, and they have no reference to any particular subject-matter over which such requested judge may assume jurisdiction.

Contempt — Sufficiency of Affidavit.

4. The affidavits on which the contempt proceeding is based, examined and *held*, for reasons set forth in the opinion, to make out a prima facie case for the state.

Officers — Attorney General — Scope of Powers — Constitutional Law.

5. The attorney general, under the Constitution and existing statutes, has the undoubted authority, either personally or through his duly appointed assistants, to institute and prosecute persons for violating the prohibition law, and also to institute and prosecute for contempts growing out of violations of injunctional orders enjoining the maintenance of liquor nuisances. There is nothing to the contrary contained in the opinion in Ex parte Corliss,

16 N. D. 470, 114 N. W. 962, which case is distinguished from the case at bar in this point.

Contempt Proceedings — Fine and Costs — Judgment — Discretion of the Court.

6. The judgment appealed from is not vulnerable to attack upon either of the grounds urged, which are, first, that such judgment designates the time when the imprisonment shall commence, whereas the sentence orally pronounced fails to make such designation, and, second, that the judgment is excessive as to the fine imposed. The fact that a portion of the fine consists of the costs is not material, provided the total fine imposed does not exceed the fine permitted by statute. Trial courts are vested with an absolute discretion in fixing punishment in these cases so long as they keep within the limits prescribed by statute. In imposing a fine of $500 and the costs taxed at $150, it was clearly the intention of the court to impose an aggregate fine of $650. Such a fine is within the maximum limit fixed by statute.

Opinion filed June 3, 1910. Rehearing denied June 21, 1910.

Appeal from District Court, Stark county; *A. G. Burr,* Special Judge.

Defendant Daniel Heidt was convicted of criminal contempt for the violation of an injunctional order enjoining him from maintaining a liquor nuisance. From a judgment of conviction he appeals.

Affirmed.

McFarlane & Murtha, W. F. Burnet, H. C. Berry, and *L. A. Simpson,* for appellants.

Andrew Miller, Attorney General, *Alfred Zuger, C. L. Young,* and *F. C. Heffron,* assistants, for respondent.

Fisk, J. This is an appeal from a judgment of the district court of Stark county adjudging appellant guilty of contempt of court in violating an injunctional order duly and regularly issued and served upon appellant in an action commenced in that court on June 1, 1909, for the purpose of enjoining defendant and others from maintaining a liquor nuisance upon certain premises in the city of Dickinson. By such judgment appellant was sentenced to imprisonment in the county jail for the period of five months and fined in the sum of $500, and costs taxed at $150. In default of payment of such fine and costs, he was adjudged to be confined in such jail for the additional period of not

exceeding 100 days. No point is made as to the sufficiency of the proceedings in the main action, the appellant admitting the pendency of such action and the issuance and service of the injunctional order. On July 20, 1909, the Honorable W. C. Crawford, judge of the tenth judicial district, wherein such action was pending, made the following written request directed to the Honorable A. G. Burr, judge of the ninth judicial district (omitting the title):

"You are hereby requested to act as district judge and take full charge of the above-entitled action, including all matters and contempt proceedings therein which are now in issue or which may hereafter be brought before you by any person, authority, or officer lawfully entitled to do so, or otherwise as law and justice may require.

"Dated July 20, 1909.

"By the Court,
"W. C. Crawford, Judge."

Thereafter and on July 22d the following affidavits, omitting formal parts, were presented to Judge Burr, at Rugby:

"F. C. Heffron, being first duly sworn, does upon oath depose and say that he is assistant attorney general of state of North Dakota; that on the 1st day of June, 1909, as such officer, in the name of the State of North Dakota, ex rel., F. C. Heffron, Assistant Attorney General for the State of North Dakota, as plaintiff, he brought an action against William Heiser, Daniel Heidt, and Mary Willard, of Stark county, North Dakota, praying that the court grant judgment that the intoxicating liquor business carried on by the defendants be adjudged a common nuisance, and that the same be abated in due form of law, and that the defendants, their clerks, servants, agents, and employees, be permanently enjoined from in any manner, personally or otherwise, on the following described premises, within the county of Stark and state of North Dakota, to wit, lot 4 in block 2, town of South Dickinson, and in the buildings thereon, known as Heiser & Heidt saloon, selling or otherwise unlawfully disposing of intoxicating liquors, or being in any manner illegally concerned, engaged, or employed in keeping said liquors for sale, or keeping and maintaining a place where persons can resort for the purpose of drinking intoxicating liquors as a beverage; and that on the 9th day of June, 1909, the Honorable W. C. Crawford, Judge of the Tenth Judicial District

Court of Stark county, State of North Dakota, granted an injunction running to the said William Heiser, Daniel Heidt, and Mary Willard, their clerks, servants, agents, and employees, and each of them, be restrained and enjoined, during the pendency of such action and until the further order of the court, from selling, keeping for sale, giving away, or otherwise unlawfully holding or disposing of intoxicating liquors as a beverage, or keeping and maintaining a place where persons can resort for the purpose of drinking intoxicating liquors as a beverage, in said county of Stark in the state of North Dakota, at the premises aforesaid; that the summons, complaint, affidavit, and order containing said injunction was duly served on said William Heiser and Daniel Heidt at Dickinson, in Stark county, state of North Dakota, on the 9th day of June, 1909, by the sheriff of Stark county, state of North Dakota, as appears by the return of said sheriff now on file in the office of the clerk of the district court in and for said county.

"The affiant is informed and believes said William Heiser and Daniel Heidt have disregarded said injunctional order and disobeyed the mandate of the court herein, in this, to wit:

"That on the 3d day of July, 1909, on the premises aforesaid, they sold beer to one J. C. Lemarr, to be drank upon the premises where sold, and between June 9, 1909, and July 19, 1909, kept a place at and upon the premises aforesaid for persons to resort for the purpose of drinking intoxicating liquors as a beverage, affidavits as to such violating being hereunto attached, marked Exhibit A and made a part hereof; and have sold intoxicating liquors to divers persons on said premises since June 9, 1909; that said injunctional order so made, as aforesaid, has not been dissolved or modified.

"The said action of the said Daniel Heidt and William Heiser has a tendency to embarrass, hinder, and obstruct this court in the discharge of its duties, and to bring the authority of the same into contempt.

"Affiant therefore asks this court, or the judge thereof, to issue an attachment to the sheriff of said Stark county, North Dakota, commanding him to forthwith arrest the said William Heiser and Daniel Heidt, and bring them before this court at such time and place as he may direct."

Duly subscribed and sworn to.

"I, J. C. Lemarr, of lawful age, being first duly sworn, says: I know the defendants, William Heiser and Daniel Heidt, I have seen them at their place of business; their business is that of liquor dealers in the city of Dickinson, in the county of Stark, and state of North Dakota, at lot 4, block 2, town of South Dickinson, and in the buildings thereon commonly known as Heiser & Heidt's saloon. I was at their place of business July 3, 1909, at which time and in which place I bought beer which was intoxicating liquor, and drank it on said premises; at the same time I saw others drinking intoxicating liquors on said premises; I also at said time and on said premises saw intoxicating liquors kept for sale, and saw the same sold and drunk upon said premises. At said time and at sundry and divers times since that date I have seen divers persons resort and assemble together on said premises for the purpose of drinking intoxicating liquors as a beverage, and while then and there so congregated did drink intoxicating liquors. The property which I saw there kept in furtherance of the sales and drinking intoxicating liquors aforesaid is more fully described as follows: Bar, back bar, tables, chairs, bottles, and glasses."

Duly subscribed and sworn to.

Upon the affidavits aforesaid Judge Burr issued an attachment commanding the sheriff of Stark county to forthwith arrest the defendants as prayed for. Pursuant thereto the defendants, William Heiser and Daniel Heidt, were arrested and taken before Judge Burr at the city of Dickinson on August 3, 1909. Thereupon the defendants moved to quash such attachment proceedings on the following grounds:

First. That the affidavits upon which the said warrant of attachment was issued are fatally defective in this, that they fail to make out a prima facie case for the state as required by law.

Second. That part of the material and necessary allegations in the affidavit of F. C. Heffron, the same being the part wherein the said defendants and each of them are charged with violation of the injunctional order, is made upon information and belief, and is not corroborated by the affidavit of J. C. Lemarr or otherwise; that said affidavit fails to state that the defendants have personally violated the injunction or knowingly permitted its violation by others.

Such motion was overruled, to which defendants excepted. Thereupon they answered admitting the pendency of the main action and the

service of the injunctional order upon them as alleged, but denying the other facts stated in said affidavits. As a further answer they allege that Judge Burr was without jurisdiction in the contempt proceedings, for the alleged reason that such contempt proceedings were not pending at the date Judge Crawford made the request to Judge Burr to assume jurisdiction as aforesaid; also that F. C. Heffron, who assumed to act as assistant attorney general in such proceedings, is not authorized to thus act under the Constitution or laws of this state. They also attack in the answer the sufficiency of such affidavits as well as the truth of the facts therein stated. Such answer was duly verified by both Heiser and Heidt.

All of the objections to the regularity and validity of the contempt proceedings, as stated in the answer, were overruled, and defendants excepted. Defendant Heiser was acquitted of the contempt charged. Defendant Heidt orally plead not guilty. The court heard testimony over the objection of defendant Heidt, and at the conclusion thereof found him guilty of violating the injunctional order, as charged, and on August 7, 1909, entered the judgment appealed from.

Appellant assigns error as follows:

"1. The Honorable A. G. Burr had no jurisdiction to issue the warrant of attachment herein or to try or hear or determine this contempt proceeding, this proceeding not being pending when Judge Burr was requested to act.

"2. That the affidavits upon which the warrant of attachment is issued do not make out a prima facie case for the state.

"3. F. C. Heffron, claiming to act herein as assistant attorney general, had no authority to institute or prosecute this proceeding.

"4 The oral judgment and sentence of the court is void for uncertainty, it fixing no time when the imprisonment is to commence; and the written judgment and sentence of the court is void because it is inconsistent with the oral judgment and sentence of the court.

"5. That part of the judgment requiring appellant to pay the cost of this proceeding in addition to the fine imposed is void, there being no provision for costs against the contemner in a criminal contempt in this state."

These assignments will be noticed in the order presented.

1. As to the jurisdiction of Judge Burr to issue the warrant of

attachment and to preside at the trial in the contempt proceedings, we think there is no room for serious debate. While, as appellant contends, a criminal contempt proceeding wherein a warrant of attachment is issued is an original special proceeding under the provisions of § 7555, Rev. Codes 1905, it cannot be correctly said to be wholly an independent proceeding, as it grows out of and is, to a certain extent, connected with the proceedings in the main action. It is only by virtue of the proceedings in the main action that this special proceeding can originate. It is dependent for its foundation upon the proceedings in the main action and the violation of the injunctional order therein issued.

The essence of the contempt consists in the violation of the mandate of the judgment in the main action. We cannot assent to appellant's contention that Judge Burr, by force of the above-written request of Judge Crawford, acquired no jurisdiction to hear and determine the contempt proceeding. Conceding for the purpose of argument that such proceedings were not pending at the date of such request, we think the necessary legal effect of the transfer to Judge Barr of jurisdiction over the main action was to confer upon him power and jurisdiction over contempts theretofore or thereafter committed arising out of violations of the mandate of the court in such main action. It is conceded that the scope of the request is sufficiently broad to thus operate but it is argued that, until the contempt proceedings were instituted and pending, there existed no legal authority to transfer the same to another judge. Our attention is directed to the case of Kirk v. Milwaukee Dust Collector Mfg. Co. 26 Fed. 501, being a decision of the circuit court, eastern district of Wisconsin, but we do not deem said case at all in point. That was a case involving a removal from a state to a Federal court, an entirely different proposition, and it was very properly held that by the removal of the main action from the state court the Federal court acquired no jurisdiction to hear and determine "a pending and unadjudicated contempt proceeding." Very satisfactory reasons are given by the court for such holding, but we find nothing therein contained which tends in any degree to support appellant's contention in the case at bar. There the contempt proceedings were pending at the time of the removal of the main action to the Federal jurisdiction. Here the exact reverse is claimed to be

true. There the action was removed to another court and jurisdiction. In the case at bar there was a mere change of judges, the same court, to wit, the district court of the tenth judicial district, retained jurisdiction of the cause, both as to the main action and the contempt proceedings, there being not even a change of venue of the action. Widely different principles are involved in the case at bar than were involved in the above-cited authority. But it is contended that under subdivision 1 of § 6765, Rev. Codes 1905, Judge Crawford could not confer upon Judge Burr power to act until such time as the contempt proceedings became "pending." The section, so far as material, reads: "No judge of the district court shall hear or determine any action, special proceeding, motion, or application, or make any order or give any judgment in any action or proceeding not pending in the judicial district for which he is elected, except in the following cases: 1. Upon the written request of the judge of the district in which such action or proceeding is at the time pending."

We think counsel's construction of this section altogether too narrow. By the use of the words, "in which such action or proceeding is at the time pending," it was not the legislative intent to restrict the jurisdiction of the judge thus requested to act in a district other than the one in which he is elected, to causes only which were then pending. Such words were there employed merely to designate what judge could legally make such request, and they have no reference to any particular subject-matter over which such requested judge may take jurisdiction.

2. It is appellant's second contention that the affidavits upon which the attachment was issued do not present a prima facie case for the state. Such contention is based solely on the assumption, which we think unwarranted, that the averment in the affidavit of the assistant attorney general, to the effect that the injunctional order had not been dissolved or modified at the date such affidavit was made, was not positive, but merely on information and belief, the affidavit of Lemarr being silent upon this point. Assuming for the sake of argument the necessity for an averment that the injunctional order has not been dissolved or modified, we are entirely clear that the affidavit, on this point, is positive, and not merely on information and belief. By the clear language of the affidavit the only matters stated on information

and belief are those relating to defendant's specific acts constituting violations of the injunctional order. The mere fact that the averment "that said injunctional order so made, as aforesaid, has not been dissolved or modified," is disconnected from such other relations only by a semicolon, is in no manner controlling. The matters intended to be stated on information and belief are, by specific language, restricted to acts pertaining to violations of the injunctional order, they having no reference to the fact as to whether such order was still in force. The latter averment is wholly foreign to the subject-matter of the former, and should be construed the same as if wholly separated therefrom. Substance—not mere form—must be looked to and given controlling effect. What we have here said clearly differentiates from the case at bar the case of State v. Newton, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, cited by appellant. A comparison of the affidavit in that case with the one here in question will, we think, suffice to demonstrate the correctness of our views above expressed. We conclude, for the above reasons, that appellant's second contention must be overruled.

3. Under his third assignment appellant challenges the authority of F. C. Heffron to prosecute these proceedings. The line of argument seems to be that the attorney general is without legal authority to appoint an assistant for the purpose of instituting and prosecuting injunctional proceedings and proceedings to punish as for contempt, violations of injunctional orders, restraining and enjoining the maintenance of liquor nuisance, under the so-called prohibition statute. Such contention is devoid of merit. The attorney general is a constitutional officer. He is the law officer of the state and the head of its legal department. His duties are prescribed by the legislature. When the nature and objects of his office are considered there can be no doubt of the constitutional power of the legislature to impose on him the duties enumerated in § 9372, Rev. Codes, 1905, relative to the enforcement of the prohibition law under the restrictions and limitations therein mentioned. Having such power it necessarily follows that like duties may be imposed upon his assistants, if, in its wisdom, the legislature deems it expedient so to do. Such legislative power was expressly recognized by this court, both in the majority and minority opinions in the recent case of State ex rel. Miller v. District

Ct. — N. D. —, 124 N. W. 417. It was there conceded that the legislature has the constitutional power to confer upon the attorney general the right in his discretion to supplant state's attorneys or to assist them in the institution and prosecution of criminal cases. The question, on which the court divided, was whether the legislature had either expressly or impliedly conferred such right in the particular instances and with reference to the particular duties there in question. The case of Ex parte Corliss, 16 N. D. 470, 114 N. W. 962, is cited by appellant's counsel in support of their contention. That case is in no respect in point and furnishes no light on the question here presented. It was there merely held that the legislature is without power to provide for appointive officers, and in effect permit them at will to supplant certain constitutional officers elected by the people in the discharge of duties belonging thereto. The attorney general is a constitutional officer elected by the people, and, as before stated, is the head of the legal department of the state, and he occupies a widely different position with reference to the enforcement of criminal statutes than a mere appointive officer would occupy. Any duties which he may perform personally may of course be performed by his regularly authorized assistants. In providing in the Constitution for the election of such officer, the people no doubt contemplated that duties of such a character might be conferred by the legislature upon him and his duly appointed assistants. The distinction between the principle here involved and that involved in Ex parte Corliss is manifestly clear.

That Mr. Heffron was the duly appointed and authorized assistant attorney general throughout these proceedings is positively sworn to by him, and furthermore such fact will be presumed in the absence of proof to the contrary, and none exists.

4. The remaining assignments challenge the validity of the judgment upon two grounds, neither of which we deem tenable, or deserving of extended consideration. It is said that the judgment is void because it designates the time when the imprisonment should commence as "at noon to-day," and in this respect it does not conform with the sentence of the court as orally pronounced, which failed to designate any time. We are unable to discover any merit whatever to such contention. It is next asserted that the judgment is excessive

to the extent of the costs taxed at $150. These were imposed as a part of the fine. The maximum fine permissible under the statute is $1,000. The judgment herein imposed a fine of $500 and costs amounting to $150, making a total of $650. The judgment cannot be held excessive. The fact that a portion of the fine consists of costs is not material, provided the total fine does not exceed the amount permitted by statute. Trial courts are vested with an absolute discretion in fixing the punishment in these cases, so long as they keep within the limits prescribed by law. The judgment is no more objectionable than it would have been had the fine read "$650," instead of reading as it does. The intention of the court no doubt was to impose by way of fine the payment of $650.

Finding no error in the record the judgment is affirmed. All concur. ELLSWORTH, J., concurring specially.

SPALDING, J. I concur without expressing any opinion as to any distinction between this case and Ex parte Corliss cited.

ELLSWORTH, J. (concurring specially). While I concur in the result and generally in all points passed upon by the foregoing opinion on the point of the jurisdiction of Judge Burr to act in the case at bar, I limit my concurrence to the holding that the order made by Judge Crawford sufficiently described the action or proceeding in which he was requested to act; and, that the proceeding in question arising as it did out of and depending for its existence upon an action pending in the district court of the tenth judicial district, may be regarded as a pending action within the meaning of § 6765, Revised Codes 1905. This, together with the fact that as Judge Burr was in any event unquestionably acting as judge *de facto* of the tenth judicial district, his judgment was merely voidable, and not void, and that no attack upon it has been made as provided by § 6766, Revised Codes 1905,—is, I think, sufficient to warrant the result announced by the opinion. The following language used in the opinion in construing § 6765, I consider *dicta* and entirely unnecessary to a decision of the point presented and an expression which I cannot accept in any part. "We think counsel's construction of this section altogether too narrow. By the use of the words, 'in which such action or proceeding is at the

time pending,' it was not the legislative intent to restrict the jurisdiction of the judge thus requested to act in a district other than the one in which he is elected, to causes only which were then pending. Such words were there employed merely to designate what judge could legally make such request, and they have no reference to any particular subject-matter of which such requested judge may take jurisdiction." I believe that the jurisdiction conferred by such request on a judge from another district than that in which the action is pending is limited by express terms of § 6765 preceding subdivision 1, as well as by the terms of this subdivision, to a case or cases particularly described in the request then pending in the district in which the outside judge is requested to act; and that the words, "is at the time pending," refer directly to the action of which jurisdiction is intended to be conferred. A blanket request made to a judge of a district not adjoining, to act generally in any cases not pending or not particularly described, does not, as I construe it, confer jurisdiction to act under subdivision 1 of § 6765.

On Petition for Rehearing.

Appellants have petitioned for a rehearing upon several grounds. The last ground urged, and the only one which we deem it necessary to notice, pertains to the latter portion of the opinion wherein the imposition of costs in addition to the fine is sustained upon the theory that such costs were imposed as a part of the fine. We are convinced that the ultimate conclusion that the costs were properly assessed is correct, but upon more mature deliberation we have concluded to modify the opinion in so far as the reasons given for sustaining such costs are concerned, and to place our decision on this feature of the case solely upon the ground that the court had the right to impose payment of the costs in addition to the fine. The supreme court of Kansas has expressly so held under a statute identically like § 9374, Rev. Codes 1905. State ex rel. Curtis v. Durein, 46 Kan. 695, 27 Pac. 148.

We think the reasoning of the Kansas court on this question is sound. See also 9 Cyc. Law & Proc. p. 54, and cases cited.

The original opinion is accordingly modified in this respect and petition for rehearing denied.

STATE OF NORTH DAKOTA v. J. A. McANDRESS.

(127 N. W. 78.)

Filed June 3, 1910. Rehearing denied June 21, 1910.

Appeal from District Court, Stark county; *A. G. Burr,* Special Judge.

J. A. McAndress was convicted of criminal contempt, and appeals.

Affirmed.

McFarlane & Murtha, W. F. Burnett, H. C. Berry, and *L. A. Simpson,* for appellant.

Andrew Miller, Attorney General, *Alfred Zuger, C. L. Young,* and *F. C. Heffron,* Assistant Attorneys General, for the State.

PER CURIAM. This is a criminal contempt proceeding involving questions in all respects similar to the questions involved in the case of State v. Heiser (this day decided by this court) ante, 357, 127 N. W. 72, and, it having been stipulated that this appeal abide the result in said case, it is accordingly ordered that the judgment of the District Court herein be affirmed.

STATE OF NORTH DAKOTA v. PAUL KOCH.

(127 N. W. 78.)

Filed June 3, 1910. Rehearing denied June 21, 1910.

Appeal from District Court, Stark county; *A. G. Burr,* Special Judge.

Paul Koch was convicted of criminal contempt, and appeals.

Affirmed.

McFarlane & Murtha, W. F. Burnett, H. C. Berry, and *L. A. Simpson,* for appellant.

Andrew Miller, Attorney General, *Alfred Zuger, C. L. Young,* and *F. C. Heffron,* Assistant Attorneys General, for the State.

PER CURIAM. This is a criminal contempt proceeding involving questions in all respects similar to the questions involved in the case of State v. Heiser (this day decided by this court) ante, 357, 127 W. 72, and, it having been stipulated that this appeal abide the result in said case, it is accordingly ordered that the judgment of the District Court herein be affirmed. All concur.

STATE OF NORTH DAKOTA v. PAUL MESSER.

(127 N. W. 78.)

Filed June 3, 1910. Rehearing denied June 21, 1910.

Appeal from District Court, Stark county; *A. G. Burr,* Special Judge.

Paul Messer was convicted of criminal contempt, and appeals.

Affirmed.

McFarlane & Murtha, W. F. Burnett, H. C. Berry, and *L. A. Simpson,* for appellant.

Andrew Miller, Attorney General, *Alfred Zuger, C. L. Young,* and *F. C. Heffron,* Assistant Attorneys General for the State.

PER CURIAM. This is a criminal contempt proceeding involving questions in all respects similar to the questions involved in the case of State v. Heiser (this day decided by this court) ante, 357, 127 N. W. 72, and, it having been stipulated that this appeal abide the result in said case, it is accordingly ordered that the judgment of the District Court herein be affirmed.

STATE OF NORTH DAKOTA v. JOHN ANDOR.

(127 N. W. 78.)

Filed June 3, 1910. Rehearing denied June 21, 1910.

Appeal from District Court, Stark county; *A. G. Burr,* Special Judge.

John Andor was convicted of criminal contempt, and appeals.

Affirmed.

McFarlane & Murtha, W. F. Burnett, H. C. Berry, and *L. A. Simpson,* for appellant.

Andrew Miller, Attorney General, *Alfred Zuger, C. L. Young,* and *F. C. Heffron,* Assistant Attorneys General for the State.

PER CURIAM. This is a criminal contempt proceeding involving questions in all respects similar to the questions involved in the case of State v. Heiser (this day decided by this court) ante, 357, 127 N. W. 72, and, it having been stipulated that this appeal abide the result in said case, it is accordingly ordered that the judgment of the District Court herein be affirmed.

F. S. FITZMAURICE v. C. C. WILLIS, A. J. DeLance, Ralph Abbott, S. H. Elliott, E. H. Emerson, as the Board of County Commissioners for Ward County, North Dakota.

(127 N. W. 95.)

Constitutional Law — Titles to Legislative Acts.

1. That part of § 21, chap. 109, Laws 1907, providing that the list of names of those voting at the primary election shall take the place of the first registration of the voters now required, and that notice only shall be given of the date of the second day of registration, is an attempt to amend the law providing for the registration of electors, and is in conflict with § 61 of the state

Note.—As to validity of registration laws, see note in 45 L. ed. U. S. 214, and notes in 23 Am. Dec. 642, and 54 Am. Rep. 843.

Constitution, which provides that no bill shall embrace more than one subject which shall be expressed in its title, and is void.

Constitutional Law — Subjects and Titles — Statutes.

2. The title to chapter 109, Laws of 1907, is, "An Act to Provide for the Selection of Candidates for Election, by Popular Vote, and Relating to Their Nomination and the Perpetuation of Political Parties." Such title in no manner expresses the substance of the attempted amendment to the registration law, and such amendment is not germane to the subject expressed in the title, hence the act in question embraces more than one subject.

Voters and Elections — Words and Phrases — "General Election."

3. The provision of the general registration law which fixes the first day of registration as the Tuesday two weeks preceding a general election or any city election remains in full force and effect.

Voters and Elections — Registration — Qualifications of Electors — Affidavit in Place of Registration.

4. Electors are not entitled to vote on the question of dividing a county and creating a new county, submitted at a general election, unless their names are contained on the registry list required in cities of 800 inhabitants or more, without furnishing the affidavit prescribed as a substitute for registration.

Voters and Elections — Qualifications of Electors — Legislative Regulation — Words and Phrases — "General Election."

5. The term "general election," found in the registration law, was there used to identify and designate the whole election held on the Tuesday after the first Monday in November in even-numbered years.

Voters and Elections — Qualification of Voters — Power of the Legislature — Regulation.

6. The legislative assembly may prescribe reasonable regulations to prevent fraud, preserve order, and insure a fair election, and to that end may prescribe the method by which the qualifications of those offering their votes as electors may be proved, and prohibit the reception of votes unless the requisite proof is made.

Voters and Elections — Construction of Statutes — Mandatory Provisions.

7. The prohibition contained in § 738, Rev. Codes 1905, reading, "No vote shall be received at any election in this state if the name of the voter offering such vote is not on the registration list, unless such person shall furnish to the judges of the election his affidavit stating that he is a resident of such precinct, giving his place of residence," etc., is within the power delegated to the legislative assembly to prescribe reasonable regulations for making proof of the qualifications of those offering to vote at an election.

Voters and Elections — Failure to Register — Illegal Votes.

8. The prohibition contained in § 738, Rev. Codes 1905, reading, "No vote

shall be received at any election in this state if the name of the voter offering such vote is not on the registration list, unless such person shall furnish to the judges of the election his affidavit stating that he is a resident of such precinct, giving his place of residence," etc., is an express prohibition, and is mandatory, and votes received in violation thereof are invalid, and cannot be counted.

Voters and Elections — Registration Requirements Mandatory.

9. At the general election held in 1908 the question of creating the county of Renville from a portion of Ward county was submitted to the voters of Ward county, and a large number of persons voted thereon in the city of Kenmare without being registered, or making proof on the day of election of their qualifications as electors as required by § 738, Rev. Codes 1905, and their votes were received and counted by the canvassing board. *Held* in a contest over the result of the election on such question, that the votes of all persons so voting must be rejected.

Voters and Elections — Registration Laws.

10. The prime purpose of the registration law is to prevent the perpetration of frauds in elections, and it must be construed in the light of such object. The object of the meeting of the board of registration on the dates fixed by statute preceding each general election is to provide for the preparation of the registration list, which is the culmination of the proceedings of the board of registration, without which their meetings and acts would be futile, as well as all other provisions of the registration statute.

Held, under all ordinary circumstances, the presence and use of such a list on the day of election in cities coming under the terms of the registration law is mandatory, and that all votes received in the absence of such list, and without being accompanied by the affidavit required of nonregistered voters, must be rejected.

Elections — Conduct — Statutory Provisions.

11. Section 2334, Rev. Codes 1905, provides that no refusal or neglect on the part of any official to perform his rightful duty in connection with an election on the division of counties shall in any wise affect the validity of such election, applies to the minor details and irregularities of such officers, and the conduct of the election, and not to the mandatory requirements of the registration and election statutes, and in case no registry list is present or used at the polls, the duty is upon the persons seeking to vote to furnish the statutory affidavits, and, failing to do so, their votes should neither be received nor counted.

Opinion filed June 3, 1910.

Appeal from the district court of Ward county; *Templeton,* Special Judge.

Contest on an election held to vote upon the creation of the new county of Renville.

Reversed.

Geo. L. Reyerson and *Geo. A. Bangs*, for appellant.

Failure to comply with a registration law invalidates an election. Cooley, Const. Lim. 757; Capen v. Foster, 12 Pick. 485, 23 Am. Dec. 632; People ex rel. Foley v. Kopplekom, 16 Mich. 342; State ex rel. Doerflinger v. Hilmantel, 21 Wis. 574; State ex rel. Bancroft v. Stumpf, 23 Wis. 630; State v. Butts, 31 Kan. 537, 2 Pac. 618; Pope v. Williams, 98 Md. 59, 66 L.R.A. 398, 103 Am. St. Rep. 379, 56 Atl. 543, approved in 193 U. S. 621, 48 L. ed. 817, 24 Sup. Ct. Rep. 573; Falltrick v. Sullivan, 119 Cal. 613, 51 Pac. 947; Zeiler v. Chapman, 54 Mo. 502; Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821; State to use of DeBerry v. Nicholson, 102 N. C. 465, 11 Am. St. Rep. 767, 9 S. E. 545; Owensboro v. Hickman, 90 Ky. 629, 10 L.R.A. 224, 14 S. W. 688; Cusick's Election, 136 Pa. 459, 10 L.R.A. 228, 20 Atl. 574; Moore v. Sharp, 98 Tenn. 491, 41 S. W. 587; 15 Cyc. Law & Proc. p. 302B; McCrary, Elections, 135.

Gray & Gray, P. M. Clark, L. F. Clausen, and *Scott Rex,* for respondents.

There was a *de facto* registration. State ex rel. Wood v. Baker, 38 Wis. 83; State ex rel. Hampton v. Waldrop, 104 N. C. 453, 10 S. E. 694; Stinson v. Sweeney, 17 Nev. 309, 30 Pac. 997; People ex rel. Martin v. Worswick, 142 Cal. 71, 75 Pac. 663.

The registration law is not mandatory. Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071; 10 Am. & Eng. Enc. Law, p. 736; Taylor v. Taylor, 10 Minn. 107, Gil. 81; State ex rel. Douglas v. Falk, 89 Minn. 269, 94 N. W. 879; Edson v. Child, 18 Minn. 64, Gil. 43; Kuykendall v. Harker, 89 Ill. 126; Dale v. Irwin, 78 Ill. 170; Perry v. Hackney, 11 N. D. 148, 90 N. W. 483; Cooley, Const. Lim. 7th ed. 928; Horning v. Board of Canvassers, 119 Mich. 51, 77 N. W. 446; Jones v. State, 153 Ind. 440, 55 N. E. 229; Capen v. Foster, 12 Pick. 485, 23 Am. Dec. 632; Byler v. Asher, 47 Ill. 101; Edmonds v. Banbury, 28 Iowa, 267, 4 Am. Rep. 177.

The provisions of a registration do not apply to a special election. Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; Graves v. Seattle, 8

Wash. 248, 35 Pac. 1079; Bew v. State, 71 Miss. 1, 13 So. 868; Kaigler v. Roberts, 89 Ga. 476, 15 S. E. 542; Stephens v. Albany, 84 Ga. 630, 11 S. E. 150; Thomasville v. Thomasville Electric Light & Gas Co. 122 Ga. 399, 50 S. E. 169, 10 Am. & Eng. Enc. Law, p. 611, note 4, and cases cited; 15 Cyc. Law & Proc. p. 302-c; State ex rel. Manhattan Constr. Co. v. Barnes, 22 Okla. 191, 97 Pac. 997.

SPALDING, J. This is an appeal from a judgment of the district court of Ward county holding that the proposition submitted in that county at the last general election for the formation of the new county of Renville from a portion of Ward county failed to carry. Judgment was entered in a contest proceeding held as provided by § 693, Rev. Codes 1905. The facts, so far as necessary to an understanding of the questions involved, are that the question of creating the new county of Renville from a portion of Ward county was submitted at the general election in 1908, and the vote, as returned, showed 3,744 for the creation of the new county and 4,275 against it. The judgment of the district court cut down the majority to about 477. The contention on this appeal arises over the vote of the three wards comprising the city of Kenmare, it being urged by the contestant that none of the votes cast in that city should be counted. If this be true, a majority in favor of the creation of the new county results. At the general election in 1906, 161 votes were cast in Kenmare. At the primary election held in June, 1908, the total number of votes cast was 207. Under the provisions of the Code relating to registration, the vote at the 1906 general election brought Kenmare within the terms of the law requiring a registration of voters. At the general election in 1908, on the question of the division and the formation of the new county, there were cast in the three precincts of the city 625 votes against the new county and 2 in favor of it. This number was reduced by the recount in the district court. The primary election was held in June, 1908, but the list of names of those who voted thereat was not in the possession of or used by the election officers at the general election in 1908, nor was any list purporting to be a registry list used. No meeting was held to correct registry lists, as required by the general law regarding registration, and none of the

voters furnished affidavits showing their qualifications as electors before voting at the general election.

1. Section 21, chapter 109, Laws of 1907, which chapter is known as the primary election law, requires the clerks of election to keep a list of all persons voting at such election, in duplicate, one of which remains a part of the record of the primary election and the other is required to be delivered to the board of registration within thirty days after the election, and reads: "The poll list so kept at the primary election and delivered to the boards of registration shall take the place of the first registration of the voters now required, and notice only shall be given of the date of the second day of registration, which shall be held and conducted as now provided, and no other shall be required to vote at the general election following."

The registration law, aside from this provision, as contained in article 16, chapter 8, of the Political Code, commencing at § 732, Rev. Codes 1905, requires the persons authorized to act as judges of election in villages, cities, and wards coming under the provisions of the registration law, who, with the inspector of election, constitute the board of registration, to meet on the Tuesday two weeks preceding any general election, or any city election, and make a list, in the manner prescribed, of all persons qualified to vote at the ensuing election in such precinct, such list, when completed, to be known as the registry of the electors of such precinct. It is required that such board shall complete, as far as practicable, such registry list on the day of such meeting, certify the same in the manner prescribed, and file it with the board, and that it shall be kept by one of the judges or the inspector, by whom it shall be carefully preserved for subsequent use. Another copy of the list is required to be posted in a public or conspicuous place at or near the place where the next preceding election in such precinct was held, and to be accessible to any elector desiring to examine it or make copies thereof. Such board is required to again meet on Tuesday next preceding such election for the purpose of revising, correcting, and completing such list.

Section 738 reads as follows: "After such lists shall have been fully completed, such board shall, within two days, cause two copies of the same to be made, each of which shall be certified by it to be a correct list of the qualified electors of the precinct so far as known,

which list the judges or inspector shall carefully keep and preserve for use on election day; and at the opening of the polls the judges or inspector shall designate two of their number to check the name of each voter voting in such precinct whose name is on the register. No vote shall be received at any election in this state if the name of the person offering such vote is not on the register, unless such person shall furnish to the judges of election his affidavit, stating therein that he is a resident of such precinct, giving his place of residence and length of time he has resided there, 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, giving his place of residence. Such oath may be administered by the inspector or one of the judges of election, or any other person authorized to administer oaths, but no person shall receive any compensation for administering such oath. Such oath shall be preserved and filed by the judges of election. Any person may be challenged and the same oath required as is now or hereafter may be prescribed by law."

The clerks of the election are required to enter on the poll list kept by them on the day of election the words "not registered" opposite the names of the persons who are not registered, but who vote by the use of the affidavit referred to, and to insert in the poll list the names and residences of such voters.

The provisions of § 21, chapter 109, Laws of 1907, that the list so kept at the primary election and delivered to the boards of registration shall take the place of the first registration of the voters required by article 16, chapter 8 of the Political Code, and that notice only shall be given of the date of the second day of registration, and that no other notice shall be required to vote at the general election following, is in conflict with § 61 of the state Constitution, which provides that no bill shall embrace more than one subject which shall be expressed in its title. The title to chapter 109 is, "An Act to Provide for the Selection of Candidates for Election, by Popular Vote, and Relating to Their Nomination and the Perpetuation of Political Parties." It is quite apparent that this chapter relates, so far as disclosed by the title, only to the nomination of candidates for office. No intimation is contained in the title, or warning given thereby, that anything may be found in the body of the act amending the law relating to the regis-

tration of voters, or to the proof of the qualifications required of an elector to entitle him to vote. It is an attempt to amend the general registration law when the remainder of the act has no relation to that subject and without notice in the title of the act of such amendment. The subject of amending the registration law is not germane to the subject of nominating candidates for office. It would be equally as germane to the subject of nominations by convention, and might, with equal relevancy, be contained in the law providing for holding political caucuses, or conventions. The identical question has been passed upon by the supreme court of Nebraska in the case of State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174, to which we have heretofore referred in several opinions, and which we have cited with approval. The primary election law of Nebraska provided that the date of the primary election should be the first day for registration of voters in all cities and counties where registration was required. The title of the act was, "An Act to Provide for Primary Elections . . . and to Regulate the Same; to Provide for the Nomination of Certain Candidates, . . . [and] for the Election of Delegates to . . . Conventions," etc. In the opinion of that court we find the following language: "Whatever may be the true explanation of these provisions being found in the primary election law under consideration, or what may have been the real purpose of the legislature in incorporating them in the act as passed, we think it is manifest that they cannot be upheld as a constitutional exercise of legislative authority. These provisions relate to a registration law applicable to general elections rather than to a primary election. They are manifestly amendatory to the general registration laws. As a registration law the new act is altogether incomplete and imperfect. The provisions regarding the registration of voters, found in the legislation we are considering, are not embraced within, nor comprehended by, the title to the act, and their incorporation therein is therefore a contravention of the fundamental law, which declares: 'No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed.' Const. art. 3, § 11. The title to the act relates exclusively to the subject of primary elections for the nomination of certain

candidates and delegates, and to the repeal of existing laws in conflict therewith. The provisions under consideration refer especially to the subject of the registration of voters, and is in its effect amendatory of existing statutes. These provisions are foreign to the subject-matter embraced in the title of the act." See also § 64 of the Constitution of North Dakota.

2. The provision in § 21, chapter 109, referred to, being in conflict with the Constitution and invalid, leaves those provisions of the registry law hereinbefore referred to and which the legislature attempted to amend, still in force and effect.

3. The learned judge of the trial court held that no registration was required to entitle the electors of Kenmare to vote upon the proposition of creating a new county. He evidently based this conclusion on the language employed by this court, and the writer hereof in State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360, in which it was held that the provision in the primary election law whereby electors were permitted to express their choice for United States Senator at the general election was, in a strict legal sense, a separate election, though held, for certain reasons, in connection with the general election and as a part of it. We think both court and counsel failed to correctly apply the language there used to the facts of the present case. We are of the opinion that when the registration of electors is required, or in lieu thereof the furnishing by them of affidavits showing their qualifications as a prerequisite to receiving their votes at a general election, the term "general election" is used in the statute containing these requirements to identify and designate the whole election held on the Tuesday after the first Monday in November in even-numbered years, and that it applies to all electors desiring to vote on that day either for the election of state officers, or on any other question submitted at the same time, and that unless such electors are registered or furnish the affidavits referred to as a substitute for registration, they are not entitled to vote. McCrary, Elections, § 194. An inspection of the election laws and the procedure which is prescribed and required to be followed by the officers of election supports this theory. Provision has not been made for the preservation of a list of those voting on special questions separate from those voting for state officers, or of those voting small ballots who do not vote the large one, except in the case of women.

4. Are the provisions of the registry law, and particularly those of § 738, mandatory or merely directory? Does the reception of votes in the election precinct, wherein a registration is required to be held, when none was in fact held, and without the voters furnishing, and the election officers receiving, affidavits required to show their qualifications, render the vote so received invalid? The answer to this question depends upon the construction which must be placed upon the phrase, "No vote shall be received at any election in this state if the name of the person offering such vote is not on the register, unless such person shall furnish to the judges of election his affidavit stating therein that he is a resident of such precinct, giving his place of residence," etc. It is argued that, because it is not provided in express language that votes so received shall be void, they must be counted. We cannot assent to this contention. Language could hardly be framed indicating more clearly than the express prohibition quoted, that votes shall not be received except on the conditions named. It is equivalent to the use of express language, that votes so received shall be void or not be counted. Negative words are generally held to be mandatory. Cusick's Election, 136 Pa. 459, 10 L.R.A. 228, 20 Atl. 574. If the qualified voter who has not submitted proof of his qualifications votes, he may not commit a crime, but he does an act which is penalized by the language of the section quite as emphatically as though it read that no such vote shall be counted. If it is illegal to receive the vote, the act of receiving or giving it cannot be legalized and given effect by the unlawful act of receiving it. Any other interpretation of the language of the section renders it meaningless, and leaves it wholly within the discretion of the election officers to comply with the law or not. The Constitution permits the legislature to prescribe regulations for the conduct of election. Section 129. Under such provision, or even without it, the legislature may prescribe reasonable regulations to prevent fraud, preserve order, and insure a fair election, and to that end may prescribe the method by which the qualifications of those offering their votes as electors may be proved, and prohibiting them from voting or their votes from being received if offered, unless such proof is made. That the provision quoted is within the power delegated to the legislature in these regards is clear. The purpose of the constitutional provision referred to is to provide for the

enactment of a law requiring the registration of electors. It deprives no one of his right to vote, and is only a reasonable regulation under which he may exercise such right. Cooley, Const. Lim. 6th ed. 758. Judge Cooley says: "Where the law requires such a registry, and forbids the reception of votes from any persons not registered, an election in a township where no such registry has ever been made will be void, and cannot be sustained by making proof that none in fact but duly qualified electors have voted. It is no answer that such a rule may enable the registry officers, by neglecting their duty, to disfranchise the electors altogether. The remedy of the electors is by proceedings to compel the performance of the duty, and the statute, being imperative and mandatory, cannot be disregarded." In support of this see the following cases: Capen v. Foster, 12 Pick. 485, 23 Am. Dec. 632; People ex rel. Foley v. Kopplekom, 16 Mich. 342; Re Duffy, 4 Brewst. (Pa.) 531; Falltrick v. Sullivan, 119 Cal. 613, 51 Pac. 947; State ex rel. Harris v. Scarborough, 110 N. C. 232, 14 S. E. 737, 6 Am. & Eng. Enc. Law, p. 290; Smith v. Skagit County, 45 Fed. 725; State ex rel. Doerflinger v. Himantel, 21 Wis. 574; State ex rel. Bancroft v. Stumpf, 23 Wis. 630; People ex rel. Ellsworth v. Laine, 33 Cal. 55; Cusick's Election, 136 Pa. 459, 10 L.R.A. 228, 20 Atl. 574; Edmonds v. Banbury, 28 Iowa, 267, 4 Am. Rep. 177; State v. Butts, 31 Kan. 537, 2 Pac. 618; State ex rel. O'Neill v. Trask, 135 Wis. 333, 115 N. W. 823; McCrary, Elections, 3d ed. §§ 91, et seq. 4th ed. §§ 127, et seq.

An inspection of the provisions and the language of our registration law, and a comparison of the provisions of chapter 445 of the 1864 Wisconsin Laws, are sufficient to satisfy us that our law was copied from that Wisconsin law. It is unnecessary to parallel the different sections of the two laws, but is sufficient to note the similarity between § 738, Rev. Codes 1905, which, with the exception of a few verbal changes, was enacted as § 8 of chapter 122 of the laws of 1881 of Dakota territory. We have quoted § 738, supra. Section 7 of the Wisconsin law referred to reads as follows:

"After said lists shall have been fully completed, the said inspectors shall, within three days thereafter, cause four copies of the same to be made, each of which shall be certified by them to be a correct list of the voters of their district, one of which shall be filed in the office of the

town clerk of towns, in the office of village clerk of villages, and the office of the city clerk of cities, and one of which copies shall be delivered to each of the said inspectors. It shall be the duty of said inspectors so receiving such list, carefully to preserve the said list for their use on election day, and to designate two of their number, at the opening of the polls, to check the name of every voter voting in such district, whose name is on the register. No vote shall be received at any annual election in this state, unless the name of the person offering to vote be on the said register made on the Tuesday or Wednesday preceding the election, unless the person offering to vote shall furnish to the board of inspectors his affidavit in writing, giving his reasons for not appearing in the day for correcting the alphabetical list, and prove by the oath of a householder of the district in which he offers his vote, that he knows such person to be an inhabitant of the district, and, if in any incorporated village or city, giving the residence of such person within said district. The oath may be administered by any one of the inspectors of election, at the poll where the vote shall be offered, or by any other person authorized to administer oaths, but no person shall be authorized to receive compensation for administering the oath. Said oath shall be preserved and filed in the office of the town, village, or city clerk. Any person whose name is on the register may be challenged, and same oaths shall be put as now are, or hereafter may be, prescribed by law."

In the Hilmantel Case, supra, the Wisconsin court construed § 7, chapter 445, Laws of 1864, in an action to determine who had been elected clerk of the board of supervisors. Hilmantel had received the certificate, and the complaint alleged that of the votes given and counted for Hilmantel in Milwaukee, 544 were received from persons whose names were not on the register, and no one of whom gave to the inspectors receiving his vote his residence within the district, either by his own affidavit or by the oath of a householder of such district, and that of such votes 145 were received from persons no one of whom proved to the inspectors by the oath of a householder of the district that he knew such person to be an inhabitant of the district, nor did any of them furnish the inspectors any proof upon oath that he was a resident of the election district. Chief Justice Dixon, who wrote the opinion, after explaining his former views of the subject and stating

that he had supposed that the question always was, who had received the greatest number of votes from legally qualified voters, without regard to any matter of mere form or want of form in the receiving, canvass, or return of votes, and his regret that the law in question did not admit a construction in accordance with his previous understanding, says that, after an examination of the law, he finds it "essentially an imperative statute, and deprives the inspectors of all jurisdiction to receive the votes of unregistered voters, unless the conditions as to the affidavit and oath are fully complied with." That under former statutes, "no duty was imposed upon the voters except that of going to the polls and depositing their votes. . . . In this matter of a voter, whose name has been omitted and who has not appeared on the day for the correction of the register, the burden of answering the requirements of the law by furnishing the affidavit and proof is thrown upon the voter himself. He is presumed to know the law, and must go to the polls prepared to comply with its conditions; and if he does not, and his vote is lost, it may, so far as it is the fault of any one, with justice be said to be his own fault. It is in the nature of a penalty imposed by the law for his neglect to do what is required of him. The inspectors cannot receive his vote, and if they cannot, it cannot afterwards be received and counted by the courts. . . . It is difficult to conceive any language more strongly imperative than this." He then considers the nature of the act and its object, and continues: "The disability or disfranchisement is inseparable from the necessary protection. Perhaps it may be said that the protection could only be afforded by imposing the disability. Hold the act to be directory, and allow the electors to vote without their names being registered, and without the affidavit and oath prescribed in case they are not, and the object of the legislature would be entirely defeated. The effect of such construction would be fatal to all protective legislation, and would leave the election laws precisely as they stood before this statute was enacted." A demurrer to the complaint of the contestant was overruled. A petition for a rehearing was submitted, the substance of which is contained in the report of the case. It covers nearly every ground suggested by the respondent in the case at bar, but it was denied. This case was decided in 1867. In 1869 the same provisions of the law were again before that court in State ex

rel. Bancroft v. Stumpf, 23 Wis. 630. It was held in that case that where there was no registry of voters of a town, and none of the persons who voted therein at an election furnished the affidavit required by law to entitle the vote of a nonregistered elector to be received, the whole vote of the town must be rejected in quo warranto. The action was to determine the title to the office of county treasurer.

In State ex rel. O'Neill v. Trask, 135 Wis. 333, 115 N. W. 823, persons not registered voted on executing affidavits furnished by the election officers. Such affidavits were defective, not stating the facts required by the statute. It was claimed that inasmuch as the affidavits furnished by the election officers were the only ones available to them, they had a right to rely on them as sufficient proof of their right to vote, and that since they were in fact electors and residents of the district, their votes should not be rejected after having been received. The court held that the language of the statute was clear and positive to the effect that no votes should be received if the name of the person offering the vote was not on the registry, unless he furnished the proof required by the statute showing his right to vote.

Respondent relies especially upon Minnesota authorities as holding similar provisions of the Minnesota registration law as only directory. That law is quite dissimilar to ours, but the section corresponding to § 738, while differing generally, does contain this language: "At such election no person shall vote whose name is not upon such list at the time of opening the polls." It was held in Taylor v. Taylor, 10 Minn. 107, Gil. 81, that the failure of the officers to perform any administrative act in relation to the election could not invalidate it if the electors had no actual notice and there was no mistake or surprise. In that case there was no registry poll list made. This decision was followed in Edson v. Child, 18 Minn. 64, Gil. 43, and in Soper v. Sibley County, 46 Minn. 274, 48 N. W. 1112, but the opinion in those cases furnish very unsatisfactory reasons for the conclusions arrived at, and in the Taylor Case the dissenting opinion written by Judge Berry is far more convincing than that of the majority of the court.

In the Edson Case Judge Berry, who wrote the opinion, states that, in his opinion, the rule laid down in the Taylor Case is unsound and

unwholesome, and that if it were a new question he should take the same position that he took in his dissenting opinion in that case.

In the Soper Case the invalidity claimed consisted in a failure to post the list of electors, and it was held that such failure was not fatal, but this is not an authority on the question we are now considering. In State ex rel Harris v. Scarborough, 110 N. C. 232, 14 S. E. 737, the supreme court of North Carolina held that the vote of a voter should be received and counted if he offered to comply with the laws in reference to registration, and was prevented by the wrongful conduct of the registrar, but if the vote was cast upon an invalid registration it should be rejected, and that it could not be counted by proving that none but duly qualified electors voted. We are of the opinion that the Wisconsin authorities cited are controlling in this case, and we must therefore hold the statute prohibiting the receipt of a vote, unless the voter has registered, or furnishes the affidavit required by the statute, mandatory.

5. Respondent urges that the primary election held in June, 1908, in Kenmare, notwithstanding the provision of the primary law substituting that election for the first day of registration is unconstitutional, constituted a *de facto* registration of those electors who voted thereat, and that, therefore, their votes should be counted. We have given this matter long and earnest consideration, and have reached the conclusion, on the facts found in this case, that this is immaterial, hence we need not determine whether it was a *de facto* registration or not. The prime purpose of the law requiring the registration of voters is to prevent fraud at elections. It contemplates that the registration list shall be in the hands of the election officials at the polling place on the day of election, and that voters who have been registered shall have their names checked off on the registration list, while those who are unregistered shall furnish the affidavit prescribed as necessary to entitle them to vote. The names of the latter are then placed upon the poll list and marked "not registered." This prohibition against receiving the votes of persons not registered unless they furnish the statutory affidavit, and all other requirements of the registration and election laws, bearing on this subject, are merely idle enactments and wholly useless, unless the registry list is present and used at the election. That list furnishes the only means provided whereby the elec-

tion officers are advised as to the possession by the voters of the necessary qualifications to entitle them to cast their ballots. It is the consummation of the registration system. Of what effect is the requirement that the registration board sit on a certain day, that they meet on a subsequent day to revise the list prepared on the first day, that such list be posted for the information of the public and of candidates, unless it is to be used, when revised and corrected, on the day of election? Without it the officials are practically powerless to prevent the very fraud which it was sought to guard against. All the registration proceedings have been conducted to the end that such list may be prepared and used. We are not unmindful of the fact that the right to vote is one of the most sacred privileges of American citizenship, and that it largely distinguishes citizenship in a Republic from citizenship in a Monarchy. But what value attaches to it, if the qualified elector may be personated by one possessing none of the qualifications necessary to entitle him to vote? What greater heritage is possessed by the qualified elector than by an alien, or an illegal voter, or one totally lacking the qualifications of an elector, if these latter may, with impunity offset and nullify the results of the exercise of the privilege possessed under the law and the Constitution by those who have a right to exercise that privilege? Unless this right is protected, the elector is deceived and defrauded at the very fountain head of his citizenship, and through the acquiescence of those to whom he has the right to look for protection. The Constitution contemplated the enactment of a registration law that the right of the elector may be exercised, under such reasonable limitations as will serve to identify him and tend to prevent the perpetration of wholesale frauds. It is argued that the result of holding that the registry list must be present and used at the election in this case will deprive a part of the legal voters of their votes. This may be true, but they are not entitled to exercise their rights as electors until they have proved their qualifications, and the loss of the votes of a few qualified voters in a particular instance is of trifling importance as compared with the evils which would necessarily result from throwing open the doors and inviting fraud in all matters in which there are active contests, thereby leaving the rights of qualified electors unprotected and the citizenship of the state or the community subject to the ignorance, malice, or

corrupt practices of a few election officers or interested and unscrupulous participants. We repeat, that to hold the presence of the registry list at the polling place unnecessary would nullify all the other features of the registration law and render the attempt of the legislature to furnish protection ineffectual. Of course there are many things in connection with the registration law with reference to which an exact compliance is not necessary, but not so with requirements which a failure to comply with would leave it within the easy power of election officials and others to defeat the purpose and wholesome intent of the legislature in prescribing a means of testing the qualifications of those offering their ballots. Much of the language of Judge Wallin in Miller v. Schallern, 8 N. D. 395, 79 N. W. 865, is pertinent in this case. We cannot quote at length, but among other things he says: "The state has therefore safeguarded the privilege of voting and the purity of elections, not merely by casting duties upon certain officers, but also by affording the voter an opportunity to see and know personally whether or not he is voting a lawful ballot, *i. e.*, an official ballot. If he neglects to notice whether the paper delivered to him is a lawful ballot, properly indorsed as such, and proceeds, either negligently or wilfully, to deposit an unlawful ballot in the box, he must then accept the consequences of his own acts, and lose his vote. In such case, as in the illustrative examples already given, the loss of the vote is the result of the voter's own acts. True, in the case at bar, the official is derelict also; but this does not alter the fact that the voter had the legal right to demand and receive an official ballot from the precinct officers, and, if he fails to exercise this privilege, he has himself to blame; nor can the official be saddled with the whole responsibility of the omission. . . . Election laws are framed upon the supposition that the voters are sufficiently enlightened to know their provisions; nor can such laws be enacted upon the contrary without inviting anarchy and political chaos."

In Perry v. Hackney, 11 N. D. 148, 90 N. W. 483, this court held that, in construing the provisions governing the conduct of elections, they should be held mandatory when the purpose of the law-making power would be plainly defeated by a violation of such provisions, and that in construing them every positive requirement which, if disobeyed,

would necessarily defeat the purpose of the requirement, should be held mandatory.

From what we have said, we feel that it is clear that the application of these principles compels the conclusion that the presence and use of the registry list at the polls on election day was, in the case at bar, essential to a valid vote in the three precincts of Kenmare except as to electors who might furnish the statutory affidavit. The trial court found that at the general election in 1906 only 161 votes were cast for governor in those precincts; that at the primary election in 1908, 207 votes were cast. No finding was made, and no hint or suggestion is offered, that there was any such increase of population in Kenmare between June and November, 1908, as to warrant any court to concluding that, had the requirements of the registration law been complied with, there would have been an increase from 207 to 627 votes between June and November. Under the authorities, one of the most marked indications of fraud in the conduct of an election is a sudden and unexplained material increase in the number of votes cast.

The authorities which we have cited, supra, are in harmony with our conclusions. In State ex rel. Wood v. Baker, 38 Wis. 71, the supreme court of Wisconsin held that, although the registration list was irregularly prepared, yet, in view of the fact that it was present and used at the polling place and the voters could observe its use when offering their ballots, and therefore were without any sort of warning that additional proof of their right to vote was necessary, that their votes should be counted. The doctrine of the decision seems to be that had they found no registry list in use when offering their ballots, their votes would have been challenged by law, and on their failure to furnish the required affidavit, similar to the one required by our statute, their votes should not be received, or counted if received. The opinion as a whole, and the reasoning of the court, support our conclusion in the case at bar. In State ex rel. Harris v. Scarborough, 110 N. C. 232, 14 S. E. 737, it is held that a vote cast upon an invalid registration should be rejected, and that one who seeks to vote without complying with the requirements of the registration law must show that he offered to do all required of him by such law, and was prevented by the fault of the officers. And the court says: If, in the face of the statute which required the elector to place upon the registration book

certain facts connected with his own history, "the courts should declare its provisions merely directory, and thus thwart the manifest purpose of an independent co-ordinate branch of the government when acting within the limit of its power, they would establish a precedent far more dangerous to liberty and constitutional government than all of the real or imaginary evils or inconveniences that might arise from the enforcement of the statute."

In Cusick's Election, 136 Pa. 459, 10 L.R.A. 228, 20 Atl. 574, it is held that the primary object of the law requiring affidavits of unregistered electors to entitle them to vote was to prevent fraudulent voting, and that it must be so considered as best to carry out that intent, and that one whose affidavit was not in compliance with the requirements of the law was not entitled to vote, that the statute was mandatory, and that until an elector had established his qualifications in the manner pointed out by the law, he was not even a prima facie qualified elector, and that court says: "As before remarked, the contention upon this point settles down to the *argumentum ab inconvenienti*. It may be that the careless voter who does not value his privilege sufficiently to see, as every voter can see with very little trouble, that his name is placed upon the registry list, and who gives no thought to the means to establish his right to vote until he comes to the poll to deposit his ballot, may suffer some inconvenience and in some instances lose his vote, not because he is not duly qualified, but for the reason that he has not the means of proof at hand to satisfy the tribunal which the law has appointed to hear his case. So, the litigant in a suit at law may be defeated though his case be never so good, if he fail to produce his evidence at the proper time. When an unregistered elector offers his vote at the polls, the law challenges it instantly, and he knows that he can only avoid the challenge by a strict compliance with the requirements of the statute. If he comes to the poll without his proof, it is his own folly and improvidence. He has no right to expect that his indifference to his rights, or indolence in asserting them, are to be condoned by nullifying the provisions of a law which is the main bulwark of the purity of the ballot, and which deprives no qualified elector of his right, except as the result of his own indifference to his duties as a citizen."

See also People ex rel. Foley v. Kopplekom, 16 Mich. 342. In

State ex rel. Hampton v. Waldrop, 104 N. C. 453, 10 S. E. 694, it was held that the registration book should present and use for the purpose prescribed by law at the voting place, and that it could not be dispensed with in any case if it could be produced; that if lost or destroyed by accident or fraud the voter would not be deprived of his vote if he was properly registered. In Morril v. Haines, 2 N. H. 248, the question arose whether the failure to use a check list at the election was such a departure from the statute as to avoid the whole balloting, and the court held that the requirement that the check list be used was valid, and any votes cast without its use void.

When the voters in Kenmare presented themselves at the polling places, they were charged with knowledge of the requirements of the law, and that, on observing the failure of the officials to use a registry list, they were only entitled to vote on furnishing the prescribed affidavit showing their qualifications. None of them furnished such affidavits. The primary duty was on the electors; at least had they not failed to comply with the provisions of the law, the present difficulty could not have arisen. The basic fallacy of respondents' claims may be resolved logically, on final analysis, into the position that the possession of the qualifications of an elector entitles one to vote. This is not so. For a discussion of this subject, see Miller v. Schallern, 8 N. D. 395, 79 N. W. 865. It might as well be said that any citizen qualified to take a government homestead may acquire title to one without proving compliance with the law regarding residence and cultivation.

6. The learned trial court was of the opinion that § 2334, Rev. Codes 1905, which provides that no refusal nor neglect on the part of any official to perform his rightful duty in connection with such election shall, in any wise, affect the validity of such election, rendered the failure to have at the polling places and make use of such registry list immaterial. What we have previously said, we think, is a sufficient answer to this suggestion. We cannot believe that it was intended by the enactment of § 2334 to render ineffectual the purpose of the registration law. In our opinion that section is only intended to apply to the minor details of conducting the election, such provisions as are plainly directory and a violation of which constitutes an irregularity only. This enactment is only in conformity with the holdings

of courts of other states in the absence of such a statutory provision, yet they at the same time held that the violation of much less vital requirements constitutes cause for rejecting votes. This section was enacted when questions relating to the division of counties were submitted at special elections, and on argument it is questioned whether it was intended to, and does apply to, general elections, and there is much force in this argument as presented, but it need not be decided. The duty rested upon the voters. It is true that duties also are placed upon the officials. Their responsibility may be said to be divided, but, as said in Miller v. Schallern, supra, "election laws are framed upon the supposition that voters are sufficiently enlightened to know their provisions; nor can such laws be enacted upon the contrary without inviting anarchy and political chaos." In that case the court passed upon another provision of the election law which we think might, with equal force, be contended to be directory, but it held it mandatory. Section 738, Rev. Codes 1905, requires the corrected list of the qualified electors to be carefully kept and preserved for use on election day, and then provides the method for its use. We think it would be fatal to the object of the registration law to apply § 2334 to the provisions of that law and the statutes regarding the conduct of elections which are mandatory. In other words that section does not affect mandatory provisions of the law. We may add that the members of this court, as a body and singly, have carefully considered and discussed every feature of this case with a view to avoiding a seeming injustice to some who may have been qualified electors in fact and law, but have been unable to reach any final and satisfactory decision admitting the counting of any of the votes illegally cast without effecting a total nullification of the registration law and defeating its purpose. These are not times in which the bars should be removed and frauds be permitted to be perpetrated in elections, regardless of the clear intent of the legislature to prevent them or render it difficult to perpetrate them. The tendency of the best and most recent authorities is toward giving effect to all laws designed to protect the honest exercise of the elective franchise against the frauds of those who may seek to gain by fraudulent practices. Whether or not any such frauds were committed in the case we are considering is immaterial. We do not intimate that any actual fraud was attempted, but we must

construe the statute with reference to facts which may exist elsewhere or arise in the future. Inasmuch as the findings only in this case are before us and they warrant a judgment in behalf of the contestant, the judgment of the District Court is reversed, and it is directed to enter a new judgment in favor of the contestant. The statute requires us to determine this appeal in a summary manner. We have attempted to comply with this requirement in so far as possible, considering the delay occasioned by counsel in the submission of briefs and our other imperative duties. It has been argued and reargued and several briefs submitted, and we feel that no further discussion would shed any light upon the subject, and that, in view of the near approach of the primary election and the few days remaining before candidates must have their names certified to enable the officers to place them upon the primary ballot, and other matters demanding immediate action, the remittitur should be transmitted to the District Court forthwith. All concur.

GREENFIELD SCHOOL DISTRICT et al. v. HANNAFORD SPECIAL SCHOOL DISTRICT et al.

(127 N. W. 499.)

Schools and School Districts — Annexation of Adjacent Territory — Collateral Attack — Acquiescence — Presumption as to Official Duty.

1. The board of education of Hannaford special school district, having, under § 949, Rev. Codes 1905, annexed adjacent territory to said special school district for school purposes, upon application in writing signed by fourteen voters of such adjacent territory, *held*, under the facts in this case, that the question as to whether said application was signed by a majority of the voters of such adjacent territory is not open to attack at this time. *Held*, further, the board of education having made the order for annexation of such adjacent territory, it is presumed that the board did everything which the statute in question required it to do before it made that order. The presumption is that public officials do as the law and their duty require them.

Note.—As to effect of changing boundaries of school districts upon rights in real property, see note in 26 L.R.A.(N.S.) 486.

The liability of territory annexed to a school district to pay its proportionate share of existing debts is treated in a note in 27 L.R.A.(N.S.) 1147.

Schools and School Districts — Estoppel — Validity Acquiesced in.

2. Under the facts stated in the opinion, *held*, that the plaintiffs are estopped from questioning the validity of the proceedings of the board of education in annexing adjacent territory to Hannaford special school district.

Opinion filed June 20, 1910.

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

Action by Greenfield School District et al against Hannaford Special School District et al. From a judgment in favor of the plaintiffs, defendants appeal.

Reversed.

Engerud, Holt, & Frame, for appellants.

The fact that the board made the order of annexation presumes full compliance with law prior thereto. Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357; Nofire v. United States, 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 212; Delaney v. Schuette, 49 Wis. 366, 5 N. W. 796; Barber Asphalt Paving Co. v. Denver, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 341; State ex rel. Little v. Langlie, 5 N. D. 600, 32 L.R.A. 723, 67 N. W. 958.

The annexation was validated by general acquiescence, and all are estopped to question it. People v. Maynard, 15 Mich. 463; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385; State ex rel. West v. Des Moines, 96 Iowa, 521, 36 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818; State v. Leatherman, 38 Ark. 81; People ex rel. Atty. Gen. v. Alturas County, 6 Idaho, 418, 44 L.R.A. 122, 55 Pac. 1067; Rumsey v. People, 19 N. Y. 41; Speer v. Kearney County, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 762; School Dist. No. 25 v. State, 29 Kan. 62; Annexation cannot be attacked collaterally. State ex rel. Little v. Langlie, 5 N. D. 600, 32 L.R.A. 723, 67 N. W. 958; State ex rel Laird v. Gang, 10 N. D. 331, 87 N. W. 5; Yankton County v. Klemisch, 11 S. D. 170, 76 N. W. 312; State ex rel. Buck v. Ravalli County, 21 Mont. 469, 54 Pac. 939; State ex rel. Central R. Co. v. Lime, 23 Minn. 521; Currie v. Paulson, 43 Minn. 411, 45 N. W. 855.

Lee Combs, for respondents.

Delay in taking steps to set aside the illegal acts of the board does

not estop the movers to attack the unlawful annexation. Redfield School Dist. No. 12 v. Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180.

The attack is not collateral. Dartmouth Sav. Bank v. School Dists. Nos. 6 & 31, 6 Dak. 332, 43 N. W. 822.

CARMODY, J. The village of Hannaford was, in the spring of 1907, organized as a special school district. In May, 1907, a petition was presented to the Hannaford board of education, praying that certain territory adjacent to Hannaford be annexed to the Hannaford special school district. The Hannaford school board accepted the petition, and adopted a resolution attaching the territory in question to their district, under the provisions of § 949, Revised Codes 1905. Ever since that time the territory so annexed has been, by the county officials, dealt with as part of Hannaford special school district. It was entered on the tax records as part of Hannaford special school district. Hannaford special school district levied taxes for the years 1907, 1908, and 1909, which were apportioned to and collected from the tax payers in the annexed territory, as part of Hannaford school district. Elections were held in Hannaford school district, in which voters in the annexed territory participated. School children in the annexed territory attended the Hannaford school. A school house was built by the Hannaford school district at a cost of more than $9,000, for which bonds were issued. This sum of $9,000 was beyond the debt limit of the original Hannaford school district, but within the debt limit of the district as enlarged by the annexation. Greenfield school district ceased taxing or asserting jurisdiction over the annexed territory after the annexation proceedings.

A division of funds and property was made by arbitration between Greenfield school district and Hannaford, after the annexation. No objection or protest against the validity of the annexation proceedings, or the right of Hannaford special school district to exercise jurisdiction over the annexed territory as part of its district, was ever made until this action was commenced in April, 1909, except that the witness Fogderud, who was one of the arbitrators to divide the property between Greenfield school district and Hannaford, testified that he signed the report which the arbitrators made, under protest, and told

them it would be tried in court before he would allow any money on it. Meanwhile, Hannaford special school district had proceeded on the assumption that the annexed territory was part of its district, and levied taxes and incurred and paid obligations which were unwarranted, unless the district included the annexed territory. After waiting for nearly two years, plaintiffs brought this action, and assert that the petition for annexation was not signed by a majority of the voters in the annexed territory, and that the board of education of the special school district of Hannaford did not find as a matter of fact that it was for the best interest of the school of such corporation, and of the territory to be attached, that the same should be so annexed to the special school district of Hannaford, and having found as it did, that it would be for the best interest of the special school district of Hannaford only, then had and now has no legal foundation for the pretended order of annexation of the territory in controversy.

Judgment was entered in favor of the plaintiffs, canceling and annulling the petition and order hereinbefore mentioned, restoring said tract of land to the respective school districts to which they formerly belonged, and reinstating the authority of the school boards of such districts over said territory, so sought and attempted to be annexed to said defendant school district, and perpetually restraining and enjoining the defendants, and each and all of them, from exercising or attempting to exercise authority or control over said territory and the people in it, for school purposes, and perpetually restraining and enjoining said defendants, and each and all of them, and their successors, in said territory for school purposes of said Hannaford special school from taxing or attempting to tax the property of any kind or character district.

It will be seen that two points only are presented: First, was the corporation organized in accordance with law, so as to acquire thereby a valid existence; and, second, if not, has the acquiescence of the plaintiffs and other interested parties for so long a period estopped them from questioning the validity of the annexation to Hannaford special school district of the adjacent territory, as herein mentioned. Rev. Codes 1905, § 949, provides in terms that when any city, town, or village has been organized for school purposes and provided with a board of education under any general law, or a special act, or under the pro-

visions of this article, territory outside the limits thereof but adjacent thereto may be attached to such city, town, or village for school purposes by the board of education thereof, upon application in writing signed by a majority of the voters of such adjacent territory.

The petition in question had upon it fourteen names. There is no dispute but what they were all legal voters of the territory annexed to Hannaford special school district. Said § 949 further provides: Upon such application being made, if such board shall deem it proper and to the best interests of the school of such corporation and of the territory to be attached, an order shall be issued by such board, attaching such adjacent territory to such corporation for school purposes, and the same shall be entered upon the records of the board. Such territory shall, from the date of such order, be and compose a part of such corporation for school purposes only.

The records of the proceedings of the board do not disclose the fact that there was any finding made in terms by the board that the petition was signed by a majority of the legal voters of said adjacent territory, but it is obvious that the board must be held to have reached such a conclusion, from the mere fact that they made the order annexing to Hannaford special school district the territory in question. While a sufficient petition is undoubtedly necessary, what body is to settle this matter? Surely the board of education. They have facilities for ascertaining whether the petition has the requisite number of signatures. We do not think, under the facts in this case, that this question is open to attack at this time. As the statute does not expressly require applicants to state in the petition that they constitute a majority of the electors, such important jurisdictional matter, as well as the qualification of each signer, was of necessity determined by ulterior inquiry, the nature and extent of which would not be likely to appear in the order. State ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958; Lawrence County v. Hall, 70 Ind. 469; Currie v. Paulson, 43 Minn. 411, 45 N. W. 854; Ellis v. Karl, 7 Neb. 381; Bennett v. Hetherington, 41 Iowa, 142; Baker v. Louisa County, 40 Iowa, 226; Redfield School Dist. No. 12 v. Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180; State ex rel. Laird v. Gang, 10 N. D. 331, 87 N. W. 5.

The records of the proceedings of the board do not disclose that there

was any finding by the board of education that the annexation of such adjacent territory was for the best interest of the territory to be annexed. It is true that the statute made it the duty of the school board to determine that it was for the best interests of the school of the defendant corporation, and of the territory to be attached, before such annexation could be made, and if they so found, to make an order of annexation, which should be entered on the records of the board. The board made the order for annexation, and it is presumed that the board did everything which the statute in question required it to do, before it made that order. The presumption is that public officials do as the law and their duty require them. Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357; Nofire v. United States, 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 212; Delaney v. Schuette, 49 Wis. 366, 5 N. W. 796; Barber Asphalt Paving Co. v. Denver, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 336; States ex rel. Little v. Langlie, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958.

Immediately on annexation, the board of Hannaford and Greenfield school districts had a joint meeting, at which all the members of both boards were present. The meeting was held for the purpose of effecting a division of the property and obligations of the territory divided. At this meeting no protest was filed against the division, and no disagreement developed on any point, except in the matter of uncollected taxes. To settle this difference, a board of arbitrators was appointed, consisting of one member from each school district, and the county superintendent of schools. This board submitted a report in writing, which was signed by all the arbitrators. Some dissatisfaction was expressed by Mr. Fogderud, one of the arbitrators, who testified that he told them it would be tried in court before he would allow any money on the arbitration agreement. He, however, signed the agreement. The school board of Greenfield school district levied no taxes on the annexed territory for the year 1907, 1908, or 1909, but did levy taxes on the balance of the property is Greenfield school district. During the same years, the defendant school district levied taxes on all its property, including the annexed land, and certified them to the county auditor, who extended them against the annexed land, and this fact was known to plaintiffs. An election was held on December 3d, 1903, for the purpose of voting bonds for the erection of a new school house. The

election was a matter of common knowledge, and was participated in by the voters who resided in the annexed territory. Bonds were voted and issued in the sum of $9,000 to run for twenty years, and were sold to the state of North Dakota, and an annual tax for a period of twenty years was levied on the property of the new district to pay the interest on the bonds, and to create a sinking fund, and this levy was certified to the county auditor, and has since been acted on by him.

The defendant school district in the fall of 1907 erected a new school house, which has since been used by the school district including the annexed territory. The erection of this building was a matter of common knowledge to the parties concerned in this lawsuit. The defendant school district has also during this period entered into contracts, issued warrants, employed teachers and other help, and has, during all of the time since the territory in controversy was annexed, performed all the duties, engaged in all the activities usual to corporations of that character, and during all of the time has treated the annexed territory as part of its school district. For two years taxes have been levied, collected, and expended under the new conditions. Plaintiffs do not attempt to excuse the delay of two years in bringing this action. In applying the doctrine of laches or the rule of estoppel by acquiescence, no fixed time will be taken as controlling, but the facts in each particular case must govern the court's decision, and where, as in this case, although but two years have elapsed since the territory in question was annexed to Hannaford special school district, grave consequences may follow if the plaintiffs are successful in this action. Hence, we think the plaintiffs are estopped from maintaining this action. 28 Cyc. Law & Proc. p. 214 and cases cited; People v. Maynard, 15 Mich. 463; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; Speer v. Kearney County, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 762; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 388; State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141; State ex rel. West v. Des Moines, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818; State v. Leatherman, 38 Ark. 81; People ex rel. Atty. Gen. v. Alturas County, 6 Idaho, 418, 44 L.R.A. 122, 55 Pac. 1067; School Dist. No. 25 v. State, 29 Kan. 62; Yankton County v. Klemisch, 11 S. D. 170, 76 N. W. 312; State ex rel. Minot v. Willis, 18 N. D. 76, 118 N. W. 820.

In 28 Cyc. supra, the following rule is laid down in the text: "Taxpayers or inhabitants may be estopped to question the validity of annexation or detachment of territory to or from a municipal corporation, as by acquiescence in the annexation or delay in attacking the same, or by failure to exercise the rights of contravention and appeal given them by statute."

In Speer v. Kearney County, the court says: "The principle is that acts of ordinary municipal bodies into which the people have organized themselves under color of law, depend far more upon general acquiescence than upon the legality of their action or the existence of every condition precedent prescribed by the statutes under which they organize and act. It is that general acquiescence by the inhabitants of the political subdivision so organized, and by the departments and officers of the state having official relations with it, gives to the acts and contracts of a municipal or quasi municipal corporation *de facto* all the force and validity of the acts of a corporation *de jure*. The interests of the public which depend upon such municipalities, the rights and the relations of private citizens which become vested and fixed in reliance upon their existence, the intolerable injustice and confusion which must result from an *ex post facto* avoidance of their acts, commend the justice, and demand the enforcement, of the rule that 'when a municipal body has assumed under color of authority, and exercised for any considerable period of time, with consent of the state, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can in private litigation question the legality of its existence.' "

The view we have taken of the action of respondent in attaching the adjacent territory and the conclusion we reach concerning all that has subsequently occurred, dispose of every point in the case.

The judgment appealed from is reversed, and the District Court is directed to enter judgment dismissing the action.

All concur, except CHIEF JUSTICE MORGAN, not participating.

F. W. TISDALE v. WARD COUNTY, North Dakota.

(127 N. W. 512.)

Taxation — Void Taxes — Recovery from County.

1. Under § 1585, Rev. Codes 1905, the fee owner of land not subject to taxation or a person claiming to be such, can recover from the county moneys paid to redeem from a tax sale, even though such tax sale has not been previously adjudged void. Van Nest v. Sargent County, 7 N. D. 139, 73 N. W. 1083, distinguished.

Sufficiency of Complaint.

2. Complaint examined, and *held* to state facts sufficient to constitute a cause of action.

Practice — Abatement of Void Taxes — Application to Board of County Commissioners before Action.

3. Respondents' contention that appellant's proper remedy was an application to the board of county commissioners for an order abating the taxes considered, and *held* untenable.

Opinion filed June 20, 1910.

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

Action by F. W. Tisdale against Ward County, North Dakota, a corporation. From an order sustaining a demurrer to plaintiff's complaint, plaintiff appeals.

Reversed.

F. B. Lambert, for appellant.

Dudley L. Nash, for respondent.

CARMODY, J. In this case the plaintiff seeks to recover upon one cause of action, $88.81, and interest, since December 6, 1906, paid by him to redeem from a tax sale of December 6, 1904, and subsequent taxes to date of payment on land in Ward county, in plaintiff's possession under a homestead entry. The second cause of action to recover $26.45, paid by plaintiff to defendant for taxes of 1906, levied on the same land. Such recovery is sought under the provisions of

Note.—As to right to recover money paid for illegal taxes, see notes in 11 L.R.A. (N.S.) 1104 and 16 L.R.A.(N.S.) 685.

§ 1585, Rev. Codes 1905, which, as far as material, is as follows: "When any sale of land for taxes is adjudged to be void, the judgment shall state the reason why it is void, and in all such cases and in cases where, by mistake or wrongful act of the county treasurer or auditor, land has been sold upon which no taxes were due, and in cases where taxes have been or may be paid on lands not subject to taxation, or on lands where subsequent to payment the cntry has been or may be canceled, the money so paid and all subsequent taxes, penalties, and costs which have been or which may be paid, shall be refunded, with interest at 7 per cent per annum from the date of payment to the person making such payment, his heirs, or assigns, and the same shall be refunded out of the county treasury to which such money was paid, on an order from the county auditor, and a *pro rata* share of the money so refunded shall be charged to the state and to any incorporated city, town, village, or school corporation which may have received any part of such void tax."

Plaintiff presented a claim against Ward county to the board of county commissioners of said county for the amount so paid for taxes as hereinbefore stated, which board rejected said claim, from which rejection plaintiff appealed to the district court of that county. After taking the appeal herein mentioned, he served his complaint on defendant, to which complaint and notice of appeal the defendant interposed a general demurrer as follows:

1. That the above-named court has no jurisdiction of the person of the defendant and respondent herein, or of the subject-matter involved in the above-entitled action.

2. That the said notice of appeal and the complaint, or either of them, do not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer and from its order this appeal is taken.

The first cause of action set forth in the plaintiff's complaint, as far as material, is as follows:

2. That during the year 1903 the plaintiff was holding down under homestead entry from the United States lands and premises lying and being in the county of Ward and state of North Dakota, described as follows, to wit: The southeast quarter of section 10, township 163, north, range 84, west, 5th P. M., and that at said time land was not liable to taxation under the law of the state of North Dakota.

3. That, contrary to law and without right, the defendant levied and assessed a tax against the land above described, in the year 1903, for the sum of $22.69, and, without any rights in law, did on the 6th day of December, 1904, sell the above-described lands to the State Loan Company.

4. That said sale was a cloud upon the title of said land above described, and the plaintiff, in order to prevent said tax sale from going to deed, did under protest, on the 1st day of December, 1906, pay to the defendant the sum of $88.81, said amount being the amount of said sale, with subsequent taxes to date of payment. That this amount being exacted from the plaintiff by the defendant, without cause and without consideration; that no part of said amount has ever been repaid to this plaintiff, although the same is past due.

5. That the above-described land has never been patented by the United States government to this plaintiff, and that his entry thereto has been canceled, and the title to said land and the whole thereof is now and always has been in the United States.

The second cause of action is substantially like the first, except that there was no sale of the land for the taxes paid by plaintiff and sought to be recovered under the second cause of action.

The appellant, in his brief, claims that the trial court sustained the demurrer for the reason that said § 1585 of the Revised Codes of 1905, is unconstitutional, and devotes most of his brief to that question. Respondent in this court concedes that said section is constitutional, and that under proper circumstances and pleading it is possible to recover moneys paid on a void tax sale, likewise moneys paid for taxes in cases where taxes have been already or may be paid on lands not subject to taxation or on lands where subsequent to payment, the entry has been or may be canceled, together with all subsequent taxes, penalties, and costs, but contends that before appellant can recover the moneys paid under the tax sale, there should be an adjudication that the tax sale was void, and cites Van Nest v. Sargent County, 7 N. D. 139, 73 N. W. 1083. In this contention respondent is in error. This case goes no farther than to hold that a stranger who has purchased the property at a tax sale, or his assignee, cannot recover from the county for the taxes paid on such sale, and subsequent taxes paid under

such sale, which tax sale has been adjudged void, although the land is exempt from taxation, but does not hold that the fee owner, or one who claims to be the fee owner, cannot recover under the facts of this case. It is plain to us that plaintiff comes within the provisions of said statute and may maintain this action. This land was not sold by mistake or wrongful act of the county treasurer or auditor. The theory on which plaintiff is entitled to recover, if at all, is that the land was not, at the time it was taxed, subject to taxation, or that his homestead entry of such land has been canceled subsequent to the payment of said taxes. We do not agree with respondent that appellant should have applied to the board of county commissioners for an abatement of said taxes under § 1553 of the Revised Codes of 1905. If the land was not subject to taxation, then the plaintiff is entitled to recover in this action. Ibid.

While the complaint states some legal conclusions, we think under the liberal rules of pleading prescribed by our Code, the complaint is good as against a general demurrer. The complaint sufficiently shows that the plaintiff paid the amount of money he seeks to recover in payment of taxes assessed against said land and the interest and penalties thereon, and the expenses of a tax sale. Paragraph 5 of the first cause of action, and paragraph 4 of the second cause of action are the same, and read as follows:

"That the above-described land has never been patented by the United States government to this plaintiff, and that his entry thereto has been canceled, and the title to said land and the whole thereof is now and always has been in the United States."

This allegation, taken with the balance of the complaint, sufficiently shows that the land was not subject to taxation.

It is well settled that a pleading is not rendered insufficient because it contains legal conclusions in addition to the facts which properly belong in it. 31 Cyc. Law & Proc. pp. 49–51, and cases cited.

Under the Codes, the allegation of a legal conclusion, instead of the facts upon which it is based, does not usually make a pleading bad on general demurrer. 31 Cyc. Law & Proc. p. 280. See also Weber v. Lewis, — N. D. —, — L.R.A.(N.S.) —, 126 N. W. 105.

Applying the foregoing rules to the complaint in the case at bar leads us to the conclusion that the demurrer was improperly sustained.

It does not make any difference whether the tax was or was not paid under protest. Respondent's counsel does not argue the first ground of demurrer. Hence we shall consider that he abandoned it.

The order appealed from is reversed, and the case remanded for further proceedings according to law.

All concur, except MORGAN, Ch. J., not participating.

STATE OF NORTH DAKOTA ex rel. LYMAN N. MILLER v. C. W. BURNHAM, as Auditor of Foster County, North Dakota.

(127 N. W. 504.)

Opinion filed June 24, 1910.

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

Petition by Lyman N. Miller praying that a writ of mandamus be issued ordering and directing the defendant, C. W. Burnham, as county auditor of Foster county, to file in his office appellant's petition. From an order denying the petition, petitioner appeals.

Affirmed.

Lyman N. Miller, for appellant.

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

PER CURIAM. This appeal is heard at this time by stipulation of parties and consent of this court. The question involved is whether a petition to place the name of the relator as a candidate for nomination for states attorney upon the ballot to be used at the primary election to be held June 29, 1910, should have been filed and such name printed upon the ballot by the county auditor of Foster county. The petitioner mailed his petition addressed to the county auditor at Carrington by registered letter at McHenry, Foster county, North Dakota, on the 27th day of May, 1910, with the request that it be filed. It should have reached the auditor's office on the 28th day of May in due course of mail, but his return and the findings of the trial court show that it was received by him on Sunday, the 29th day of May. Monday, the

30th, was the last day on which such petitions could be presented to the county auditor, but that day was a legal holiday, being Memorial day, and the county auditor refused to treat the petition as though presented and filed prior to the 29th day of May, 1910, which was the 29th day prior to the primary. The statute provides that "every candidate for a county or district office shall not more than forty days nor less than thirty days, and before 4 o'clock P. M. of the thirtieth day prior to any primary election, present to the county auditor a petition giving his name, postoffice address," etc.

The district court held that the act of the county auditor in refusing to receive and file the petition was legal. No new questions are involved in this appeal. The law of the case is covered by the opinion of this court in State ex rel. Anderson v. Falley, 9 N. D. 464, 83 N. W. 913.

The judgment of the District Court is affirmed.

GEORGE SCHLOSSER v. GREAT NORTHERN RAILWAY COMPANY.

(127 N. W. 502.)

Carriers — Killing of Stock — Principal and Agent — Authority to Execute Shipping Agreement.

Action to recover damages for negligently killing three horses belonging to plaintiff while being shipped from Grand Rapids, Minnesota, to Hunter, North Dakota. Plaintiff, in the fall of 1907, shipped twenty-two horses from Hunter, North Dakota, to Grand Rapids, Minnesota, to the firm of Sutton & Mackey, over defendant's line. Sutton & Mackey were engaged in logging in Northern Minnesota during the winter months, and plaintiff's horses were shipped by him to them for work in the woods. Under the agreement, plaintiff was to and did pay the expenses of shipping the horses from Hunter, North Dakota, to Grand Rapids, Minnesota. Sutton & Mackey, in addition to the compensation paid plaintiff for the use of his horses, were to deliver them after the season was ended to plaintiff at Hunter, North Dakota, free of charge. On March 19, 1908, one of Sutton & Mackey's men, Crocker by name, brought the horses to Grand Rapids, and shipped them over defendant's line to plaintiff in Hunter. Defendant's agent at Grand Rapids filled out the ordinary form of live stock shipping contract, upon information given by Crocker, and Crocker

executed the contract in the name of the plaintiff, by Crocker. The rate charged on this shipment was based on a valuation of $75 per head. *Held*, that plaintiff was not a party to the contract between Sutton & Mackey and defendant, that Crocker had no right or authority to sign plaintiff's name to the contract, and that plaintiff was entitled to recover the full value of the horses killed.

Opinion filed June 27, 1910.

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

Action by George Schlosser against the Great Northern Railway Company. From a judgment for plaintiff, and from an order denying a motion for judgment notwithstanding the verdict and for a new trial, defendant appeals.

Affirmed.

Murphy & Duggan, for appellant.

One intrusted by the owner to ship goods is presumed to have authority to sign terms of shipment. 1 Hutchinson, Carr. § 457; Armstrong v. Chicago, M. & St. P. R. Co. 53 Minn. 183, 54 N. W. 1059; California Powder Works v. Atlantic & P. R. Co. 113 Cal. 329, 36 L.R.A. 648, 45 Pac. 691.

The owner of personal property is bound by the acts of those to whom he intrusts it, while acting within the purpose and limits contemplated. Illinois C. R. Co. v. Sims, 77 Miss. 325, 49 L.R.A. 322, 27 So. 527; Welty v. Indianapolis & V. R. Co. 105 Ind. 55, 4 N. E. 410; Forks Twp. v. King, 84 Pa. 230.

Skulason & Burtness, for respondent.

An agent is liable to third persons for negligence resulting in the latter's injury, on account of acts of nonfeasance or misfeasance in the discharge of his agency. Mechem, Agency, §§ 569 et seq.; Lough v. John Davis & Co. 30 Wash. 204, 59 L.R.A. 802, 94 Am. St. Rep. 848, 70 Pac. 491; Stiewel v. Borman, 63 Ark. 30, 37 S. W. 404; Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437; Baird v. Shipman, 132 Ill. 16, 7 L.R.A. 128, 22 Am. St. Rep. 504, 23 N. E. 384; Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; 2 Clark & S. Agency, §§ 595, 596; Orcutt v. Century Bldg. Co. 201 Mo. 424, 8 L.R.A. (N.S.) 929, 99 S. W. 1062; Rev. Codes 1905, subdiv. 3.

CARMODY, J. This is an action brought by plaintiff in the district court of Grand Forks county for damages caused by the loss of three horses shipped over the defendant's railway. Verdict was directed at the trial for plaintiff; and from an order denying defendant's motion for judgment notwithstanding the verdict, and in the alternative for a new trial, and from the judgment entered, the defendant appeals.

The plaintiff, in the fall of 1907, shipped twenty-two horses from Hunter, North Dakota, to Grand Rapids, Minnesota, to the firm of Sutton & Mackey, over the defendant's line. Sutton & Mackey were engaged in logging in northern Minnesota during the winter months, and plaintiff's horses were shipped by him to them for work in the woods, getting out logs and timber. The agreement that plaintiff had with Sutton & Mackey, besides the compensation for the use of the horses, was that plaintiff should stand the expense of the shipment one way, and they the other. Plaintiff paid the expense going down, and they paid the expense coming back. The understanding was that plaintiff was to have his horses back when the season was over, no definite time being set. This was the agreement made at the time of the agreement as to the compensation for the use of the horses, and as part of that agreement. In addition, plaintiff paid certain other expenses incurred on the return trip for inspection of his horses at Larimore, and other expenses caused by delay on account of a wreck. Plaintiff made a trip to Grand Rapids for his horses, which were then out in the woods, and he returned without them, and with the same understanding that they were to return them to him at Hunter, North Dakota. About ten days later, on March 19th, 1908, one of Sutton & Mackey's men, Dick Crocker, brought the horses to Grand Rapids, and shipped them to the plaintiff. He presented them to the defendant's agent at Grand Rapids for shipment to Hunter, North Dakota, and the agent filled out the ordinary form of livestock shipping contract upon information given by Crocker, and Crocker executed the contract in the name of plaintiff, by Crocker. The agent got the name of the shipper, the consignee, and destination, number of horses and other *data* from the man in charge of the horses, filled the contract accordingly, placing the valuation of the horses at $75 each, indorsed the amount of freight based on that valuation, $71.82, on the contract, and Crocker executed the contract in Schlosser's name. The rate charged

on this shipment was based on the valuation of $75 per head, given by the shipping agent, and applied in all shipments of horses where the valuation given was under $100 per head. Where the valuation given exceeds $100 per head, a higher rate is fixed by the tariffs than that charged in this case. The valuation placed on the live stock by the shipper is always ascertained before stock is received by the carrier for shipment. The fixing of the liability of the carrier is an important part of the contract. Crocker was a man who had shipped horses a great many times and was familiar with the method of shipment, and knew he was signing a contract placing a valuation of $75 per head on the horses. Three of the horses so shipped were killed in transit, as the answer admits. The plaintiff brought this action in tort against the carrier for the value of the horses destroyed, and the carrier defended on the ground of a contract of limited liability, made by it with the bailees. Plaintiff testified that the three horses were worth $550. Defendant tendered a judgment for the amount specified in the contract, $75 per head, and costs. At the close of the testimony, a verdict for $550 and interest was directed in plaintiff's favor.

Appellant assigns several errors. The principal ones, however, consist in granting plaintiff's motion for a directed verdict, and in a denial of defendant's motion for judgment notwithstanding the verdict, in accordance with defendant's offer of judgment. Other errors as to the ruling of the trial court on the admission of evidence are assigned, but they depend on whether the learned trial court erred in granting the motion of plaintiff for a directed verdict, and in denying the motion of defendant for judgment notwithstanding the verdict.

In the case at bar the contract was a printed contract, and the valuation of horses at $75 each was printed therein. Appellant contends that Dick Crocker was authorized to sign the contract, and that plaintiff was bound thereby. It further contends that the general and universally accepted proposition, which controls this case, is the following: "If the owner of the goods intrusts them to another for the purpose of having them delivered to a carrier for transportation, the person to whom they are so intrusted will be presumed to have authority to agree with the carrier upon the terms of shipment, and this authority would include the right to enter into a reasonable agreement on behalf of the owner, restricting the carrier's liability as insurer."

In our judgment, this general rule has no application to the facts in the case at bar. The horses were not intrusted to Sutton & Mackey for the purpose of having them delivered to a carrier for transportation. The contract between plaintiff and Sutton & Mackey was one of hiring, and under its terms the horses were to be returned to plaintiff at Hunter, North Dakota, at the expense of Sutton & Mackey.

Section 5516, Rev. Codes 1905, reads as follows: "Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time."

Section 5540 of said Code reads as follows: "At the expiration of the term for which personal property is hired, the hirer must return it to the latter at the place contemplated by the parties at the time of hiring, or if no particular place was so contemplated by them, at the place at which it was at that time."

In the case at bar it was definitely agreed that the horses were to be returned to plaintiff at Hunter, North Dakota. Plaintiff had nothing to say as to the means employed by Sutton & Mackey to return the horses. They might, instead of shipping the horses by rail, have driven them overland to Hunter, but they saw fit to employ a common carrier for this purpose. In making this shipment the defendant common carrier became the agent of Sutton & Mackey, and plaintiff has the right to bring the action for the destruction of his property against either Sutton & Mackey or their agent, the carrier. The rule is that an agent is liable to third parties for negligence, resulting in injury to them in the discharge of his agency. An agent, like other persons, in discharging his duties to his principal, is bound to recognize and respect the rights and privileges of others. He must take care that he does not, by his own act, unnecessarily injure another. If he fails to do so, either negligently or intentionally, and thereby causes an injury to another, he is liable for damages to the party injured. The fact that he was acting as agent at the time will not relieve him from liability. Everyone, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character, and which the law imposes upon him independent of contract. The defendant, being a

common carrier, owed the duty of such common carrier to the public, and is liable to the plaintiff for its negligence.

Where an agent is guilty of misfeasance, that is, where he has actually entered upon the performance of his duties to his principal, and in doing so fails to respect the rights of others, by doing some wrong, as where he fails or neglects to use reasonable care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by reason of his misfeasance. An agent's liability in such cases is not based upon the ground of his agency, but on the ground that he is a wrongdoer, and as such, is responsible for any injury he may cause. 2 Clark & S. Agency, § 595; Stiewel v. Borman, 63 Ark. 30, 37 S. W. 404; Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456. See also subdivision 3, sec. 5791, Rev. Codes 1905.

The owner of goods shipped by a carrier really sustains the damage either from their loss or injury, and there is no doubt that he may maintain an action against the carrier therefor, not because he has any contract with him for the carriage, but because the carrier has the goods lawfully in his possession. It has become his duty to carry them safely, and deliver them to the consignee subject only to a lien for his charges, and a wrongful refusal or failure to do so is a tort for which the owner may maintain an action. Hale, Bailments & Carriers, p. 548.

It was the duty of Sutton & Mackey to return the horses to the plaintiff at Hunter, free of charge. Having delivered the horses to the defendant at Grand Rapids, Minnesota, for shipment to the plaintiff at Hunter, North Dakota, and the defendant, by its negligence, having killed three of the horses, it was liable to the plaintiff for the full value thereof. The plaintiff was not a party to the contract between Sutton & Mackey and defendant. Crocker had no right or authority to sign plaintiff's name to the contract.

The order and judgment appealed from are affirmed.

All concur, except MORGAN, Ch. J., taking no part.

WINTERER v. MINNEAPOLIS, St. P. & S. S. M. RY. CO.

(127 N. W. 995.)

Filed September 17, 1910.

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

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

Affirmed.

PER CURIAM. This is a companion case to that of Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co. just decided by this court, post, 642 and was tried in the district court at the same time, pursuant to a stipulation that the case at bar should abide the decision in the Hollinshead Case; the damages having been stipulated at the sum of $375.

For the reasons announced in the Hollinshead Case, and pursuant to such stipulation of counsel, the judgment and order appealed from are hereby affirmed.

F. H. STOLTZE v. H. A. HURD, J. A. Roell, Margaret Roell, The Fidelity Mutual Life Insurance Company, a Corporation.

(30 L.R.A.(N.S.) 1219, 128 N. W. 115.)

Mechanics' Lien — Building on Lots Owned in Severalty.

When two persons have made a joint contract with a builder for the erection of a building to be placed on two adjoining lots owned in severalty by each of said persons, and a subcontractor furnishes building material, which

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Note.—The other cases as to mechanics' liens where a building covers adjoining lands held in severalty are reviewed in a note to this case in 30 L.R.A.(N.S.) 1219.

As to extent of land to which mechanics' lien will attach, see note in 26 L.R.A. (N.S.) 831.

is used for the erection of such building under an entire contract with the builder, he is entitled to a joint lien, but not to a separate lien against one lot and the part of the building standing thereon.

Filed September 17, 1910.

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

Action by F. H. Stoltze v. H. A. Hurd, J. A. Roell, Margaret Roell, The Fidelity Mutual Life Insurance Company, a Corporation.

From order overruling demurrer to complaint, defendants appeal.

Reversed.

Thompson & Schull and *F. B. Lambert,* for appellants.

If the contract under which the work was done was joint, the lien must be joint, or not at all. Sergeant v. Denby, 87 Va. 206, 12 S. E. 402; Phillips v. Gilbert, 101 U. S. 721, 25 L. ed. 833; Fullerton v. Leonard, 3 S. D. 118, 52 N. W. 325; Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737; Lehmer v. Horton, 67 Neb. 574, 93 N. W. 964, 2 A. & E. Ann. Cas. 683; Culver v. Lieberman, 69 N. J. L. 341, 55 Atl. 812; Idaho Min. & Mill. Co. v. Davis, 52 C. C. A. 200, 123 Fed. 396; Bowman Lumber Co. v. Newton, 72 Iowa, 90, 33 N. W. 377; Lewis v. Saylors, 73 Iowa, 504, 35 N. W. 601; McElroy v. Keily, 27 R. I. 474, 63 Atl. 238; Wall v. Robinson, 115 Mass. 429; Worthley v. Emerson, 116 Mass. 374; Rice v. Nantasket Co. 140 Mass. 256, 5 N. E. 524; Premier Steel Co. v. McElwaine-Richards Co. 144 Ind. 619, 43 N. E. 878; Maryland Brick Co. v. Spilman, 76 Md. 342, 17 L.R.A. 599, 35 Am. St. Rep. 434, 25 Atl. 297; Willamette Mills Co. v. Shea, 24 Or. 40, 32 Pac. 759; Orr v. Northwestern Mut. L. Ins. Co. 86 Ill. 260; James v. Hambleton, 42 Ill. 308; Batchelder v. Rand, 117 Mass. 176; Quimby v. Durgin, 148 Mass. 104, 1 L.R.A. 514, 19 N. E. 14; Wall v. Robinson, 115 Mass. 429; Lax v. Peterson, 42 Minn. 214, 44 N. W. 3; O'Leary v. Roe, 45 Mo. App. 567; Kick v. Doerste, 45 Mo. App. 134; Cole v. Colby, 57 N. H. 98; McAuley v. Mildrum, 1 Daly, 396; Livingston v. Miller, 16 Abb. Pr. 371; Mandeville v. Reed, 13 Abb. Pr. 173; Chadbourn v. Williams, 71 N. C. 448; Pennock v. Hoover, 5 Rawle, 291.

Oral agreement affecting title to land is void. Rodgers v. Lamb, 137 Mich. 241, 100 N. W. 440; Foster v. Ross, 33 Tex. Civ. App. 615, 77 S. W. 990; Sebree v. Thompson, 31 Ky. L. Rep. 1146, 104 S. W.

781; Jante v. Culbreth, — Tex. Civ. App. —, 101 S. W. 279; Wood v. Wood, 124 Ind. 545, 9 L.R.A. 173, 24 N. E. 751; Tucker v. Ottenheimer, 46 Or. 585, 81 Pac. 360.

C. Aurland, for respondent.

Plaintiff had a lien on both lots and buildings. Menzel v. Tubbs, 51 Minn. 364, 17 L.R.A. 815, 53 N. W. 653, 1017; Lax v. Peterson, 42 Minn. 214, 44 N. W. 3; Fullerton v. Leonard, 3 S. D. 118, 52 N. W. 325; Reilly v. Williams, 47 Minn. 590, 50 N. W. 826.

If he had a lien on both, he had on one. Miexell v. Griest, 1 Kan. App. 145, 40 Pac. 1070; Reilly v. Williams, 47 Minn. 590, 50 N. W. 826.

Lienor could hold on a portion of the lots, and waive as to others. Miexell v. Griest, 1 Kan. App. 145, 40 Pac. 1070; Miller v. Shepard, 50 Minn. 268, 52 N. W. 894; Reilly v. Williams, 47 Minn. 590, 50 N. W. 826; Carr v. Hooper, 48 Kan. 253, 29 Pac. 398; Carter Lumber Co. v. Simpson, 83 Tex. 370, 18 S. W. 812; Poole v. Fellows, 25 R. I. 64, 54 Atl. 772.

CARMODY, J. This is an action brought by plaintiff to foreclose an alleged mechanic's lien. The complaint alleges that the defendant J. A. Roell is the owner of lot 20 in block 7, of the town site of Minot, in Ward county, North Dakota.

That one A. S. Blakey is the owner of lot 21 in said block 7, that said lots are adjoining, and that the defendant Roell and the said Blakey entered into a joint contract with the defendant Hurd for the construction and erection by him, the said H. A. Hurd, for them, upon the said lots 20 and 21, of a three-story brick and stone building.

That in pursuance of said contract the defendant Hurd did erect and construct on said lots a three-story brick and stone building.

That on or about the 17th day of April, 1907, plaintiff entered into a contract for the sale to the defendant Hurd of certain building material to be by him used in the construction of said building.

That plaintiff did furnish defendant Hurd building material of the value of $5,740.48.

That prior to the completion of said building, the plaintiff duly notified the said A. S. Blakey and the said J. A. Roell, and each of them, that he had furnished said materials to defendant Hurd as aforesaid.

That on or about the 10th day of January, 1908, at the request of the defendant Hurd and the said A. S. Blakey, and with the consent of the defendant J. A. Roell, and in consideration of the payment to him of the sum of $3,000 by the said A. S. Blakey, the plaintiff waived his lien upon the said lot 21 and the part of the building thereon standing.

That on the 12th day of March, 1908, he filed in the office of the clerk of the district court in and for Ward county, a duly verified claim, for the purpose of securing and perfecting a lien for the balance of the moneys due him for the materials so furnished on said lot 20, and the building thereon standing.

That subsequently $407 was paid by defendant Hurd to this plaintiff.

That on the 14th day of July, 1908, for the purpose of further perfecting his lien, he filed as supplementary and amendatory to the lien statement filed on March 12th, his supplementary and amendatory claim therefor.

That the whole of said lot 20 is required for the convenient use and occupation of said building.

That the defendants and each of them claim to have some interest in or lien or encumbrance upon the said premises, which, if any there be, the plaintiff alleges are subsequent and subject to his lien.

That there is due and owing the plaintiff from the defendant Hurd the sum of $2,224.40.

Plaintiff asks judgment for that amount, for the foreclosure of his lien; that the rights and interests of the defendants and each of them, in said premises, be determined, if any they have, and the same be decreed to be subject and subsequent to the lien of the plaintiff; for the sale of the said lot 20 and the building thereon standing, and for a deficiency judgment against the defendant Hurd.

To this complaint defendant Hurd interposed the following demurrer: "Comes now the defendant H. A. Hurd, and demurs to the complaint of the plaintiff herein, on the ground that two causes of action have been improperly united on said complaint;

And demurs to the complaint on the further ground that said complaint does not state facts sufficient to constitute a cause of action against this defendant;

And on the further ground that the court has no jurisdiction of the subject of the action."

The defendants J. A. Roell, Margaret Roell, and the Fidelity Mutual Life Insurance Company, demurred to the complaint as follows:

1. That there is a defect of parties defendant.

2. That several causes of action have been improperly united.

3. That the complaint does not state facts sufficient to constitute a cause of action.

Both of these demurrers were overruled. From the orders overruling said demurrers, separate appeals were taken to this court, which appeals were submitted together. Defendants assign as error the overruling of the demurrers.

Section 6238, Rev. Codes 1905, reads as follows: "If labor is done or materials furnished under a single contract for several buildings, erections, or improvements, the person furnishing the same shall be entitled to a lien therefor as follows:

1. If such buildings, erections, or improvements are upon a single farm, tract, or lot, upon all such buildings, erections, and improvements, and the farm, tract, or lot upon which the same are situated.

2. If such buildings, erections, or improvements are upon separate farms, tracts, or lots, upon all such buildings, erections, and improvements and the farms, tracts, or lots upon which the same are situated; but upon the foreclosure of such lien the court may in the cases provided for in this subdivision apportion the amount of the claim among the several farms, tracts, or lots in proportion to the enhanced value of the same produced by means of such labor or materials, if such apportionment is necessary to protect the rights of third persons."

The doctrine is well settled that, where one seeks to avail himself of the benefits of a purely statutory right, he must bring himself fairly within its provisions, by complying with its terms. A mechanics' lien is a creature of the statute, and every step prescribed by the statute must be shown to have been substantially followed, or it does not exist. Mark Paine Lumber Co. v. Douglas County Improv. Co. 94 Wis. 322, 68 N. W. 1013; Rosholt v. Corlett, 106 Wis. 474, 82 N. W. 305; Caylor v. Thorn, 125 Ind. 201, 25 N. E. 217; Robbins v. Blevins, 109 Mass. 219; Berry v. McAdams, 93 Tex. 431, 55 S. W. 1112; Neely v. Searight, 113 Ind. 316, 15 N. E. 598; Schulenburg v. Bas-

com, 38 Mo. 188; Clark v. Edwards, 119 N. C. 115, 25 S. E. 794; Shafer v. Archbold, 116 Ind. 29, 18 N. E. 56; North Dakota Lumber Co. v. Bulger, 125 N. W. 883.

There was but a single joint contract made by defendant Hurd with the owners of the lots for the construction of a building upon both lots. The plaintiff sold the building material to defendant Hurd, under one contract for both buildings.

The contract entered into by the lienor is the basis of the lien, and if the contract under which the work is done and the material furnished is joint, "the lien must be joint, or not at all." Sergeant v. Denby, 87 Va. 206, 12 S. E. 402.

The United States Supreme Court in Phillips v. Gilbert, 101 U. S. 721, 25 L. ed. 833, in an appeal from the supreme court of the District of Columbia, in which the act of Congress passed February 2d, 1859 (11 Stat. at L. 376, chap. 17) providing that "any person who shall hereafter, by virtue of any contract with the owner of any building . . . perform any labor upon or furnish any materials . . . for the construction or repairing of such building, shall, upon filing the notice prescribed in § 2 of this act have a lien upon such building and the lot of ground upon which the same is situated," where such a lien was claimed for materials furnished and work done upon a row of brick buildings upon different lots, under a joint contract therefor with the owner, held that, such contract being joint, the lien must be joint. The opinion by Mr. Justice Bradley contains: "The contract was one, and related to the row as an entirety, and not to the particular buildings separately. The whole row was a building within the meaning of the law, from having been united by the parties in one contract, as one general piece of work."

The supreme court of South Dakota in Fullerton v. Leonard, 3 S. D. 118, 52 N. W. 325, uses the following language: "It is the contract with the owners which is to govern the question before us. There was no separate contract with the several owners for the building of each house or the barn; nor was there, as disclosed from the complaint, a separate account for each building to be kept. But the contract was joint, and was for the entire work, and the contract with the subcontractor with the plaintiff was of the same nature. The material was to be furnished for all the buildings for the sum specified, and not

for each separately. It seems clear then, that as between the contractors and the owners, the buildings must be considered as one piece of work, and that the right to a joint lien can be maintained against all the buildings. The lien must have its foundation in the contract, and if the contract be joint, the lien must be joint, or not at all."

The lien must follow the contract, and no valid lien can be had against one particular lot or building. The plaintiff was entitled to a joint lien upon the building and both lots, but is not entitled to a separate lien upon one lot, and to portion of the building situated thereon. See § 6238, Rev. Codes 1905. If further authority is necessary, the following cases are in point: Phillips v. Gilbert, 101 U. S. 721, 25 L. ed. 833; Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737; Lehmer v. Horton, 67 Neb. 574, 93 N. W. 964, 2 A. & E. Ann. Cas. 683; Seattle Lumber Co. v. Sweeney, 33 Wash. 691, 74 Pac. 1001; Phillips v. Salmon River Min. & Development Co. 9 Idaho, 149, 72 Pac. 886; Bowman Lumber Co. v. Newton, 72 Iowa, 90, 33 N. W. 377; Childs v. Anderson, 128 Mass. 108; Premier Steel Co. v. McElwaine-Richards Co. 144 Ind. 619, 43 N. E. 878; Willamette Mills Co. v. Shea, 24 Or. 40, 32 Pac. 762; Batchelder v. Rand, 117 Mass. 176; Eisenbeis v. Wakeman, 3 Wash. 534, 28 Pac. 923.

The fact that the complaint alleges that at the request of the defendant Hurd and said A. S. Blakey, and with the consent of the defendant J. A. Roell, and in consideration of the payment to him of the sum of $3,000 by the said A. S. Blakey, the plaintiff waived his lien upon the said lot 21 and the part of the said building thereon standing, does not help the plaintiff. No agreement or consent by Hurd, Blakey, or Roell is binding on the other defendants, who the plaintiff alleges claim some interest in the property.

The plaintiff not having any lien to foreclose, the complaint does not state facts sufficient to constitute a cause of action.

The orders appealed from are reversed, and the District Court is directed to enter orders sustaining each of said demurrers.

All concur, except MORGAN, Ch. J., not participating.

JAMES L. SMITH v. JOHN C. HOFF.

(127 N. W. 1047.)

Statement of Case — Time for Settlement — Extensions — Statutory Construction.

1. Section 7068, Rev. Codes 1905, providing that upon good cause shown and in furtherance of justice, a district court may extend the time within which any of the acts mentioned in §§ 7058 and 7065 may be done either before or after the time limited therefor has expired, is a remedial statute, and must be liberally construed in favor of the purposes obviously intended to be served by its enactment.

Appeal and Error — Statement of Case — Time for Settlement — Purpose of Limiting Time.

2. The purpose of providing a limited time for proposing and settling a statement of the case to be used on appeal is, under present conditions, fully served if these steps are taken at such time and in such manner as not to interfere with the prompt and orderly disposition of the case upon appeal.

Appeal and Error — Statement of Case — Extension of Time for Settlement — Discretion.

3. If from the showing of an applicant for an extension of time for the purpose of settling a statement of the case to be used on appeal, it appears that the appellant is prosecuting the appeal in good faith upon meritorious grounds, and that there is reasonable excuse for his failure to take the preliminary steps within the time limited by law, it is an abuse of discretion to deny him a reasonable extension of time for these purposes.

Opinion filed September 21, 1910.

Certiorari by James L. Smith, to review the action of the judge of the eighth judicial district in denying an application to extend the time for the purpose of settling a statement of the case to be used on appeal.

Writ granted and after review the district court is directed to reverse its order made on the first application.

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

Scott Rex, for respondent.

ELLSWORTH, J. The plaintiff and appellant in the above-entitled action applied to and obtained from this court a writ of certiorari for the purpose of reviewing an order of the district court of the eighth judicial district, denying plaintiff's application for a stay of proceed-

ings in the action, and an extension of time within which to prepare and settle a statement of the case to be used upon appeal. The full record acted upon by the district court has been certified and transmitted to this court, and, on the hearing ordered by this court, no suggestion has been made that the practice pursued by appellant is not the proper means of obtaining a review of an order of the district court from which there is no appeal, and no plain, speedy, and adequate remedy provided by law for any detriment or prejudice to a party arising therefrom. We will therefore review the facts out of which the proceeding in the district court arose, and the action of the court thereon, for the purpose of determining whether or not the authority of said court in the matter has been regularly pursued.

Plaintiff's action is, in substance, one to determine adverse claims to real property. He alleges that he is the owner in fee of certain lands situated in Ward county, and of certain lots in the city of Minot, and that while such owner he entered into a contract with the defendant for the sale to him of the same; that defendant failed to pay the purchase price agreed upon in said contract and to comply with its terms in other important particulars; and that plaintiff has thereupon exercised his right under the terms of said contract, to cancel and declare the same forfeited and void. The relief prayed for is that the title of plaintiff may be quieted against any claims of defendant arising out of said contract. The defendant answered, denying plaintiff's title to all of the real property in controversy, and alleged in substance that he, the defendant, was the owner in fee of the property, and that any conveyance of title made to plaintiff was held by him solely as security for the repayment of a certain loan or advance of money made by plaintiff to defendant, and prayed that the amount of indebtedness of defendant to plaintiff for which the title of said property was held as security be determined, and that, upon payment of the same, the title of defendant be quieted as against any claim of plaintiff. The action was tried to the district court without a jury on April 17, 1909. The district court found the facts to be substantially as alleged by defendant, and ordered the entry of a decree adjudging defendant to be the owner in fee simple of the premises involved in the action, subject, however, to a claim of plaintiff as security for an indebtedness of $3,267.60, with interest until paid at the rate of 12

per cent per annum. The conveyance of title held by plaintiff to the premises was declared to be, in law, a mortgage which might thereafter be foreclosed as such in case payment of the amount of the indebtedness specified was not made; and it was decreed that, upon satisfaction of plaintiff's indebtedness, his action should be dismissed and title to the real property in controversy quieted in defendant. A formal decree in accordance with the mandate of this order was entered in the district court on May 15, 1909.

After the order for judgment was made, but prior to the entry of the decree, on April 30, 1909, plaintiff made application to the district court for a stay of proceedings for a period of ninety days for the purpose of preparing a statement of the case to be used upon appeal from the decree. This application was summarily denied. Meantime, between the order for judgment and the entry of the decree by the trial court, the defendant, Hoff, conveyed his entire interest in the lots in the city of Minot to one Robinson. At about the same time and without knowledge of this conveyance, the Minneapolis, St. Paul, & Sault Sainte Marie Railway Company commenced a proceeding against Hoff for the purpose of condemning the said lots in the city of Minot to its use as station grounds. When the attorney for the railway company became advised of the fact that the title to the lots was no longer in Hoff, who was sole defendant in the condemnation proceedings, it dismissed the action, and on or about May 22, 1909, commenced another, in which plaintiff and Robinson, defendant's grantee, were named as defendants. Both defendants answered in the condemnation proceeding, and, before a trial of the same could be reached in regular course, the judge of the district court left the state for his summer vacation and was absent for a period of sixty days, returning to Minot and his district about September 1, 1909. During the month of August, 1909, Mr. L. W. Gammons, the sole attorney for the railway company in the condemnation proceedings, was taken ill, and from that time until his death, on December 17, 1909, was totally incapacitated for the performance of any service with reference to the trial of said condemnation proceeding. It was, however, regularly noticed for trial and placed on the trial calendar of the October, 1909, term of the district court and of a special term held in January, 1910. On January 4, 1910, plaintiff's attorneys were appointed attorneys for the railway

company as successors of Mr. Gammons, and at once proceeded to bring the condemnation proceeding to trial. It then transpired that certain jurisdictional facts necessary to the maintenance of such proceeding were known only to Mr. Gammons; and the railway company, being unable without his testimony to make proof of these facts or to secure an admission of the truth of the same from the attorneys for Mr. Robinson, found it was necessary to again dismiss the condemnation proceeding. It was dismissed accordingly on February 17, 1910, and immediately thereafter, on the same day, another proceeding was commenced, which was brought to trial with promptness and despatch on March 16, 1910. A jury then made its award of damages for the taking of the lots in Minot in the sum of $5,500, which sum was entered in a final order of condemnation of said premises on March 25, 1910.

It appears from the showing made by plaintiff that intending to appeal from the judgment entered upon the order of the district court made on April 15, 1909, for the purpose of preparing a statement of the case, he ordered from the official reporter of said district a transcript of all proceedings had upon the trial of said proceeding, and that such transcript was delivered to him on or about May 17, 1909. As explanation of and justification for his subsequent delay in completing and procuring the settlement of such statement, he avers that at this time it became apparent that the lots in the city of Minot which represented almost the entire value of the real property in controversy would be condemned to the uses of the railway company. Such being the case, their entire value necessarily depended upon the assessment of damage made by the jury called to try the condemnation proceeding. Plaintiff shows that he made considerable effort to secure estimates that would enable him to forecast with some probability the award of the jury, and had reason to believe that it would not exceed the sum of $3,500. In case such estimate reasonably approximated the finding of the jury in the condemnation proceeding, the result of an appeal of this action, though wholly favorable to plaintiff, would be in no way to his pecuniary advantage, as the sum, with interest added, of the indebtedness for which the title to the property was subject as security to his claim, as declared by the decree of the district court, would equal, if not exceed, any value that could then possibly be realized

from the property. He decided, therefore, to expedite as far as possible the determination of the condemnation suit, and to await its outcome before proceeding further upon his appeal. Immediately upon the award of the jury in the condemnation suit, the trial of which plaintiff claims, so far as he was concerned, was, under the condition, forwarded with diligence and despatch, in a sum largely exceeding the value of his claim on the property as declared by the district court, he decided to proceed with an appeal of this action; and, in order that he might properly prepare and present the same upon a showing of fact substantially as hereinbefore narrated, he applied to the judge of the district court for an order extending the time within which to propose and settle a statement of the case. This application was made on May 7, 1910. A hearing on notice was ordered immediately, and had on May 13, 1910, when the district court, after considering the showing made by plaintiff and an adverse showing presented by defendant, entered its order denying the application. The reason assigned by the district court for its action was that no good reason existed for an extension of time to prepare and settle a statement of the case in the action, and that, should the time be extended upon "the application made nearly a year after the entry of judgment herein, it would in fact permit plaintiff to reap the results of speculation as to the outcome of a suit other than this entitled action;" and that plaintiff had been guilty of laches in the prosecution of any contemplated appeal.

Plaintiff perfected his appeal to this court by service of a notice and undertaking on appeal and the filing of the same with the clerk of the district court on May 11, 1910. As hereinbefore noted, pursuant to this appeal, the full record of the action had been transmitted to this court. If an extension of time is granted that will permit plaintiff to properly propose and settle a statement of the case, he declares his willingness to prepare his appeal and have it in readiness for submission at the next succeeding term of this court, which, in view of the time the appeal was perfected, is the earliest at which it would have been presented in any case.

The single point presented for our consideration is, therefore, whether or not the district court regularly pursued its authority and exercised a sound judicial discretion in making its order denying plaintiff's application for an extension of time for the purpose of settling

a statement of the case to be used upon this appeal. It may be assumed from the effort made by plaintiff to prepare his appeal upon a settled statement of the case, that the errors relied upon by him for a judgment other than that decreed by the district court do not appear upon the judgment roll proper, and can be brought to our attention only by means of a properly certified statement of the case. The district courts of this state are given full authority "upon good cause shown, and in furtherance of justice," to extend the time within which a statement of the case may be prepared and settled, either before or after the expiration of the time limited for that purpose. Section 7068, Rev. Codes 1905. This statute seems to contemplate broader powers and wider discretion than that conferred on trial courts by the laws of almost any other state. The character of the power granted and the fact that the statute so conferring it is obviously remedial presupposes liberality in its exercise. Its exercise is not an absolute, nonreviewable authority, but a judicial discretion into the soundness of which this court may inquire whenever properly called to its attention. Unless there is grave question, however, whether the discretion of the district court has been soundly exercised, it will not be disturbed. Johnson v. Northern P. R. Co. 1 N. D. 354, 48 N. W. 227; Moe v. Northern P. R. Co. 2 N. D. 282, 50 N. W. 715; McDonald v. Beatty, 9 N. D. 293, 83 N. W. 224. The statutes of our state have at all times since statehood provided that, in order to procure the settlement of a statement of the case, it must be prepared and "proposed" within a limited period after notice of entry of judgment. The courts have invariably held that, in cases where these steps were not timely, they would refuse to settle the statement for the sole reason that it was proposed or presented out of time. The original purpose of such a statute was undoubtedly to require that oral testimony and verbal orders of the court made during the course of a trial should be brought permanently upon its records promptly at a time when these proceedings were still fresh in the minds of the court and the attorneys. At the present time with the general employment of stenographers to commit to writing the testimony given and the proceedings had at the time of their occurrence, the same reason does not exist for prompt action in the preparation of such statement. The purpose of the statute, therefore, requiring that the statement be proposed and settled within a limited

time is fully served when these steps are taken with such despatch as will preclude interference with the prompt and orderly disposition of the case upon appeal. If preliminary matters have not been followed up with sufficient diligence to have the appeal in readiness for hearing within the time contemplated by law, or the respondent has suffered prejudice or detriment by inattention to and inexcusable delay in the performance of necessary preparatory steps by the appellant, these facts of themselves operate conclusively to prevent the settlement of a statement of the case when it is attempted after the time limited by law; and, whatever the inducing cause for a failure to take these steps within the time limited by law, an application for an extension must be judicially determined by the trial court in a manner that subserves the interests of justice.

Under conditions as they now exist, some of the tests that we deem may be of value in determining whether or not the party applying after the expiration of the statutory time is entitled to an extension of time for settlement of a statement of the case are the following: (1) Do the facts shown by appellant as cause for an extension indicate that he is prosecuting the appeal in good faith upon meritorious grounds, without intent to delay its orderly and timely despatch? (2) If the extension applied for is granted, will it operate to delay the hearing of the appeal beyond the period required in the ordinary course; and, if so, is this delay satisfactorily accounted for by appellant? (3) Is the respondent prejudiced, or will he to any degree whatever be placed at a disadvantage upon appeal by excusable delay of appellant in the performance of the preliminary steps? Applying these principles to the determination of the case at bar, we note, first, that there is no reason to believe that the appeal is not being prosecuted in good faith. The plaintiff makes an affidavit of merits and alleges numerous errors of the trial court. It is quite apparent that plaintiff, confronted with the situation that the only property of value involved in his appeal would be condemned to the use of the railway company, and necessarily in doubt as to the amount of the award that would then represent its value, might reasonably hesitate to incur the expense of appeal until such time as he knew the award would be greater than the sum which he would, in any event, receive out of the property. He seems to have been reasonably diligent so far as in him lay in bringing the

condemnation proceeding to trial. When the award was made, he decided promptly to proceed with the appeal. At that time the status of the property was unchanged, and the trial of the appeal would not be delayed beyond the time that it would have taken had plaintiff chosen to wait almost to the end of the year allowed for appeal before perfecting his appeal. Plaintiff was undoubtedly within his rights in waiting, if he saw fit, until the time for appeal had almost expired. Had he settled the statement of the case within the thirty days allowed for that purpose, and still delayed his appeal until the time at which it was taken, the time of hearing would not be in any manner expedited. In the meantime the relation of respondent and his grantee to the property has not in any manner changed, and an extension of time for the purpose of preparing a statement of the case will not in any manner operate to the prejudice of either.

In our view of the conditions, the district court placed upon the statute permitting an extension of time a construction too strict and technical. The right of appeal may be asserted on the last day of the period limited for its exercise, as meritoriously as on the first. Plaintiff was not therefore speculating upon his rights by delaying his appeal until the end of the year in which he was authorized to take it. The settlement of a statement of the case was an essential incident of this appeal, and the right to have it settled by the district court was as important and valuable to him as the right of appeal. A delay in its exercise that did not interfere with the right of appeal or the despatch of the hearing on appeal was therefore not an unwarranted speculation upon the outcome of another suit, or an attempt to reap benefits therefrom to which he was not entitled. To deny appellant the means of properly presenting his appeal is in effect to defeat his right of appeal, and a construction so drastic as to produce such result is usually applied only in cases where the appellant is acting in bad faith or is guilty of gross laches. It does not appear that appellant in this case can be reasonably charged with either.

The order of the District Court denying the application of plaintiff for an extension of time for the purpose of settling a statement of the case to be used upon appeal is therefore reversed, and that court is directed to enter an order granting a reasonable time after the transmission of this record to the District Court for that purpose. All concur.

THE STATE OF NORTH DAKOTA, EX REL. BITHULITIC & CONTRACTING, Limited, v. M. F. MURPHY, as Mayor, and George S. Thomas, et al., as Aldermen of the City of Grand Forks.

(128 N. W. 303.)

Municipal Corporations — Special Assessments — Payment — Discharge of Assessments.

1. The owner of any real property in a city, against which a special assessment has been made, may pay the assessment in full at any time with unpaid interest thereon to the date of payment, and such payment shall constitute a discharge of the lien of such assessment upon his property.

Municipal Corporations — Special Assessments — Warrants — Payable "on or before."

2. A city issuing special assessment paving warrants, payable in twenty annual instalments, has the right to have incorporated in each of such warrants a stipulation that the city may pay the same at any time before maturity, and thus stop interest.

Opinion filed October 19, 1910.

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

Application by the State on the relation of Bithulitic & Contracting, Ltd., against M. F. Murphy and others for mandamus. From an order denying a peremptory writ, relator appeals.

Affirmed.

Feetham & Elton, for appellant.

J. B. Wineman, for respondents.

CARMODY, J. Application by the state on the relation of Bithulitic & Contracting, Ltd., to the district court of Grand Forks county for a peremptory writ of mandamus against M. F. Murphy, mayor, Charles J. Evenson, auditor of the city of Grand Forks, and George S. Thomas and others, as members of the common council of said city, to compel the common council of Grand Forks to direct the issuance to the relator of special assessment warrants in due form in payment of the amount found due the said relator, which warrants shall not contain any provision reserving to the city the right to call or pay the same

before they become due by the terms thereof and to compel the mayor and auditor of said city to issue immediately, upon being authorized thereto by the city council, and deliver to the said relator, warrants in due form, not containing any provision reserving to the city the right to call or pay the same before they become due by the terms thereof. From a final order denying the writ, relator appeals.

During the winter of 1909 and 1910, the city of Grand Forks organized paving district No. 12 of such city, and entered into a contract with relator to pave certain of its streets in said district, and agreed to pay for the work in special assessment warrants, drawing 6 per cent interest. The contract for such improvements fixed no time for payment therefor. It provided that the city would, from time to time as the work progressed, pay to such contractor upon an estimate made by the city engineer of the amount already earned thereunder, 85 per cent of the amount shown by such estimate to have been so earned, in special assessment warrants drawn on fund of paving District No. 12, of such city. During the month of June, 1910, the city offered to issue to relator its special assessment warrants drawn on the special assessment fund of paving district No. 12, payable on the 1st day of July of each year, from July 1st, 1911, to July 1st, 1930, inclusive, drawing interest at the rate of 6 per cent per annum, with the following provision: "This warrant may be retired before the due date thereof, by written notice from the city treasurer, delivered to or mail by registered letter to the owner thereof, as shown by the warrant record of the city, and to such address as shown on such record, and interest thereon to cease from the date of such delivery or the mailing of notice, and all unmatured interest coupons hereto attached shall be void."

The only question at issue in this proceeding is whether the appellant has the right to demand of the city of Grand Forks, that there be issued to it in payment for the work done by it, special assessment warrants due at certain specified times without having incorporated in such warrants a stipulation to the effect that the city may pay the same at any time before the specified due date.

That part of § 2786, Rev. Codes 1905, which applies to the matter in controversy, is as follows: " . . . and in anticipation of the levy and collection of such special assessments, the city may, at any

time after the making of a contract for any such improvements, issue warrants on such funds, payable at specified times and in such amounts as, in the judgment of the city council, the taxes and assessments will provide for, which warrants shall bear interest at the rate of not to exceed 7 per cent per annum, payable annually, and may have coupons attached representing each year's interest. Such warrants shall state upon their face for what purpose they are issued, and the fund from which they are payable, and shall be signed by the mayor, and countersigned by the city auditor under the seal of the city, and be in denominations of not more than $1,000 each. Such warrants may be used in making payments on contracts for making such improvements, or may be sold for cash, at not less than the par value thereof, and the proceeds thereof credited to such fund, and used for paying for such improvements. It shall be the duty of the city treasurer to pay such warrants and interest coupons as they mature and are presented for payment, out of the district funds on which they are drawn, and to cancel the same when paid."

Section 2794 is as follows: "The special assessments herein provided for the payment of the cost of paving and repaving shall be payable in equal annual amounts, and in case such paving shall be made on a perishable foundation of wood, such amounts shall be extended over a period not to exceed ten years, and in case such pavement shall be constructed with a concrete or other permanent foundation, such amount shall be extended over a period not exceeding twenty years; provided that whenever the city counsel shall determine to pave upon such permanent foundation, otherwise than with ordinary wooden pavement, such amounts may in the discretion of the city council, be extended over a period not to exceed thirty years, and the said assessment shall bear interest at the rate of not exceeding 7 per cent per annum on the total amount thereof remaining from time to time unpaid, and the rate to be fixed by the city council."

Section 2797 of said Code provides as follows: "All special assessments levied under the provisions of this article shall become due and payable ten days after the same shall have been approved by the city council, and shall thereafter bear interest at the rate of 7 per cent per annum."

Section 2806, as far as material, is as follows: "The owner of any

property against which an assessment shall have been made for the cost of any improvement under this article shall have the right to pay the same, or any part thereof remaining unpaid, in full, with the unpaid interest thereon, and such payment in full shall constitute a discharge of the lien of such assessment upon his property."

Construing § 2806, supra, we are convinced that the owner of any property against which a special assessment has been made may pay the assessment in full at any time, with unpaid interest thereon to the date of payment, and such payment shall constitute a discharge of the lien of such assessment upon his property.

Appellant contends that the language of the statute, "payable at a specified time," taken in connection with the following language, "it shall be the duty of the treasurer to pay such warrants as they mature," can only be construed to mean that the warrants must be made payable unconditionally on a certain due date. In this contention we think it is in error. A promissory note, to be negotiable, must be payable on demand or at a fixed determinable future time. Our negotiable instrument act, § 6306, provides that an instrument is payable at a determinable future time which is expressed to be payable on or before a fixed or determinable future time, specified therein. It is invariably held that a note payable on or before, for all purposes of negotiation, is regarded as a note payable solely on the date named therein. Jordan v. Tate, 19 Ohio St. 586; Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197; First Nat. Bank v. Skeen, 101 Mo. 683, 11 L.R.A. 748, 14 S. W. 732.

In Jordan v. Tate, supra, the court says: "The negotiable character of a promissory note is not affected by the fact that it is made payable by its terms on or before a future day therein named. Though the maker has a right to pay such note at any time after its date, yet for all purposes of negotiation it is to be regarded as a note payable solely on the day therein named."

In Mattison v. Marks, supra, the court says: "It seems to us that this note is payable at a time certain. It is payable certainly, and at all events, on a day particularly named; and at that time, and not before, payment might be enforced against the maker. It is impossible to say that this paper makes the payment subject to any contingency, or puts it upon any condition. The legal rights of the holder

are clear and certain; the note is due at a time fixed, and it is not due before. True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more."

In First Nat. Bank v. Skeen, supra, which was an action upon a promissory note, the court says: "The objection to its negotiability rests on the use of the words 'on or before the 1st day of September, 1885,' in connection with the promise to pay. It is claimed that such language makes the time of payment uncertain; and hence destroys its negotiable character. . . . It would seem obvious that a certainty of ultimate payment should not be considered impaired by the intervention of an option, in favor of the maker, to discharge his obligation at an earlier time. The paper still retains a fixed date, when the promise to pay must be performed."

The statute under which the warrants in question are issued does not provide in terms for the redemption at any time, nor prescribe any method therefor, though it does prescribe that no warrant under the act shall be issued for a longer period than ten, twenty, or thirty years, according to the quality of the foundation on which the paving is laid, and such warrants may be issued for any shorter period of time in the discretion of the city council. This the relator knew when making the contract, which contract did not provide when the warrants should become due.

Special assessment warrants are creatures of the statute, and are issued and received in pursuance of statutory provisions, and the holders and owners thereof are chargeable with notice of such provisions of the statute as fully as if set forth and at large in the warrants and each of them. The relator company therefore, knew that the warrants and the interest thereon were payable only out of the special assessments (except in case a deficiency remained after all special assessments had been collected and applied in payment of the warrants), and also that those who were chargeable with the burden of paying the special assessments could lawfully pay at any time and be exempt from payment of interest thereafter.

Construing §§ 2786, 2794, and 2806, supra, we think respondents had authority to issue the warrants offered to be issued by it to relator, and that relator is not deprived of any of its rights by the city issu-

ing warrants payable in twenty annual instalments, with an option to retire them at any previous time. Any other construction of the statute would, in our opinion, be inconsistent with the legislative intent.

As sustaining our views herein, see Wilmette v. People, 214 Ill. 107, 73 N. E. 327; Stewart v. Henry County, 66 Fed. 127.

The order appealed from its affirmed. All concur.

STATE OF NORTH DAKOTA v. HENRY GUTTERMAN.

(128 N. W. 307.)

Criminal Law — Instructions — Right to be Heard by Counsel.

Among other things the court instructed the jury as following: "Gentlemen of the jury, I charge you to pay no attention to any remarks or statements made by counsel; you are the sole judges of the questions of fact in this case, the court will give you the law, it is your duty to decide this case according to the law given you by the court." *Held*, error.

Opinion filed October 20, 1910.

Appeal from the County Court, McHenry county; *Honorable Horace Bagley*, J.

Action by the State of North Dakota against Henry Gutterman.

From a judgment in favor of plaintiff, defendant appeals.

Reversed.

E. R. Sinkler and *C. W. Hookway*, for appellant.

Charles D. Donnelly, State's attorney, *Andrew Miller*, Attorney General, and *C. L. Young*, Assistant Attorney General, for respondent.

CARMODY, J. This is an appeal from a judgment of conviction in an action against the defendant, for the crime of keeping and maintaining a common nuisance under the prohibitory law of the state of North Dakota. Appellant assigns as error the following instruction to the jury; "Gentlemen of the jury, I charge you to pay no attention to any remarks or statements made by counsel; you are the sole judges of the questions of fact in this case, the court will give you the law, it is your duty to decide this case according to the law given you by the court."

The right of the defendant in a criminal case to be represented by counsel is one guaranteed him by the Constitution. Section 13 of the Constitution of the state of North Dakota, as far as material, is as follows: "In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel."

Section 9993 of the Revised Codes of 1905 is as follows: "If the information or indictment is for an offense punishable with death, three counsel on each side may argue the case to the jury. If it is any other offense the court may, in its discretion, restrict the argument to one counsel on each side." While we do not suppose the court intended by the instruction complained of that the jury should not listen to and avail themselves of the argument of counsel, and while he undoubtedly meant that the jury were not to decide the case on anything that counsel might say, but were to take evidence as given by the witnesses into consideration, and the law as given them by the court as the basis of their verdict, still we cannot say that the instruction complained of is not prejudicial. Parties have a right to appear by counsel, and it is the privilege of counsel to address the jury. If the jury are to disregard the arguments of counsel altogether, if they are to shut their ears to the illustrations, comments, and reasonings, how unmeaning, indeed how absurd, is the appearance of counsel. It is a most valuable right to be represented by learned and eloquent counsel, not only before the court, as to the law, but also before the jury, as to the facts. So far as the facts of a case are concerned, the privilege is valuable, just because the jury may look to the argument of counsel, may consider his reasoning, before making up their verdict. In our opinion it was a dangerous stretch of judicial prerogative, by the charge of the court, to tell the jury to pay no attention to any remarks or statements made by counsel. To the legal mind, perhaps, the charge in question was not misleading, but to a jury not composed of lawyers, such a charge may have had the effect to have confused and misled them, and in the form here put it should not have been given. Reeves v. State, 34 Tex. Crim. Rep. 483, 31 S. W. 382; Garrison v. Wilcoxson, 11 Ga. 155; People v. Hite, 8 Utah, 461, 33 Pac. 254; 11 Enc. Pl. & Pr. p. 367, and cases cited.

The other errors assigned are such that they are not likely to arise on a new trial; hence we need not consider them.

Judgment reversed and a new trial ordered. All concur.

WILLIAM ACTON v. FARGO & MOORHEAD STREET RAILWAY COMPANY.

(129 N. W. 225.)

Verdict — Sufficiency of Evidence — Appeal and Error.

1. Where, as in this case, the verdict is supported by substantial evidence and the trial court has declined to disturb such verdict when challenged for alleged insufficiency of the evidence, such ruling will not be reversed in this court.

Street Railways — Rights — Duty and Rights of Other Users of Streets.

2. A traveler passing along a city street has a right to use every part of it regardless of whether there is a street car track in it or not. In view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them, unnecessarily, and to turn to one side when they meet them; but, subject to that, and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision.

Street Railways — Rights in Streets.

3. Street cars have precedence, nccessarily, in the portion of the way designated for their use. This superior right must be exercised, however, with proper caution and a due regard for the rights of others; and the fact that it

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Note.—The statement in the preceding case, that a traveler is entitled to use every part of the street, and that street car companies have no exclusive right to the use of their tracks, but only a paramount right, is in harmony with the other authorities, as shown by a review thereof in 25 L.R.A. 508, on the subject of street car collisions with vehicles or horses, in which both the liability of the street railway company and the contributory negligence of the person injured are considered. The doctrine of last clear chance, which is also involved in ACTON v. FARGO & M. STREET R. CO. is treated in an elaborate note in 55 L.R.A. 418, and various phases of the doctrine are also considered in later notes in 7 L.R.A.(N.S.) 132, 17 L.R.A.(N.S.) 707, and 19 L.R.A. (N.S.) 446.

has a prescribed route does not alter the duty of a street railway company to the public, who have the right to travel upon its track until they are overtaken by its cars.

Street Railways — Instructions — Collision with Vehicles — Contributory Negligence.

4. The court charged the jury as follows: "I charge you, gentlemen of the jury, as a matter of law, that even if you find from a preponderance of the evidence that the plaintiff in this action was guilty of contributory negligence in going upon the defendant's track, under all the circumstances of the case, that nevertheless, if the defendant or its employees in charge of the car were aware, or should by the exercise of reasonable diligence and care have become aware, of the dangerous position of the plaintiff, in time to have, by the exercise of reasonable diligence and care, avoided the collision with the buggy of the plaintiff, that the prior negligence of the plaintiff would not bar his right to recover in this action." This instruction states the law correctly.

Street Railways — Negligence — Discovered Peril — Collision.

5. The ground upon which plaintiff may recover, notwithstanding his own negligence, is that the defendant, after becoming aware of the danger to which plaintiff was exposed, failed to use a proper degree of care to avoid injuring him.

Street Railways — Rights in Streets — Care of Drivers of Other Vehicles.

6. It is not necessarily negligent to drive a vehicle along a street railway track in the direction in which cars travel upon the track, nor in the direction from which the cars will approach. But when so driving the driver should keep a lookout for cars approaching in the opposite direction, and he should use reasonable diligence to ascertain the approach of cars from the rear, but he is not, as a matter of law, required to keep a constant watch to the rear to discover approaching cars.

Negligence — Contributory Negligence — Last Clear Opportunity.

7. Unless the negligence of the plaintiff proximately contributes to the injury, it does not constitute contributory negligence which bars a recovery. The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it.

Street Railways — Use of Streets — Collision — Negligence — Reasonable Diligence to Avoid Accidents.

8. While it is the duty of vehicles moving along street railway tracks to leave the tracks on the approach of cars so as not to obstruct their passage, still those in charge of cars must use reasonable diligence to prevent collisions, and the company is liable for injury resulting from their failure to do so.

Street Railways — Care Required — Anticipation that Other Vehicles Will Leave Track.

9. Where a street car is approaching from the rear a vehicle moving along

the track, the person operating the car has not the right to proceed without regard to the presence of the vehicle, in anticipation that the vehicle will leave the track in time to give free passage to the car.

Street Railways — Use of Streets — Trolley Car — Approaching Another Vehicle.

10. In the case of a trolley car approaching another vehicle directly in a line with its progress, and a possible obstacle in the way, a proper regard for the rights of others requires that the car be reduced to such control that it may be brought to a standstill if necessary.

Street Railways — Collisions — Ordinary Care — Contributory Negligence.

11. A street railway company is liable for injuries sustained by a collision between a vehicle and a car, where the employees in charge of the car, by the exercise of ordinary care, could have avoided the accident, notwithstanding the negligence of the driver in the first instance in placing himself in a situation of peril.

Street Railways — Motormen Must Give Warning.

12. Such timely and reasonable warning of the approach of a street car must be given as will enable others in the exercise of due care to avoid injury from it.

Street Railways — Collision — Contributory Negligence — Duty of Motormen on Discovery of Danger — Question for Jury.

13. If those in charge of a street car discover, or should by the exercise of ordinary care have discovered, plaintiff's peril, while driving a wagon on the track in time to have avoided a collision, and did not do so, plaintiff's negligence in failing to look back for an approaching car would not preclude his recovery. Whether defendant's motorman in charge of a street car which collided with plaintiff's vehicle made proper efforts to avoid the collision if he saw, or by the exercise of ordinary care could have seen, plaintiff's peril, *held* under the facts to be for the jury.

Street Railways — Injury to Other Vehicles — Right to Presume Due Care.

14. One driving along the street railway track in daylight has the right to suppose that if a car is approaching from the rear a proper lookout is maintained, and that ordinary care will be exercised to avoid injuring him.

Damages — Excessive Amount.

15. The jury awarded plaintiff $2,450 damages, without interest. *Held*, not excessive.

Instructions — Trial — Verdict.

16. An instruction to the jury that the answers to the separate questions must be of such a nature that they will fully support the general verdict, *held*, not error.

Instructions — Prejudice — Harmless Error.

17. The jury having found that the motorman of defendant did not exercise ordinary care and reasonable diligence in stopping his car and preventing the accident after he saw, or might in the exercise of reasonable diligence have seen, that plaintiff was in a position of danger, for reasons stated in the opinion the appellant was not prejudiced by the instructions complained of.

Instructions — Harmless Error.

18. A judgment will not be reversed because of an erroneous instruction, when it affirmatively appears from answers to interrogatories, that such instruction did not influence the jury in reaching its verdict.

Instruction — Refusal — Care Required of Motorman — Appeal and Error.

19. The court refused to charge the jury that, though the motorman saw the plaintiff driving along, and on the track, and (if he was driving thereon) he had a right to assume that the plaintiff would exercise ordinary care to observe the approach of the car, and would get out of danger before the car would reach him, and that the motorman is not required to check his car (if said car is running at an ordinary rate of speed) until he has reasonable cause to believe that there is actual danger of a collision, *held*, not error, under the circumstances of this case.

Verdict — Special Findings — Conflict with General Verdict.

20. The special findings made by the jury are sufficient to sustain the general verdict. If the questions not answered, or where the answers are not proved, were all answered favorably to appellant, the general verdict would still be consistent with the special findings.

Opinion filed September 24, 1910.

Rehearing denied December 30, 1910.

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

Action by William Acton against Fargo & Moorhead Street Railway Company. From an order denying defendant's motion for judgment notwithstanding the verdict, or for a new trial, and from the judgment, defendant appeals.

Affirmed.

Stambaugh & Fowler, attorneys for appellant.

One traveling by night on a railway track must watch for approaching cars. Adolph v. Central Park, N. & E. River R. Co. 76 N. Y. 532; North Hudson County R. Co. v. Isley, 49 N. J. L. 468, 10 Atl. 665; Wood v. Detroit City R. Co. 52 Mich. 402, 50 Am. Rep. 259, 18 N. W. 124; Missouri P. R. Co. v. Moseley, 6 C. C. A. 641, 12 U. S. App. 601, 57 Fed. 921; Mynning v. Detroit, L. & N. R.

Co. 59 Mich. 257, 26 N. W. 514; Robards v. Indianapolis Street R. Co. 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953; Everett v. Los Angeles Consol. Electric R. Co. 115 Cal. 105, 34 L.R.A. 350, 46 Pac. 889, 43 Pac. 207; Carson v. Federal Street & P. Valley R. Co. 147 Pa. 219, 15 L.R.A. 257, 30 Am. St. Rep. 727, 23 Atl. 369; Butler v. Rockland, T. & C. Street R. Co. 99 Me. 149, 105 Am. St. Rep. 267, 58 Atl. 775; Green v. Los Angeles Terminal R. Co. 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 724; Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 593, 53 L.R.A. 618, 84 N. W. 823; Rider v. Syracuse Rapid Transit R. Co. 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836; Holwerson v. St. Louis & Suburban R. Co. 157 Mo. 216, 50 L.R.A. 850, 57 S. W. 770; Cawley v. LaCrosse City R. Co. 101 Wis. 145, 77 N. W. 179, 106 Wis. 239, 82 N. W. 197; Markowitz v. Metropolitan Street R. Co. 186 Mo. 350, 69 L.R.A. 389, 85 S. W. 351; Bogan v. Carolina C. R. Co. 55 L.R.A. 418, and cases cited in note, 129 N. C. 154, 39 S. E. 808.

To warrant the application of the "last clear chance," plaintiff's negligence must continue up to and contribute to the injury. 2 Am. & Eng. Enc. Law, 2d ed. Supp. p. 64; Dyerson v. Union P. R. Co. 74 Kan. 528, 7 L.R.A.(N.S.) 133, 87 Pac. 680, 11 A. & E. Ann. Cas. 207; Everett v. Los Angeles Consol. Electric R. Co. 115 Cal. 105, 34 L.R.A. 350, 46 Pac. 889, 43 Pac. 207; Rider v. Syracuse Rapid Transit R. Co. 171 N. Y. 139, 58 L.R.A. 127, 63 N. E. 836; Holwerson v. St. Louis & Suburban R. Co. 157 Mo. 216, 50 L.R.A. 850, 57 S. W. 770; Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 593, 53 L.R.A. 618, 84 N. W. 823; Robards v. Indianapolis Street R. Co. 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953; Green v. Los Angeles Terminal R. Co. 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 724; Vizaccheroo v. Rhode Island Co. 26 R. I. 392, 69 L.R.A. 191, 59 Atl. 105; State use of Meidling v. United R. & Electric Co. 97 Md. 73, 54 Atl. 612; Wood v. Detroit City Street R. Co. 52 Mich. 402, 50 Am. Rep. 259, 18 N. W. 124; Hot Springs Street R. Co. v. Johnson, 64 Ark. 420, 42 S. W. 833; Cullen v. Baltimore & P. R. Co. 8 App. D. C. 69. See note to Gahagan v. Boston & M. R. Co. 55 L.R.A. 434; Smith v. Norfolk & S. R. Co. 114 N. C. 728, 25 L.R.A. 287, 19 S. E. 863, 923; Texas & P. R. Co. v. Staggs, — Tex. Civ. App. —, 37 S. W. 609; Austin Dam & Suburban R. Co. v. Goldstein, 18 Tex. Civ. App. 704, 45 S. W. 600.

If the findings are inconsistent with the general verdict, judg-

ment cannot be rendered, and a new trial must be ordered. Dickerson v. Waldo, 13 Okla. 189, 74 Pac. 505; Atchison, T. & S. F. R. Co. v. Hamlin, 67 Kan. 476, 73 Pac. 58; Healey v. New York, N. H. & H. R. Co. 20 R. I. 136, 37 Atl. 676; Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295; Sloss v. Allman, 64 Cal. 47, 30 Pac. 574.

Error to instruct jury after arguments, to make special findings conform to general verdict. Coffeyville Vitrified Brick Co. v. Zimmerman, 61 Kan. 750, 60 Pac. 1064; Kilpatrick-Koch Dry-Goods Co. v. Kahn, 53 Kan. 274, 36 Pac. 327; Special verdicts. Mechanics' Bank v. Barnes, 86 Mich. 632, 49 N. W. 475; Cole v. Boyd, 47 Mich. 98, 10 N. W. 124; Ryan v. Rockford Ins. Co. 77 Wis. 611, 46 N. W. 885; Des Moines & D. Land & Tree Co. v. Polk County Homestead & T. Co. 82 Iowa, 663, 45 N. W. 773.

Barnett & Richardson, for respondent.

That a street car drives upon a vehicle ahead of it is of itself proof of negligence. 2 Thomp. Neg. 76; Conway v. New Orleans City & Lake R. Co. 51 La. Ann. 146, 24 So. 780; Indianapolis Street R. Co. v. Darnell, 32 Ind. App. 687, 68 N. E. 609; Floyd v. Paducah R. & Light Co. 23 Ky. L. Rep. 1077, 64 S. W. 653; Richmond Pass. & Power Co. v. Allen, 103 Va. 532, 49 S. E. 656; Greene v. Louisville R. Co. 119 Ky. 862, 84 S. W. 1154, 7 A. & E. Ann. Cas. 1126; Schilling v. Metropolitan Street R. Co. 47 App. Div. 500, 62 N. Y. Supp. 403; Moritz v. St. Louis Transit Co. 102 Mo. App. 657, 77 S. W. 477; United R. & Electric Co. v. Cloman, 107 Md. 681, 69 Atl. 379.

A street railway company has no superior rights on the highway. Citizens' Street R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; Barry v. Burlington R. & Light Co. 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229; Shea v. St. Paul City R. Co. 50 Minn. 395, 52 N. W. 902; Watson v. Minneapolis Street R. Co. 53 Minn. 551, 55 N. W. 742; Mertz v. Detroit Electric R. Co. 125 Mich. 11, 83 N. W. 1036; Rascher v. East Detroit & G. P. R. Co. 90 Mich. 413, 30 Am. St. Rep. 447, 51 N. W. 463; La Pontney v. Shedden Cartage Co. 116 Mich. 514, 74 N. W. 712; White v. Worcester Consol. Street R. Co. 167 Mass. 43, 44 N. E. 1052; Indiana Union Traction Co. v. Pheanis, 43 Ind. App. 653, 85 N. E. 1040; Swain

v. Fourteenth Street R. Co. 93 Cal. 179, 28 Pac. 829; Will v. West Side R. Co. 84 Wis. 42, 54 N. W. 30.

To travel on a street railway track 60 or 70 feet is not of itself negligence. Wilkins v. Omaha & C. B. R. & Bridge Co. 96 Iowa, 668, 65 N. W. 987; Bensiek v. St. Louis Transit Co. 125 Mo. App. 121, 102 S. W. 587; Cohen v. Metropolitan Street R. Co. 34 Misc. 186, 68 N. Y. Supp. 830; Fishbach v. Steinway R. Co. 11 App. Div. 152, 42 N. Y. Supp. 883; Schilling v. Metropolitan Street R. Co. 47 App. Div. 500, 62 N. Y. Supp. 403; Memphis Street R. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374; Noll v. St. Louis Transit Co. 100 Mo. App. 367, 73 S. W. 907; American Storage & Moving Co. v. St. Louis Transit Co. 120 Mo. App. 410, 97 S. W. 184; Ball v. Camden & T. R. Co. 76 N. J. L. 539, 72 Atl. 76; Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135; Zolpher v. Camden & Suburban R. Co. 69 N. J. L. 417, 55 Atl. 249; Geoghegan v. Union R. Co. 122 App. Div. 646, 107 N. Y. Supp. 503; Hot Springs Street R. Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245; Ablard v. Detroit United R. Co. 139 Mich. 248, 102 N. W. 741; Vincent v. Norton & T. Street R. Co. 180 Mass. 104, 61 N. E. 822; Benjamin v. Holyoke Street R. Co. 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95; Funck v. Metropolitan Street R. Co. 133 Mo. App. 419, 113 S. W. 694; Mayes v. Metropolitan Street R. Co. 121 Mo. App. 614, 97 S. W. 612; Muller v. New York City R. Co. 51 Misc. 640, 101 N. Y. Supp. 98; Blakeslee v. Consolidated Street R. Co. 112 Mich. 63, 70 N. W. 408.

A traveler on a street car track may presume a proper lookout and warning from an approaching car. Indianapolis Street R. Co. v. Marschke, 166 Ind. 490, 77 N. E. 945; American Storage & Moving Co. v. St. Louis Transit Co. 120 Mo. App. 410, 97 S. W. 184; Cohen v. Metropolitan Street R. Co. 34 Misc. 186, 68 N. Y. Supp. 830; Greene v. Louisville R. Co. 119 Ky. 862, 84 S. W. 1154, 7 A. & E. Ann. Cas. 1126; Memphis Street R. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374; 2 Thomp. Neg. 1448; Ablard v. Detroit United R. Co. 139 Mich. 248, 102 N. W. 741; Stanley v. Cedar Rapids & M. City R. Co. 119 Iowa, 526, 93 N. W. 489; Vincent v. Norton & T. Street R. Co. 180 Mass. 104, 61 N. E. 822; Benjamin v. Holyoke Street R. Co. 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95.

There is no presumption in favor of special findings, but there is every presumption in favor of a general verdict. Jeffersonville v. Gray, 165 Ind. 26, 74 N. E. 611; 20 Enc. Pl. & Pr. pp. 338, 353, 367; Mares v. Northern P. R. Co. 3 Dak. 336, 21 N. W. 5.

If there is any construction of a special finding that sustains the general verdict, it will be adopted. Grant v. Spokane Traction Co. 47 Wash. 112, 91 Pac. 553; Osburn v. Atchison, T. & S. F. R. Co. 75 Kan. 746, 90 Pac. 289; Ft. Wayne Cooperage Co. v. Page, — Ind. App. —, 82 N. E. 83; Wendel v. Cleveland, C. C. & St. L. R. Co. 41 Ind. App. 460, 82 N. E. 469; Samson v. Zimmerman, 73 Kan. 654, 85 Pac. 757; Chicago & E. R. Co. v. Lawrence, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.

Contributory negligence is no defense, if defendant discovers or ought to discover the peril in time to avert it. Harrington v. Los Angeles R. Co. 140 Cal. 514, 63 L.R.A. 238, 98 Am. St. Rep. 85, 74 Pac. 15; Thompson v. Salt Lake Rapid Transit Co. 16 Utah, 281, 40 L.R.A. 172, 67 Am. St. Rep. 621, 52 Pac. 92; Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338, 43 Atl. 762; Hart v. Cedar Rapids & M. City R. Co. 109 Iowa, 631, 80 N. W. 662; Remillard v. Sioux City Traction Co. 138 Iowa, 565, 115 N. W. 900; Ramsey v. Cedar Rapids & M. C. R. Co. 135 Iowa, 329, 112 N. W. 798; Jett v. General Electric R. Co. 178 Mo. 664, 77 S. W. 738; St. Louis, B. & M. R. Co. v. Droddy, — Tex. Civ. App. —, 114 S. W. 902; Murray v. St. Louis Transit Co. 108 Mo. App. 501, 83 S. W. 995; Wichita R. & Light Co. v. Liebhart, 80 Kan. 91, 101 Pac. 457; Ruppel v. United R. Co. 10 Cal. App. 319, 101 Pac. 803; St. Louis Southwestern R. Co. v. Thompson, 89 Ark. 496, 117 S. W. 541; 2 Thomp. Neg. 1476.

Motorman cannot anticipate that a vehicle ahead of him will get out of the way. Mertz v. Detroit Electric R. Co. 125 Mich. 11, 83 N. W. 1036; Manor v. Bay Cities Consol. R. Co. 118 Mich. 1, 76 N. W. 139; Prendenville v. St. Louis Transit Co. 128 Mo. App. 596, 107 S. W. 453; Greene v. Louisville R. Co. 119 Ky. 862, 84 S. W. 1154, 7 A. & E. Ann. Cas. 1126.

Motorman's negligence was the proximate cause and plaintiff's the remote cause, and therefore not concurrent. Central R. Co. v. Foshee, 125 Ala. 199, 27 So. 1006; Randle v. Birmingham R. Light

& P. Co. 158 Ala. 532, 48 So. 114; Pilmer v. Boise Traction Co. 14 Idaho, 327, 15 L.R.A.(N.S.) 254, 125 Am. St. Rep. 161, 94 Pac. 433; Bensiek v. St. Louis Transit Co. 125 Mo. App. 121, 102 S. W. 587; Trigg v. Water, Light & Transit Co. 215 Mo. 521, 20 L.R.A.(N.S.) 987, 114 S. W. 972; Thompson v. Salt Lake Rapid Transit Co. 16 Utah, 281, 40 L.R.A. 172, 67 Am. St. Rep. 621, 52 Pac. 92; Murray v. St. Louis Transit Co. 108 Mo. App. 501, 83 S. W. 995; Dey v. United R. Co. 140 Mo. App. 461, 120 S. W. 134; Bourrett v. Chicago & N. W. R. C. Co. — Iowa, —, — L.R.A. (N.S.) —, 121 N. W. 380; Wenninger v. Lincoln Traction Co. 84 Neb. 385, 121 N. W. 237; Citizens' Street R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; 1 Thomp. Neg. 177.

Where special findings show that the jury were not misled, instructions, even if erroneous, are not error. 20 Enc. Pl. & Pr. pp. 302–304; Kansas City, Ft. S. & M. R. Co. v. Chamberlain, 61 Kan. 859, 60 Pac. 15; Blackwell v. O'Gorman Co. 22 R. I. 638, 49 Atl. 28; Porter v. Waltz, 108 Ind. 40, 8 N. E. 705; Cleveland, C. C. & I. R. Co. v. Newell, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; Andrews v. Mundy, 36 W. Va. 22, 14 S. E. 414; Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350; Fisk v. Chicago, M. & St. P. R. Co. 83 Iowa, 253, 48 N. W. 1081; Wright v. Mulvaney, 78 Wis. 89, 9 L.R.A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045; Knowlton v. Milwaukee City R. Co. 59 Wis. 278, 18 N. W. 17.

CARMODY, J. This is an action for damages for personal injuries inflicted upon plaintiff by one of defendant's street cars on October 15, 1907. A trial was had in the district court, and a verdict rendered in favor of the plaintiff. Thereafter the defendant moved for judgment notwithstanding the verdict, or for a new trial, both of which motions were denied, and judgment entered on the verdict. From the order denying such motions, and from the judgment, defendant appeals to this court. The appellant is the owner of a street railway system in the city of Fargo. A portion of its track is laid upon Broadway, which runs north and south. On the day of the accident, the respondent was driving north on the west side of appellant's track, on Broadway. He was driving a double team of work horses attached

to a single buggy, without any top. He started to drive north from a point located on the west side of Broadway, about midway between First and Second avenues. Before starting north, he looked south but saw no car. He drove north on the west side of the track, at a distance of about 5 or 6 feet from the track, until he reached a point a little north of the center of the block between Third and Fourth avenues, and 60 or 70 feet south of where he was struck. At this point he noticed a team facing him, standing on the west side of the track, attached to a heavy lumber wagon, at a distance of about 6 feet from the west rail of the track. When he saw this team, he looked back over his shoulder for a distance of about 100 feet, and then drove upon the track so that his buggy was astride the west rail. He drove in this position, without looking back for an approaching car, until he reached the point where this team was standing, when he was struck by a car approaching from the rear, and was thrown from his buggy. Just prior to the accident, plaintiff's team was traveling 3 miles per hour, while appellant's car was traveling about 8 miles per hour. The motorman sounded the gong, and respondent heard the sound just about the time he was struck by the car. The accident happened at about 11 o'clock in the morning. It is undisputed that there is a clear view of the place of the accident for several hundred feet south. The car in question, under conditions similar to those at bar, could be stopped in between 20 and 25 feet. The car was stopped between 20 and 30 feet north of the point of the accident.

In addition to the general verdict, the court submitted thirty-seven questions to the jury. Appellant assigns eighteen errors, which are divided into four subdivisions: (1) The evidence fails to show that the defendant was guilty of negligence. (2) The evidence shows that the plaintiff was guilty of such contributory negligence as to prevent his recovery. (3) The damages are so excessive as to appear to have been given under the influence of passion and prejudice. (4) Errors in law occurring at the trial.

We will take up these propositions in the order advanced in the argument of appellant. The jury found a general verdict in favor of the plaintiff, and in addition thereto found that the defendant was guilty of negligence under the law as laid down by the court; that the motorman did not exercise ordinary care and reasonable diligence in

stopping his car, and preventing the accident after he saw, or might in the exercise of reasonable diligence have seen, that plaintiff was in a position of danger; that the gong was sounded by the motorman as he approached the point where the accident occurred; that it was not proved as to what distance before the accident he sounded the gong. The jury did not answer the questions as to how far from the point where the accident occurred that the motorman turned the reverse and set the brakes, nor the question how far from the point where the accident occurred did the reversing of the brakes actually begin to take effect. The jury found that the car ran north of the point where the collision occurred from 20 to 30 feet before it came to a stop; that just before the accident the car was running 8 miles per hour; and that the plaintiff was driving at the rate of 3 miles per hour. The first contention of appellant that the evidence fails to show that the defendant was guilty of negligence must be overruled. The jury found in favor of the plaintiff in a general verdict, and found by the special findings that the defendant was guilty of negligence. The defendant having moved for a new trial, or for judgment notwithstanding the verdict on the ground, among others, of the insufficiency of the evidence to justify the verdict, and the trial court having denied such motion, if the verdict is supported by substantial evidence, then it must stand. Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Muri v. White, 8 N. D. 58, 76 N. W. 503; Howland v. Ink, 8 N. D. 63, 76 N. W. 992; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Magnusson v. Linwell, 9 N. D. 157, 82 N. W. 743; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; Lang v. Bailes, 19 N. D. 582, 125 N. W. 891.

Under the doctrine laid down by this court in the cases herein cited, an examination of the evidence convinces us that there is substantial evidence to support the verdict, and the learned trial court did not abuse its discretion in denying the motion for a new trial or for judgment notwithstanding the verdict, on the ground of the insufficiency of the evidence. Appellant argues with much force that, assuming appellant's negligence, plaintiff was guilty of contributory negligence, which, as a matter of law, would prevent his recovery. The jury an-

swered the question, "Was the plaintiff guilty of contributory negligence, as defined by the court in his instructions?" as follows: "To a certain extent." The evidence shows that plaintiff drove north 600 or 700 feet on the west side of the track, and that, seeing a team about 6 feet west of the track, approaching from the north, he looked over his shoulder for a distance of about 100 feet, saw no car, then turned upon the track and drove north, without looking back, for a distance of 60 or 70 feet, to the point where he was struck by the car.

A traveler passing along a city street has a right to use every part of it regardless of whether there is a street car track in it or not. The rights of a street car are, simply, in view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them, unnecessarily, and to turn to one side when they meet them; but, subject to that, and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision. The plaintiff was not a trespasser on the street car tracks in any sense. The right of the street railway in the street is only to use it in common with the public. It has no exclusive right of travel, even upon its track, and is bound to use the same care in preventing a collision, as the driver of a wagon, or any person crossing or entering upon the highway. Street cars have precedence, necessarily, in the portion of the way designated for their use. This superior right must be exercised, however, with proper caution and a due regard for the rights of others; and the fact that it has a prescribed route does not alter the duty of a street railway company to the public, who have the right to travel upon its track until they are overtaken by its cars. In the case at bar, there is no dispute but that the motorman saw, or might have seen, the plaintiff, for some time and for a considerable distance, before he overtook and struck him with the car.

On the question of the contributory negligence of the plaintiff, and the duty of the defendant if plaintiff was guilty of contributory negligence, the court charged the jury as follows: "I charge you, gentlemen of the jury, as a matter of law, that even if you find from a preponderance of the evidence that the plaintiff in this action was guilty of contributory negligence in going upon the defendant's track, under all the circumstances of the case, that nevertheless, if the defendant or its employees in charge of the car were aware, or should

by the exercise of reasonable diligence and care have become aware, of the dangerous position of the plaintiff, in time to have, by the exercise of reasonable diligence and care, avoided the collision with the buggy of the plaintiff, that the prior negligence of the plaintiff would not bar his right to recover in this action." This instruction states the law correctly. If the motorman, after seeing respondent, had any reasonable ground to apprehend, that he was not aware of the approaching train, and was unconscious of the danger that was imminent, a recovery is justified notwithstanding plaintiff's prior negligence. Evans v. Adams Exp. Co. 122 Ind. 362, 7 L.R.A. 678, 23 N. E. 1039; Evansville & C. R. Co. v. Hiatt, 17 Ind. 102; Krenzer v. Pittsburg, C. C. & St. L. R. Co. 151 Ind. 587, 68 Am. St. Rep. 252, 43 N. E. 649, 52 N. E. 220; Citizens' Street R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778. The ground upon which a plaintiff may recover, notwithstanding his own negligence, is that the defendant, after becoming aware of the danger to which the plaintiff was exposed, failed to use a proper degree of care to avoid injuring him. Zimmerman v. Hannibal & St. J. R. Co. 71 Mo. 476. It is not necessarily negligent to drive a vehicle along a street railway track in the direction in which cars travel upon the track, nor in the direction from which the cars will approach. But when so driving, the driver should keep a lookout for cars approaching in the opposite direction, and he should use reasonable diligence to ascertain the approach of cars from the rear, but he is not, as a matter of law, required to keep a constant watch to the rear to discover approaching cars. Hot Springs Street R. Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245.

A driver of a vehicle has a right to assume, and to act upon the assumption, that warning will be given by those in charge of the approaching car behind him, and that the motorman will not knowingly or negligently run him down. The evidence shows conclusively that the car could be stopped in from 20 to 25 feet. The jury found that the plaintiff drove on the track for a distance of 60 to 70 feet, at the rate of 3 miles per hour. The defendant necessarily traveled about 200 feet from the time plaintiff first drove upon the track to the time of the accident. Consequently the motorman had sufficient time to stop the car and avoid the accident. The jury found, further, that the car ran north of the point where the collision occurred before it came

to a stop a distance of from 20 to 30 feet. The evidence amply justifies the finding of the jury that the motorman did not exercise ordinary care and reasonable diligence in stopping his car and preventing the accident after he saw, or might in the exercise of reasonable diligence have seen, that plaintiff was in a position of danger. Unless the negligence of the plaintiff proximately contributed to the injury, it does not constitue contributory negligence which bars a recovery. The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it. A very full discussion of the doctrine of the last clear chance is found in note to case of Bogan v. Carolina C. R. Co. 55 L.R.A. 418.

Thompson on Negligence, vol. 1, § 177, lays down the following rule: "But suppose the traveler had come upon the track without making any use of his faculties to ascertain whether or not a train was approaching, but he had nevertheless arrived upon or near the track so far ahead of the train that those in charge of it, after seeing him thus exposed to danger, might have avoided injuring him; or if the circumstances were such that, by keeping the lookout which is required by law of persons propelling such a dangerous agency over a public highway, they might have seen him in time to have avoided injuring him, by the use of ordinary or reasonable care, by checking the speed of the train or by giving him warning,—but negligently failed in these particulars,—then the railroad company may be liable to the traveler, or to the person suing for the injury done to him, because its negligence is deemed the proximate cause of the injury, while his is deemed a remote cause of it."

The following is taken from Thompson on Negligence, vol. 2, § 1477: "It is, then, a rule constantly applied by many courts in these cases that, although the traveler may have been guilty of negligence in exposing himself to danger on the tracks of the street railway company, yet if, after discovering him in his exposed position, or if, by the exercise of ordinary diligence and attention to his duties, the driver could have discovered him in that position in time to avoid running upon him and injuring him, by the exercise of the like care in giving him warning, or in checking or stopping the car, the company will be liable."

In 27 Am. & Eng. Ency. of Law, 2d ed. p. 70, the rule is thus

stated: "While it is the duty of vehicles moving along street railway tracks to leave the tracks on the approach of cars, so as not to obstruct their passage, still those in charge of cars must use reasonable diligence to prevent collisions, and the company is liable for injuries resulting from their failure to do so. . . . It has been held that where a street car approaching from the rear runs down a wagon driving along the track, this is of itself sufficient evidence of negligence on the part of the street railway company, in the absence of special circumstances excusing such act to carry the question to the jury. Where a street car is approaching from the rear a vehicle moving along the track, the person operating the car has not the right to proceed without regard to the presence of the vehicle, in anticipation that the vehicle will leave the track in time to give free passage to the car."

"When a motoneer discovers a vehicle on the track a short distance ahead of him, it is his duty to have the power which propels the car under his control, and to use it so as to avoid a collision with such vehicle if he can. The fact that the vehicle can be turned in either direction, and that the way is open for it to be turned, does not relieve the motoneer of the duty to use ordinary care to avoid a collision. It must be remembered that the plaintiff was not a trespasser, but was rightfully upon the street." Flannagan v. St. Paul City R. Co. 68 Minn. 300, 71 N. W. 379.

In the case of a trolley car overtaking another vehicle directly in a line with its progress, and a possible obstacle in its way, a proper regard for the rights of others requires that the car be reduced to such control that it may be brought to a standstill, if necessary. Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135; Prendenville v. St. Louis Transit Co. 128 Mo. App. 596, 107 S. W. 453.

The street trolley has no special right of way accorded to it by law, and the duty imposed upon other vehicles is equally imposed upon it. No vehicle can, without reasonable notice of its approach (what is reasonable notice is a question for the jury), violently run into, or force from its way, another, having a legitimate right upon the street, without becoming responsible for any damage which may result. Consolidated Traction Co. v. Haight, supra.

One driving upon the side of a street has a right to drive upon a street railway track in order to pass another vehicle standing between

the curb and the track. Goodson v. New York City R. Co. (Sup.) 94 N. Y. Supp. 10.

Negligence and contributory negligence are questions for the jury, where plaintiff, driving a wagon so loaded with barrels that he could not see behind it without leaning to the side, failing so to look, pulled in towards defendant's street car track to pass a carriage standing by the curb, so that the barrels were struck by an electric car which came from behind, frightening his horses, and causing them to run away and injure him, there being evidence that the wagon, before being struck, traveled 35 feet while within the line of the car, and that the motorman, though seeing the wagon in time to stop, being 30 to 50 feet from it, increased his speed to 6 miles an hour, thinking he had room enough to pass. Blakeslee v. Consolidated Street R. Co. 112 Mich. 63, 70 N. W. 408.

A driver of a team and wagon, who looked and listened for a car prior to going on a street car track, and who neither saw nor heard a car, was not negligent as a matter of law for not looking for a car within a minute thereafter while driving 470 feet along the track. Bensiek v. St. Louis Transit Co. 125 Mo. App. 121, 102 S. W. 587.

A street railway company is liable for injuries sustained by a collision between a vehicle and a car, where the employees in charge of the car by the exercise of ordinary care could have avoided the accident, notwithstanding the negligence of the driver in the first instance in placing himself in a situation of peril. Ibid.

A driver in a city street has a right to expect that street cars will be managed with reasonable care and a proper regard for the rights of others lawfully using the street, and he may drive along the track in full view of a car approaching from the rear, and the fact that he so proceeds for any distance will not charge him with contributory negligence in case of a collision, if, under all the circumstances, his conduct was consistent with ordinary prudence; the only limitation on his right being that he must not unnecessarily interfere with the passage of the car, which, though entitled to preference, has not an exclusive right to the track. Cohen v. Metropolitan Street R. Co. 34 Misc. 186, 68 N. Y. Supp. 830.

The following decisions by various courts of various states cover the case most thoroughly, and are in accord with the principles herein ex-

pressed: Vincent v. Norton & T. Street R. Co. 180 Mass. 104, 61 N. E. 822 (by Holmes, Ch. J.); Fenner v. Wilkes-Barre & W. Valley Traction Co. 202 Pa. 365, 51 Atl. 1034; Consumers' Electric Light & Street R. Co. v. Pryor, 44 Fla. 354, 32 So. 797, 806; Manor v. Bay Cities Consol. R. Co. 118 Mich. 1, 76 N. W. 139; Schilling v. Metropolitan Street R. Co. 47 App. Div. 500, 62 N. Y. Supp. 403; Shea v. Potrero & B. V. R. Co. 44 Cal. 414; Mahoney v. San Francisco & S. M. R. Co. 110 Cal. 471, 42 Pac. 968; Robinson v. Louisville R. Co., 50 C. C. A. 357, 112 Fed. 484; Tashjian v. Worcester Consol. Street R. Co. 177 Mass. 75, 58 N. E. 281; Tacoma R. & Power Co. v. Hays, 49 C. C. A. 115, 110 Fed. 496; Hall v. Ogden City Street R. Co. 13 Utah, 243, 57 Am. St. Rep. 726, 44 Pac. 1046; Saunders v. City & Suburban R. Co. 99 Tenn. 130, 41 S. W. 1031; Citizens' Rapid Transit Co. v. Seigrist, 96 Tenn. 119, 33 S. W. 920; Woodland v. North Jersey Street R. Co. 66 N. J. L. 455, 49 Atl. 479; Shea v. St. Paul City R. Co. 50 Minn. 395, 52 N. W. 902; Laethem v. Ft. Wayne & B. I. R. Co. 100 Mich. 297, 58 N. W. 996; Citizens' Street R. Co. v. Steen, 42 Ark. 321; Shaw v. Salt Lake City R. Co. 21 Utah, 76, 59 Pac. 552; McClellan v. Ft. Wayne & B. I. R. Co. 105 Mich. 101, 62 N. W. 1025; Indianapolis Street R. Co. v. Darnell, 32 Ind. App. 687, 68 N. E. 609; Moritz v. St. Louis Transit Co. 102 Mo. App. 657, 77 S. W. 477; Greene v. Louisville R. Co. 119 Ky. 862, 84 S. W. 1154, 7 A. & E. Ann. Cas. 1126; Barry v. Burlington R. & Light Co. 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229; Indiana Union Traction Co. v. Pheanis, 43 Ind. App. 653, 85 N. E. 1040; Memphis Street R. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374; Benjamin v. Holyoke Street R. Co. 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95; Ablard v. Detroit United R. Co. 139 Mich. 248, 102 N. W. 741; Noll v. St. Louis Transit Co. 100 Mo. App. 367, 73 S. W. 907; Funck v. Metropolitan Street R. Co. 133 Mo. App. 419, 113 S. W. 694; Ball v. Camden & T. R. Co. 76 N. J. L. 539, 72 Atl. 76; Mayes v. Metropolitan Street R. Co. 121 Mo. App. 614, 97 S. W. 612; Indianapolis Street R. Co. v. Marschke, 166 Ind. 490, 77 N. E. 945.

In Funck v. Metropolitan Street R. Co. 133 Mo. App. 419, 113 S. W. 694, plaintiff drove 335 feet on defendant's track without looking back for a car although he might have done so. He looked when he first drove onto the track and saw no car. The night was dark except

for street lamps. The defendant pleaded contributory negligence on the part of plaintiff. The court says: "If those in charge of a street car discovered, or should by the exercise of ordinary care have discovered, plaintiff's peril while driving a wagon on the track in time to have avoided a collision, and did not do so, plaintiff's negligence in failing to look back for an approaching car would not preclude his recovery;" and further says: "Under the facts, it was the duty of the court to submit to the jury the question whether defendant had performed its duty in the premise in making a proper effort to have avoided the collision after its motorman saw, or could have seen by the exercise of ordinary care, plaintiff's peril."

In Ball v. Camden & T. R. Co. 76 N. J. L. 539, 72 Atl. 76, the plaintiffs, husband and wife, were in a top buggy with the top up and back curtains down but side curtains up. It was December 2, 1905, a night described by plaintiffs' witnesses as "drizzly and dark." There were two car tracks in the street, and the horse and buggy were being driven in the right-hand track. The plaintiffs became aware of a car coming up behind them, and were in the act of turning out when struck, the buggy being wrecked, and Mrs. Ball more or less injured. The husband and wife both testified that they heard no bell nor any sound of the car. They did not claim to have looked back to see if a car was coming, but both said that its approach was manifested by their seeing the light from the headlight of the car shining under the feet of the horse. Ball immediately pulled his horse to the right, but did not clear the track in time to avoid the car. A motion was made to nonsuit, which was denied. The court says: "We think there was a clear case for the jury on this point. The circumstances, which the jury were entitled to find as facts, that a trolley car driven at high speed on a dark night ran into the rear of a wagon in front of it, and traveling in the same direction, without any warning, and when the car had a headlight bright enough to show by its very reflection on the ground the approach of the car to those in the wagon, and therefore manifestly bright enough to make the wagon plainly visible to an ordinarily watchful motorman, seem to us quite sufficient to justify the jury in concluding that the motorman was not properly attending to his duties, and the court would have been in error to remove such a question from their consideration. The contributory negligence of the plaintiffs

was also a jury question. It is intimated by plaintiff in error that Ball was guilty of negligence in law by driving on the car track and not keeping a vigilant lookout to his rear; but he was entitled to drive on any part of the roadway, having due regard for the rights of others, and was not bound to keep a lookout behind him."

In Mayes v. Metropolitan Street R. Co. 121 Mo. App. 614, 97 S. W. 612, the court says: "Where plaintiff looked to see if a car was approaching from the rear when she drove into a street, she was not bound to look back while driving close to the car track to guard against a car approaching from the rear, she being entitled to presume that persons in control of such cars and other following vehicles would look out for her safety and avoid running into her."

In Indianapolis Street R. Co. v. Marschke, 166 Ind. 490, 77 N. E. 945, plaintiff was driving at an ordinary trot. There were four street car tracks. She turned toward the track nearest her for the purpose of passing a heavy wagon that was slowly moving in the direction which she was going. Appellee knew that the south-east bound electric cars used the said track, and as she turned in that direction she glanced back up the track, and also listened. She did not hear a gong, nor did she hear a car moving on the viaduct. She continued to drive near the southwest rail of said track until she was opposite the wagon, when the running board of appellant's street car which had approached her from the rear, came into contact with the left hind wheel of her buggy, throwing her out and injuring her. The court held that the question of the contributory negligence of the plaintiff in driving on the track was one for the jury. The court further held that one driving along a street railroad track in daylight has the right to suppose that, if a car is approaching from the rear, a proper lookout is maintained and that ordinary care will be exercised not to injure him.

Appellant claims that the plaintiff's conduct in driving on the track amounted to gross negligence as a matter of law, which should defeat his recovery, and claims further that the jury found as a matter of fact that plaintiff was guilty of contributory negligence. We do not think that this finding helps appellant. Both parties being negligent, the true rule is held to be that the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it. It is well settled that a

plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission (after becoming aware of the plaintiff's danger) to use ordinary care for the purpose of avoiding the injury to him. Harrington v. Los Angeles R. Co. 140 Cal. 514, 63 L.R.A. 238, 98 Am. St. Rep. 85, 74 Pac. 15; Thompson v. Salt Lake Rapid Transit Co. 16 Utah, 281, 40 L.R.A. 172, 67 Am. St. Rep. 621, 52 Pac. 92; Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338, 43 Atl. 762; Hart v. Cedar Rapids & M. City R. Co. 109 Iowa, 631, 80 N. W. 662; Remillard v. Sioux City Traction Co. 138 Iowa, 565, 115 N. W. 900; Ramsey v. Cedar Rapids & M. City R. Co. 135 Iowa, 329, 112 N. W. 798; Jett v. General Electric R. Co. 178 Mo. 664, 77 S. W. 738; St. Louis, B. & M. R. Co. v. Droddy, — Tex. Civ. App. —, 114 S. W. 902; Murray v. St. Louis Transit Co. 108 Mo. App. 501, 83 S. W. 995; Wichita R. & Light Co. v. Liebhart, 80 Kan. 91, 101 Pac. 457; Ruppel v. United R. Co. 10 Cal. App. 319, 101 Pac. 803; St. Louis Southwestern R. Co. v. Thompson, 89 Ark. 496, 117 S. W. 541; 2 Thomp. Neg. § 1477.

The jury awarded plaintiff $2,450, without interest. The damages so awarded, appellant insists, are so excessive as to appear to have been given under the influence of passion and prejudice. We do not think that the damages are so excessive as to warrant us in setting aside or reducing the verdict on that ground. Plaintiff testified that he suffered more or less pain ever since the accident; that the difficulty was a little above the small of the back and just above the groin on the right side. He tried to do little jobs several times since, but always had to quit. When he attempted to work this pain took him across the back and in the side; previous to the accident he was always well and able to work.

The jury, by the special findings, did not find that plaintiff received any permanent injuries by reason of the accident, but did find that he was injured in his kidneys, liver, and head. The court instructed the jury as follows: "May I impress upon you the necessity of the greatest care in making answer to these questions, because, under the law, the answers to the separate questions must be of such a nature that they will fully support the general verdict which you shall find." This,

appellant insists, is error, and contends that if the court instructs the jury that the special findings must be consistent with the general verdict, then the value of the special findings amounts to absolutely nothing. The instruction complained of immediately precedes the following: "Under our law it is proper to present to juries questions to be answered, as I am doing in this case. The purpose of it is that the court may be fully informed as to the character of the decision which you have made. To aid you in forming your conclusions, in addition to the general instructions, which I will give you, concerning the law, may I suggest to you the following: You will be permitted to take with you to the jury room the extra copies of the questions which you have been using during the arguments of counsel. By reading those questions in connection with the instructions of the court concerning the law found herein, you will be able to determine which party is entitled to prevail, by making answer to these questions according as you shall find the facts to be. Your answers to these questions should be direct, concise, and couched in as few words as possible. To the end, therefore, that there may be no error, and that your special findings may fully support the general verdict which you render, you had better take one of these extra sets of questions which you have with you, and begin with question No. 1, make your answer thereto, and write it down upon the extra set, then, in their order, question No. 2, and so on throughout the entire series. When you have done this, and thus settled the questions of fact involved in harmony with the instructions concerning the law which I herewith give you, you will then be able to determine which side should prevail."

Section 7034, Rev. Codes 1905, provides that when the special findings of fact are inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly. We do not think the court committed any error in the instructions complained of, taken in connection with the balance of the instructions hereinbefore quoted. He merely instructed the jury that the special findings must be consistent with the general verdict, and this the law requires. Section 7034, supra; People v. Murray, 52 Mich. 289, 17 N. W. 843; Des Moines & D. Land & Tree Co. v. Polk County Homestead & T. Co. 82 Iowa, 663, 45 N. W. 773; Capital City Bank v. Wakefield, 83 Iowa, 46, 48 N. W. 1059.

In People v. Murray, 52 Mich. 289, 17 N. W. 843, a number of special questions were put to the jury. The judge said to the jury as to these: "Answer the questions put to you, keeping in mind that the answers to these questions should be consistent with the verdict which you find." This, it is urged, required the jury to conform their special findings to the general verdict. But we think the court merely reminded the jury that the general verdict should be in accord with the facts as they found them; an unnecessary caution, perhaps, but certainly not misleading.

In Des Moines & D. Land & Tree Co. v. Polk County Homestead & T. Co. 82 Iowa, 663, 45 N. W. 773, the court submitted two special findings. The jury were instructed to be careful that the answers to these interrogatories supported and were in harmony with the general verdict. The court says: "There was clearly no error in this action of the court. The caution given to the jury was timely, and tended to direct them to a careful consideration of the facts, and the necessity of consistency in their findings and verdict. Special findings are often the cause of much perplexity to juries, especially, as is sometimes the case, when they are numerous, and requested rather for the purpose of confusing than making clear that about which they are investigating."

In Capital City Bank v. Wakefield, 83 Iowa, 46, 48 N. W. 1059, the court submitted special interrogatories to the jury with these instructions: "You will decide upon them in the same manner as your general verdict, and answer the same. You will be careful, however, that these answers are in harmony with and support your general verdict." The court says: "The general tenor of previous instructions is that they should decide the case upon the evidence, and then they were specifically told that they must decide upon these special questions in the same manner as their general verdict. Thus far the jury could be in no doubt but that they were to decide the special questions from the evidence. The caution which follows could not lead to a different conclusion. True it would have been more exactly correct if it had cautioned them to be careful that their general verdict was in harmony with the answers, as the answers control; but we do not think, in view of what preceded, that the jury could have understood that they were to decide upon their answers to the special interrogatories from anything but the evidence.

Appellant in his 13th assignment assigns as error the following portion of the charge: "However, the court further instructs you that the plaintiff is bound to exercise that degree of care and caution for his own safety that a person of ordinary prudence would exercise under the same and similar conditions and circumstances, and if you believe that the plaintiff did not exercise such a degree of care and caution, and the accident was occasioned thereby, then the law is for the defendant, and you should so find, unless you further find that the defendant did or could have discovered the peril of the plaintiff in time to have avoided the injury to him, by the exercise of reasonable diligence;" and contends that in effect the court charged the jury: "That in order that the contributory negligence of the plaintiff shall prevent his recovery it must have occasioned (that is, caused) the accident. In other words, must have been the immediate and sole cause of the accident. We do not think that the learned trial court intended to have the jury so understand. What he undoubtedly intended to convey to the jury was that the negligence of the plaintiff must have proximately contributed to the injury. The true rule is that where the injured person's negligence is a mere condition before the accident, and the injury could be prevented by the exercise of reasonable care and prudence on the part of the company after his peril is discovered or should be discovered, his negligence is a remote cause and the company's negligence the proximate cause of the injury, and hence there may be a recovery therefor. 36 Cyc. Law & Proc. p. 1528, and cases cited. The respondent had a right to expect that a proper lookout would be kept by those in charge of the cars, and that ordinary care would be exercised by them to avoid injuring him. Greene v. Louisville R. Co. 119 Ky. 862, 84 S. W. 1154, 7 A. & E. Ann. Cas. 1126; Wenninger v. Lincoln Traction Co. 84 Neb. 385, 121 N. W. 237; Randle v. Birmingham R., Light & P. Co. 158 Ala. 532, 48 So. 114; Pilmer v. Boise Traction Co. 14 Idaho, 327, 15 L.R.A.(N.S.) 254, 125 Am. St. Rep. 161, 94 Pac. 432; Bensiek v. St. Louis Transit Co. 125 Mo. App. 121, 102 S. W. 587.

In his 14th assignment appellant assigns as error the following portion of the court's charge: "I charge you as a matter of law that it was the duty of the defendant in this case and its employees, after discovering, if it did so discover, the dangerous position of the plain-

tiff, if you find from the evidence that his position was dangerous, to use the greatest degree of care to avoid injuring the plaintiff." Appellant particularly objects to the use of the words "greatest degree of care." While a street railway company is required to exercise a very high degree of care in the operation of its road in public streets and highways, it is only required to exercise what under the circumstances is ordinary care and prudence; that is, it is required to exercise such care and vigilance in the management and operation of its cars to avoid injuring persons rightfully upon such streets or highways as a person of ordinary prudence and capacity may be expected to exercise under the same or similar circumstances, but it is not required to exercise the highest degree of care, or guard against unusual and extraordinary dangers. What constitutes ordinary care and prudence within the meaning of the above rule depends upon the known and reasonably to be expected hazards and dangers of the particular case, and varies under different conditions, such as the character of the cars, the agency of propulsion, the locality in which they are operated, whether in the country or in a city, whether over much traveled or unfrequented streets, and the possibility or probability attending their operation as what under some conditions will be ordinary and reasonable care may under other conditions amount even to gross negligence. The plaintiff was not a trespasser, and it was the duty of the defendant to keep a special lookout to avoid a collision with persons or animals lawfully upon the track. The care should be commensurate with the dangers to be reasonably apprehended. The general rule imposes upon street railway companies the duty to exercise exceptional care in operating their cars upon the public streets of a city. 36 Cyc. Law & Proc. p. 1473, and cases cited.

In Bunyan v. Citizens' R. Co. 127 Mo. 12, 29 S. W. 842, the court says: "It was the duty of the gripman and other employees to keep a vigilant watch for persons on or approaching the track, and, when discovered in danger, to use every possible effort, consistent with the safety of passengers, to avoid striking them. This duty does not depend upon the fact that the person had negligently placed himself in the position of danger. The previous negligence of such person would constitute no defense to an action for an injury resulting from neglect of these duties." Bishop v. Chicago, M. & St. P. R. Co. 4 N. D.

536, 62 N. W. 605; Johnson v. Great Northern R. Co. 7 N. D. 284, 75 N. W. 250; Missouri, K. & T. R. Co. v. Reynolds, — Tex. Civ. App. —, 115 S. W. 341.

In Maxfield v. Texas & P. R. Co. — Tex. Civ App. —, 117 S. W. 483, the court uses the following language: "It was the absolute duty of the engineer in charge of appellee's train, when he discovered appellant's peril, to make use of all the means at his command, consistent with the safety of the engine, to stop or check the train and avoid striking appellant."

The 18th question submitted to the jury is as follows: "Was the defendant guilty of negligence under the law as laid down by the court?" Answer, "Yes."

The 28th question submitted to the jury is as follows: "Did the motorman exercise ordinary care and reasonable diligence as those terms are defined by the court, in stopping his car and preventing the accident after he saw, or might in the exercise of reasonable diligence have seen, that plaintiff was in a position of danger?" To which question the jury answered, "No." The court having correctly defined "ordinary care," and the jury having found that the motorman of defendant did not exercise ordinary care and reasonable diligence in stopping his car and preventing the accident after he saw, or might in the exercise of reasonable diligence have seen, that plaintiff was in a position of danger, the appellant was not prejudiced by the instructions complained of. A judgment will not be reversed because of an erroneous instruction, when it affirmatively appears from answers to interrogatories, that such instruction did not influence the jury in reaching its verdict. 20 Enc. Pl. & Pr. p. 304; Harriman v. Queen Ins. Co. 49 Wis. 71, 5 N. W. 12; Worley v. Moore, 97 Ind. 15; Cleveland, C. C. & I. R. Co. v. Newell, 104 Ind. 265, 54 Am. Rep. 312, 3 N. E. 836; Woolery v. Louisville, N. A. & C. R. Co. 107 Ind. 381, 57 Am. Rep. 114, 8 N. E. 226; Porter v. Waltz, 108 Ind. 40, 8 N. E. 705; Fisk v. Chicago, M. & St. P. R. Co. 83 Iowa, 253, 48 N. W. 1081; Ft. Scott W. & W. R. Co. v. Karracker, 46 Kan. 511, 26 Pac. 1027; Atchison, T. & S. F. R. Co. v. McKee, 37 Kan. 592, 15 Pac. 484; New Omaha Thompson-Houston Electric Light Co. v. Dent, 68 Neb. 668, 94 N. W. 819, 103 N. W. 1091.

In Woolery v. Louisville, N. A. & C. R. Co. 107 Ind. 381, 57

Am. Rep. 114, 8 N. E. 226, the court says: "It is now urged that these instructions were erroneous, in that they required the plaintiff to prove more than was necessary in each case, in order to establish the defendant's negligence. However this may be, since it affirmatively appears from the answers to special interrogatories, that the jury found the defendant guilty of negligence, and that their verdict in its favor was the result of finding the decedent guilty of contributory negligence, it is certain that the instructions in reference to this feature of the case were not prejudicial to the plaintiff. A judgment will not be reversed upon an erroneous instruction, when it affirmatively appears from answers to interrogatories, that the instruction complained of was not influential in inducing the verdict."

In the case at bar, the jury having found that the motorman of defendant did not exercise ordinary care and reasonable diligence in stopping his car and preventing the accident after he saw, or might in the exercise of reasonable diligence have seen, that plaintiff was in a position of danger, it is plain that the verdict was not arrived at by reason of the court having used the word "occasioned" in the instruction complained of in appellant's 13th assignment of error, nor by having instructed the jury that it was the duty of the defendant in this case and its employee after discovering, if it did discover, the dangerous position of the plaintiff, if dangerous, to use the greatest degree of care to avoid injuring the plaintiff, as the jury found that the defendant did not exercise ordinary care. What has heretofore been said in regard to the 14th assignment of error disposes of the 16th and 17th assignments of error.

Appellant contends that the cases in which it has been held that special findings cured erroneous instructions are all those in which the instruction is based upon the existence or absence of a fact, and the special finding has found that such fact exists or does not exist, hence showing clearly and conclusively that the erroneous instruction was not prejudicial. We are unable to concur in the contention of counsel that the rule that erroneous instructions may be cured by the answers to special interrogatories has no application in the case at bar.

The court refused to give the following instruction: "I further charge you that, though the motorman saw the plaintiff driving along, and on the track, and (if he was driving thereon) he had a right to

assume that the plaintiff would exercise ordinary care to observe the approach of the car, and would get out of danger before the car would reach him, and that the motorman is not required to check his car (if said car is running at an ordinary rate of speed) until he has reasonable cause to believe that there is actual danger of a collision." The refusal to give this instruction is now assigned as error. This requested instruction does not state the law correctly, as applied to the facts of this case, as the jury found that the plaintiff drove 60 or 70 feet along the railroad track, and that the car was not stopped until it reached a point between 20 and 30 feet north of the accident, when the evidence shows that it could have been stopped in from 20 to 25 feet if the motorman had it under control. The motorman had no right to assume that plaintiff would get off the track before the car reached him. It was his duty to use ordinary care to avoid the accident and have his car under control.

There is no merit in appellant's contention that certain of the special findings are inconsistent with each other and are inconsistent with the general verdict. The special findings made by the jury are sufficient to sustain the general verdict.

If the questions not answered, or where the answers are not proved, were all answered favorably to appellant, the special verdict would not be inconsistent with the general verdict, taking into consideration the answers to the balance of the question submitted to the jury; and we are unable to see how appellant's rights are prejudicially affected by the answers or lack of answers to these questions.

Finding no prejudicial error in the record, the judgment and order appealed from are affirmed.

All concur, except MORGAN, Ch. J., not participating.

ROBERT AULD and Bertha Johanna McGaffney v. F. W. CATHRO, Laura M. Dana and Gertrude G. Dana.

(32 L.R.A.(N.S.) 71, 128 N. W. 1025.)

Wills — Undue Influence — Jury — Submission of Issue.

1. There is no evidence to establish the fact that the will in controversy was executed as a result of undue influence practised upon the testatrix, hence the ruling of the trial court was correct in refusing to submit such issue to the jury.

Witnesses — Evidence — Privileged Communications — Testimony of Physician.

2. The privilege of secrecy to all information acquired by a physician from a patient in attending the patient professionally, in a proceeding contesting the probate of an alleged will of decedent, the testimony and opinion of decedent's attending physician as to her mental capacity, based entirely on information derived from her statements or the physician's observations while treating her professionally and for the purpose of such treatment, were properly excluded.

Trial — Jury — Reading of Testimony.

3. The failure of the trial court to have the testimony of a witness read at the request of the jury, *held*, under the circumstances of the case at bar, not error.

Wills — Instructions — Disposing Capacity.

4. The charge of the court relating to the disposition a testator or testatrix can make of his or her property under the laws of this state correctly states the law.

Evidence — Opinion of Nonexpert — Sanity.

5. The rule is that a nonexpert will be allowed to express an opinion upon an issue of sanity only after he has testified to acts, conversations, or conduct which to some extent indicate sanity.

Evidence — Opinion of Nonexpert — Insanity — Discretion of Court.

6. In this class of cases the question of the competency of the witness to testify is one for the court, and is also a question lying within the sphere of judicial discretion; and the familiar rule that such discretion will not be reversed except in cases of abuse applies in the case of nonexperts as well as experts who are called to express opinions upon an issue of insanity.

Opinion filed September 24, 1910. Rehearing denied December 14, 1910.

Appeal from District Court, Bottineau county; *Honorable Chas. F. Templeton,* J.

Action by Robert Auld and Bertha Johanna McGaffney against F. W. Cathro, Laura M. Dana, and Gertrude G. Dana. From an order denying a motion for a new trial, contestants appeal.

Affirmed.

Noble, Blood, & Adamson, and *Ball, Watson, Young, & Lawrence,* of counsel, for appellants.

Undue influence is to be measured with regard to the mental and physical condition of the person influenced. Woerner, Am. Law of Administration, 48; Dunaway v. Smoot, 23 Ky. L. Rep. 2289, 67 S. W. 62; Juzan v. Toulmin, 9 Ala. 663, 44 Am. Dec. 448; Lingle v. Lingle, 121 Iowa, 133, 96 N. W. 708; Woodbury v. Woodbury, 141 Mass. 329, 55 Am. Rep. 479, 5 N. E. 275; Meyer v. Fishburn, 65 Neb. 626, 91 N. W. 534; 29 Am. & Eng. Enc. Law, p. 111 and cases there cited.

Unjust and unnatural disposition of property may be considered. Meier v. Butcher, 197 Mo. 68, 6 L.R.A.(N.S.) 202, 94 S. W. 883, 7 A. & E. Ann. Cas. 887; Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 712, 5 S. W. 7; Elliott v. Welby, 13 Mo. App. 19; Tyner v. Varian, 97 Minn. 181, 106 N. W. 898; Rivard v. Rivard, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; England v. Fawbush, 204 Ill. 384, 68 N. E. 526; Livering v. Russell, 30 Ky. L. Rep. 1185, 100 S. W. 840; Hoffman v. Hoffman, 192 Mass. 416, 78 N. E. 492; Re Wiltsey, 135 Iowa, 430, 109 N. W. 776; Fry v. Jones, 95 Ky. 148, 44 Am. St. Rep. 206, 24 S. W. 5; Farnsworth's Will, 62 Wis. 474, 22 N. W. 523; Trezevant v. Rains, 85 Tex. 329, 23 S. W. 890; Edgerly v. Edgerly, 73 N. H. 407, 62 Atl. 716.

If there is evidence for and against the validity of the will, case is for the jury. Re Arnold, 147 Cal. 583, 82 Pac. 252; Fry v. Jones, 95 Ky. 149, 44 Am. St. Rep. 206, 24 S. W. 6; Lischy v. Schrader, 104 Ky. 657, 47 S. W. 611; Disch v. Timm, 101 Wis. 179, 77 N. W. 196; Davis v. Dean, 66 Wis. 100, 26 N. W. 737; Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75; Baker v. Baker, 102 Wis. 226, 78 N. W. 453; Re Derse, 103 Wis. 108, 79 N. W. 46; Re Wheeler, 5 Misc. 279, 25 N. Y. Supp. 314.

Privileged communication to a physician can be waived by the patient and those representing him. Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W.

374, 10 A. & E. Ann. Cas. 622; Winters v. Winters, 102 Iowa, 53, 63 Am. St. Rep. 428, 71 N. W. 184; Blackburn v. Crawford, 3 Wall. 175, 18 L. ed. 186; Thompson v. Ish, 99 Mo. 160, 17 Am. St. Rep. 555, 12 S. W. 510; Fraser v. Jennison, 42 Mich. 209, 3 N. W. 882; Scripps v. Foster, 41 Mich. 742, 3 N. W. 216.

Weeks & Murphy and *Geo. A. Bangs,* for respondent.

Mere suspicion, conjecture, or possibility that undue influence induced a will, or power, motive, and opportunity to exercise it, are insufficient. Ginter v. Ginter, 79 Kan. 721, 22 L.R.A.(N.S.) 1024, 101 Pac. 634; Re Shell, 28 Colo. 167, 53 L.R.A. 387, 89 Am. St. Rep. 181, 63 Pac. 413; Winn v. Grier, 217 Mo. 420, 117 S. W. 48; Lamb v. Lippincott, 115 Mich. 611, 73 N. W. 887; Re Nelson, 132 Cal. 182, 64 Pac. 294; Sheehan v. Kearney, 82 Miss. 688, 35 L.R.A. 102, 21 So. 41.

Sufficiency of the evidence to show mental capacity is one for the court. 1 Wharton & S. Med. Jur. § 96; Kempsey v. McGinniss, 21 Mich. 123; Leffingwell v. Bettinghouse, 151 Mich. 513, 115 N. W. 731.

The undue influence must destroy free agency. Myers v. Hauger, 98 Mo. 433, 11 S. W. 974; Doherty v. Gilmore, 136 Mo. 414, 37 S. W. 1127.

A privileged communication is personal with the patient, applies to testamentary matters, and cannot be waived by the heirs and personal representatives. Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 296, 36 Am. Rep. 617; Westover v. Ætna L. Ins. Co. 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104; Renihan v. Dennin, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874; Re Myer, 184 N. Y. 54, 76 N. E. 920, 6 A. & E. Ann. Cas. 26; Re Coleman, 111 N. Y. 220, 19 N. E. 71; Re Flint, 100 Cal. 391, 34 Pac. 863; Harrison v. Sutter Street R. Co. 116 Cal. 156, 47 Pac. 1019; Re Redfield, 116 Cal. 637, 48 Pac. 794; Re Nelson, 132 Cal. 182, 64 Pac. 294.

Witness may testify to sanity of a person, from general observations, without testifying to facts. 2 Jones, Ev. § 366; Lamb v. Lippincott, 115 Mich. 611, 73 N. W. 887; Re Hull, 117 Iowa, 738, 89 N. W. 979; Stutsman v. Sharpless, 125 Iowa, 335, 101 N. W. 105; Lucas v. McDonald, 126 Iowa, 678, 102 N. W. 532; State v. Hay-

den, 131 Iowa, 1, 107 N. W. 929; Heaston v. Krieg, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805; Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111; Glover v. State, 129 Ga. 717, 59 S. E. 816.

Accuracy of observation and weight of opinion is for the jury. Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489; Howard v. Carter, 71 Kan. 85, 80 Pac. 61; Lassas v. McCarty, 47 Or. 474, 84 Pac. 76.

CARMODY, J. This litigation arose in the county court of Bottineau county, and involves the validity of the last will of one Mary Auld, deceased. Plaintiffs and appellants, Robert Auld and Bertha Johanna McGaffney, were respectively the husband and sister of said deceased. Defendant and respondent Cathro is the executor named in said last will. Defendants Laura M. and Gertrude G. Dana are two of the legatees named in said will. Respondent Cathro filed in such county court a petition praying for the probate of such will. Appellants filed written objections to admitting said will to probate, in which they allege, in substance, that the writing purporting to be the said will was pretended to be made and executed on the 18th day of March, 1905; that on the said 18th day of March, 1905, and long prior thereto, said Mary Auld, by reason of unsoundness of mind, insanity, mental weakness, and imbecility, has been wholly incapable of making and executing her last will and testament, or any codicil to any will or testament, or any writing in the nature of a last will and testament; that said paper or writing purporting to be the last will and testament of the said Mary Auld were obtained by fraud and undue influence exerted over and upon her, by said Cathro, H. C. Dana, and others, as follows: That said Cathro, Dana, and others, by reason of the unsoundness of mind, mental weakness, and imbecility of the said Mary Auld, exercised over and upon the said Mary Auld undue influence in varied and divers ways, and represented to the said Mary Auld that it would be necessary for her to place her property in the hands of a third person, or some person other than any of her relatives or heirs, to prevent the said Robert Auld from obtaining said property for himself, and the said writing is not the last will and testament of the said Mary Auld, deceased; that the said Robert Auld and the said Mary Auld were married in the county of Cavalier and state of North Dakota, in August, 1892, and the said Mary Auld,

from the time of said marriage, always represented to Robert Auld, and he always supposed that they were lawfully married; that she was the wife of the said Robert Auld at the time of her death; that the said Mary Auld represented to him at the time of her marriage that her name was Mary Hitterdahl, but contestants now believe that her name was Mary Olson, and that at the time of her marriage with said Robert Auld she had a husband living, named N. K. Olson, from from whom she was not at the time of said marriage divorced; and that all of the real property named by the said Mary Auld in said purported last will and testament is property given to her by Robert Auld in consideration of love and affection, and for the reason and under the belief that the said Mary Auld was his wife.

In addition to these objections, Robert Auld filed another objection as follows: "That the said purported last will and testament of the said Mary Auld, deceased, was not signed, sealed, and declared by her to be her last will and testament and witnessed; that it was not executed by the said Mary Auld, deceased, as provided by the statutes of North Dakota."

Respondents, replying to said written objections, deny each and every allegation contained therein, except as admitted or qualified.

Deny that said Mary Auld, on the 18th day of March or at any time, was unsound of mind, insane, mentally weak or an imbecile, and allege that at all times prior to her death she was of sound mind, and possessed of sufficient mental capacity to make and execute her last will and testament.

Deny that the will was obtained by fraud or undue influence, and allege that said will was duly and legally signed, executed, and witnessed.

Deny that any of the property named in said will was given to Mary Auld by said Robert Auld.

The county court made findings of fact and conclusions of law sustaining the contentions of appellants, and found that the said Mary Auld at the time of her death had a sister, Bertha Johnanna McGaffney, and a husband, Robert Auld, who are the plaintiffs in this action.

An appeal from the order and decree denying the petition of F. W. Cathro, asking for admission to probate of said instrument, was taken to the district court of Bottineau county, where the will was al-

lowed by the jury. From an order denying their motion for a new trial, contestants appeal to this court.

In addition to the facts herein stated, the following are the facts necessary to a decision of this case: At the time of the marriage of testatrix with Robert Auld, she had a homestead of 160 acres of land in Rolette county, adjoining Bottineau county; also three horses, two cows, and a calf, and household goods. She afterwards traded her farm for city property in Bottineau. She and her husband, Robert Auld, did not get on very well together, and lived separately a considerable portion of their married life. At the time of her death, an action for divorce brought against testatrix by Robert Auld, in which issue had been joined, was pending. Appellant Robert Auld married within ten days after her death. Testatrix was quite eccentric, and lived largely alone. H. C. Dana, father of the two girls, had done testatrix some favors, which she appreciated. She had frequently advised with him during her life, and several times stated to him that she was going to will him her property, as she did not want her husband, Robert Auld, to have any of it, said her people had not treated her right, and she did not want them to have any of her property. Dana each time protested, saying he did not want anything to do with it. She finally told him that she would will the property to his two little girls. This was in January, 1905. Dana then said to her, "I don't suppose there is any use in making your will, you are not going to die." He never talked with her again about the will until after the first will, hereinafter mentioned, was made. On the 4th day of February, 1905, testatrix made a will in which she devised all her property to respondents Laura M. and Gertrude G. Dana. After making the will of date February 4th, 1905, and about the first part of March, her sister, appellant, came to live with her. Testatrix then informed Dana that appellant Bertha wanted testatrix to leave her, Bertha, something. Testatrix said it would be all right for her to leave Bertha something, and Dana said, "sure." On the 18th of March, 1905, she made another will in which she devised a house and lot in the city of Bottineau to appellant Bertha Johanna McGaffney, and the balance of her property equally to respondents Laura M. and Gertrude G. Dana. The will also contained the following provision: "I have knowingly and intentionally omitted from this, my

last will and testament, Robert Auld, and any and all relatives of mine not mentioned herein." The property disposed of by the will consisted of two houses, and about six lots in the city of Bottineau, and about $1,000 in money. In all of the value of about $5,000. Both the Dana girls were born in one of these houses. Testatrix said she thought it would be nice for them to have the house they were born in.

She died on the 29th day of March, 1905, and left surviving her, in addition to her husband, Robert Auld, and her sister, Bertha Johanna McGaffney, her mother and a sister, Mrs. Bergen, and two brothers living at Hitterdahl, Minnesota. She had been separated from them for a number of years. Appellant Bertha Johanna McGaffney lived with testatrix, and took care of her for about fifteen days before her death. Testatrix was suffering from tuberculosis, from which she finally died.

Appellants assign twenty-three errors, which are divided in the brief into five subdivisions, as follows:

1. The refusal of the court to submit the question of undue influence to the jury. The court instructed the jury that there was not sufficient evidence to establish that the alleged will in controversy was executed as the result of undue influence practised upon the said Mary Auld.

2. Rejecting the offer of proof of the attending physician, Dr. J. A. Johnson.

3. The action of the trial judge, relative to the request of the jury to have the testimony of Mrs. Barnes read.

4. Exception to that portion of the charge of the court relating to the disposition a testator or testatrix can make of his or her property, under the laws of this state.

5. The admission of testimony of nonexperts as to deceased's competency.

No claim is made in this court that the evidence is insufficient to justify the verdict. We will consider these questions in the order named.

A careful examination of the testimony in regard to undue influence upon the deceased convinces us that the trial court was right in refusing to submit that question to the jury, as there is not a scintilla

of evidence that Cathro, Dana, or any other person exercised any undue influence over testatrix regarding the said will.

Section 7304, Rev. Codes 1905, as far as material, reads as follows: "3. A physician or surgeon cannot, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

Robert Auld, having been appointed special administrator of the estate of the said Mary Auld, deceased, made the following offer: "The counsel for the contestants in open court and of record, acting in behalf of the personal representative of Mary Auld, deceased, and of the heirs at law of said Mary Auld, and with their consent and approval, do hereby waive any privilege that may have existed arising out of the relations of physician and patient between the deceased, Mary Auld, and Dr. Johnson, and offer to show and prove by the said Dr. Johnson the following facts, and by separate offers hereunder:

1. "That on the night of March 18th, 1905, upon the occasion of his visit to her residence, and in the presence of J. J. Weeks and others, and at the time the alleged will was made, did take the temperature of the said Mary Auld; that her temperature was 103⅘."

2. "Counsel further offers to show by the testimony of Dr. Johnson that he made examination of Mary Auld on the occasion above stated and that she was then seriously affected with toxemia."

3. "Counsel further offers to show by the testimony of this witness that the effects of toxemia upon the human system to the extent the said Mary Auld was then afflicted is to produce mental and physical stupor and torpor, and render a person so affected and afflicted incapable of coherent thinking and of imperfect memory and impaired reasoning power; and that upon the occasion in question the said Mary Auld was thus afflicted and affected."

4. "Counsel further offers to show by this witness that upon the night of the 18th of March, 1905, when the alleged will is said to have been executed, the said Mary Auld was not in possession or control of such mental faculties as she ordinarily possessed, and was wholly unable to reason or think consecutively, or exercise the power of memory."

5. "Counsel further offers to show by the witness Dr. Johnson that

he visited Mary Auld during her lifetime, observed her upon the following occasions,—his calls and visit upon her and her calls on him varying in length from fifteen minutes to twenty minutes,—October 31, 1904; February 16, 1905; February 22, 1905; March 3d, 1905; 9th, 11th, 15th, 16th, 18th of March, three visits on the 20th of March, and one visit each on the 21st and 24th of March, 1905.

"That from the observations made upon the occasions above stated the said Mary Auld, in his opinion, was not of sound mind."

To which offer the following objection was made: Respondents and proponents object to said testimony upon the grounds and for the reason that it appears that all proofs therein outlined consists of information derived by the witness from an examination made by him while acting as the physician of the deceased testatrix, and there has been no consent shown with respect to his testifying thereto, and by reason thereof the communication is privileged, and must be excluded under the provisions of § 7304 of the 1905 Code, which objection was sustained.

Appellants contend that the rejection of the offer of proof of the attending physician was error. While this question has not heretofore been passed upon by this court, and while some courts, notably Minnesota, Iowa, and Missouri, have held, under certain circumstances, that such testimony was admissible under statutes somewhat similar to ours, we, however, think the better rule sustains the ruling of the learned trial court.

New York, Wisconsin, California, Utah, and other states hold such evidence inadmissible, holding that the privilege is personal with the patient, that it applies in testamentary matters, and cannot be waived by the heirs and personal representatives. Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 296, 36 Am. Rep. 617; Westover v. Ætna L. Ins. Co. 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104; Renihan v. Dennin, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874; Re Coleman, 111 N. Y. 220, 19 N. E. 71; Re Myer, 184 N. Y. 54, 76 N. E. 920, 6 A. & E. Ann. Cas. 26; Boyle v. Northwestern Mut. Relief Asso. 95 Wis. 312, 70 N. W. 351; Re Hunt, 122 Wis. 460, 100 N. W. 874; Re Van Alstine, 26 Utah, 193, 72 Pac. 943; Connecticut Mut. L. Ins. Co. v. Union

Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; Supreme Lodge K. P. v. Meyer, 198 U. S. 508, 49 L. ed. 1146, 25 Sup. Ct. Rep. 754; Re Flint, 100 Cal. 391, 34 Pac. 863; Harrison v. Sutter Street R. Co. 116 Cal. 156, 47 Pac. 1019; Re Redfield, 116 Cal. 637, 48 Pac. 794; Re Nelson, 132 Cal. 182, 64 Pac. 294; Re Bruendl, 102 Wis. 45, 78 N. W. 169.

Section 834 of the Code of New York is as follows: "A person duly authorized to practise physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

Section 836 provides that that section applies to every examination of a person as a witness, unless the provisions thereof are expressly waived by the patient.

These sections have been construed by the New York court several times.

In Westover v. Ætna L. Ins. Co. 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104, the court says: "The purpose of the laws would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician, or a client to his attorney, or a penitent to his priest. Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by anyone, unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave, the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator."

In Renihan v. Dennin, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320, the court says: "But it is claimed that the statute should be held not to apply to testamentary cases. There is just as much reason for applying it to such cases as to any other, and the broad and sweeping language of the two sections cannot be so limited as to exclude

such cases from their operation. There is no more reason for allowing the secret ailments of a patient to be brought to light in a contest over his will, than there is for exposing them in any other case where they become the legitimate subject of inquiry. An exception so important, if proper, should be ingrafted upon the statute by the legislature and not by the courts."

In Re Myer, 184 N. Y. 54, 76 N. E. 920, 6 A. & E. Ann. Cas. 26, the court says: "The petitioners introduced testimony tending to show that, at the time of the execution of the will, the testatrix was afflicted with paresis, which it was claimed deprived her of testamentary capacity. In order to supplement and support this evidence, the petitioners called two physicians,—Drs. Carlton and Townsend. The former had been the medical adviser of the testatrix's brother, and the latter of her mother. These witnesses testified that both the mother and brother of testatrix had been afflicted with what they termed 'general paresis,' that their knowledge of this condition was obtained while attending such persons in their professional capacity, and that such knowledge was necessary in order to treat them. The testimony was objected to as incompetent and privileged under § 834 of the Code of Civil Procedure, and the ruling admitting it was properly excepted to because it was inadmissible, upon two grounds:

"1. It is clearly within the provisions of § 834, which prohibits a physician from disclosing 'any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.' . . .

"By the express terms of § 836 the provisions of § 834 are made to apply to the 'examination of any person as a witness.' The fact that the testimony of these physicians related to patients who were not parties to the proceeding or interested therein, and who were, in fact, dead at that time, does not annul the prohibition of the statute. In Davis v. Supreme Lodge, K. H. 165 N. Y. 159, 58 N. E. 891, the defense sought to prove the cause of death of two aunts of the deceased, by the testimony of their attending physicians. The evidence was excluded, and this court upheld the ruling. Judge O'Brien, in writing for the court, said (page 163): 'This court has held that the statements of the attending physician for the purpose of establishing the cause of death either of the insured himself or of his an-

cestors or their descendants, although not parties to nor beneficiaries under the contract, were not admissible. They are excluded, not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist between the physician and patient, but on grounds of public policy as well. The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it.' "

In Re Flint, 100 Cal. 391, 34 Pac. 863, the supreme court of California says: "The question of waiver of the privilege by the personal representative or heir of the deceased is a new one in this state, but the statute of New York bearing upon this matter is similar to the provision of our Code of Civil Procedure, and the decisions of the courts of that state furnish us ample light in the form of precedent. The Code of Civil Procedure of New York (§ 836) provides that the privilege is present unless 'expressly waived by the patient.' "

The court further says: "Who has the power to waive it? Can the heir waive it as against the objection of the devisee? That is the thing done in this case, and we think the action of the court cannot be sustained. It cannot be said that the heir is representing the deceased, for the heir is attempting to overthrow the will, and offers this evidence of the attending physician, over which the privilege rests for the very purpose of attacking the mental soundness of the patient. Such is not the representative of the deceased referred to in the various decisions of the courts. This provision of law rests upon a sound public policy."

In Boyle v. Northwestern Mut. Relief Asso. 95 Wis. 312, 70 N. W. 351, the court says: "The question as to the admissibility of the evidence of the physicians, against the objection of the beneficiaries of the certificate, claiming under Mrs. Boyle, the deceased, is not one free from difficulty. There can be no question but that the information they severally acquired, and which enabled them to give their testimony, was acquired in attending Mrs. Boyle as a patient, and that it was necessary to enable them to advise her and to prescribe for her as physicians. Was this information privileged, as to her, under Rev. Stat. § 4075, which provides that 'no person duly author-

ized to practise physic or surgery shall be compelled to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.' By the common law, information thus obtained by a physician or surgeon was not privileged, but he was at liberty to disclose it, either in or out of court, whatever effect such disclosure would have upon the rights, reputation, or feelings of his patient. The contention in favor of the admissibility of the evidence is that the use of the word 'compelled' in the section shows that the information thus acquired is not privileged from disclosure as to the patient, whom such a disclosure may most seriously affect, but is privileged only as to the physician or surgeon, and that he may, at his option, disclose it in court, when all the injurious details may be publicly elicited under oath, or he may refuse to do so, in which event only the information is to be privileged, so that its disclosure will not be 'compelled.' . . . The statute relates only to his giving testimony in court in relation to information thus acquired, and it should receive, we think, a liberal interpretation, in order to carry out its evident beneficial purposes. It provides that the physician shall not be compelled to disclose any information, etc., acquired in his confidential relations with his patient. For whose benefit was this provision intended? Clearly, for the benefit of the patient, whose interests, reputation, and sensibilities may be injured and grossly outraged by its disclosure. The fact that the physician acquired the information in order to prescribe for or treat the patient cannot affect the physician in the least degree unfavorably, nor that he should be compelled to disclose as a witness the information or knowledge thus acquired. The object of the section, therefore, was to protect the patient, to whom protection was so important, and not the physician, to whom it was quite unimportant, from the consequences of such disclosure, and shows that the provision that the physician shall not be compelled to make the disclosure as a witness renders the statement of the patient privileged as to him, and that this was within the intention of the makers of the statute clearly implied from its language, and that it should not be disclosed by the physician without his consent."

In Re Hunt, 122 Wis. 460, 100 N. W. 874, the court says: "2. Exclusion of attending physician's testimony and opinion as to mental competency, based entirely upon information derived from decedent's statements or physician's observation while treating her professionally and for the purpose of such treatment. Our decisions upon the statute (§ 4075, [Rev.] Stat. [Wis.] 1898) giving privilege of secrecy to all information acquired by physician from patient in attending latter professionally, necessary to enable prescription for such patient, have eliminated from consideration very many of the refinements and distinctions with which some other courts have limited, if not emasculated, similar statutes. Thus the privilege under our statute is not confined to communications made by the patient, but extends to all information, however derived by the physician in the course of professional attendance and for the purpose specified. McGowan v. Supreme Court, I. O. F. 104 Wis. 173, 186, 80 N. W. 603; Green v. Nebagamain, 113 Wis. 508, 512, 89 N. W. 520; Re Downing, 118 Wis. 581, 590, 95 N. W. 876. Neither are the words 'necessary' or 'prescribe' to receive any technical or unduly restricted meaning. Re Bruendl, 102 Wis. 45, 47, 78 N. W. 169. Further, and more important to the present controversy, we have held that the privilege is created for the protection of the patient, and is personal to him; and have in the plainest terms repudiated the doctrine supported by some authority elsewhere, that others can in any degree waive the privilege. In Boyle v. Northwestern Mut. Relief Asso. 95 Wis. 312, 70 N. W. 351, this construction was announced, although its application was merely to deny right of waiver to physician. In Re Bruendl, supra, right of waiver was contended for in behalf of the heirs of the decedent, who offered the physician's testimony, and the whole subject was argued and considered fully, whereupon it was said: 'The legislature has decided wisely that public policy requires such measure of restriction upon the freedom of the physician to testify or of others to demand testimony.' While the decision in this case turned on other considerations, the above remark was made with deliberation, and in response to full discussion. We adhere to that view, and hold that no one, save the patient himself, can effectively consent to withdrawal of this mantle of secrecy which the statute has

cast about the information which the physician needfully acquired in and for professional treatment.

"Appellant contends further, however, that the statute has no application to a contest over the probate of a will, and cites quite an array of cases where courts have, on one theory or another, reached substantially that conclusion. While most of these cases relate to the testimony of attorneys as to the very transaction of preparing the will, a few of them either deal directly with physicians, or admit evidence of attorneys on grounds seemingly applicable to physicians. The great majority of these proceed on the ground that the right to waive the privilege, personal to the testator while living, passes on his death to those who succeed to his estate. This doctrine grew up in dealing with communications to attorneys with reference to property, where, as said, the privilege was accorded as a protection merely to property interests; so that there was a measure of logic in the conclusion that those who succeed to the property rights succeeded also to the right of secrecy, and might waive it, at least so far as it affected their own interests. This view has never yet been approved even as to attorneys in Wisconsin, where such evidence, whenever admitted, has been justified on other grounds, as we shall see. As to physicians, however, the attitude of this court, as already pointed out, is adverse to any power to waive the secrecy of professional information, and is also adverse to the grounds asserted by other courts, notably Iowa (Winters v. Winters, 102 Iowa, 53, 63 Am. St. Rep. 438, 71 N. W. 184), *viz.*, that the 'statutes are for the protection of the patient while living, and of his estate when dead.' Whether this last idea may be correct as to communications to attorneys with reference to property transactions, it certainly is not true with reference to the sheltering of information acquired by attending physicians. The purpose of that statute is personal. It is to protect the patient himself from disgrace or chagrin. Its effect on property rights or estate is only incidental. Boyle v. Northwestern Mut. Relief Asso. 95 Wis. 322, 70 N. W. 351; Green v. Nebagamain, 113 Wis. 508, 89 N. W. 520; Re Bruendl, 102 Wis. 45, 47, 78 N. W. 169. Such reasons do not cease upon the death of the patient. His memory and good name are still subject to injury by publication of information necessary to proper treatment by his physician, and apprehension of

such enforced publication after his death may well result in reluctance or unwillingness to make those disclosures necessary for preservation of life or health which it is the policy of the statute to encourage by assurance of their secrecy."

In Fraser v. Jennison,—a will contest,—42 Mich. 206, 3 N. W. 882, the trial court permitted the physician who attended the testator to testify as to his condition. The supreme court sustained the ruling, holding that the statute is one of privilege for the protection of the patient, and he may waive it if he sees fit, and what he may do in his lifetime, those who represent him after his death may also do for the protection of the interests they claim under him.

In later cases, the same court held that no one but the patient himself could waive the privilege. Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401; Derham v. Derham, 125 Mich. 109, 83 N. W. 1005; Storrs v. Scougale, 48 Mich. 387, 12 N. W. 502.

In Storrs v. Scougale, supra, the court, in speaking of the evidence of a physician, says: "This evidence ought not to be passed over without remark. It is surprising evidence for many reasons. One of these is that the physician had no business to give it. The statute —Comp. Laws, § 5943—provides that 'no person duly authorized to practise physic and surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.' Every reputable physician must know of the existence of this statute; and he must know, from its very terms as well as from the obvious reasons underlying it, that it is not at his option to disclose professional secrets. A rule is prescribed which he is not to be 'allowed' to violate; a privilege is guarded which does not belong to him but to his patient, and which continues indefinitely, and can be waived by no one but the patient himself."

In Indiana it is held that only one seeking to uphold the will may waive the privilege, and not one seeking to break it. Towles v. McCurdy, 163 Ind. 12, 71 N. E. 129; Morris v. Morris, 119 Ind. 341, 21 N. E. 918; Heuston v. Simpson, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; Brackney v. Fogle, 156 Ind. 535, 60 N. E. 303.

In Towles v. McCurdy, supra, the court says: "When the contro-

versy is among heirs and devisees, the set of such heirs or devisees who strive to overthrow the will cannot for their own benefit, and against the wishes of the other set, who desire to sustain it, waive the objection to evidence, otherwise incompetent, to the detriment of the interests of those who seek to establish the will."

The jury retired about 3 o'clock P. M. on the 10th day of August. The same afternoon the Honorable C. F. Templeton, the judge before whom the said action was being tried, left the city of Bottineau, at which place the jury was, and went to Lake Metigoshe, about 12 or 13 miles distant from the city of Bottineau, and did not return to Bottineau until about 10 A. M. of the morning of August 12th.

That about 10:30 P. M. on said 10th day of August, the jury requested, through the bailiff, that the testimony of Mrs. E. E. Barnes, a witness in said action for contestants, be read to the jury, and the bailiff reported back to the jury that he had not been able to reach the judge.

At about 8 o'clock in the morning of August 11th, the jury had not arrived at a verdict, and another request was sent by the jury through the bailiff, for the said testimony, and the said trial judge informed the jury that the testimony requested would be furnished at the opening of court at 10 o'clock A. M. on the morning of August 12th, August 11th being Sunday.

That the jury arrived at a verdict at about 5 o'clock P. M. on the 11th day of August, without having read to them the portion of Mrs. Barnes's testimony they desired to hear before arriving at a verdict.

The action of the trial judge relative to the requests of the jury to have the testimony of Mrs. Barnes read, appellants assign as error, and strenuously contend that such action of the trial judge tended to force the jury to arrive at a verdict. Appellants rely principally upon three cases: State v. Place, 20 S. D. 489, 107 N. W. 829, 11 A. & E. Ann. Cas. 1129; Henderson v. Reynolds, 84 Ga. 159, 7 L.R.A. 327, 10 S. E. 734; Pierce v. Pierce, 38 Mich. 412. None of these cases are in point.

In State v. Place, supra, after the case was submitted, the jury retired to consider the case at 9 o'clock P. M. on June 21, 1905, and after being out all night and all the next forenoon, without having agreed upon a verdict, they were brought into court and asked by the

court if they had agreed upon a verdict, to which they replied that they had not. The court thereupon asked, "What seems to be the matter?" To which the foreman replied, "We are shy on evidence." The court thereupon replied that he could not help them out any on the evidence, if it were matters of law he could give them further instructions. "But," said he, "you will have to agree in this case, for I will keep you together until you do agree." Defendant's counsel thereupon excepted to the court's statement to the jury that he would keep the jury together until they did agree, and to this the court replied in substance: "You may have an exception, but I will keep this jury together until they do agree upon a verdict." All of the foregoing took place in the presence and hearing of the jury. The court thereupon directed the jury to retire with the officer, at the time of taking the noon recess, which they did, and when the court reconvened after recess, at 1:30 P. M. on June 22d, the jury was brought into court, and asked by the court if they had agreed upon a verdict, to which they replied that they had, whereupon the court asked them what their verdict was, and the foreman replied: "We, the jury, find the defendant guilty as charged in the information." The jury was then polled and each answered that that was his verdict. This verdict was set aside, the court saying: "In this enlightened age no one will contend that a verdict should stand which does not, at least presumptively, express the free and deliberate judgment of those who rendered it."

In the case of Henderson v. Reynolds, supra, the jury retired at about half past 8 on Saturday night. Some time before 12 o'clock the judge sent the sheriff to inquire of the jury if they were likely to agree. The sheriff reported that the jury told him that they were not. About half an hour after, the court ordered the jury brought in, and told them it was nearly 12 o'clock, and that, the next day being Sunday, they would have to cease their deliberations until after midnight of the next day; that during that time they were not to discuss the verdict, or anything connected with the case; that they would have to keep together during the entire day and night; that the sheriff would provide a place for them to sleep together; and that they would be furnished their meals, but that it would be at their

own expense. The jury were then sent back to their room, and in a few minutes returned with a verdict.

In setting the verdict aside, the court said: " 'The old idea of starving juries, to coerce a verdict, has passed away, and the judge is empowered to furnish refreshments at the expense of the county.'

"We are not surprised that this jury should agree so quickly after being instructed by the judge that they would be kept together for more than twenty-four hours longer and at their own expense. It may have been that the very jurors who were holding out against the proposed verdict were unable to pay for their meals, and therefore agreed to the verdict, rather than go without food until the court should meet again, the next Monday morning."

In Pierce v. Pierce, which was a will contest, the case was submitted to the jury on Tuesday afternoon. On Wednesday afternoon the officer in charge was requested to inform the judge that they could not agree. Thereupon the judge directed the officer to tell them: "The judge does not believe it yet, and you might say to them that it is essential they agree to-night, as I am going away, and won't be back until day after to-morrow, and they might not get discharged until I come back, as Judge Coolidge is going to be here." The verdict was returned within an hour thereafter. The court says: "We cannot but think the tendency of the message was to drive the jury into action which might not have been taken otherwise. . . . Jury trials can never be safe unless the verdict is made as far as possible the unbiased and free conclusion of every juror. Every attempt to drive men into an agreement which they would not have reached freely is a perversion of justice. It may be discretionary with the trial judge to keep a jury out until he is satisfied an honest and free agreement is not to be expected. But there is no legal propriety in keeping a jury confined unreasonably. After they have come to an agreement, and a verdict obtained by the suggestion of such an alternative it is a verdict obtained by what it would be hard to distinguish from duress. It may be that the court is not bound to be present continually on the chances of an agreement; but any unusual and prolonged delay is not to be favored without giving an opportunity to find a sealed verdict."

There was no coercion in the case at bar. The jury were at liberty

to and did return a sealed verdict. The first request made by the jury to have the testimony of Mrs. Barnes read was made about 10:30 P. M. Saturday night. The next request was made about 8 o'clock on Sunday morning. The judge then sent word to the jury that the testimony requested would be read at the opening of court on Monday morning. The jury, without waiting to have the testimony read, agreed upon a verdict at 5 o'clock in the afternoon of Sunday. The judge was not obliged to remain close to the jury during all their deliberations.

Section 6750, Rev. Codes 1905, as far as material, is as follows: "Courts shall not be open on Sundays or legal holidays, unless for the purpose of instructing or discharging a jury, or receiving a verdict." The court was not obliged to have the testimony read to the jury on Sunday, even had he been in Bottineau, and he was not obliged to remain for the purpose of receiving a verdict, as the jury were allowed to return a sealed verdict, which they did.

Section 7027, Rev. Codes 1905, is as follows: "After the jury have retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the case, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of or after notice to the parties or counsel."

Appellants insist that the failure to have the testimony of Mrs. Barnes read to the jury necessitates a reversal of the case. Assuming, without deciding, that the jury were entitled to have the stenographer's minutes of the testimony of Mrs. Barnes read, we cannot agree with appellants that the failure to have it read necessitates a reversal of the case. The learned trial court did not refuse the request of the jury, but sent word to them that the testimony would be read at the opening of the court on Monday morning. The jury, without waiting for the testimony to be read, returned a verdict.

In Moore v. State, 52 Tex. Crim. Rep. 364, 107 S. W. 355, which was a prosecution for burglary, the jury made a request to have read to them by the official stenographer a part of the testimony of the witnesses as to the location of the house alleged to have been entered, and as to how high the moon was. The court says: "It appears from the

record that this request was made to the court at night, and that in response thereto, after some inquiry had been made, the court advised the jury that the stenographer had gone home, but that as soon as he could get him he would have the testimony read to them as requested. A short time after this, and without additional or further request from the jury, a verdict of guilty was returned. It was, of course, clearly the right of the jury to have the testimony requested read to them; but where, as in this case, they returned a verdict without pressing further their request, it must be assumed that it was no longer desirable or necessary, to have their memories refreshed by having the testimony read to them. We do not, therefore, believe there was any error in this action of the court."

In People v. Warren, 130 Cal. 678, 63 Pac. 87, which was a prosecution for grand larceny, the case was submitted to the jury about eight o'clock P. M. After 11 o'clock P. M. the jury came into court and asked to have the testimony of defendant read to them. The reporter informed the judge that it would take about two hours to read the testimony. The judge then announced to the jury that, owing to the lateness of the hour, it would be necessary to adjourn until the next day at 9 o'clock A. M., when the testimony would be read. A few minutes before 9 o'clock the next morning the jury came into court and announced that they had agreed upon a verdict. Counsel then objected to the verdict being received, because the testimony called for by the jury had not been read. This objection was overruled, and such ruling was sustained on appeal.

Appellants cite, in support of their contentions that it was reversible error not to have the testimony of Mrs. Barnes read to the jury, the following cases: State v. Perkins, 143 Iowa, 55, 21 L.R.A.(N.S.) 931, 120 N. W. 62; Roberts v. Atlanta Consol. Street R. Co. 104 Ga. 805, 30 S. E. 966; State v. Manning, 75 Vt. 185, 54 Atl. 181; People v. Shuler, 136 Mich. 161, 98 N. W. 986; Drew v. Andrews, 8 Hun, 23; Moore v. State, 52 Tex. Crim. Rep. 364, 107 S. W. 355; Alexander v. Gardner, 14 R. I. 15; Slack v. Stephens, 19 Colo. App. 538, 76 Pac. 741; Merritt v. New York, N. H. & H. R. Co. 164 Mass. 440, 41 N. E. 667; Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20, 17 Mor. Min. Rep. 179; State v. Hunt, 112 Iowa, 509, 84 N. W. 525; Cannon v. Griffith, 3 Kan. App. 506, 43 Pac. 829.

We have carefully examined these cases, and find that they are not in point, and that most of them only go to the extent of holding that it is not error in the trial court, at the request of the jury, to direct the stenographer to read from his notes the testimony of the witnesses on a material issue in the case.

The cases of State v. Manning, 75 Vt. 185, 54 Atl. 181, and People v. Shuler, 136 Mich. 161, 98 N. W. 986, hold that it is in the discretion of the trial court to grant or deny a request of the jury to have certain evidence read.

In Drew v. Andrews, 8 Hun, 23, which was a civil action, after the case went to the jury and they had deliberated for about two hours, they requested of the court information as to what a witness for the defendant had testified in reference to a portion of the work claimed for. The counsel for the defendant, in the presence of plaintiff's counsel, asked the court to bring in the jury and state the evidence to them, as requested. The court refused. A short time after, the jury returned into court, and said they had agreed on a verdict for plaintiff. The appellate court held it was error for the trial court to refuse the request of the counsel for the defendant, made in the presence of plaintiff's counsel, to bring in the jury and state the evidence to them as requested. This case has no bearing on the case at bar, as in the case at bar the trial court sent word to the jury that he would have the requested testimony read to them on Monday morning, but the jury, without waiting to have such testimony read, returned a verdict.

Appellants assign as error the following portion of the court's charge: "The law of this state provides that every person of sound mind, being eighteen years of age or more, whether married or single, has a right to make disposition of his or her estate by will, and so distribute his or her estate as to devest those who would otherwise inherit it as his or her legal heirs, of their interest herein. Indeed the object of the law in permitting a person to make a will is to enable a testator or testatrix to divide and distribute his or her property as to him or her may seem best; and no next of kin or relative, no matter how near they may be, can be said to have any legal or natural right to the estate of the testator or testatrix which can be asserted against the legally executed will of the latter. The law in this state has placed the estate of persons over the age of eighteen years wholly under the

control of the owner, and to be divided or distributed by the latter as he or she may freely choose and direct in the last will and testament made by him or her. Neither husband, mother, sister, nor brother have any natural right to the estate of the deceased wife, daughter, or sister which can be exerted against any disposition of said estate which said wife, daughter, or sister, if of sound mind, may choose to make by will," saying that it was unnecessarily charging as to the legal naked right to dispose of property by will without stating that an unnatural disposition might be considered as evidence tending to establish mental incapacity or undue influence." As stated before, there was no evidence of any undue influence. We think the court stated the law correctly, and there was no error in the charge.

The last assignment of error argued is as to the admission of testimony of nonexpert witnesses as to the mental soundness of the deceased, over the objection of appellants on the ground of an insufficient foundation.

The rule is that a nonexpert will be allowed to express an opinion upon an issue of sanity only after he has testified to acts, conversation, or conduct which to some extent indicate sanity.

In this class of cases the question of the competency of the witness to testify is one for the court, and is also a question lying within the sphere of judicial discretion; and the familiar rule that such discretion will not be reversed except in cases of abuse applies in the case of nonexperts as well as experts who are called to express opinions upon an issue of insanity. State v. Barry, 11 N. D. 428, 92 N. W. 809; Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69; Re Hull, 117 Iowa, 738, 89 N. W. 979; Atkins v. State, 119 Tenn. 458, 13 L.R.A. (N.S.) 1031, 105 S. W. 353; Ryder v. State, 100 Ga. 528, 38 L.R.A. 721, 62 Am. St. Rep. 334, 28 S. E. 246.

In Denning v. Butcher, supra, the court says: "The right of a nonexpert witness to give an opinion based upon facts fully disclosed to the jury has always been recognized, but it is equally clear that the court has the right to determine whether such facts have been disclosed as to entitle the witness to express an opinion." See also 3 Wigmore, Ev. §§ 1917 etc.; See also note in Ryder v. State, supra.

It follows, from what we have said, that the court did not err in denying appellant's motion for a new trial.

The order appealed from is affirmed.

ELLSWORTH, J. (Dissenting.) I am unable to agree in the holding of my associates that the trial court was justified as a matter of law in instructing the jury that there was not sufficient evidence to establish that the alleged will in controversy was executed as the result of undue influence practised upon the said Mary Auld. The testimony shows quite conclusively, I think, that at the time of the execution of the will, Mrs. Auld was at the point of death and in a mental condition closely bordering on entire incompetency. In such a condition as this the mind of the testator was peculiarly susceptible to the influence of a stronger will. An influence that at other times might be without effect, in this condition of mind and body might have been regarded by the jury as "undue." I believe that all the circumstances attending the subscription of the will by the testator should have been submitted to the jury under a proper instruction. Neither the trial court nor this court could usurp the function of the jury to the extent of saying that it might not have found upon a consideration of these facts that undue influence was exercised; and if it had so found, I believe there was sufficient competent evidence to sustain a holding of that kind.

I am of the opinion, therefore, that for error in this particular, the judgment should be reversed and a new trial granted.

MATHILDA DIETER v. JOHN H. FRAINE.

(128 N. W. 684.)

Homestead — Exemption.

1. The constitutional and statutory provisions of this state declaring as absolutely exempt to the head of a family the homestead as created, defined,

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Note.—The validity of sale of a homestead under execution is considered in 87 Am. Dec. 273, and the question of attachment and judgment liens against homesteads generally is the subject of notes in 34 Am. St. Rep. 496 and 38 Am. St. Rep. 247. The question who is the head of a family within the meaning of the homestead laws is treated in notes in 61 Am. Dec. 586 and 70 Am. St. Rep. 107. As to suits by wife for or concerning homesteads, see note in 76 Am. Dec. 442. See also note at end of case.

and limited by law, are wholesome and salutary regulations remedial in character, enacted in furtherance of a wise, generous, and humane public policy to encourage the establishment and maintenance of homes, and should be liberally construed with a view of carrying into effect the obvious purpose of their enactment.

Homestead Exemptions — Policy of Law.

2. The homestead exemption is declared in favor of the head of the family in a representative capacity, and is not intended only for the benefit of the individual who stands in that relation, but for the protection and preservation of the home for the benefit of the family as a whole.

Homestead Exemption — Waiver — Attachment.

3. The homestead of a family in this state is absolutely exempt from attachment or mesne process, and from levy and sale upon execution, and for any other final process issued from any court, and such exemption is not presumed to be waived by the failure or neglect of the head of the family to expressly claim it.

Homestead Exemption — Judicial Sale.

4. A levy on execution upon, and a judicial sale of, premises known to the levying officer to be occupied by the family of the judgment debtor as a homestead, is wholly inoperative and void, and a sheriff's certificate issued pursuant to such sale conveys no interest in the property.

Opinion filed October 12, 1910. Rehearing denied November, 30, 1910.

Appeal from District Court, Walsh county; *Honorable W. J. Kneeshaw,* J.

Action by plaintiff to determine adverse claims to real property. From a decree in favor of defendant, plaintiff appeals.

Judgment reversed, and the district court directed to enter judgment in plaintiff's favor.

E. R. Sinkler, for appellant.

Execution sale of homestead passes no title. Johnson v. Twichell, 13 N. D. 426, 101 N. W. 318; N. D. Rev. Codes 1905, § 5049; 2 Freeman, Executions, ¶ 315; Thompson, Homestead & Exemption, 625; Kingman v. O'Callaghan, 4 S. D. 628, 57 N. W. 912.

In the absence of statutory or constitutional provisions, selection is unnecessary; occupancy is enough. Cook v. McChristian, 4 Cal. 26; Riggs v. Sterling, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705; Thomas v. Dodge, 8 Mich. 51; Kimball v. Salisbury, 17 Utah, 381,

53 Pac. 1037; Anderson v. Stadlman, 17 Wash. 433, 49 Pac. 1070; Beecher v. Baldy, 7 Mich. 488.

Absence of head of family from the home still occupied by family is not abandonment. Meader v. Place, 43 N. H. 307; Chitty v. Chitty, 118 N. C. 647, 32 L.R.A. 394, 24 S. E. 517; Edwards v. Reid, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202; Quigley v. McEvony, 41 Neb. 73, 59 N. W. 767; Lindsay v. Murphy, 76 Va. 428; Phelan's Estate, 16 Wis. 77.

Even desertion of head of family, who remain on homestead, is not abandonment. White v. Clark, 36 Ill. 285; People v. Stitt, 7 Ill. App. 294; 15 Am. & Eng. Enc. Law, p. 658 and notes; Dearing v. Thomas, 25 Ga. 223; Warren v. Block, 1 Ky. L. Rep. 121; Drury v. Bachelder, 11 Gray, 214; Blandy v. Asher, 72 Mo. 27; Morrill v. Skinner, 57 Neb. 164, 77 N. W. 375.

Neither spouse can affect homestead rights of the other. Bremseth v. Olson, 16 N. D. 242, 13 L.R.A.(N.S.) 1170, 112 N. W. 1056, 14 A. & E. Ann. Cas. 1155; Morrill v. Skinner, 57 Neb. 164, 77 N. W. 375; Riggs v. Sterling, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705; Ring v. Burt, 17 Mich. 465, 97 Am. Dec. 200; First Nat. Bank v. Jacobs, 50 Mich. 340, 15 N. W. 500; Showers v. Robinson, 43 Mich. 502, 5 N. W. 988; Griffin v. Johnson, 37 Mich. 87; Ives v. Mills, 37 Ill. 73, 87 Am. Dec. 238; Walt v. Walt, 113 Tenn. 189, 81 S. W. 228; 3 Current Law, 1639; Mathewson v. Kilburn, 183 Mo. 110, 81 S. W. 1096.

Wife may maintain action to preserve the homestead. Adams v. Beale, 19 Iowa, 61; Eve v. Cross, 76 Ga. 695; Mauldin v. Cox, 67 Cal. 390, 7 Pac. 804; Prey v. Stanley, 110 Cal. 423, 42 Pac. 908; Boling v. Clark, 83 Iowa, 481, 50 N. W. 57; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 743; Andrews v. Melton, 51 Ala. 400; Rev. Codes 1905, § 5052; Comstock v. Comstock, 27 Mich. 97; 21 Cyc Law & Proc. 635; Ness v. Jones, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706; Linander v. Longstaff, 7 S. D. 157, 63 N. W. 775; McClure v. Braniff, 75 Iowa, 38, 39 N. W. 171.

John H. Fraine and *Gordon Christie*, for respondent.

Unless head of the family, wife cannot assert the right of exemptions. Ness v. Jones, 10 N. D. 581, 88 Am. St. Rep. 755, 88 N. W. 708; Linander v. Longstaff, 7 S. D. 157, 63 N. W. 775.

ELLSWORTH, J. The action out of which this appeal arises was brought by appellant to determine adverse claims to real property. The particular purpose of the action, as alleged in the complaint, is to set aside as null and void a sale upon execution, made at the instance of respondent, of two lots in the city of Grafton, and a sheriff's certificate of sale of the premises issued to respondent as purchaser, on March 18, 1907.

The record here consists only of the judgment roll. The evidence and exhibits offered were not brought up, and are not before us. The facts necessary to the determination of the appeal must, therefore, be taken from the findings of the court. From these it appears that appellant was the owner in fee of the lots in question, and for a period of about eleven years last past has continually owned and resided upon the premises with her husband and family, consisting of a daughter twenty-five years of age. The husband of plaintiff is alive, and is not in any manner mentally or physically incapacitated from caring and providing for his family, consisting of his wife and daughter, as aforesaid. On the other hand, he is physically able and competent to do so. He has not abandoned or deserted the plaintiff, or in any way relinquished his right to the headship of the family. He has been temporarily away from appellant off and on for two years last past, and out of the state of North Dakota most of the time, but during all of said time has been able-bodied, free from infirmity or sickness, and able and willing to support or assist in supporting his wife and family. Prior to the commencement of this action, he took up a claim of 160 acres of land in the state of Washington, under the desert land laws of the United States, and still holds and claims the same.

It further appears, from admissions of the pleadings and the findings of the court, that respondent is the holder of a judgment, obtained in an action against appellant and her husband upon a claim for services as an attorney in conducting the defense of a criminal prosecution of the husband; that respondent caused execution to issue on this judgment, and to be levied upon the premises occupied by appellant, and the same to be sold at execution sale; that at said sale he became the purchaser, and is now the owner of a sheriff's certificate of sale of the premises in controversy, dated March 16th, 1907, which certificate of sale has been filed for record in the office of the regis-

ter of deeds in Walsh county and duly recorded; that the proceedings under the execution sale culminating in the certificate of purchase held by respondent are regular in form, and on their face convey to respondent title to the premises in question, subject only to appellant's right of redemption. Prior to the date of sale evidenced by this certificate, appellant made the claim in writing that the premises were exempt to her under the homestead laws of the state of North Dakota. Her husband did not join in this claim, nor has he at any time made a similar claim on his own behalf as head of a family.

The court finds as its conclusion of law that the husband of appellant has not, constructively or otherwise, been deposed from his prima facie headship of the family, and that plaintiff is not the head of a family within the meaning of the law providing for homestead exemption; that appellant is not entitled to claim the premises as a homestead, for the reason that she is not the head of a family within the meaning of the laws of this state; that the sheriff's certificate held by respondent is valid and sufficient, and conveys to him title to the lots in question subject only to a redemption by appellant as provided by law.

The district court, upon these findings and conclusions, ordered that judgment be entered in favor of the defendant, declaring that the sheriff's certificate mentioned in the pleadings operates to convey title in the premises to respondent, and that appellant is without claim thereto, which was done accordingly. The plaintiff appeals to this court, demanding a review and new trial of the entire case. Owing to the record presented here, however, we can only review the findings of fact, for the purpose of determining whether they support the conclusions of law and the decree entered by the trial court.

What is known as the homestead right is in this state provided by means of laws, "exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law." Constitution, § 208. The statute adopted in furtherance of this constitutional policy provides in broad terms that the homestead defined by law "shall be exempt from judgment lien, and from execution or forced sale, except as provided in this chapter." Rev. Codes, 1905, § 5049. The only exceptions in the chapter referred to are in favor of debts secured by mechanics' or laborers' liens for work or labor

done, or material furnished, exclusively for the improvement of the same; debts secured by mortgage on the premises, executed and acknowledged by both husband and wife; debts created for the purchase thereof; and taxes accruing and levied thereon. Rev. Codes, 1905, § 5051. As against all other debts, not only the homestead, but the proceeds thereof in case of sale, are absolutely exempt from levy or seizure by a creditor. An execution for the enforcement of a judgment obtained upon a debt not within the classes enumerated may be levied upon the homestead only in case it appears, after due application to the court and an appraisement had, that the property claimed as a homestead exceeds in value the amount of the homestead exemption. Rev. Codes, 1905, §§ 5055–5064. The provisions of the Code of Civil Procedure relating to exemptions reiterated, in even stronger language, the declaration of unqualified exemption of the homestead from levy and sale for all debts not of exceptional character, in the following language: "Except as hereinafter provided, the property mentioned in this chapter is exempt to the head of a family . . . from attachment or mesne process, and from levy and sale upon execution, and from any other final process issued from any court." Then follows a classification of property declared to be absolutely exempt, including, in express language, "the homestead as created and defined and limited by law." Rev. Codes, 1905, § 7115–7116. The only exception mentioned in this chapter to a claim of absolute exemption is to the effect that "no property shall be exempt from execution or attachment in an action brought for its purchase price or any part thereof." Rev. Codes, 1905, § 7126.

It is settled, beyond all cavil, by previous holdings of this court, that the constitutional and statutory provisions of homestead right are wholesome and salutary regulations in furtherance of a wise, generous, and humane public policy, encouraging the establishment and maintenance of homes; that statutes providing for homestead exemptions are remedial in character, and should be liberally construed with a view of carrying into effect the obvious purpose of their enactment; and that the object sought by the adoption of this constitutional provision, and the enactment of statutes in furtherance thereof, "was to protect and preserve the home, not for the benefit of the head of the family, but for the benefit of the family as a whole. . . .

It was the protection of the family which was the purpose in view, and, this being true, it is the duty of the courts, in construing said provisions, to give effect to such plain intent." Bremseth v. Olson, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 A. & E. Ann. Cas. 1155.

It is apparent, therefore, that the homestead right is declared to exist, and the homestead exemptions are made, by both constitutional and statutory provisions, to the head of the family, not as an individual, but in representative capacity. The right is extended to the family in its entirety, and not to the individual who for the time being stands at its head. This purpose is indicated not only by the general policy of the law, but by the fact that the husband, though the nominal head of the family, is prohibited from conveying or encumbrancing this right by his individual act. Rev. Codes, 1905, § 5052.

Respondent contends, and the trial court held, that no homestead exemption existed in the case at bar by reason of the fact that it was not claimed by the husband, who was to be regarded as the sole head of the family. The fact that the premises were the family domicil seems to be conceded. This brings us to the consideration of the point of whether or not the homestead exemption is to be regarded as a personal privilege of the head of the family that may be considered as waived by his failure, refusal, or neglect to assert it.

It may be conceded that a personal exemption, or these exemptions which are known under the statute as "additional" or "specific alternative," may be waived by a failure of the proper party to claim them within a specified time after seizure. This court has specifically so held, and its ruling is consistent with standard authority on that subject. Ness v. Jones, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 708. Does it follow that this principle also applies to the absolute exemptions provided by § 7115? If such is the case the holding of the trial court that appellant was not entitled to the assertion of a homestead right in this case is correct.

It is apparent, however, from an examination of § 7115 and the following sections treating of the subject of exemption, that there is a clear and broad distinction to be drawn between those exemptions classified as absolute and those termed "additional" or "specific alternative" by the statute. As said by the supreme court of South Dakota

in passing upon a statute taken word for word, as is ours, from the Compiled Laws of 1887: "Exemptions under this statute are of three classes,—absolute, additional, and special alternative. Either of these come under the provisions of the section above quoted. [Comp. Laws, § 5126.] The absolute exemptions are without any condition or encumbrance. They are unmixed and unconnected with any peculiarities or qualifications; complete and perfect in themselves. Not so with the other two. The statute provides: 'In addition to the property mentioned, . . . the debtor may, by himself or his agent, select . . . goods, chattels, merchandise, money, or other personal property, not to exceed in the aggregate $1,500 in value, which is also exempt, and must be chosen and appraised as hereinafter provided.' . . . This relates to the additional exemptions. The special alternative exemptions may be substituted for the additional, but the debtor must select and choose the property he wishes to be exempted. In the case of absolute exemptions, there can be no doubt but they are at all times, and under all circumstances, not subject to the lien of a judgment, or levy and sale under execution, except such execution was issued for the purchase money of said property. No such conclusion can be drawn in relation to the other two, for the statute requires selection and appraisement,—a setting aside of the property." Longley v. Daly, 1 S. D. 258, 46 N. W. 247.

The foregoing excerpt, we believe supplies a sound construction of § 7115, and § 7116 of the Revised Codes of 1905. It seems apparent that the legislature, in view of the important character of the homestead right, did not see fit to leave its assertion to the caprice of any individual member of a family. It lodged this right in the family itself by making the homestead absolutely exempt from execution, and declaring in pointed and express phrase that it was not the subject of levy and sale under any final process issued from any court. Upon the exclusive and emphatic terms of this inhibition, we can place no other meaning than that any attempt to proceed against the homestead right by means of attachment, execution, or other process of any character involving seizure, levy, and sale, is absolutely prohibited, and if resorted to is wholly inoperative for any of the purposes ordinarily accomplished by such process, and null and void.

A levy does not constitute a lien upon such property, and a sale thereof does not operate to convey to the purchaser any interest whatever.

In the case at bar there seems to be no question but that the property levied upon and sold was the residence of a family, and well within the limits of area and value defined by law as constituting a homestead. The temporary absence of the husband is not even slight evidence of an abandonment. The fact that the family was living there must have been known to the sheriff making the levy and sale. Aside from the fact that notice was served upon him that the property was a homestead, he would be required to take notice that the premises were absolutely exempt from execution, and not the subject of levy and sale. The fact that he proceeded to make a levy, and go through the form of a sale on execution under a judgment that was not a lien upon the property, did not operate to convey any title or interest to respondent, who was the purchaser at the sale. The sheriff's certificate issued to him was wholly unauthorized, and it is at most a cloud upon appellant's title. While, under the conditions, she might not have been qualified to claim an exemption in personal property, it was not necessary, in order to assert the homestead right, that she should make this claim.

It is apparent, therefore, that the findings of the District Court do not afford support for its conclusions, or authorize a decree of the character of that entered. It is accordingly ordered that the judgment of the District Court be reversed, and that it enter a judgment in appellant's favor declaring the sheriff's certificate issued to respondent to be null and void, and quieting title in appellant against any claim of respondent. All concur.

Note.—See note to Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245. Execution sale conveys no title to homestead; and officer's liability, if any, is only for cost of clearing title. Johnson v. Twichell, 13 N. D. 426, 101 N. W. 318. Definition of homestead exemption. Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684. Surviving wife and children are entitled to homestead, although it exceeds statutory value. Ibid. Excess may be applied on decedent's debts, after other property is exhausted. Ibid. Liens not deducted in determining value. Ibid. Where homestead exceeding 5,000 in value is decreed by county court, its decree must show the excess and indivisibility. Ibid. Husband's contract to sell homestead without wife's joining is void, and he is not liable for damages for its breach. Silander v. Gronna,

SAMUEL RANDALL and Duncan Ferguson v. JOHN JOHNSTONE.

(128 N. W. 687.)

Parties — Nonjoinder — Only One Interested Can Demur.

1. A demurrer for nonjoinder of parties will not be sustained unless it appears that the demurrant has an interest in having the omitted party made defendant, or is in some way prejudiced by the omission.

Demurrer — Misjoinder — Causes Properly United.

2. The defendant demurred to the complaint on the ground, among others, that several causes of action were improperly united in said complaint. For reasons stated in the opinion the demurrer was properly overruled.

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15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544. Both spouses must join in all conveyances of, or instruments affecting, the homestead, and the requirement is not unconstitutional as defeating husband's right of individual conveyance. Gaar, S. & Co. v. Collin, 15 N. D. 622, 110 N. W. 81. Acquiescence in its dedication subjects it to existing laws as to conveyance. Ibid. Wife's assent to extension of mortgage on homestead unnecessary. Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677. He can prevent, without her assent, statute of limitations running against a mortgage on homestead. Ibid. Joining husband in a mortgage on homestead does not make wife a surety. Ibid. Residence essential to homestead claim. Smith v. Spafford, 16 N. D. 208, 112 N. W. 965. Removal with intent to abandon defeats the right. Ibid. Homesteader's declaration as to intent competent, but not conclusive, evidence. Ibid. Evidence held to show abandonment. Ibid. Husband can claim homestead although title is in wife. Bremseth v. Olson, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 A. & E. Ann. Cas. 1155. Surrender of contract, removal from the homestead, disposal of personal property to carry it on, evidences abandonment of contract and homestead. Ferris v. Jensen, 16 N. D. 462, 114 N. W. 372. Forfeiture of contract of purchase by vendee extinguishes homestead in land bought thereunder. Ibid. Upon verbal agreement of husband and wife to sell homestead, and purchaser entering relying thereon, and making part payment, and improving it, both spouses acquiescing, they cannot deny the validity of sale. Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35. Statute of frauds and homestead provisions give way to estoppel in such case. Ibid. Homestead statute will not be construed to effect fraud. Ibid. "Head of family" defined, Holcomb v. Holcomb, 18 N. D. 561, 120 N. W. 547. Unless husband is entitled to homestead exemptions, none survive to wife or children. Ibid. Mortgage of homestead without wife's signature is void. Justice v. Souder, — N. D. —, 125 N. W. 1029. Unless begun before January 1, 1906, no action can be maintained asserting homestead rights accruing prior thereto. Ibid.

Adverse Claims — Sufficiency of Complaint.

3. Complaint examined and, *held*, that the facts therein alleged are sufficient to constitute a cause of action.

Opinion filed November 23, 1910.

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

Action by Samuel Randall and Duncan Ferguson against John Johnstone. From an order overruling a demurrer to the complaint, defendant appeals.

Affirmed.

Heffron & Baird and *J. A. Miller*, for appellant.

In an action to cancel a contract, each signer is a proper party to the action. Thompson v. Coffman, 15 Or. 631, 16 Pac. 713; Ex parte Fulton, 7 Cow. 484; Scheid v. Leibshultz, 51 Ind. 38; Kendall v. Kendall, 7 Me. 171; Staples v. Wheeler, 38 Me. 372; Clark v. Rawson, 2 Denio, 135.

Purcell & Divet, McFarland & Murtha, and *A. J. Denoyer*, for respondents.

Only when one has an interest in having a party brought in, can he demur for nonjoinder.

30 Cyc. Law & Proc. 141 and note 60; Stockwell v. Wager, 30 How. Pr. 271; Summers v. Moore, 115 N. C. 700, 20 S. E. 714; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 83 N. W. 245.

Carmody, J. The complaint in its first paragraph sets out in full a contract of sale dated January 15th, 1906, between the Golden Valley Land and Cattle Company, and defendant, of section 11, township 138, range 106, Billings county, North Dakota, which contract is signed by the defendant and by Carrie Johnstone, although her name is not mentioned in the body of the contract; and further alleges in substance as follows: (2) That the contract was canceled by mutual consent on or about the 18th day of January, 1906. (3) That on or about the 8th day of June, 1907, the defendant, well knowing that said contract was canceled, and for the purpose of encumbering and clouding the title to said land, and harassing the owners thereof, and furnishing a pretext for making claim thereto, and for trespassing thereon,

presented said contract to the register of deeds of Billings county, and filed the same for record, with an indorsement on said contract purporting to be an acknowledgment by the defendant before a notary public. (4) That in truth and in fact the said instrument was never acknowledged so as to entitle it to record, but the Register of Deeds, believing the said instrument entitled to record, recorded the same. (5) That about the month of April, 1907, the said Golden Valley Land and Cattle Company duly sold and conveyed the southeast quarter of said section 11 to the Stondall Land and Investment Company. (6) That the ownership of said land was in the Golden Valley Land and Cattle Company at the time it conveyed the same to the Stondall Land and Investment Company. (7) That on or about the 15th day of April, 1909, the said Stondall Land and Investment Company by warranty deed conveyed the said southeast quarter of said section 11 to these plaintiffs, who have ever since been and now are the owners thereof. (8) That the plaintiffs took the land and the conveyance thereof in good faith, for an adequate consideration, and without knowledge of any claim thereto by the defendant. (9) That in the spring of 1908, the defendant, without the knowledge or consent of the owner of said land, entered upon the same and forcibly excluded the said Stondall Land and Investment Company therefrom, and has ever since forcibly excluded the Stondall Land and Investment Company and these plaintiffs therefrom. (10) That in the season of 1908 the defendant raised a crop on said land of the value of $1,000, and in the season of 1909 raised a crop on said land of the value of $1,500. (11) That neither the Stondall Land and Investment Company, nor these plaintiffs, had any knowledge that defendant had cropped said land, until about the time of harvesting the crop of 1909. (12) That the value of the use and occupation of said land for the years 1908 and 1909 is $750 a year. (13) That the actual detriment caused the owners of said land by reason of being excluded therefrom was $1,000 for the year 1908, and $1,500 for the year 1909. (14) That the withholding of the possession of said land from the said Stondall Land and Investment Company and from these plaintiffs, and the taking possession of said land in the first instance, was wrongful and unlawful, and the same was taken and held as part of a fraudulent scheme on the part of the defendant to obtain the use of said land. (15) That, in pursuance of

such fraudulent scheme, the defendant, well knowing that he is a trespasser, claims to be an adverse holder of said land under the contract aforesaid. (16) That said contract, and the record thereof, constitute a cloud upon the title of the plaintiffs to said land. (17) That the defendant threatens and intends to, and unless enjoined and restrained by order of the court will continue to, keep and possess the said lands, and farm and crop the same, and plaintiffs have no means of preventing such occupation, use, and cropping of said lands except by application to the court for an injunction against such acts. (18) That the defendant is insolvent, or so nearly so that a judgment against him on account of his unlawful holding of said land would be uncollectable.

The prayer for relief asks that the contract be canceled of record; that the defendant be required to surrender the same to the plaintiffs, that he be enjoined from farming or cropping said land during the pendency of this action and from interfering with the plaintiffs, and that plaintiffs recover from the defendant either the value of the use and occupation of said land since the same was taken possession of by the defendant, triple damages for the actual detriment caused by the detention thereof, or that the defendant be declared a trustee of the plaintiffs, and required to account as a trustee for the farming operations of said land as the facts shall show plaintiffs entitled to, and that plaintiffs have any other further or different relief that the facts in equity shall entitle them to, and for their costs.

To this complaint defendant demurred on the following grounds:

1. That said complaint shows that there is a defect in parties defendant in that Carrie Johnstone is a necessary party defendant in this action.

2. That several causes of action have been improperly united in said complaint.

The court made an order overruling said demurrer, from which order defendant appeals to this court.

Appellant claims that Carrie Johnstone has rights at issue in this action, and that she became bound by signing the contract, even though not mentioned in the body of the instrument. Whether she has rights under the contract is not material to a decision herein.

The rule laid down in 30 Cyc. Law & Proc. p. 141, is as follows: "A demurrer for nonjoinder of parties will not be sustained unless

it appears that the demurrant has an interest in having the omitted party made defendant, or is in some way prejudiced by the omission."

A party sued may undoubtedly insist that another party ought also to be sued with him. But to sustain a demurrer on this ground, it must appear that the party demurring has an interest in having such other party made defendant. As a general rule the plaintiff may choose for himself what persons he will make defendants. So far as it can, without prejudice to the rights of others, the court will determine the controversy between the parties before it, and, when it cannot be done, it will take measures to have the necessary parties brought in. It is not often that a demurrer will lie for a nonjoinder of defendants. Before the defendant can sustain a demurrer on account of a nonjoinder of a defendant, he must show that his interest requires that such person should be made a party to the litigation.

It is clearly settled that, although the court perceives that there are persons who should be made parties in order to a complete determination of the controversy, yet unless it is made affirmatively to appear that the party demurring is to be prejudiced by the omission to make such parties defendants, the demurrer must be overruled. The remedy is not by demurrer, but by motion, or the court can voluntarily order such parties joined in the action where the necessity arises. Now in this case, what possible interest has the defendant in having Carrie Johnstone made a party? His case cannot be improved thereby, and, if, not, then upon this ground alone the demurrer fails. The complaint does not show that Carrie Johnstone has any interest in this land, but, even if she has, the decree of the court, when she is not a party to the action will not be binding upon her, and whatever rights, if any, she has can be protected by herself in an adequate proceeding. Stockwell v. Wager, 30 How. Pr. 271; Summers v. Moore, 115 N. C. 700, 20 S. E. 714; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 83 N. W. 245.

In Dalrymple v. Security Loan & T. Co. supra, which was an action to quiet title, the defendants demurred to the complaint on the ground, among others, that there was a defect of parties defendant. The court says: "There is, however, unanimity in the decisions, to the effect that a demurrer for defect of parties cannot be sustained unless the 'demurrant has an interest in having the omitted party joined, or that

he is prejudiced by the nonjoinder,' " and cites Bliss, Code Pl. § 298, and cases cited in note C; also 6 Enc. Pl. & Pr. p. 311. The court further says: "No suggestion is made, however, tending to show wherein the defendants are prejudiced by the absence of Oliver C. Dalrymple [an omitted party] as a party; nor are we able to discover from anything averred in the complaint that his absence or presence as a party can prejudice or affect the interests of the defendants. . . . Nothing appears tending to show that John C. [Dalrymple an omitted party] claims any title as against the plaintiff, or that any person, whether a party to this action or not, has ever claimed title, right, or lien through or by any act done or omitted by John C. Dalrymple."

Appellant claims that several causes of action are improperly united in the complaint; that paragraphs 1 to 4 set out a contract for the sale of all of section 11; paragraphs 5 and 6 the transfer in April, 1907, by the Golden Valley Land and Cattle Company, to the Stondall Company, of the southeast quarter of said section 11; paragraphs 7 and 8, the transfer, April 15, 1909, from said Stondall Company to plaintiffs, of the said southeast quarter of section 11; paragraphs 9 and 10 the entry of defendant upon the land and his raising a crop in 1908 worth $1,000 and a crop in 1909 worth $1,500; paragraphs 12 and 13 allege the value of the use and occupation of the land to be $750 each year for 1908 and 1909, and the actual damage caused the owners, $1,000 for the year 1908, and $1,500 for 1909; argues that it is impossible to tell whether the plaintiffs refer to all of section 11 or only to the southeast quarter thereof; that plaintiffs demand a cancelation of record of the contract for a whole section of land when they only own one quarter, and still further to surrender to these claimants of one quarter, the contract for the whole section; claims that plaintiffs not only demand rent for the southeast quarter, which they claim to own, but for the other three quarters of the section, which they do not claim to own; claims that plaintiffs have no right to join a cause of action for themselves with a cause for the Stondall Company. We do not think that the complaint is vulnerable to attack upon the ground that several causes of action are improperly united. It may be true, and no doubt is true, that plaintiffs are asking for more relief than they are, under the allegations of the complaint, legally or equitably entitled to recover, but this fact does not debar them from recover-

ing the relief to which the complaint shows they are entitled. Aside from the questions of non-joinder of parties defendant, and misjoinder of causes of action, we are not here concerned with this question, but merely whether the complaint contains allegations sufficient, if established, to entitle them to any relief in the action. For the purpose of disposing of this question, the prayer for relief is no part of the complaint. Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099; Bliss, Code Pl. § 417; Maxwell, Code Pl. 9.

The trial court will adjust the equities of the parties on the trial. No matter what relief plaintiffs claim in their pleading, other parties cannot be prejudiced thereby, as they will receive no more relief than they are entitled to. We take it that the principal object of this action is to quiet title in the plaintiffs to whatever portion of section 11 they show title to, and to recover rents and profits or whatever damages they are entitled to for the withholding of the land, and to restrain and enjoin the defendant from further cropping or interfering in any way with whatever rights or interests in the land plaintiffs have.

The appellant, for the first time, raises the question in this court that the complaint does not state facts sufficient to constitute a cause of action, and urges all the grounds urged by him in support of the demurrer hereinbefore mentioned. What we have hereinbefore said is sufficient answer to the contention of appellant that the complaint does not state facts sufficient to constitute a cause of action.

In view of the fact that the arguments in this and two other companion cases were advanced in this court, if the District Court in its discretion allows the defendant to answer, we suggest that it be upon condition that the case be placed on the calendar at the next term of the District Court in Billings county.

The order appealed from is affirmed. All concur.

FRED W. LOHR v. WILLIS T. HONSINGER.

(128 N. W. 1035.)

New Trial — Verdict — Reduction by Court.

1. The trial court has authority in a proper case to order a reduction of the verdict of the jury which he considers excessive, and to require the prevailing party to accept the reduced amount or submit to a new trial.

Instructions.

2. The refusal to give certain requested instructions, *held*, not error.

Appeal and Error — New Trial — Evidence.

3. Objections to certain questions considered in the opinion and the rulings thereon, *held*, prejudicially erroneous.

Opinion filed November 23, 1910.

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

Action by Fred W. Lohr against Willis T. Honsinger. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals.

Reversed.

Pierce, Tenneson, & Cupler, for appellant.

V. R. Lovell, for respondent.

CARMODY, J. The Vermont Building Company was a corporation of the state of Iowa. The capital stock consisted of $60,000 common stock, and $35,000 preferred stock. Appellant owned $18,000 par value of the preferred stock and $59,700 par value of the common stock. The balance of the preferred stock, $17,000 par value, was owned by residents of Iowa, Vermont, and New York. Appellant was a resident of the state of New York. One of the purposes for which the corporation was promoted was the construction of a Masonic Block in the city of Sioux City, Iowa. In September, 1904, the sole property of the Vermont Building Company was an equity of redemption in the Masonic Block, and about $14,000 in money, in the possession of the treasurer in Sioux City. A mortgage on the Masonic Block had been foreclosed, and the year of redemption would expire about November 1, 1904. No redemption was made. Appellant and S. L.

Wheeler, an attorney residing at Plattsburgh, New York, and who had been consulted by appellant regarding the affairs of the Vermont Building Company, went to Sioux City on September 12, 1904, for the purpose of holding the annual meeting of the stockholders of such company, and electing officers and directors. Appellant, his wife, Henrietta Honsinger, and Wheeler were elected directors. Appellant was elected president and Wheeler treasurer. Appellant and Wheeler were at Sioux City from September 12th, to September 16th, 1904. The money, $14,000, was turned over to Wheeler as treasurer, and he took the same with him to New York, leaving no property belonging to such company in the state of Iowa. The plaintiff was a member of the firm of Lohr, Gardner, & Lohr, practising law at Sioux City, Iowa. This firm had been attorneys for the Vermont Building Company for several years, but plaintiff had never attended to any business for the company or appellant. The business had always been attended to by a brother of said plaintiff, W. F. Lohr, a member of said firm, who was also secretary and treasurer of the Vermont Building Company, but who was absent from Sioux City and sick while appellant and Wheeler were there. On September 16, 1904, a complete settlement was had between the plaintiff and appellant and the Vermont Building Company. At that time appellant purchased from respondent five shares of stock of the company, belonging to respondent's brother, W. F. Lohr, for the sum of $400. On the same day respondent gave appellant his negotiable promissory note for $500, payable on or before two years from date. This note was, before maturity, sold to the City National Bank of Plattsburgh, New York, and suit was commenced by the bank against respondent in the state courts of Iowa, and was pending at the time of the commencement and trial of this action. Appellant and Wheeler both testified that there was but $13,100 on hand on the 16th of September, 1904, and that the $400 worth of stock and the promissory note of $500 were turned over to appellant to make up the sum of $14,000, and that appellant paid Wheeler, as treasurer, $900 for the note, and the stock owned by W. F. Lohr. Respondent testified that appellant paid him $500 as a retainer; that appellant said he was suspicious of lawyers, and did not want to pay the $500 in cash, as he was afraid the legal services would not be performed, and that he (respondent) gave appellant his $500

note as in the nature of a personal bond that he (respondent) would perform the legal services for appellant. Respondent testified that while appellant was in Sioux City, in September, 1904, he employed respondent to look after any legal business that might come up, as appellant expected litigation on account of his removing the assets of the Vermont Building Company from Iowa to New York. This is denied by appellant and Wheeler. Respondent further testified that appellant was trying to figure some way to convert this $14,000 to his own use, either by using it to pay him back salary or to retire the preferred stock owned by him, and that he consulted respondent about this matter. This is also denied by appellant. About December, 1904, one Leroy Kent, a stockholder in the Vermont Building Company, commenced an action against appellant and the Vermont Building Company in the United States circuit court for the northern district of Iowa, asking for the appointment of a receiver for the Building Company. No service was made on appellant, except that a paper purporting to be a summons was served on him in New York. He made no appearance in the action. Plaintiff, who owned one share of the common stock of the corporation, intervened and tried to get the action dismissed. He testified that he intervened at the request of appellant and said Wheeler. A receiver for the Building Company was appointed by the United States circuit court for the northern district of Iowa, who undertook to get possession of the assets by proceedings in the United States Circuit court for the Northern district of New York, which court held that the receiver was not legally appointed. An action was commenced by George H. Hollister, receiver of the Farmers' Trust Company, against the Vermont Building Company. The firm of which plaintiff was a member were the attorneys for the plaintiff in that action. Afterwards the claim was sold to a man named McKenzie Stewart, who was a son-in-law of appellant. Part of the services claimed to have been rendered by respondent for appellant were in connection with this suit. After the action hereinbefore mentioned was commenced by the Bank of Plattsburgh, New York, against respondent, he came to Fargo, North Dakota, and commenced this action against appellant, attached some real estate, and obtained service on appellant. The account on which respondent brought this action is as follows:

1904.

Sept. 16, To services investigting matter of Honsinger's salary as president of Vermont Building Company and advice regarding same	$50.00
Sept. 16, To counsel and advice regarding claim of Farmers' Trust Co. v. Vermont Building Co. etc.	100.00
Sept. 16, To counsel and advice regarding priority of preferred stock held by Honsinger	100.00
Sept. 17, To services searching records, etc., regarding suit of G. H. Hollister v. Vermont Building Co.	50.00
Sept. 25, To services in investigating status of preferred stock of Vermont Building Co.	100.00
Oct. 27, To services regarding redemption of Masonic Block from sheriff's sale	100.00
Oct. 30, To services in attempting sale of Masonic Block and of Honsinger's stock in Vermont Building Co.	100.00
Dec. 19, To services examining records, etc., in Federal Court in case of Kent v. Honsinger et al.	50.00
Dec. 22, To services in Kent v. Honsinger et al.	50.00
1905.	
Feb. 4, To services preparing application for permission to intervene in Kent v. Honsinger	50.00
Feb. 4, To services preparing motion to dismiss action in Kent v. Honsinger et al.	50.00
June 1, To services preparing brief and examining authorities in Kent v. Honsinger et al.	100.00
June 3, To argument on motion to dismiss action in Kent v. Honsinger et al.	200.00
July 20, To services in case of Hellister, Receiver, v. Vermont Building Company, McKenzie, Intervener, at request of Honsinger	25.00
Sept. 11, To services in court and elsewhere in Kent v. Honsinger	25.00
Sept. 14, To general services attending annual meeting of stockholders of Vermont Building Company, etc.	50.00
	$1,200.00

At the trial he withdrew the last item of $50 from the account. The jury evidently believed respondent's version of the transaction, and gave him a verdict for $1,155, and interest since May 1, 1906, on which verdict judgment was duly entered. In due time the defendant made a motion for a new trial, upon which motion the district court made an order denying the motion for a new trial, upon condition that said verdict and judgment be modified and reduced to the sum of $755, and interest since May 1, 1906, and that respondent file his written election to accept such reduction within twenty days from date of the order, else the verdict and judgment in said action be vacated, set aside, and a new trial granted. In accordance with the terms of said order, the respondent served upon the attorneys for appellant and filed with the clerk of court his notice of election to accept such reduction of the verdict and judgment, from which order and judgment defendant appeals to this court.

Appellant assigns numerous errors on the admission and rejection of testimony, and on the refusal of the court to give to the jury the instructions requested by him. The order of the trial court, reducing the amount of the verdict $400, does not recite upon what ground it was made, nor that any items sued upon were stricken out in making the reduction, because they were not supported by the evidence. Appellant strenuously contends that the evidence is insufficient to justify the verdict, and that the damages are excessive, appearing to have been given under the influence of passion or prejudice, and that it will not do for the trial judge to reduce the verdict to what he believed the jury should have found; that would be substituting his judgment for that of the jury.

That the court has the power to require a remittitur in a proper case is now the settled doctrine in this state. Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Aronson v. Oppegard, 16 N. D. 595, 114 N. W. 377; Galvin v. Tibbs, H. & Co. 17 N. D. 600, 119 N. W. 39.

Upon the main question in the case, as to whether there was an employment, the parties were directly in dispute, and the jury were at liberty to believe whichever they chose. There was some evidence to support the conclusion reached, and, independent of other considerations, we might not be disposed to set aside their conclusion. Upon

the question of the value of the respondent's services, there was no testimony except his own. It appears from the testimony that the gross receipts of the firm of Lohr, Gardner, & Lohr during the year 1903 were about $5,000. It further appears that all matters between the appellant and the building company and the plaintiff were settled in full on September 16, 1904. The plaintiff kept no books of account; he made no charge; he presented no bill to appellant until after the commencement of this action, when the court ordered him to furnish an itemized account.

It is claimed that the court erred in refusing the instructions requested by the defendant. After a careful consideration it is our opinion that there is no reversible error in refusing the instructions.

On the trial counsel for plaintiff examined appellant as to matters that were irrelevant to the issue, but having a tendency to create a bad impression against him. Appellant was called for cross-examination under the statute, sworn and examined as a witness, and testified: "I live in West Chazey, New York, and have lived there during all the time covered by Mr. Lohr's testimony; I was in Iowa in 1904, the last time in September of that year. I am familiar with the affairs of the Vermont Building Company; I am the owner of a majority of the preferred stock, and was in 1904 and 1905; there was $35,000 preferred stock in the company. I owned $18,000 some odd, I couldn't give it exact. The balance of the preferred stock of the Vermont Building Company, being a minority, was owned by different persons, some reside in New York, and I presume some in Iowa, and some of them in Vermont. All of them put together did not own as large a block of the preferred stock as I did. There was $60,000 in common stock; the total capitalization was $95,000. A. H. Hazen and F. W. Dwinnell were the principal movers in the organization of the company; I became interested after the organization, through F. W. Dwinnell; also talked with Hazen about it. If I remember rightly, I own 597 shares of the common stock, par value, that would be $59,000; I didn't pay $59,700 for it."

He was then asked the following questions: "How much did you pay for the common stock of the company?" Appellant's counsel objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled. Appellant answered: "$150. I paid $150

for $59,700 par value of the common stock of the Vermont Building Company." Appellant was asked this question: "This $14,000 that you took back to the state of New York from the state of Iowa on or before the 16th day of September, 1904, have you ever disbursed any of it in dividends to the holders of the minority interests of the stock?" Objected to as incompetent, irrelevant, and immaterial. Objection overruled and appellant answered as follows: "I never disbursed it, minority or majority either; it is in the hands of the treasurer." Appellant was asked the following question: "There is no apparent reason, so far as you know, for the continuation of the existence of the Vermont Building Company, is there?" Objected to as incompetent, irrelevant, and immaterial; not shown to be in any way connected with the issues. Overruled; answered as follows: "Not without it should choose to go into business further during the life of the corporation." Appellant testified as follows: "I was interested to know whether the funds in the hands of the Vermont Building Company could be applied in the retirement of the preferred stock. I looked that question up, it might have been a matter of importance to me." He was then asked the following question: "Q. And you wanted to have the preferred stock in your hands retired by the payment of the par value of that preferred stock out of the treasury of the Vermont Building Company, didn't you?" Objected to as incompetent, irrelevant, and immaterial; calling for a conclusion; calling for a state of facts not in evidence, and calling for a matter not in issue now between the parties, and in no way connected with it, which objection was overruled, to which question he answered: "As it might be, according to law, and the by-laws and articles of incorporation of the company." The respondent was asked the following question: "Q. Counsel has interrogated you with regard to the results that could happen to Dr. Honsinger by the appointment of a receiver for the Vermont Building Company, in the state of Iowa; please explain to the jury what results could accrue to Dr. Honsinger by the legal appointment of a receiver in the state of Iowa for the Vermont Building Company." Objected to as not the question which counsel for defendant propounded to witness; but the question which was propounded and which he answered was, What benefit did accrue to Dr. Honsinger or to the Vermont Building Company, not what might

have accrued, which objection was overruled and plaintiff testified as follows: "In that case the receiver could proceed to the state of New York and commence action to recover the $14,000, in the hands of the treasurer; he could return with it to the state of Iowa, and administer it there in accordance with the order of the court, which would have been more in accordance with the wishes of the minority stockholders who secured his appointment. The appointment of a receiver in the state of Iowa was asked on behalf of the minority stockholders. The appointment of a receiver in the state of Iowa would have resulted in the surrender, by the attorney for Dr. Honsinger, of the funds which he had in his possession." Surely this answer was only a conclusion of the witness, and was prejudicial.

We think this testimony objected to, as a whole, had direct tendency to inflame the minds of the jury, and create a prejudice against the appellant; and the fact that the trial court thought that the verdict was excessive in the amount of $400 confirms us in the opinion that the verdict in this case does not represent that fair and impartial consideration which should characterize the decision of disputed questions of fact.

As a matter of fact, in the case of Kent v. Vermont Building Company and Honsinger, in which respondent intervened, a judgment was obtained in the United States circuit court for the northern district of Iowa, dissolving the corporation, and appointing a receiver, and an ancillary action was brought in the United States circuit court for the northern district of New York, based on that judgment, to require the officers of the corporation to turn over to the receiver appointed in the action in Iowa, the funds belonging to the corporation; and the defense was that that judgment was absolutely void for the reason that the United States circuit court for the northern district of Iowa obtained no jurisdiction of the corporation, and the decision of the United States circuit court of the northern district of New York was based upon the fact that the United States circuit for the northern district of Iowa obtained no jurisdiction of the corporation, and therefore the judgment in Iowa was absolutely void. Hence, plaintiff's conclusion of what would be the result of the appointment of a receiver in the Kent action was wrong.

The order and judgment appealed from are reversed, and a new trial granted.

All concur, except MORGAN, Ch. J., dissenting.

MORGAN, Ch. J. (dissenting). It may be that the cross-examination set forth in the majority opinion had a tendency to create prejudice in the minds of the jurors, but that is not the question before us. If it was proper cross-examination, the fact that it had that effect on the jury is not any reason for setting aside the verdict. If conceded to be improper cross-examination, that does not necessarily result in a new trial. The question in that case would be, Does the verdict show that the cross-examination had the result of creating passion or prejudice in the minds of the jury, growing out of such cross-examination?

I do not think the cross-examination improper or prejudicial. It had a direct bearing on plaintiff's employment, and whether, and to what extent, the services were beneficial, and the interest of the appellant in the services rendered by the plaintiff. On this appeal the question is whether the verdict was excessive after the trial court ordered that plaintiff must remit $400 or a new trial would be granted. The amount of the recovery as it now stands does not seem to me excessive, in view of the necessary finding of the jury that defendant employed the plaintiff, and that the services shown by the evidence were actually rendered. It does not appear clearly excessive, which is the only test in this court.

I therefore respectfully dissent from the conclusion reached by the court.

STATE OF NORTH DAKOTA v. FLOYD MILLER.

(128 N. W. 1034.)

Criminal Law — Intoxicating Liquors — Importation for Sale as Beverage — Intent — Proof of Similar Offenses — Instructions.

1. On a prosecution for the crime of importing into this state intoxicating liquors for sale or gift as a beverage, proof that the defendant did, prior to the time set out in the information, but within one or two months prior thereto, sell intoxicating liquors, is admissible only as bearing on the intent with which the act for which the accused is informed against was done.

Criminal Law — Trial — Refusal of Request — Request Embraced in Charge Given.

2. The charge as a whole states the law correctly. Hence, no error was committed in refusing defendant's requests for instructions.

Opinion filed November 25, 1910.

Appeal from County Court, Ransom county; *Honorable F. S. Thomas*, J.

Action by the state of North Dakota against Floyd Miller. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Chas. S. Ego, for appellant.

T. A. Curtis, State's Attorney, and *Andrew Miller*, Attorney General, for respondent.

CARMODY, J. Appellant was informed against for the crime of importing into this state intoxicating liquors for sale or gift as a beverage. It appears from the evidence that appellant received 1 gallon of whisky and one case of beer by express on November 3d, 1909, and a consignment of a like kind and quantity on November 5th. Appellant explained the proximity of the second shipment to the first by offering evidence tending to prove that a larger portion of the first

Note.—The right to introduce in a criminal proceeding evidence of other crimes in order to show the intent with which the act for which the accused is on trial was done is one of the well-recognized exceptions to the rule forbidding evidence of other crimes in criminal case, as shown by the authorities analyzed and reviewed in an elaborate note in 62 L.R.A. 194.

consignment was stolen. The prosecution produced one James Hall, who had pleaded guilty to a violation of the prohibition law and was serving sentence therefor. It was sought by his testimony to show that the defendant had been guilty of violations of the prohibition law during the months of September and October, 1909. The jury returned a verdict of guilty. Judgment was had upon the verdict, from which judgment defendant appeals.

Appellant assigns twelve errors, but they can be classified into two groups,—one on the admission of testimony, and the other on the court's instructions to the jury. The state relied for a conviction upon the importation of intoxicating liquors for sale or gift as a beverage, and after the importations of November 3d and 5th were proven, the witness Hall, who had worked for appellant on a threshing rig during the fall of 1909, over the objection of appellant that the evidence was incompetent and irrelevant, in that it tends to prove the commission of another offense than that charged in the information, and as calling for a conclusion, testified in substance that he and Miller drove around the country for five or six days with Miller's team, with boxes of liquor in the rig; that there was an agreement between him and Miller to go out and sell liquor; this agreement was made after they got through threshing; in pursuance of such agreement he, Hall, went out and sold liquor. Did not know as Miller sold any liquor, could not say whether he did or not. Appellant paid witness for some liquor. Did not know that appellant handed out any boxes to persons, but thought he did; witness ordered his liquor from Moorhead; it came in his name, except one case, which came in appellant's name, with his permission; would not swear that appellant made more than one sale. He either made a sale or drank it himself. On cross-examination the witness testified that he did not see appellant make a sale; did not see him take any money; the agreement was that witness should do the selling. The agreement was made in September, about the 15th or possibly the 25th; thought they went first to Anselm; did not remember whether they drove back to Lisbon or Sheldon from Anselm; attended a dance at Ed. Thompson's; had liquor with them at the time; did not remember to whom he sold; did not remember to whom Miller sold; did not see him make a sale. He gave witness some money, but witness did not remember how much. The reason he thought appellant made sales was that he said so. Ap-

pellant and witness talked over the amount of sales each had made; they tried to compare accounts; accounts did not come up just right.

This evidence was introduced not to convict the defendant, but to show the intent of the defendant in importing liquor. The rule seems to be that similar offenses in cases of this kind may be shown, first, to prove the intent; second, when they are part of one criminal scheme or system. The defendant was charged with the crime of importing intoxicating liquors into this state for sale or gift as a beverage. When it was proved that he had imported the intoxicating liquors, as charged in the information, then the fact that he had, previous to that time, made sales, and that he and the witness Hall had an agreement to make sales; that they drove around the country together with whisky in the buggy,—was admissible to show the intent of appellant in importing the intoxicating liquors.

Courts have almost uniformly held that proof of a collateral crime could not be introduced, unless there was such a logical connection between the collateral offense and the offense charged that the proof of the collateral offense furnished some legal evidence tending to establish some fact necessary to be established in proving the crime charged. The testimony of Hall tended to directly establish the fact that he and the defendant were engaged in selling intoxicating liquors; that most of the liquor had come in the name of witness Hall, but one shipment at least had come in the name of appellant, previous to the importation for which he was convicted. Pearce v. State, 40 Ala. 720; State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; People v. Molineux, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; State v. Fallon, 2 N. D. 510, 52 N. W. 318; State v. Kent (State v. Pancoast), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; State v. Murphy, 17 N. D. 48, 17 L.R.A.(N.S.) 609, 115 N. W. 84, 16 A. & E. Ann. Cas. 1133.

On this phase of the case the court charged the jury as follows: "Gentlemen of the jury, there has been some evidence introduced here that the defendant did, prior to the time set out in the information, but within one or two months prior thereto, sell intoxicating liquors to divers persons. This evidence is before you simply for the purpose of aiding you in coming to your conclusion as to the purpose for which these liquors were imported. Before you can convict, you must

be satisfied beyond a reasonable doubt that the liquors were imported for the purpose of sale contrary to law." In this instruction there is no error. Appellant requested the following instruction: "In weighing the testimony of a witness you shall take into consideration his general character, what his business is and has been, who he is, where he comes from, and what his antecedents are, if the same have been proven. These are all the circumstances which are proper for you to consider in determining for yourselves just what weight should be given the testimony of any particular witness, whether for the state or for the defendant." In lieu thereof, the court gave the following instruction: "Gentlemen of the jury, you are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. You may take into consideration their interest, bias, or prejudice, if any, their relationship to the parties and to the case, if any, the probability or improbability of the story related by them, and any and all other facts and circumstances in evidence which, in your judgment, would add to or detract from their credibility or the weight of their testimony." This instruction, we think, is sufficient. The appellant complains of the instruction, and particularly that the court used the words "may take into consideration," in place of "should take into consideration." While it might have been proper to have used the word "should," still the defendant could not have been prejudiced by the use of the word "may."

The charge as a whole states the law correctly, and was as favorable to the defendant as he could expect.

Finding no prejudicial error the judgment appealed from is affirmed. All concur.

STATE OF NORTH DAKOTA v. C. H. ALBERTSON.

(128 N. W. 1122.)

Criminal Law — Bill of Particulars.

1. The questions raised by the assignments of error relating to the denial of the defendant's demand for a bill of particulars, and to allowing the attorney general to ask questions which the defendant claims assumed facts unproven and questions which were leading, are identical with the same questions

passed upon by this court in the case of State v. Empting, decided at this term, 21 N. D. —, 128 N. W. 1119, and what is said by the chief justice in that case disposes of these questions.

Criminal Law — Information and Indictment — Indorsing Names of Witnesses — Testimony of Witnesses Not on Information.

2. Section 9794, Rev. Codes 1905, requires that the names of all witnesses for the prosecution, known to the state's attorney to be such at the time of filing the information, shall be indorsed or otherwise exhibited thereon, but provides that other witnesses may testify in behalf of the prosecution on the trial of said action, the same as if their names had been indorsed on the information. It is not error for the trial court to allow the examination of such witnesses.

Criminal Law — Witnesses — Evidence.

3. The information covers the time from January 1st, 1909, until May 18th, 1910. The attorney general, against the objection of defendant, was permitted to ask some of the witnesses this question: "How many times have you drunk malt or beer there in the last year and a half?" The objection to the question that it embraced more time than alleged in the information was overruled. This ruling, even if erroneous, is not prejudicial. The time inquired about was at best but a slight variance, and numerous witnesses answered substantially the same question without any objection on the part of the defendant.

Criminal Law — Jury — Advice to Acquit — Instruction — Refusal.

4. Error cannot be predicated upon the refusal of the court at the close of a state's case to advise the jury to return a verdict of not guilty, as the jury is not bound by such advice.

Criminal Law — Trial — Reopening for Further Evidence — Discretion of Court.

5. No error was committed in permitting the state, after it had rested its main case, to reopen the case for the introduction of the testimony of McDonald. It is a familiar rule of district court practice for the trial court at any time prior to the close of the case, in the exercise of its judicial discretion, to reopen the case and receive further evidence.

Criminal Law — New Trial — Impeaching Evidence.

6. The statements contained in affidavits used on a motion for a new trial are purely impeaching, and the general rule is that such evidence does not furnish a good ground for granting a new trial.

Verdict — Sufficiency of Evidence.

7. The question of the insufficiency of the evidence to justify the verdict is not properly raised.

Opinion filed November 25, 1910.

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

Action by the State of North Dakota against C. H. Albertson. From an order denying defendant's motion for a new trial, defendant appeals.

Affirmed.

Newton & Dullam, for appellant.

General powers of a court authorize a bill of particulars in criminal cases. Com. v. Snelling, 15 Pick. 321; Rex v. Hodgson, 3 Car. & P. 422; Rex v. Bootyman, 5 Car. & P. 300; State v. Conlin, 27 Vt. 323; State v. Freeman, 27 Vt. 525; State v. Bacon, 41 Vt. 532, 98 Am. Dec. 616; State v. Rowe, 43 Vt. 267.

Material facts must be assumed in question propounded to witnesses. 1 Thomp. Trials, § 369; 2 Elliott, Ev. §§ 831–838; People v. Mather, 4 Wend. 249, 21 Am. Dec. 122; People v. Graham, 21 Cal. 261; Carpenter v. Ambroson, 20 Ill. 170; Baltimore & O. R. Co. v. Thompson, 10 Md. 76; 1 Greenl. Ev. § 434; Klock v. State, 60 Wis. 574, 19 N. W. 543; Turney v. State, 8 Smedes & M. 120, 47 Am. Dec. 74; Gunter v. Watson, 49 N. C. (4 Jones, L.) 455.

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

It was not error to refuse defendant a bill of particulars. State v. Williams, 14 Tex. 98; State v. Quinn, 40 Mo. App. 627; United States v. Ross, 1 Morris (Iowa) 164; People v. Alviso, 55 Cal. 230; Jones v. State, 136 Ala. 118, 34 So. 236; Com. v. Moore, 2 Dana, 402.

Granting or refusing a bill of particulars is a matter of discretion. Com. v. Wood, 4 Gray, 11; Com. v. Giles, 1 Gray, 469; DuBois v. People, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658; Sullivan v. People, 108 Ill. App. 328; People v. Tweed, 63 N. Y. 194; Tilton v. Beecher, 59 N. Y. 176, 17 Am. Rep. 337; United States v. Tilden, 10 Ben. 547, Fed. Cas. No. 16,521; Mathis v. State, 45 Fla. 46, 34 So. 287 and cases cited.

It is not error to allow witnesses, not indorsed on information and not known to state's attorney, when filing it, to testify. Hill v. People, 26 Mich. 496; People v. Hall, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 4 Am. Crim. Rep. 357; People v. Moran, 48 Mich. 639,

4 Am. Crim. Rep. 476; State v. Church, 6 S. D. 89, 60 N. W. 143; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

CARMODY, J. Appellant was, on the 26th day of May, 1910, convicted by a jury in the district court of Burleigh county of keeping and maintaining a common nuisance, in violation of § 9373, Rev. Codes 1905. There is no specific place set forth in the information where the nuisance was kept, but it alleges only that it was kept at a certain place located in the city of Bismarck, in Burleigh county, North Dakota. The defendant demanded a bill of particulars showing the description of the place, building, or other structure where the alleged nuisance was kept, the kinds of liquor sold, when and to whom sold. The demand was not verified. The trial court denied the demand. The first four errors assigned by appellant relate to this ruling. The attorney general was permitted, over the objections of defendant, to ask questions which defendant claims assumed facts unproven and questions which were leading. The fifth, sixth, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty-fourth, and forty-sixth errors assigned relate to the rulings on this class of evidence. The questions raised by the assignments of error hereinbefore mentioned are identical with the same questions passed upon by this court in the case of State v. Empting, decided at this term, — ante, —, 128 N. W. 1119, and what is said by the chief justice in that case disposes of the assignments of error hereinbefore mentioned in the case at bar.

The attorney general, over the objection of the defendant, was permitted to call as a witness, Fred Weir, whose name was not indorsed on the information. In this there was no error.

Section 9794, Rev. Codes 1905, reads as follows: "All informations filed under the provisions of this article shall be by the state's attorney of the county or judicial subdivision, or by the person appointed to prosecute, as informant; and said state's attorney or person appointed to prosecute shall subscribe his name to said 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, 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."

The attorney general informed the court that he had no knowledge of this witness at the time he filed the information.

See State v. King, 9 S. D. 628, 70 N. W. 1046; Hill v. People, 26 Mich. 496; People v. Hall, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 4 Am. Crim. Rep. 357; People v. Moran, 48 Mich. 639, 4 Am. Crim. Rep. 476; State v. Church, 6 S. D. 89, 60 N. W. 143; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

The information covers the time from January 1st, 1909, until May 18th, 1910, a period of one year, four months, and eighteen days. The attorney general, against the objection of defendant, was permitted to ask some of the witnesses this question: "How many times have you drunk malt or beer there in the last year and a half?" The objection to the question that it embraced more time than was alleged in the information was overruled. This ruling, even if erroneous, is not prejudicial. The time inquired about was at best but a slight variance, and numerous witnesses answered substantially the same question without any objection on the part of the defendant. Pharo v. Beadleston, 2 Misc. 424, 21 N. Y. Supp. 989; Com. v. Dillane, 1 Gray, 483.

The motion to advise the jury to return a verdict of not guilty was properly denied. State v. Wright, 20 N. D. 216, 126 N. W. 1023 and cases therein cited.

No error was committed in permitting the state, after it had rested its main case, to reopen the case for the introduction of the testimony of A. F. McDonald. It is a familiar rule of district court practice for the trial court, at any time prior to the close of the case, in the exercise of its judicial discretion, to reopen the case and receive further evidence. No testimony had been introduced at that time by the defendant, and he could not have been prejudiced by the ruling complained of.

The witness McDonald's name was on the information, and defendant could not have been prejudiced or surprised by the fact that he was called as a witness after the state had rested. State v. Martin, 89 Me. 117, 35 Atl. 1023; McDonald v. Smith, 14 Me. 99; Ruggles v. Coffin, 70 Me. 468; Turner v. St. John, 8 N. D. 245, 78 N. W. 340.

McDonald testified that he was chief of police of Bismarck; that he was present and assisted Deputy Sheriff Barnes in making a search of the premises about three weeks before the trial; and defendant, Albertson, was there; that McDonald and Deputy Sheriff Barnes told Albertson they were down there to search, and he told them to go ahead and search. The defendant made a motion to vacate and set aside the verdict, and for a new trial upon the statement of the case, and the affidavits of R. Wilson, August Boyer, Jr., and defendant Albertson. The affidavit of Wilson is to the effect that he was present in the front room of the place where the nuisance was alleged to be maintained, at the time the search was made by Deputy Sheriff Barnes and Chief of Police McDonald; that Albertson was not in the front room when the officers came in, nor in the back room, according to the best knowledge and belief of Wilson, and that no such conversation as McDonald testified to took place; that he knew Deputy Sheriff Barnes, Chief of Police McDonald, and defendant Albertson. Boyer's affidavit was in substance that he knew Chief of Police McDonald, Deputy Sheriff Barnes, and defendant Albertson; that he and Wilson were in the front room of the place where the nuisance was alleged to be maintained when Barnes and McDonald came in to make the search; that defendant Albertson was not there, and did not come in for about ten minutes after the officers came in, and that the officers had then passed into another room, and that no such conversation as that testified to by McDonald took place. Albertson's affidavit was to the effect that he was not in the front room of said place when the officers entered, and did not see them there, but met them in the back room, but no such conversation as that testified to by McDonald took place. Albertson did not go on the stand at the trial.

These affidavits are purely impeaching, and the general rule is that such evidence does not furnish a good ground for granting a new trial. Libby v. Barry, 15 N. D. 286, 107 N. W. 972; Heyrock v. McKenzie, 8 N. D. 601, 86 N. W. 762; Stoakes v. Monroe, 36 Cal. 388, 2 Mor. Min. Rep. 246; 14 Enc. Pl. & Pr. p. 791.

At any rate the motion for a new trial, based on these affidavits, was addressed to the sound judicial discretion of the trial court, and the action of the trial court upon the motion is conclusive upon this

court, unless it appears that the discretion vested in the court below has been abused.

The question of the insufficiency of the evidence to justify the verdict is not properly raised.

Finding no prejudicial error, the order appealed from is affirmed. All concur.

STATE OF NORTH DAKOTA v. GEORGE ROBIDOU.

(128 N. W. 1124.)

Criminal Law — Misconduct of a Juror — New Trial — Discretion of Court.

An order refusing a new trial sought for alleged misconduct of a juror will not generally be disturbed, unless the trial court appears to have abused its discretion.

Opinion filed November 25, 1910.

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

Action by the State of North Dakota against George Robidou. From an order denying defendant's motion for a new trial, defendant appeals.

Affirmed.

F. H. Register, for appellant.

Accepting a juror who conceals his unfitness is no waiver. State v. Stockman, 9 Kan. App. 422, 58 Pac. 1032; Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769; Moody v. Pearce, 7 J. J. Marsh. 221.

If prejudice might have resulted from juror's misconduct, it is presumed, and a new trial should be granted. Monroe v. State, 5 Ga. 140; Myers v. State, 97 Ga. 94, 25 S. E. 252; 2 Thomp. Trials, § 2617; Thompson v. State, 26 Ark. 323; Pope v. State, 36 Miss. 121; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760; Westmoreland v. State, 45 Ga. 225; Madden v. State, 1 Kan. 340; People v. Turner, 39 Cal. 370; State v. Prescott, 7 N. H. 288; Folsom v. Manchester, 11 Cush. 334; Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49; Clack v.

Kansas City Electrical Wire Subway Co. 138 Mo. App. 205, 119 S. W. 1014.

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

The grant of a new trial for a juror's misconduct is largely in the sound judicial discretion of the trial judge, to be disturbed only for abuse. State v. McDonald, 16 S. D. 78, 91 N. W. 447; State v. Andre, 14 S. D. 215, 84 N. W. 783; State v. Taylor, 134 Mo. 161, 35 S. W. 92; State v. Cucuel, 31 N. J. L. 249; Com. v. White, 147 Mass. 79, 16 N. E. 707; Bird v. State, 18 Fla. 498; Borland v. Barrett, 76 Va. 138, 44 Am. Rep. 152; People v. Johnson, 110 N. Y. 144, 17 N. E. 684; State v. Salverson, 87 Minn. 50, 91 N. W. 1, 12 Am. Crim. Rep. 644.

The discretion was not abused. Perry v. Cottingham, 63 Iowa, 41, 18 N. W. 680; 12 Enc. Pl. & Pr. p. 563; McAllister v. Sibley, 25 Me. 474; State v. Craig, 78 Iowa, 642, 43 N. W. 462; Pettibone v. Phelps, 13 Conn. 445, 35 Am. Dec. 90; State v. Allen, 89 Iowa, 51, 56 N. W. 261; Com. v. Sallager, 3 Clark (Pa.) 127; State v. Baughman, 111 Iowa, 75, 82 N. W. 452; Barlow v. State, 2 Blackf. 116; Jordan v. State, 22 Fla. 532; State v. Gould, 40 Kan. 265, 19 Pac. 739; Crawford v. Com. 18 Ky. L. Rep. 16, 35 S. W. 114; 12 Cyc. Law & Proc. pp. 718–720, and notes; 12 Enc. Pl. & Pr. pp. 561–563 and notes; People v. Johnson, 110 N. Y. 144, 17 N. E. 684; People v. Boggs, 20 Cal. 436; State v. Cucuel, 31 N. J. L. 262; 2 Thomp. Trials, § 2553.

Carmody, J. Appellant was, on the 25th day of May, 1910, convicted by a jury in the district court of Burleigh county of keeping and maintaining a common nuisance, in violation of § 9373, Rev. Codes 1905. One James R. Falconer was accepted as a juror after an examination as to his qualification by both parties. On the 31st day of May, one William J. Empting made an affidavit that he was well acquainted with the juror Falconer; that, after said Falconer had been accepted as a trial juror, he accosted affiant on or about noon of the 24th day of May, and stated that he, said Falconer, had to get off this jury as his hired man had been hurt, and then requested affiant to see said defendant and tell him to let the said Falconer off the jury, and if he, said defendant, did not, he, the said Falconer, would con-

vict him, the said defendant. That affiant did not, on said 24th day of May, communicate the statements of said Falconer to said defendant, but sent word of said statements to the defendant. Defendant, on the 3d day of June, 1910, made an affidavit, stating that neither William J. Empting nor any other person communicated to him, defendant, the statements of the juror Falconer until after he was convicted in said action, and that he, said defendant, had no knowledge of the statements made by the juror Falconer, until after the trial of the action, and had he known that the juror Falconer had stated that he would convict defendant if he, said Falconer, was not let off the trial jury in said action, defendant would have gladly consented to the excuse of the said Falconer as a trial juror in said action. The juror Falconer made an affidavit, in which he states that after he had been accepted and qualified as a juror, he told the said William J. Empting that he, Empting, should say to the defendant that he, the defendant, had better excuse the juror Falconer from said jury because he, Falconer, would probably be against him, and states in explanation of said conversation that the said Falconer and the said Empting were acquaintances of long and intimate standing, and that the statement referred to on the part of affiant was made in a jocular manner and not seriously intended, and not intended to be seriously understood by the said Empting, and that the manner of Falconer's speech and the circumstances of the conversation were such that the said Empting knew and understood that the statement was made by the juror in a jocular manner, and not seriously intended, and that the said Empting so understood the same, and that both the affiant and the said Empting so understood the matter. Juror Falconer further states that he had no prejudice against the defendant at that time, or at any other time during the trial of said case, and was not influenced by any prejudice against him, and states that he took no affront at not being excused from said jury by the defendant; and avers that he was not at that time, or at any time during the trial of the case, in any manner influenced in his deliberations or in his verdict by his conversation with the said Empting, or by any other influence, except the evidence introduced in the case and the instructions given him by the court, and that he based his verdict solely upon such evidence and such instructions.

On the 2d day of August, Empting made an affidavit in rebuttal,

in which he denied that the conversation by the juror Falconer was to the effect or in the words stated in the affidavit of said Falconer, and averred that Falconer stated in positive language and without qualification that he, Falconer, had to get off the jury as his hired man had been hurt, and that unless the defendant let Falconer off said jury, he, Falconer, would convict the defendant, and as part of such conversation Falconer requested Empting to so state and notify the defendant; that at the time of and during such conversation Falconer was serious and seemed very desirous of being excused from said jury; that such conversation of Falconer did not partake in any degree of any levity, joking, or jesting, but was carried on by him in a serious and earnest manner; that the manner of Falconer impressed Empting with the belief at the time of said conversation, and Empting in truth understood therefrom that, unless the defendant excused Falconer from said jury, Falconer would convict defendant, and acting under this belief, Empting sent word of the said conversation to the defendant; that Empting did not understand the said conversation or any part of it in any jocular way, but as seriously intended as spoken, and Empting believed, from the said conversation and the earnest manner and seriousness during it, that Falconer meant and intended to convict the defendant if he did not excuse him, Falconer, from the jury.

It also appears from the statement of the case that on the 26th day of May, 1910, William J. Empting, who made the affidavit, was tried in the same court for a like offense, and that the juror Falconer, after an examination both by the state and Empting, was accepted as a juror. On these affidavits, and on the examination of the juror Falconer as to his qualifications in the case at bar, and in the case of State v. Empting, 21 N. D. —, 128 N. W. 1119, a motion for a new trial was made by the defendant and denied, from which order defendant appeals to this court.

The only error relied upon by the appellant is the denial of his motion for a new trial.

It is now well established by the modern authorities that every instance of misconduct in a juror will not destroy the verdict. The rule deduced from the cases seems to be that however improper such conduct may have been, yet, if it does not appear that it was occasioned by the prevailing party, or anyone in his behalf; if it does not indi-

cate any improper bias upon the juror's mind, and the court cannot see that it either had, or might have had, an effect unfavorable to the party moving for a new trial, — the verdict ought not to be set aside. Pettibone v. Phelps, 13 Conn. 445, 35 Am. Dec. 88, and cases there cited.

That the juror acted very improperly, there can be no doubt, but whether, for this misconduct the verdict should be set aside is altogether a different question. The district court may have very correctly concluded, from the evidence adduced,—of the credibility of which he was to judge,—that the alleged misconduct of the juror which we are now considering, and which occurred during the trial, did not in the slightest degree in any manner interfere with the full and impartial investigation and final determination of the cause.

Proffatt on Jury Trials, § 388, lays down the rule as to expression of opinions by jurors pending the trial, as follows: "It will not, however, in every case be a sufficient ground for setting aside the verdict, unless the expression be such as to unmistakably indicate a previous opinion, irrespective of that derived from the evidence."

In the case of State v. Baughman, 111 Iowa, 72, 82 N. W. 452, the affidavit of one Towne alleged that during the trial a juror stated, in conversation at the former's home, in substance, that he, the juror, was convinced of the defendant's guilt, and that it would require a good deal of evidence to change his mind; and, further, that he understood that defendant's father had been guilty of the same crime, and had run away. Towne claimed to have advised the juror not to talk that way, as evidence might be offered to change his conclusions, and that the juror stated, "It couldn't be done." The court, in refusing to set aside a verdict of guilty, says: "While his conduct is to be condemned, it does not appear to have worked harm to the defendant. Misconduct does not entitle the defeated party to a new trial, unless it may be said to have influenced the result. It may furnish ground for the juror's punishment, but should not necessarily affect the parties to the suit when entirely innocent of wrongdoing. A large discretion in the matter of determining the effect of misconduct of jurors is necessarily lodged in the trial court."

In Jordan v. State, 22 Fla. 528, which was an action for selling intoxicating liquors, one of the jurymen sad: " 'Fisher gained Anthony

Johnson's case yesterday, but I will be damned if he gains this one,' meaning the one then on trial; that said Fisher having been a witness for the said Anthony Johnson on his trial the day before and having also been a witness who had testified on behalf of the defendant on that day." The court refused to set aside a verdict of guilty.

In those cases the statements made by the jurors were much stronger than the statements in the case at bar. The remarks made by the juror to Empting were made to an acquaintance of many years' standing. The juror says they were made in a jocular manner and had no effect whatever on his arriving at a decision of the case. That the case was decided on the evidence as given in court and the law given by the court. True, Empting testified just as positively that the juror was in earnest, and seemed to be considerably excited and agitated when he made the remarks complained of, but Empting evidently did not consider them very serious at the time as he did not communicate them to the defendant in the case at bar, although Empting's trial for a like offense followed the trial in the case at bar, and it is a fair inference that he was in the court room during the trial of the defendant and could have communicated the juror's remarks to defendant or his counsel. Two days after the juror Falconer made the remarks, he was accepted by Empting as a juror in a case in which Empting was defendant, and in which he was charged with a like offense. Considering the juror's affidavit, his examination as to his qualifications as a juror, and his oath as a juryman, the presumption is that he arrived at a verdict on the law and the evidence.

The refusal or denial of a motion for a new trial for alleged misconduct on the part of the jury is, as a general rule, a matter within the discretion of the judge presiding at the trial; and unless it appears that this discretion was abused, or that there has been palpable error, or unless it appears that the trial court refused to review and consider the evidence by which its consideration of the motion should have been guided or controlled, the refusal of the trial judge to grant a new trial will not as a general rule be disturbed on appeal. 12 Enc. Pl. & Pr. pp. 561, 562 and cases cited; State v. McDonald, 16 S. D. 78, 91 N. W. 447; State v. Andre, 14 S. D. 215, 84 N. W. 783; Pettibone v. Phelps, 13 Conn. 445, 35 Am. Dec. 88; State v. Allen, 89 Iowa, 51, 56 N. W. 261; State v. Beasley, 84 Iowa, 83, 50 N. W. 570;

Perry v. Cottingham, 63 Iowa, 41, 18 N.W. 680; State v. Salverson, 87 Minn. 41, 91 N. W. 1,12 Am. Crim. Rep. 644; People v. Johnson, 110 N. Y. 134, 17 N. E. 684; State v. Cucuel, 31 N. J. L. 249; State v. Taylor, 134 Mo. 109, 35 S. W. 92; State v. Howard, 118 Mo. 136, 24 S.W. 41.

In State v. McDonald, 16 S. D. 78, 91 N. W. 447, the court says: "Upon a careful examination of the affidavits, we are unable to say that the trial court erred in refusing the motion for a new trial upon the ground stated. The question was largely in the sound judicial discretion of the trial court, and, this court being unable to say that there was an abuse of such discretion, the ruling of the court should not be disturbed."

In State v. Andre, 14 S. D. 215, 84 N. W. 783, the court says: "A motion for a new trial for alleged misconduct of the jury, or any other ground specified by statute, being addressed to the sound discretion of the trial judge, whose superior knowledge of all the facts and circumstances enables him to know the requirements of justice, a reviewing court will never interfere, unless an abuse of such discretion affirmatively appears."

In Perry v. Cottingham, 63 Iowa, 41, 18 N. W. 680, where the trial court granted a new trial on the ground of misconduct of one of the jurors, the court says: "The question whether the verdict ought to be set aside in any case, on this or similar grounds, is left very largely to the sound discretion of the trial court. The judge who tries the case is necessarily in a much better position to determine whether the substantial rights of the parties have been affected by the misconduct complained of than we can be; and when he has determined that justice and the proper administration of the law demand that there should be another trial of the cause, it should be made to appear very clearly that there has been an abuse of discretion, before we would be warranted in setting aside his order."

In the case of People v. Johnson, 110 N. Y. 134, 17 N. E. 684, which was an appeal from a judgment of the general term of the supreme court, affirming a judgment of conviction of murder in the first degree, one of the grounds mentioned for a new trial was the misconduct of the jury. The court says: "In such cases the trial court is authorized to grant a new trial provided they can see that the 'sub-

stantial rights' of the defendant have been prejudiced, and not otherwise."

In State v. Taylor, 134 Mo. 109, 35 S. W. 92, the court says: "Relative to the alleged separation of the jurors and other alleged misconduct, the previous forming and expressing of opinions by several of them, it is enough to say that the whole matter of this paragraph was examined by the lower court upon affidavits pro and con, and that court having ruled that the verdict should stand, we will not interfere with such ruling unless upon grounds the most clear and reasons the most manifest."

After a careful review of the record, we cannot say that the trial court abused its discretion in denying defendant's motion for a new trial.

The order appealed from is affirmed. All concur.

ELLEN CLINE v. MARGARET DUFFY.

(129 N. W. 75.)

Judgment — Vacating Default Judgment — Discretion of Court.

1. An application to vacate a default judgment or order not based upon irregularities of procedure, but exclusively upon the statutory grounds of "mistake, inadvertence, surprise, or excusable neglect" of the moving party, is an appeal to the favor and not in the nature of an application based upon a strict legal right. Such an application invokes the sound judicial discretion of the court to which it is addressed. The supreme court will, however, reverse the lower court's ruling where it clearly appears that the trial court abused the discretion vested in it by statute.

Judgment — Vacating Default Judgment — Diligence — Discretion of Court — Burden of Proof.

2. Persons applying for relief from default judgments, upon the ground of "mistake, inadvertence, surprise, or excusable neglect" have the burden of

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Note.—The right to vacation of a judgment on account of negligence or mistake of attorney is considered, with a review of the authorities, in 96 Am. St. Rep. 108; and the question whether neglect of counsel is to be imputed to party under a statute providing for relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect is the subject of a note in 27 L.R.A.(N.S.) 858.

showing diligence, and unless it is shown affirmatively the court will not ordinarily exercise its discretion in their favor. The applicant must not only show facts excusing the default on his part, and that he has a meritorious defense, but he must also show proper diligence in prosecuting his remedy. He must make his application with due diligence after receiving notice or knowledge of the default.

Applying the above rules to the facts herein, *held*, that it was an abuse of discretion to deny appellant's motion to be relieved from the default judgment rendered against her.

Opinion filed December 1, 1910. Rehearing denied December 22, 1910.

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

Appeal from an order refusing to vacate a judgment by default.

Reversed.

Flynn & Traynor (*Guy C. H. Corliss*, of counsel), for appellant.

Motion was made with sufficient promptness. Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Bloor v. Smith, 112 Wis. 340, 87 N. W. 870; Searles v. Christensen, 5 S. D. 650, 60 N. W. 29.

There was no negligence on the part of attorneys to warrant denial of motion. Whereatt v. Ellis, 70 Wis. 207, 5 Am. St. Rep. 164, 35 N. W. 314; 23 Cyc. Law & Proc. p. 942; Merchants' Bank v. Mills, 3 E. D. Smith, 210.

Burke, Middaugh, & Cuthbert, for respondent.

Negligence of attorney is imputable to his client. 23 Cyc. Law & Proc. p. 939; Williamson v. Cummings Rock Drill Co. 95 Cal. 652, 30 Pac. 762; Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863; Sanborn, V. & Co. v. Centralia Furniture Mfg. Co. 5 Wash. 150, 31 Pac. 466.

Statement of Facts.

This is an appeal from an order denying defendant's motion to be relieved from a default judgment taken against her for want of an answer or appearance, and for leave to answer and defend upon the merits. The record discloses that such default judgment was entered December 30, 1907, and that on August 12, 1908, defendant, by her attorneys, caused notice of motion to vacate the judgment to be served on

plaintiff's attorneys, the motion being returnable August 22d. The motion was finally submitted to the trial court on October 16, 1908, and on May 24, 1909, the order complained of was made. Numerous errors are assigned upon such order.

In addition to the files and records in the case and a proposed verified answer, the moving papers submitted to the trial court in support of the motion to vacate the judgment consisted of the affidavits of M. W. Duffy, Margaret Duffy (the defendant), M. H. Brennan, and Henry M. Gray, and also affidavits of certain persons engaged in the real-estate business at Devils Lake, which latter affidavits merely tend to show that the damages assessed in the judgment are excessive.

In order that there may be a clear understanding of the showing made in the court below upon the questions relative to the principal basis of the motion, to wit, "that such default judgment was taken against the defendant through her mistake, inadvertence, surprise, and excusable neglect," we deem it necessary to set forth in full the affidavits in so far as they relate to such ground. The affidavit of M. W. Duffy is as follows:

"M. W. Duffy, being first duly sworn, deposes and says that he is the son of the defendant, Margaret Duffy, in the above-entitled action; that ever since the death of his father, Maurice Duffy, in 1898, he has conducted practically all business for the said defendant, and has at all times been quite familiar with the facts relative to the matters involved in the action above entitled; that on or about the 19th day of April, 1907, under instructions from the defendant, he delivered to Brennan & Gray, attorneys in Devils Lake, North Dakota, at their office in said city, the summons and complaint in the above-entitled action, and then and there employed the said attorneys to make appearance and to defend the said action on behalf of the said defendant; that at said time he talked over the facts of the case with M. H. Brennan, one of the members of said firm of attorneys, who had also been and was still one of the attorneys in charge of the probating of the estate of Maurice Duffy, deceased, and with whom affiant had at times previous to the commencement of this action talked regarding the matters in controversy herein, and left the matter to be defended by said attorneys for defendant; affiant at all times thereafter until on or about the 9th day of July, 1908, fully believed that

an answer or other competent pleading had been served in said action and that the same was pending for trial in this court; that as affiant recollects, the jury for the June term, 1907, of this court had not been called up to October, 1907, and affiant thought that to be the reason same did not come on for trial; that in October, 1907, affiant moved to Stanley, North Dakota, and from time to time thereafter wrote to said attorneys relative to said case, and in January, 1908, received a letter from Henry M. Gray, one of the attorneys for defendant, that same would not be tried before the June, 1908, term of said court; that early in June, 1908, affiant wrote again to said attorneys as to when said cause should be tried, and, receiving no reply, came to Devils Lake on July 8th or 9th, and then for the first time discovered that no appearance had been made in said case on behalf of the defendant, and that judgment had been entered against the defendant by default; that as soon as possible thereafter, consistent with the business of affiant at that time in Devils Lake, he returned to Stanley, North Dakota, on July 20th, and then notified his mother, the defendant herein, of said judgment; that on or about the 8th or 9th day of July, after discovering said judgment, affiant also learned that execution had been issued on said judgment and had been placed in the hands of the sheriff of said county, and affiant thereupon consulted with Fred J. Traynor, an attorney of the firm of Anderson & Traynor at Devils Lake, North Dakota, and was advised by him that it would be necessary for the defendant personally to come to Devils Lake and talk with her attorney personally before proceedings could be taken to vacate the judgment, but that it would be time enough if she came within three weeks or thereabouts; that he so informed the defendant on or about July 20th, 1908; that on the 19th day of April, 1907, there was served on the said defendant, Margaret Duffy, as well as on this affiant, summons and complaint in another action in this court in which the said Ellen Cline was plaintiff, and Margaret Duffy, Maggie Cline, Matthew Duffy, Willie Duffy, Winnie Duffy, Nina Duffy, and Clyde Duffy, and John W. Mahar were named as defendants, and on said day and at the said time as he delivered the summons and complaint in the case of Ellen Cline v. Margaret Duffy to said attorneys, he also delivered the summons and complaint in this second action, and employed said attor-

neys to act for the defendants in both actions, and affiant is informed by said attorneys that in the second-mentioned case a demurrer to the complaint has been served and said case is pending on said demurrer, but said attorneys inform affiant that they have no recollection of having received the papers in the case now sought to be opened, and that their files in this case are lost and cannot be found, and stated to this affiant that they did not know of the existence of this action until on or about the month of July, 1908."

Defendant's affidavit follows:

"Margaret Duffy, being first duly sworn, deposes and says that she is the defendant named in the above-entitled action; that she is informed that on the 30th day of December, 1907, judgment by default in the above-entitled action was entered against her in the above-named court for the sum of $761.90 damages and $14.90 costs, making a total judgment of $776.80, and the same entered in judgment book No. 4, at page 146, in the office of the clerk of said court. That affiant did not know anything about the entry of said judgment until on or about the 20th day of July, 1908, and before said time had no intimation whatsoever that the said action had gone to judgment; that the summons and complaint herein were served on affiant on or about the 19th day of April, 1907, and that on the same day and date as said papers were served affiant sent her son, M. W. Duffy, with said papers to the office of Brennan & Gray, attorneys at Devils Lake, North Dakota, and instructed him to employ said Brennan & Gray as attorneys to appear for the defendant in this action, and to answer and defend the same for her, and to protect her rights therein; that thereafter said M. W. Duffy informed affiant that he had delivered said papers to said Brennan & Gray, and had employed them to make appearance and answer for defendant within the time required by law; that said M. W. Duffy had done practically all of affiant's business since the death of the husband and father, Maurice Duffy, and was familiar with the facts relating to said case, and M. H. Brennan, a member of said law firm of attorneys, was then and still is attorney for the estate of Maurice Duffy, deceased, and he too was familiar with the circumstances involved in said action, and defendant did not deem it necessary, therefore, to go personally to said attorney's office to state the facts of said case and depended upon her said son and

said attorneys to protect her rights therein; that from time to time up to October, 1907, affiant had her said son call upon said attorneys relative to said case, and at no time did she have any intimation that said case had not been answered; that in October, 1907, she removed her residence from Ramsey county to Stanley, North Dakota, a distance of about 174 miles, but from time to time caused her said son to write to said attorneys relative to the time of trial of said cause, and in January, 1908, said M. W. Duffy received a letter from Henry M. Gray, one of the members of said firm of attorneys, that said case would not come on for trial until the June, 1908, term of court; that at all time after the 19th day of April, 1907, until on or about July 20th, 1908, this affiant believed that her rights were being and had been duly protected by answer or other competent appearance; and always intended to defend against said action; that in the month of July, 1908, she sent her said son from Stanley, North Dakota, to Devils Lake to ascertain when said cause would be tried, and it was upon his return on or about July 20th, 1908, that she received her first intimation that said cause had gone to judgment by default, and that no appearance in same had been made on the behalf of the defendant; that as soon thereafter as she could possibly arrange to leave for Devils Lake she did so, and on or about August 5th made appointment with Fred J. Traynor, an attorney at Devils Lake, North Dakota, for Friday, August 7th, to interview him as to her rights in said matter; that on the 7th day of August, 1908, she engaged Anderson & Traynor, attorneys at Devils Lake, to take proceedings to have said judgment vacated and permission granted to defend therein, and on said day and date made a full and complete statement of all the facts and circumstances of this case within her knowledge to her said attorney, Fred J. Traynor, one of the members of said firm, and after having fully disclosed to said attorney all the facts and circumstances of the case as aforesaid, affiant is informed and advised by her said attorney, and affiant does verily believe it to be true, that she has a good and substantial defense to said action on the merits, such as will result in the dismissal of the plaintiff's action, and judgment in favor of defendant upon a trial of the merits thereof.

"Wherefore defendant prays that the judgment may be vacated

and set aside and defendant allowed to serve and file her answer hereto attached, and to defend therein."

The affidavit of M. H. Brennan and Henry M. Gray is as follows:

"M. H. Brennan and Henry M. Gray, being first duly sworn, each for himself deposes and says that he was a member of the former firm of attorneys of Brennan & Gray, at Devils Lake, North Dakota; that he has no recollection whatever of having seen the summons and complaint in the action of Ellen Cline v. Margaret Duffy, and did not know that there was such an action in existence until he learned of the judgment therein sometime about the month of July, 1908; that he is familiar with a certain case of Ellen Cline v. Margaret Duffy, Maggie Cline, Matthew Duffy, Willie Duffy, Winnie Duffy, Nina Duffy, Clyde Duffy, and John W. Mahar, and that the firm of Brennan & Gray are attorneys therein and in *due time served a demurrer to the complaint in said case, and the said case is still pending on said demurrer;* that affiant has at all times until the discovery of said judgment thought that the said action above mentioned, in which demurrer was served, was the only action between said parties, Ellen Cline and Margaret Duffy, pending or in which papers had been served; that if the summons and complaint in the action of Ellen Cline v. Margaret Duffy were delivered at our office or to either of us, the same are lost and cannot be found; that he has searched in his said office and among the files of the firm, and, after diligent search, has been unable to find any trace of any papers in said action, and if said case was ever intrusted to the firm of Brennan & Gray the same has been inadvertently overlooked."

In opposition to the motion, plaintiff submitted the affidavit of Henry G. Middaugh as follows:

"I, Henry G. Middaugh, being first duly sworn say: That I am one of the attorneys for the plaintiff in the above-entitled action. After said action was commenced I had several interviews with one of the sons of the defendant with reference to a settlement in said action and another action involving another tract of land, brought by Ellen Cline against Margaret Duffy and her children; that there were quite a number of interviews, and the only question involved was the amount that the defendant should pay to effect a settlement with the plaintiff. The plaintiff resides in Chicago, Illinois, as I am advised, and my

dealings and the dealings of the plaintiff's attorney with her have been through correspondence with attorneys in Chicago. Under date of December 23d, 1907, the attorneys in Chicago for the plaintiff advised plaintiff's attorneys here that one of the defendant's sons had asked the plaintiff to forward a quitclaim deed, so that the settlement which was then in the process of negotiation could be carried out, and after receiving the quitclaim deed from the plaintiff the plaintiff's attorneys here and under date of January 18th, 1908, addressed a letter to Brennan & Gray at Devils Lake, North Dakota, containing the plaintiff's proposition of settlement, which letter was duly mailed to said Brennan & Gray at Devils Lake, North Dakota, and which letter was as follows:

" 'With reference to the Ellen M. Cline matter, we have authority to settle the whole matter for $750 if closed up at once. On settlement your clients will be entitled to the following papers: (a) A release executed by Ellen M. Cline releasing Margaret Duffy individually and as administratrix from all claims and demands. (b) A quitclaim deed from Ellen M. Cline, widow, to Margaret Duffy, widow, covering the W. ½ of the S. W. ¼ of 22 and the W. ½ of the N. W. ¼ of 27–156–63. (c) A stipulation signed by us on behalf of the plaintiff and yourselves on behalf of the defendants in the case of Ellen Cline against Margaret Duffy, Maggie Cline, Matthew Duffy, Willie Duffy, Winnie Duffy, Nina Duffy, Clyde Duffy, and John W. Maher, involving the W. ½ of the S. W. ¼ of 22 and the W. ½ of the N. W. ¼ of 27–156–63, dismissing the action with prejudice, but without costs to either party as against the other. (d) A release of the *lis pendens* filed in the action last above described. (e) A satisfaction of the judgment entered in the case of Ellen Cline v. Margaret Duffy, which was recovered for the sale by the defendant of the W. ½ of the N. W. ¼ and the N. ½ of the S. W. ¼ of 33–156–63, in the manner not authorized by the Probate Code, that being the Jacob Wolfe quarter.

" 'Yours truly, Burke, Middaugh, & Cuthbert.'

"Not hearing from Brennan & Gray, the attorneys for the defendant, with reference to said matter, I did afterwards speak to Mr. Gray, one of the attorneys for the defendant, about it. I supposed that he knew about the judgment in the above-entitled action at all

times after it was entered, and I know that he knew about it after the plaintiff's attorneys addressed to him the letter of January 18th, which is above set forth, which specifically refers to the judgment in the above-entitled action.

"Again and under date of March 31st, 1908, the plaintiff's attorneys wrote to Brennan & Gray, the attorneys for the defendant, a letter of which the following is a copy:

" 'The attorneys in Chicago for Ellen Cline are urging us to take some action in the Margaret Duffy matter. Some time ago we wrote you that we would accept $750 in settlement of the whole matter. If this is not closed up at once, we will have to issue execution on the judgment against Margaret Duffy. Please advise us.

" 'Yours truly, Burke, Middaugh & Cuthbert.'

"Afterwards and on June 15th, 1908, the plaintiff's attorneys caused an execution to be issued on the judgment in the above-entitled action, and delivered to the sheriff of Ramsey county. Thereafter and on or about the 9th day of July, 1908, one of the sons of the defendant, in company with Mr. Fred J. Traynor, called upon the plaintiff's attorney, and wanted to know as to the prospect of a settlement, and at that time the plaintiff's attorneys exhibited to said son and to said Fred J. Traynor the copy of said letter of January 18th, 1908, addressed to Brennan & Gray and containing the plaintiff's offer of settlement, and, in answer to the inquiry of Mr. Traynor if that was the best settlement that the plaintiff's attorneys could make, I told him that we would take the responsibility of settling at that time if they desired to settle promptly for the sum of $700, which would include the amount that was to go to the plaintiff and the amount of her attorneys' fees, and the son of the defendant and Mr. Traynor said they would take the matter under consideration.

"I have examined the records in the office of the register of deeds of Ramsey county, North Dakota, and I find that on the date on which the defendant, Margaret Duffy, verified her affidavit in the application to vacate the judgment in the above-entitled action, there was recorded in the office of the register of deeds of Ramsey county, North Dakota, a warranty deed bearing the date on that day, recorded in book 21 of deeds, at page 511, reciting a consideration of $1.00 and other valuable consideration, whereby the defendant did grant to

Maurice V. Duffy those certain premises situated in the county of Ramsey and state of North Dakota, and known and described as the S. E. ¼ of the N. E. ¼ of section 19 and the W. ½ of the N. E. ¼ of section 19 in township 157 in range 62 west; that said deed appears to have been acknowledged on August 12th, 1908, before Fred J. Traynor, notary public, and to have been witnessed by Fred J. Traynor and M. H. Brennan."

In reply defendant submitted the affidavits of M. H. Brennan and Henry M. Gray as follows:

"M. H. Brennan, being first duly sworn, deposes and says that he has read the affidavit of Henry G. Middaugh in the above-entitled matter; that deponent never received the letter alleged to have been dated January 18th, 1908, which said Middaugh alleges was addressed to Brennan & Gray, and that he never saw or heard of said letter or any of its terms until he read the affidavit of said Middaugh; that between April, 1907, and March 16th, 1908, he met and talked frequently with said Middaugh at the United States Land Office and other places, and at no time did said Middaugh intimate to deponent that any judgment had been taken in said action or that any proposition of settlement had been mailed or submitted, or any letter not answered in said matter; that from April 1st, 1907, until March 16th, 1908, he was Register of the United States Land Office, the duties of which involved numerous details requiring constant attention, and that during said time he did very little practice at law, but left pending business to the care of H. M. Gray, and whether the summons and complaint in this case was left in the office, or, if left, destroyed on the mistaken impression it was a duplicate, owing to the number of defendants, deponent cannot now recall; that deponent is certain, however, that there was no intention of letting the matters involved go by default, as the same were discussed with said Gray, and the points supposed to be involved, particularly the question of jurisdiction of the subject-matter, the estate not having been closed, were talked over between himself and said Gray, and demurrer advised; that an inspection of the complaint in this case and that in the case of Ellen Cline v. Margaret Duffy, Maggie Cline, Matthew Duffy, Willie Duffy, Winnie Duffy, Nina Duffy, Clyde Duffy, and John W. Mahar, which is hereto attached marked Exhibit "A," shows that the first paragraph in each

complaint is almost identical with the exception that there is a different description of real estate involved; that the last-named case also makes allegations to the effect that Margaret Duffy as administratrix of the estate of Maurice Duffy, deceased, had wrongfully made disposition to her own benefit of the land therein described; that among other things the demurrer served in that case alleges that the complaint does not state facts sufficient to constitute a cause of action, and that the court has no jurisdiction of the subject of the action nor of the persons of the defendants; and the failure to answer or demur in the case at bar against Margaret Duffy (sole defendant) was due to inadvertence."

"Henry M. Gray, being first duly sworn, deposes and says that he has read the affidavit of Henry G. Middaugh in the above-entitled matter; that to the best of his knowledge and belief the letter of January 18th, 1908, which said Middaugh alleges he sent to Brennan & Gray, was never received by affiant; that during the year 1908 affiant had a talk with said Middaugh regarding settlement in the Cline-Duffy matter, but said Middaugh did not mention any judgment, and affiant did not in fact know there was any such judgment until some time after the 31st of March, 1908; that at said conversation with said Middaugh the matter under discussion was a settlement by which said Middaugh should obtain from said Ellen Cline quitclaim deed to her alleged interest in the land involved in the case of Ellen Cline v. Margaret Duffy, Maggie Cline, Matthew Duffy, Willie Duffy, Winnie Duffy, Nina Duffy, Clyde Duffy, and John W. Maher; that some time in the spring of 1908 affiant did receive a letter from said Middaugh containing the statements as set forth in said Middaugh's affidavit, as being of date March 31st, 1908, but knowing that a demurrer had been served in the case, the title of which is given just above, and not knowing of any other case between these parties, thought the communication referred to said case, and knowing no judgment could have been entered therein, the demurrer being still pending, set it aside temporarily pending the negotiations for settlement, until some considerable time thereafter, in looking over the records in the office of the clerk of court, he discovered the judgment now sought to be opened up; that affiant was not present on the 19th day of April, 1907, when M. W. Duffy was at the office of M. H. Brennan, and knew nothing of any case be-

tween these parties until Mr. Brennan turned over to affiant a certain envelope containing the papers therein, and the only papers therein were the summons and complaint in the case of Ellen Cline v. Margaret Duffy, Maggie Cline, Matthew Duffy, Willie Duffy, Winnie Duffy, Nina Duffy, Clyde Duffy, and John W. Maher, and these were the only papers involving any case between Ellen Cline and Margaret Duffy that ever came into affiant's hands or attention until the discovery of this judgment, and until after the 31st day of March, 1908, some time, affiant never knew and never suspected that there was in existence any other case between these parties than the one of Ellen Cline v. Margaret Duffy, Maggie Cline, Matthew Duffy, Willie Duffy, Winnie Duffy, Nina Duffy, Clyde Duffy, and John W. Maher."

FISK, J. (after stating the facts as above). In the light of the above facts and showing, we are required to review the action of the trial judge in denying defendant's application, and we must do this in accordance with well-settled rules repeatedly announced by this court in prior decisions, a brief reference to which will be here made. In Fargo v. Keeney, 11 N. D. 484, 92 N. W. 836, Mr. Chief Justice Wallin, in speaking of the scope of the review by this court, of orders such as this, said, in referring to § 5298 of the Codes which is § 6884, Rev. Codes 1905: "That section provides that said court may, 'in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.' This language clearly confers the requisite authority upon the district court, in furtherance of justice, to relieve a party from a judgment in any case where the same was taken against him through 'his mistake, inadvertence, surprise, or excusable neglect.' Therefore the question left for determination is one of fact, *viz.*, whether the trial court erred in ruling that the judgment in this case was so taken. In deciding this question it should be premised that, where an application to vacate a judgment or order is not based upon irregularities of procedure, but is placed exclusively upon the ground of mistake, surprise, inadvertence, or excusable neglect of the moving party, such application under the authorities is an appeal to the favor, and is not in the nature of an application based upon a

strict legal right. In such cases the application invokes the sound judicial discretion of the court to which it is addressed, and in all such cases it is well settled that there can be no reversal of the ruling of the court below by a reviewing court, except where the court of review finds that the trial court abused the discretion vested in it by the law. The mere fact that the appellate court does not entirely agree with the court of original jurisdiction in its rulings does not suffice to show a case of abuse of discretion within the meaning of the authorities. [Citing and quoting from Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581.] . . . The final question presented is, therefore, whether the vacating order is one involving an abuse of discretion on the part of the trial court. Unless it is such, this court, under an established rule of practice in this and other courts, cannot disturb the ruling of the court below upon which court the statute by its terms devolves a discretion in this class of cases."

In Keeney v. Fargo, 14 N. D. 419, 105 N. W. 92, the present chief justice of this court, among other things, said: "Courts have a wide discretion relating to granting or withholding relief in such cases, which will not be disturbed, except on a showing of an abuse of discretion. Nichells v. Nichells, 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73; Smith v. Wilson, 87 Wis. 14, 57 N. W. 1115."

This court has very recently had occasion to give expression of its views upon the rule above referred to. Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102. Among other things it was there said: "A general rule having unanimous support seems to be that if the moving party makes a clear and unquestionable showing that he has a good defense or cause of action on the merits, of the benefit of which he has been deprived without fault on his part, the trial court cannot, in the exercise of a sound judicial discretion, deny him the relief prayed for, and if it has done so its action will be reversed. On the point, however, of what constitutes fault on the part of the moving party and what may be said to constitute surprise, mistake, inadvertence, and excusable neglect, the cases are in irreconcilable conflict." Under the facts in that case it was held that the defendant was in no manner guilty of a lack of due care and diligence, and that it was solely through the inadvertence and ex-

cusable neglect of counsel that the default was occasioned. There is nothing therein stated which conflicts with or in any manner changes or modifies the well-settled rule announced by the prior decisions.

Another rule equally well settled is that there must not only be diligence in preventing a default, but there must be diligence in making the application to be relieved from such default after notice thereof. "It is well settled in cases of this kind, that the moving party has the burden of showing diligence, and, unless it is shown affirmatively, the court will not ordinarily exercise its discretion in his favor." Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381, citing St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66; Gerish v. Johnson, 5 Minn. 23, Gil. 10. The court there expressly approved the rule announced in 6 Enc. Pl. & Pr. p. 189 as follows: "It is not sufficient for the applicant to show a case within the statute of relief and a good defense on the merits. He must also show proper diligence in prosecuting his remedy." See also Keeney v. Fargo, 14 N. D. 423, 105 N. W. 93. The contention that, if the application is made within a year after notice of the default, it is in time, notwithstanding the applicant fails to use diligence in applying for the relief, is contrary to the express holdings of this court. Such prior decisions are clearly sound and merit our unqualified approval.

It is our plain duty, therefore, not to interfere with the exercise by the trial judge of the discretion vested in him, unless we are able to say, from the showing made, that there was a clear and manifest abuse of such discretion. The burden was upon the applicant to affirmatively show diligence prior to the default, and also to show such diligence after the default in seeking relief therefrom, or he must show facts excusing the exercise of such diligence. A failure to make such showing will ordinarily not only justify, but require, the court to exercise its discretion in denying the application. Tested by these rules we are required to determine from the facts whether the trial judge abused his discretion in denying appellant's motion.

Upon the former hearing a majority of the court arrived at a conclusion adverse to appellant's contention. Upon a rehearing and reargument of the case, we have reached an opposite conclusion. More mature deliberation has served to convince us that, under the showing, appellant cannot rightfully be charged with any degree of negligence

in suffering such default to be taken, nor can she rightfully be charged with a lack of due diligence after acquiring knowledge of such default, in asking to be relieved therefrom. Upon being served with the summons and complaint, she promptly took steps through her son, M. W. Duffy, for the purpose of employing counsel to appear and defend such action. There is no reason to believe that, in so doing, she and her son did not act in the utmost good faith, believing that they had done everything necessary and requisite to protect her legal rights. It is, we think, equally plain that the firm of Brennan & Gray, whom she supposed that she had employed to appear for her therein, through a misunderstanding of fact, caused, no doubt, by reason of there being two cases instead of but one, as they apparently, through inadvertence, believed,—did not know that there were two cases in which they were expected to appear and answer. The fact that the members of such firm did not understand that they were employed in the case at bar is established beyond peradventure by their affidavits as well as by their conduct, which is strongly corroborative thereof. Had they believed or suspected that there were two cases, instead of one, it is inconceivable that they would have appeared in but one case. "But it is strenuously argued by respondent's counsel that, if Brennan & Gray were not made to understand that they were retained in both cases, this is indisputable proof of inexcusable neglect on appellant's part, or on the part of her agent, M. W. Duffy. In other words, that either Mrs. Duffy or Brennan & Gray are guilty of inexcusable neglect, and that, taking either horn of the dilemma, no relief can be given her. We are unable to concur in this view of the situation. Owing to an evident misunderstanding, Brennan & Gray were not in fact employed in the case at bar. The contractual relation of attorney and client never existed between them, for the obvious reason that the minds of the parties never met." This being true, the cause of the misunderstanding is immaterial, provided appellant was in no respect to blame therefor. That she acted as a reasonably prudent person would have acted, and that she, in good faith, believed and relied upon the belief that she had retained Brennan & Gray, and entertaining such belief suffered the default to be taken against her, is, we think, fairly established. And that she learned nothing to the contrary until the month of July, 1908, is equally plain from the record. It therefore

follows that notice to Brennan & Gray of such default (conceding that they received such notice) was not imputable to appellant, so as to charge her with the lack of diligence in making application to be relieved therefrom. After acquiring actual knowledge of such default, she promptly moved to vacate the same. In the light of these facts we feel compelled to hold that the learned trial court, in making the order complained of, abused the discretion vested in him.

The order appealed from is accordingly reversed, but the judgment will be permitted to stand as security for any judgment that plaintiff may finally recover.

All concur, except MORGAN, Ch. J., dissenting.

MORGAN, Ch. J. I cannot concur in the conclusion reached by the court. On the facts recited in the majority opinion I think that there was a contract of employment and no misunderstanding as to the fact that there were two suits. There was neglect that has not been excused in not answering or demurring in time, and therefore clearly no abuse of discretion in refusing to set aside the default judgment.

STATE EX REL. ERNEST R. MOORE v. GUS FURSTENAU, as County Treasurer of Ramsey County, North Dakota.

(129 N. W. 81.)

Taxation — Payment of a Portion of Tax — Tax Certificate Holders — Payment of Subsequent Tax — Assessments.

An owner and holder of tax sale certificates, issued on sales of real estate for delinquent general taxes or for delinquent general taxes and delinquent special assessments, may pay the subsequent delinquent general taxes assessed against said premises, without paying any subsequent delinquent special assessments against said premises, and obtain receipts from the county treasurer for such delinquent general taxes so paid, and the amounts so paid shall constitute additional liens on the land for which the tax sale certificates were issued.

Opinion filed December 1, 1910.

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

Action by State ex rel. Ernest R. Moore against Gus Furstenau, as County Treasurer of Ramsey County, North Dakota. From a judgment in favor of defendant, petitioner appeals.

Reversed.

Flynn & Traynor (*C. F. Clark*, of counsel), for appellant.

F. T. Cuthbert, for respondent.

CARMODY, J. Petitioner and appellant, at the regular 1906, 1907, and 1908 tax sales in Ramsey county, bid in lands for which tax certificates were issued as follows: No. 371 for the 1906 sale; Nos. 474, 485, 486, 487, 498, and 499 for the 1907 sale; Nos. 557, 631, and 633 for the 1908 sale. Nos. 371, 498, 499, and 633 were issued for general taxes against the real estate sold; Nos. 474, 485, 486, 487, 557, and 631 were issued for the total amount of both general taxes and special assessments of the city of Devils Lake against the real estate sold. Prior to the tax sale of 1909 for the taxes of 1908, appellant tendered to respondent as county treasurer, the full amount of the general taxes due, and then delinquent on all of said premises, and demanded that tax receipts for said general taxes be issued to appellant as taxes paid subsequent to the issuance of the tax certificates so held by appellant. Respondent refused to accept the money or issue any of said receipts, because there were delinquent special assessments of the city of Devils Lake against all of these pieces of property in addition to the general taxes, and the treasurer refused to accept the general taxes unless the special assessments were also paid. The special assessments upon the properties for which tax-sale certificates Nos. 474, 485, 486, 487, 557, and 631 were issued had attached or been levied prior to the issuance of the tax sale certificates, and the special assessments due on the real estate for which such tax-sale certificates were issued for 1908, were instalments of the levy which had already been made at the time of the issuance of the tax-sale certificates. The special assessments upon the properties described in certificates 371, 498, 499, and 633 were all levied subsequent to the issuance of the tax-sale certificates. Appellant had previously paid both general taxes and special assessments against the properties for which tax certificates

were issued for the sales previous to 1908. Upon the refusal of respondent to accept payment of the amount due for general taxes, and issue receipts therefor, appellant deposited the money in a bank, and notified the treasurer, and demanded in writing said receipts. The treasurer still refused, and appellant thereupon made application for a peremptory writ of mandamus requiring the treasurer to accept the money and issue the receipts. The court denied the application and made an order accordingly, and judgment was entered thereon, from which judgment petitioner appeals to this court.

The facts are undisputed, and there is only one question involved on this appeal, namely, whether the owner and holder of a tax certificate is entitled to pay the general taxes on the premises covered by the certificate, and receive a receipt therefor, and hold the same as an additional lien against such premises, and at the same time refuse to pay the special assessments duly levied against said premises. A correct decision of this case depends wholly upon the construction of the several sections of the Revised Codes of 1905 hereinafter mentioned. The right of the owner and holder of a certificate of tax sale to pay subsequent delinquent taxes on the premises covered by his certificate, and receive receipts therefor, and hold the amounts so paid as an additional lien against such premises, is given by § 1596, Rev. Codes 1905.

Section 2478, Rev. Codes 1905, reads as follows: "When any person shall desire to pay only a portion of the tax charged on any real estate, such person shall pay a like proportion of the several taxes charged thereon, and no person will be permitted to pay one of said taxes without paying the others, except taxes, the collection of which shall have been enjoined by law."

This, the respondent contends, applies to all taxes including special assessments. In this we think he is in error. This section is practically the same as § 94 of chapter 28 of the Political Code of 1877, and was passed long before the present special assessment law.

Section 1572, Rev. Codes 1905, which applies to general taxes only, is as follows: "Taxes upon real property are hereby made a perpetual paramount lien thereupon against all persons and bodies corporate, except the United States and the state."

Section 2803 provides, among other things, that from the time a

special assessment list is approved by the city council, the assessment shall remain a lien upon the property against which it is assessed until fully paid, and shall have precedence over all other liens except ordinary taxes, to which it shall be subject.

Section 2804 provides in part that special assessments, together with all interest and penalties, shall be collected and paid over to the city treasurer in the same manner as any other city taxes, but this only refers to the manner of collecting special assessments.

Section 2806 authorizes the owner of real property against which a special assessment has been made, to pay the same or any part thereof and the unpaid interest at any time.

Section 2807 as far as material, provides that the county treasurer shall add to all special assessments the same interest and penalties that are provided to be added in the case of general taxes, and at the same time, and shall collect such interest and penalties with such special assessments, and shall pay over to the city treasurer all such interest and penalties.

Section 2808 is as follows: "If the real property against which any assessment is levied is sold to enforce the collection of a special assessment which has become delinquent, the sale shall be made by the same officer, and upon like notice, and subject to the same provisions in relation to redemption, and the same record thereof shall be kept by the officer making the sale, as in cases of real property for delinquent taxes; but if any real property is subject to sale at the same time for delinquent taxes, and also for delinquent special assessments, it shall be sold separately for each; and a separate certificate of sale shall be issued upon each of said sales, although both sales are made to the same person, and the certificates issued upon the sale for special assessments shall so state, and, if no redemption is made from such sale, a deed shall be issued to the purchaser or his assigns, which shall be, as nearly as practicable, in the same form as deeds issued upon sales for general taxes, except that it shall state that such sale was made for special assessments; and in case the sale for special assessments is made to a different purchaser from the sale for general taxes, such purchaser may redeem said premises from the purchaser of the same for delinquent general taxes, and upon such redemption

shall be subrogated to all the rights of such purchaser from whom such redemption is made."

Thus it will be seen that while special assessments for city improvements are considered taxes for some purposes, and the same interest and penalties are provided to be added as in the case of general taxes, nevertheless the Code distinguishes between general taxes and special assessments, and makes the general taxes a superior lien to that of special assessments, and allows the holder of a certificate for special assessments to redeem from the holder of a certificate for general taxes.

A special assessment is a tax in the sense that it is an enforced contribution from the property owner for the public benefit, but not in the sense that it is a burden, as he receives an equivalent in the shape of the enhanced value of his property, and only property benefited by the improvement may be assessed, the district being determined legislatively, but the amount of the tax is determined judicially, and according to the benefits. Although possessing many points of similarity, special assessments and taxes are inherently different, and the same rule of construction where the words are used in statutes will not be indiscriminately applied.

It seems to us from the provisions of the Code herein cited, that the certificate holder has authority to pay the general taxes without paying the special assessments, and that the county treasurer should have received the amount tendered in the case at bar, and should have issued receipts therefor. If, as respondent contends, this construction is calamitous, then the remedy is with the legislature, and not with the courts.

The fact that the county auditor did not issue separate certificates of sale has no effect on this case. Certainly if the lots were sold to appellant for delinquent general taxes, and to some other person for delinquent special assessments, no person would contend that the holder of the certificate of sale for general taxes could not pay the general taxes without also paying the special assessments, as he would have no special assessment certificates to protect.

The judgment of the District Court is reversed, and the District Court is directed to issue a peremptory writ of mandamus as prayed for. All concur.

THE STATE OF NORTH DAKOTA v. ANDREW STABER.

(129 N. W. 104.)

Criminal Law — Evidence — Harmless Error.

1. The admission of incompetent evidence which could not have prejudiced the defendant, the facts having been established by other undisputed and competent testimony, is not ground for reversal.

Criminal Law — Intoxicating Liquors — Evidence — Freight Bills.

2. A record describing articles of freight received at a local station, billed to defendant and another, and delivered to defendant with his signature acknowledging receipt of such articles, is competent evidence tending to show the nature of the articles so receipted for.

Instructions.

3. The charge as a whole states the law correctly. Hence no error was committed in refusing defendant's requests for instructions.

Criminal Law — Remarks of State's Attorney.

4. Remarks of the state's attorney in his address to the jury, as set forth in the opinion, *held*, not prejudicial.

Opinion filed December 9, 1910.

Appeal from District Court, Richland county; *Honorable Frank P. Allen,* J.

Action by The State of North Dakota against Andrew Staber. From an order denying defendant's motion for a new trial, defendant appeals.

Affirmed.

Purcell & Divet, for appellant.

C. E. Wolfe, State's Attorney, *Jos. Forbes,* Assistant State's Attorney, and *Andrew Miller,* Attorney General, for respondent.

CARMODY, J. The defendant was informed against jointly with one Leonard Staber for keeping and maintaining a common nuisance in violation of the prohibition law, on certain premises in the village of East Wyndmere, in Richland county, on the first day of July, 1909, and thence continuously from day to day until the 18th day of August, 1909. He demanded and procured a separate trial, which resulted in his conviction. In due time a motion for a new trial was made, and

denied. From the order denying the motion for a new trial, defendant appeals to this court.

On the trial Frank Beaver testified that he peddled and sold beer for the defendant. Other witnesses testified to having drank beer on the premises and seeing others drinking there. Also to seeing the defendants on the premises, and one witness testified to being served with beer by the defendant. The state then introduced C. S. Kimber, station agent of the Northern Pacific Railroad Company at Wyndmere, who testified that he knew the defendant; that in the conduct of the business of his office he kept books in which he noted the receipt and delivery of express and freight. Had the books with him which showed the delivery of freight and express for the month of July and the first eighteen days in August, 1909. Thought he had a record of shipments delivered to defendant personally between July 1st and August 18th, 1909. Exhibits C, D, E, and F are freight receipts. In the railroad and express business they are used for the consignee's receipt, and are signed by the party to whom the goods are delivered, that is, the consignee. Witness examined the signature at the bottom of each of the exhibits, and could not be sure whether the handwriting was Girder's or Staber's. About the time these instruments bear date there was a firm or partnership doing business in Wyndmere by the name of Girder and Staber. He was then asked the following question: "Do you know who the Staber of that firm was?"

The question was objected to by the defendant as calling for a conclusion of the witness as to whether or not there was such a firm, and it assumes the fact; that the witness has not shown himself competent to testify as to the character of any concern doing business as Girder & Staber, or what their relations were.

The objection was overruled, to which the defendant excepted.

"A. Yes, sir. Q. Which Staber was it? A. Andrew Staber, the defendant sitting behind Mr. Divet."

The receipts marked C, D, E, and F were made by the agent's helper, did not come with the goods, waybills come with goods. There is a memorandum made on these receipts or on the waybills; that memorandum is found on the left hand side of the bill. The bills are numbered consecutively for a month. The yellow papers attached to

the back of three of these exhibits are bills of lading. They did not come with the goods. They are for record, to show the delivery to the right party. Did not have any independent recollection of the transactions that were embodied in these papers except what the papers showed. He was required to keep such records.

The plaintiff offered in evidence Exhibit E. The defendant objected to the introduction of Exhibit E, upon the ground that it was incompetent, irrelevant, and immaterial; no proper foundation laid; no proof of any fact recited therein, and if intended as an admission upon the part of the defendant, no foundation has been laid by showing what knowledge of the same was ever brought home to the defendant; and upon the further ground that it was not the best evidence, having been made up by the witness from other memoranda, which memoranda would be the best evidence. In support of this evidence the defendant asked leave of the court to examine the witness preliminary as to the exact manner of making up the exhibit, which request was granted.

Preliminary examination by Mr. Divet:

"Q. Mr. Kimber, the parts of the exhibit that appear in writing as distinguished from the parts in printing were placed upon that paper in the office when the goods were delivered at Wyndmere were they not? A. Yes, sir. The entries upon Exhibit E were not made by me. They were made by Elmer Sheder; he was employed in the office of the railway company, at Wyndmere. He got the information from which the exhibit is made up from the waybill from which the goods were received. The waybill is a paper containing upon it in writing matters purporting to describe the goods that are shipped, to give the weight thereof, the rate of freight, and the amount of freight,—exhibits of the character of Exhibit E; and Exhibit E itself is but a copy taken from the waybill of the parts that appear in writing.

"Q. Whether or not the things upon Exhibit E were correctly copied, you have no means of knowing have you? A. Yes, sir.

"Q. As a matter of fact the party making the exhibit resorts to the waybill for his information, doesn't he? A. Yes, sir.

"Q. And without the waybill the party would have no means of putting upon the Exhibit E that I am referring to the characters and

writing that are made upon it; that is, he got his information from it? A. Yes, sir.

"By the Court: What means of knowledge have you as to the correctness of Exhibit E that it has been correctly copied from the waybill?

"A. After the work is done; after they are made out, I look them over.

"Q. Do you look them over? A. Certainly.

"Q. And compare them? A. Yes."

Examination continued by Mr. Divet:

"I could not remember that I ever looked over and compared this particular waybill, Exhibit E, that we are referring to, but we look them all over.

"By the Court: You say you looked this one over? A. I expect I did.

"2. Are you prepared to say you did? A. Yes, sir. The waybills from which this copy is made are sent to St. Paul to the offices of the railroad company in St. Paul."

By Mr. Divet:

"The defendant now adds to the objection made the specific objection that it appears that the exhibit is not the best evidence, and no foundation has been laid for the introduction of secondary evidence by attempting to procure the original of which the exhibit purports to be a copy, and upon the further ground that there is no showing that the original waybill itself contained a correct description of the articles referred to in the exhibit. The objection is overruled, to which the defendant excepts.

"The state now offers in evidence Exhibits C, D, and F, with the papers attached to the back of each.

"The defendant objects to Exhibits C, D, and F upon all the grounds urged to the objection of Exhibit E. It is stipulated that the same record may be considered as made to each of said exhibits as made by the preliminary examination as to Exhibit E. To the papers attached to each of the three exhibits last offered, the defendant objects upon the ground they are irrelevant, immaterial, and incompetent; no proper foundation laid, and in no wise binding upon the defendant.

"The objection is overruled, to which the defendant excepts."

On cross-examination the witness testified that he examined the signature at the bottom of the four exhibits that have been offered in evidence,—the signature of Girder & Staber. Could not say which one wrote them. Knew one of them did, because he did not deliver the goods to the other party; had no recollection of delivering this particular shipment. Freight is sometimes delivered by others except witness. Beer shipments or liquor shipments are not delivered to people other than the consignee. He always instructed his helper not to deliver liquor or beer shipments to people other than the consignee, but could not swear whether he did or not. The firm of Girder & Staber went out of existence some time about July 1st, 1909.

W. M. Baumgartner, station agent of the Soo road, at Wyndmere, called as a witness, testified that he had charge of the receipt and delivery of freight and express. Kept records that showed the receipt and delivery of freight and express. Had a record of the delivery of shipments of express from July 1, 1909, to August 18, 1909. There was no record of any express delivered to defendant during the time, but there was a record of a delivery to Girder & Staber during that time. Heard the testimony of Kimber as to the way business was done at the Northern Pacific office. The Soo station and the Northern Pacific station were together in the same building. Papers were then marked Exhibits H, J, and K. Exhibits H, J, and K were freight receipts. These receipts were signed by the consignee. Had no independent recollection with reference to any of these shipments mentioned in the exhibits. All he knew about them was what the record showed. Have done business with Andrew Staber to a certain extent. Never saw him sign his name. Had seen him sign the name of Girder & Staber. Had seen him sign Exhibits H, J, and K. Collected the freight charged on these exhibits from defendant Staber. Exhibits H, J, and K were offered in evidence by the state, and objected to upon all the grounds urged to Exhibits C, D, E, and F when offered. Objection overruled. Defendant excepted. Exhibit C is a freight receipt dated July 2, 1909, for a cask of beer, weight 250 pounds, consignor G. Heileman Brewing Company, date of delivery July 3, 1909. Signature of party authorized to receipt for freight,—Guyter-Staber. Bill of lading attached to back. Acknowledges the receipt from the G. Heileman Brewing Co. Exhibits D, E, and F

are the same as Exhibit C except as to dates and numbers. The shipments as shown by Exhibits C, D, E, and F were sent C. O. D. by freight. Exhibits H, J, and K were receipts of the same character, except that no yellow papers were attached to them; they were signed Girder & Staber, by defendant; were admitted in evidence, and no error is assigned upon them.

Appellant assigns as error the overruling of his objection to the introduction in evidence of Exhibits C, D, E, and F, and each thereof. In this connection we will first consider the error assigned in the court permitting witness Kimber to testify to a partnership relation between one Guyter or Girder and the defendant. The testimony shows that either defendant or Girder signed the name Guyter-Staber to the exhibits admitted in evidence. The witness, without objection, testified that at the time exhibits C, D, E, and F bore date, there was a firm or partnership doing business in Wyndmere by the name of Girder & Staber. He was then asked: "Do you know who the Staber of that firm was?" The defendant's objection was that the question called for a conclusion of the witness, as to whether there was such a firm, and assumed that fact. Also that the witness had not shown himself competent to testify as to the character of any concern doing business as Girder & Staber, or what their relations were. This objection was overruled, and the witness answered: "Andrew Staber, the defendant, sitting behind Mr. Divet." There is no error in this ruling. The witness had already testified without objection that there was such a partnership, and if he knew, it was not error to allow him to testify that the defendant was the Staber of that firm.

Whether it is error to admit Exhibits C, D, E, and F in evidence, appellant is not, in our opinion, prejudiced by the admission of such exhibits. Exhibits H, J, & K are receipts of the same character. Exhibits H, J, and K, are concededly signed by the defendant, and are under the ruling in the case of State v. Dahlquist, 17 N. D. 40, 115 N. W. 81, binding upon the defendant, as admissions by him of the receipt of the articles therein described. There are several exhibits admitted in evidence, some of which are concededly competent, signed by the defendant. The jury were instructed that the exhibits signed by the defendant might be considered by them as admissions of the

receipt of the goods as enumerated in said receipts or waybills by the defendant, while the exhibits not signed by him were not binding upon him, and were not admissions by him of the receipt of such goods. In view of these instructions, the presumption is that the jury only considered the exhibits signed by the defendant as admissions against him. There is no complaint that the evidence is insufficient to justify the verdict. Aside from the exhibits complained of, the evidence is abundantly sufficient to justify such verdict. With these exhibits out of the case the jury could have found no other verdict than the one found. The defendant offered no testimony, and the uncontradicted testimony of the state, aside from the exhibits complained of, clearly shows that the defendant is guilty of the offense charged in the information.

In People v. Gonzalez, 35 N. Y. 49, the defendant was convicted of murder, and appealed to the supreme court, where the conviction was reversed. On a writ of error sued out by the state the judgment of the supreme court was reversed and the conviction affirmed. The court says: "The circumstances which were established by evidence, confessedly competent, were so conclusive as to the guilt of the prisoner, that no honest jury could refuse to convict him of the crime. To acquit him would be to shield guilt from justice and deny the protection of law to the innocent. If, therefore, the court below was right in holding that the judge erred in admitting additional evidence tending to the same conclusion, we think it was clearly wrong in reversing the conviction; for, upon the facts disclosed, the supposed error could work no legal injury to the prisoner. As it was shown, beyond all question, by undisputed and competent proof, that the accused was one of the murderers, we are under no legal or moral obligation to assume that the jury might have rendered a false verdict of acquittal but for the erroneous admission of other and needless evidence. . . . The reception of illegal evidence is presumptively injurious to the party objecting to its admission; but where the presumption is repelled, and it clearly appears on examination of the whole record, beyond the possibility of rational doubt, that the result would have been the same, if the objectionable proof had been rejected, the error furnishes no ground for reversal.

"Many of the earlier cases in this state favored a departure from

the English rule on this subject, and maintained that it was impossible to determine whether the evidence improperly received might not have had a controlling influence upon the jury. . . . The later decisions have modified this doctrine, in harmony with the general current of English and American authority, and we think they rest upon sound principles. The intendment is that an error of the judge, whether in the admission of evidence, or in his instructions to the jury, was prejudicial to the party; but there is no more difficulty in the one case than in the other, in determining, upon the whole record, whether, in the particular case, such intendment is repelled. Where, as in the present case, it is apparent and obvious that the supposed error did not, and could not, affect the result, nor work either injury or injustice to the party accused, we think it does not call for a reversal of the conviction." To the same effect, see Rice on Evidence, Vol. 3, 244, and subdivision C on page 418.

In State v. Chase, 17 N. D. 429, 117 N. W. 537, 17 A. & E. Ann. Cas. 520, in which defendants were convicted of keeping a gambling resort, the court says: "The defendants were arrested while card games were going on at the place where both defendants were at the time. One of the players had a conversation with one of the persons who accompanied the officer making the arrest, as follows: 'I had a conversation in there at that second table. I asked the fellows for their cards, and one fellow said I could not have them. The defendants at that time were over by the round table. The room is, I should judge, 10 or 12 by 14 or 16. Both defendants were in this room. . . . I asked the fellows for their cards, and they said I could not have them, and I says, "Yes, I want them," and one fellow said, "Well, you can't have them, we are playing for 25 cents," and I said, "I can't help it. I want all the stuff," and he said "All right. You are an officer. We were just playing for fun," and gave me the cards. I heard other conversation in there.' It is claimed that it was error to receive this testimony without a showing that the defendants heard the conversation. Standing alone, this testimony would not sustain a conviction, but there is other evidence in the record showing that gambling games were going on in that room when the arrests were made and at other times. The defendants offered no testimony, and the uncontradicted testimony of the state clearly showed that gam-

bling was going on, and had been for a long time going on, in the room where this conversation took place. On this point there can be no question but that the verdict was amply sustained on this point by the evidence, and the evidence objected to had no bearing on the case, except as to whether gambling was permitted to be carried on in this room. The objection to the evidence is that it was hearsay so far as the defendants are concerned, as there is no showing that the defendants heard the coversation, and could not therefore be charged by their silence in having acquiesced in the statement that gambling was going on there. If the players had unequivocally stated that the game was being played for money, it may be doubted whether the admission of the evidence was prejudicial, in view of the size of the room and the circumstances under which the statements were made. But we need not dispose of the objection on that ground. The statement of the player, as narrated by the witness, cannot be said to show that the game was being played for money. Considered altogether, it required no statement from the defendants, and their silence became immaterial."

The true rule seems to be that an error in receiving incompetent evidence, if properly excepted to, can only be disregarded when it can be seen that it did no harm. If the evidence is slight or irrelevant, or if, without it, the fact is conclusively established by other evidence, it may be disregarded, because it could not have injured the other party.

Appellant assigns as error the following instruction of the court to the jury: "I instruct you, further, that certain exhibits have been introduced, being receipts for freight delivered or waybills. Where the testimony shows that said receipts or waybills were signed by the defendant, such exhibits may be considered by you as an admission by the defendant of the receipt of the goods as enumerated in said receipts or waybills. On the other hand, any of said exhibits or receipts which the testimony shows were not signed by the defendant, would not be binding upon the defendant,—would not be an admission by him of the receipt of the goods as enumerated in said bill or receipt." There is no error in this instruction. Under the ruling in the case of State v. Dahlquist, supra, the defendant is bound by receipts or waybills signed by him. There is no error in the refusal of

the court to give the instructions asked for by appellant. See State v. Dahlquist, supra.

During his argument to the jury the state's attorney said in substance that the character of goods being handled by the defendant was shown by the written evidence, Exhibits D, C, E, F, and G, and that liquor was being received in such quantities that any reasonable man would be justified in assuming that it was for sale, and not for the private use of the man receiving it. Whereupon the following proceedings were had:

By Mr. Divet:

"The defendant objects and excepts to the statement of counsel in regard to the written evidence Exhibits D, C, E, F, and G, and the other exhibits known as freight bills or freight receipts, showing the character of the goods that were shipped to the defendant, upon the ground that the recitals in such exhibits are not evidence of the fact that the articles entered thereupon were as matter of fact the articles that were shipped or delivered, such exhibits being competent here, if at all, only for such bearing as they may have as admissions of the defendant, and the defendant asks the court to require counsel to discontinue the line of argument, and instruct the jury that recitals in such exhibits as to the character of the goods contained in the shipment are not evidence of the fact that the goods were of that character."

By Mr. Wolfe:

"Counsel for the state informs the court that he will keep strictly within the line that these admissions are not admissions against the defendant except where the defendant has attested them over his own signature."

"By the Court:

"That is just what I was going to suggest."

The exhibits signed by defendant are admissions against him; hence we cannot conceive how appellant can be prejudiced by these remarks, particularly as the state's attorney immediately stated that he would keep strictly within the line that these admissions are not admissions against the defendant except where he has attested them over his own

signature. The court committed no error in denying appellant's motion for a new trial.

The order appealed from is affirmed.

All concur, ELLSWORTH, J., concurring specially.

ELLSWORTH, J. (Concurring specially.) I concur in the result announced but not in the reasoning of that part of the opinion contained in these words: "With these exhibits out of the case the jury could have found no other verdict than the one found. The defendant offered no testimony and the uncontradicted testimony of the State aside from the exhibits complained of, clearly shows that the defendant is guilty of the offense charged in the information."

I deem it highly improbable that a jury acting upon evidence such as is shown by the record of this case would have found a verdict different from that rendered. Nevertheless, the jury was at full liberty if it saw fit to do so to render a verdict of not guilty and such verdict would have stood as conclusive of the fact of the defendant's guilt notwithstanding the apparent weight of the evidence. Therefore, it appears to me that we are not authorized to go further than to say that there was no reasonable probability of a different verdict.

There is no means known to the law of this State whereby a defendant in a criminal case can be held guilty of an offense charged against him except upon the verdict of a jury after a fair and impartial trial. It is not the province of this court to declare his guilt or to hold as a matter of law that the verdict of a jury could not be other than one of conviction. To reason or presume upon the probability of the action of a jury in such a case is the limit of our discretion.

THE STATE OF NORTH DAKOTA v. HENRY FUJITA.

(129 N. W. 360.)

Jury — Formation of Opinion — Newspaper Account — Common Rumor.

1. Following the rule announced in State v. Ekanger, 8 N. D. 559, 80 N. W.

Note.—The question of challenge of jurors on account of preconceived opinion is the subject of a note in 36 Am. Dec. 521.

482, and State v. Werner, 16 N. D. 83, 112 N. W. 60, it is *held* that a juror who states on his *voir dire* that he has formed and entertains an opinion as to the guilt or innocence of the accused, which it will require some evidence to remove, is not disqualified from serving, where it appears that such opinion is based wholly upon newspaper accounts of the transactions, and common street gossip, provided, it satisfactorily appears to the court that the juror can, and will, if accepted, notwithstanding such opinion, fairly and impartially try the case on the testimony adduced and the law as given by the court.

Criminal Law — Appeal and Error — Qualifications of Jurors — Decision of Lower Court.

2. The decision of the trial court in such a case is entitled to great respect, and will be disturbed only when it clearly appears that there was an abuse of discretion.

Witnesses — Leading Questions — Discretion of Trial Court.

3. The trial court has a large discretion in permitting leading questions.

Criminal Law — Rape — Age of Consent — Assault with Intent.

4. A man who attempts to have carnal knowledge of a girl under the age of consent may be convicted of an assault with intent to commit rape.

Criminal Law — Rape — Assault With Intent — Evidence.

5. Evidence examined, and, *held*, sufficient to sustain the verdict.

Instructions.

6. The charge of the court to the jury fully and fairly states the law of the case.

Criminal Law — Conduct of State's Attorney.

7. Record examined. *Held:* that counsel for the state made no remarks in the arguments to the jury not warranted by the evidence.

Opinion filed December 21, 1910.

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

Action by the State of North Dakota against Henry Fujita. From a judgment in favor of plaintiff, and from the order denying defendant's motion for a new trial, defendant appeals.

Affirmed.

Taylor Crum, for appellant.

If error occurs in overruling a challenge for cause, it should be corrected regardless of defendant's unexhausted peremptories. People v. McQuade, 110 N. Y. 284, 1 L.R.A. 279, 18 N. E. 156; People

v. Bodine, 1 Denio, 308; Freeman v. People, 4 Denio, 31, 47 Am. Dec. 216; People v. Casey, 96 N. Y. 115, 4 Am. Crim. Rep. 312; People v. Carpenter, 102 N. Y. 238, 6 N. E. 584.

Where rape is not accomplished, the amount of force is material as showing the intent or lack of intent. State v. Canada, 68 Iowa, 397, 27 N. W. 288; Stephens v. State, 107 Ind. 185, 8 N. E. 94; People v. Dowell, 136 Mich. 306, 99 N. W. 23; Davis v. State, 31 Neb. 247, 47 N. W. 854.

It must appear that accused assaulted prosecutrix and intended to have intercourse with her. Johnson v. State, 27 Neb. 687, 43 N. W. 425; Krum v. State, 19 Neb. 728, 28 N. W. 278; Skinner v. State, 28 Neb. 814, 45 N. W. 53; Dunn v. State, 58 Neb. 807, 79 N. W. 719; State v. Biggs, 93 Iowa, 125, 61 N. W. 417.

Defendant should have been convicted of assault or assault and battery. People v. Dowell, 136 Mich. 306, 99 N. W. 23; State v. Fordham, 13 N. D. 494, 101 N. W. 888; State v. Cody, 18 Or. 506, 23 Pac. 891, 24 Pac. 895; N. D. Code of Crim. Proc. § 10072.

Court should have cautioned jury as to conviction on uncorroborated testimony of the prosecutrix. 3 Rice, Ev. 830; People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; People v. Hamilton, 46 Cal. 540; People v. Ardaga, 51 Cal. 371, 2 Am. Crim. Rep. 590.

Andrew Miller, Attorney General, and *Arthur W. Fowler,* State's Attorney, for respondent.

If a juror will put aside any impression or opinion and try the case fairly, he is competent. State v. Ekanger, 8 N. D. 559, 80 N. W. 482; State v. Werner, 16 N. D. 83, 112 N. W. 60.

It is not error to overrule challenge for cause, if defendant has peremptories left. 24 Cyc. Law & Proc. p. 328; People v. Decker, 157 N. Y. 186, 51 N. E. 1018.

Where prosecutrix is under age, if defendant assaulted and intended sexual intercourse, whether he intended to use force or not is immaterial. 33 Cyc. Law & Proc. p. 1495; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; People v. McDonald, 9 Mich. 150; People v. Lourintz, 114 Cal. 628, 46 Pac. 613; State v. Grossheim, 79 Iowa, 75, 44 N. W. 541; Polson v. State, 137 Ind. 519, 35 N. E. 907; State v. Sargent, 32 Or. 110, 49 Pac. 889; Re Lloyd, 51 Kan. 501, 33 Pac. 307; Addison v. People, 193 Ill. 405, 62 N. E. 235; Murphy v. State,

120 Ind. 115, 22 N. E. 106; 2 Am. & Eng. Enc. Law, p. 988; 10 Enc. Ev. p. 586; People v. Goulette, 82 Mich. 36, 45 N. W. 1124; Davis v. State, 31 Neb. 247, 47 N. W. 855; Com. v. Roosnell, 143 Mass. 32, 8 N. E. 747.

CARMODY, J. Defendant, who is a native of Japan, was convicted in the district court of Cass county on August 2, 1910, of the crime of assault and battery with intent to commit rape in the first degree, and from orders denying a new trial and from a judgment sentencing him to confinement in the penitentiary for a term of five years, and that he be fined $500, he appeals to this court, alleging numerous errors in the rulings of the trial court, and also alleging insufficiency of the evidence to sustain the verdict. Appellant is about forty-nine years of age, and the female upon whom it is alleged that he perpetrated this crime is about the age of fifteen years. Defendant was the proprietor of a restaurant on Front street in the city of Fargo, a two-story building in which there were roomers upstairs. The prosecutrix went to work at his place in June, 1909; stayed there about five weeks; slept in a room on the ground floor, next to a room occupied by the defendant, with a curtain for a door between the two rooms. A colored woman named May Ford was keeping house for the defendant, and was in some measure his business partner. The prosecutrix testified that about the 6th or 7th of July, the colored woman was working out, and defendant came in her room Tuesday night, got in her bed and tried to do things to her; she would not let him. The second night he came in her bed twice, tried to do things to her. She told him he could not do it. The third night she went to bed with her underskirt, underdrawers and underwaist on. After she dropped asleep defendant, who was bare naked, got in her bed, untied her drawers and pulled them down; pulled her petticoat up. After he got into bed, tried to pull her over, and she hung to the bed. He talked some, but she could not understand what he said. He tried to pull her legs apart. She told him to get out of bed; she would tell the police. He got out of bed, and went to his own room. She also testified that on four previous occasions he took her on his lap and kissed her. She tried to get off his lap and he would not let her; he hung to her. She also testified that she called the colored lady mamma and the defendant papa, and

told them that they were so good to her she wanted to be their girl, and stay there always with them; claimed her father used to beat her, threatening to kill her, and that the defendant and the colored lady were good to her, got her clothes and shoes and treated her like their own child. She did not cry out or make any noise when defendant came into her room. She went to school a week while at the restaurant. Previous to the assault, the colored woman and defendant quarreled, and she left the place. After the alleged assault the colored woman took the prosecutrix away from defendant's restaurant to the hollow. Defendant drove the colored woman away. A man named Johnson took the prosecutrix away from the hollow to Miss Topping's. Prosecutrix left defendant's restaurant Friday, and went to Miss Topping's Sunday. Miss Topping had charge of the Crittenden home. Three women, two colored and one white, roomed upstairs over the defendant's restaurant. Defendant denied getting into the bed with the prosecutrix; claimed that it was warm weather, that she was uncovered, and that folks could see her through the window, and he went into her bedroom and covered her up on two or three occasions; claimed that he worked nights and went to bed daytimes; kept part of his stock in the prosecutrix's bedroom; said the prosecutrix kept a light in her room; said she was just like his own daughter. He had about fifteen rooms upstairs. There was also some evidence pro and con as to the reputation of defendant's restaurant.

The first two assignments call into question the correctness of the rulings of the trial court in denying defendant's challenge for actual bias to jurors Aselson and Herbert. The juror Aselson on his *voir dire* stated in substance that he had read some articles in the Fargo newspapers about some alleged doings of the defendant on Front street; that he believed some of the articles and some he did not; that he never talked with anyone about the case; that he had formed an opinion that would require evidence to remove. On being examined further it developed that the opinion which he entertained was based solely upon these newspaper articles; that if sworn as a juror he would disregard this opinion and render a fair and impartial verdict based upon the evidence. The juror Herbert testified that he had formed an opinion as to the guilt or innocence of the defendant that it would take evidence to change. On being examined further,

he testified that the opinion he had formed was based solely upon the street gossip; that he had no clear or definite recollection of what he heard; that if sworn as a juror he could and would put aside this impression or opinion that he had, and try the case on the evidence given on the witness stand by the witnesses, and a true and impartial verdict render upon such evidence under the instructions of the court. From a careful examination of the testimony of those two jurors, we are unable to say that the trial judge in whom is vested by law a very wide discretion in such cases, clearly abused its discretion.

See State v. Church, 6 S. D. 89, 60 N. W. 143; State v. Ekanger, 8 N. D. 559, 80 N. W. 482; State v. Werner, 16 N. D. 83, 112 N. W. 60; 24 Cyc. Law & Proc. pp. 286–298 inclusive; People v. Casey, 96 N. Y. 115, 4 Am. Crim. Rep. 312; People v. Carpenter, 102 N. Y. 238, 6 N. E. 584.

Defendant complains that the counsel for the state led the complaining witness, by leading questions, both at the preliminary hearing and at the trial, which were not for the purpose of identification of persons or things, nor where she was called to contradict another, when she was not a hostile witness, nor where the matters were of a complicated nature, nor introductory. No objection was made to the so-called leading questions except in two instances, to one of which the defendant objected as follows: "I object to these leading questions. I know the witness is not all right, but . . . " Mr. Stambough, who was examining the witness, answered: "I can't do anything else much." No further objection was made at that time, and no ruling. The next objection the record shows is as follows: "Objected to as leading. She can be led to say anything by that kind of questions." To which the court responded: "A little objectionable, Mr. Stambaugh." Mr. Stambaugh answered: "I know, but this is redirect examination, and it is difficult to make this witness . . . ." The Court: "I realize that." Mr. Stambaugh: "I will not go any further with it." These are all the objections that seem to have been made to so-called leading questions, and no ruling was made thereon.

There must have been a manifest abuse of discretion by the trial court in permitting a party to ask leading questions of a witness, before a case will be reversed on that ground. It must have influenced the answer, and injury must have resulted.

8 Enc. Ev. p. 161.

Leading questions are discretionary with the trial court, and not ground for reversal, unless it appears from the answers of the witness that he was influenced in making them by the form of the questions. Reddin v. Gates, 52 Iowa, 210, 2 N. W. 1079.

It is elementary that the trial court has a large discretion in permitting leading questions.

Appellant claims that the evidence is insufficient to justify the verdict, and says: "It is conceded here, as it was conceded in the court below, that no force or fear is necessary to be shown if sexual intercourse is proven upon a female child under the age of consent. Testimony as to force or fear in such a case would be wholly immaterial. It must also be conceded here, as it was in the court below, that there is not sufficient evidence, in the case at bar, to sustain a verdict for an assault with intent to commit rape upon a woman above the age of consent. The question in this case is therefore narrowed down as to the amount or character of force or fear necessary to constitute an assault with intent to commit rape upon a child under the age of consent. If rape is accomplished upon a child under the age of consent, the degree of force sufficient to accomplish the sexual act is by law made sufficient to constitute the crime, no other degree of force or fear than the accomplished act is necessary to be shown; but upon a charge of an assault with intent to commit rape upon such child,—the rape in fact not having been committed,—the amount of force is material as showing the intent or lack of intent. The gist of the offense charged is the intent with which the act was done. Defendant must have intended to commit a rape. To constitute such intent he must have had a purpose, not only to have sexual intercourse with the prosecutrix, but must have intended also to use whatever degree of force might be necessary to overcome her resistance and accomplish his object," and cites a large number of cases to sustain this contention, among which are State v. Canada, 68 Iowa, 397, 27 N. W. 288; Johnson v. State, 27 Neb. 687, 43 N. W. 425; Krum v. State, 19 Neb. 728, 28 N. W. 278; Skinner v. State, 28 Neb. 814, 45 N. W. 53; Dunn v. State, 58 Neb. 807, 79 N. W. 719; State v. Biggs, 93 Iowa, 125, 61 N. W. 417; State v. Kendall, 73 Iowa, 255, 5 Am. St. Rep. 679, 34 N. W. 843; Moore v. State, 79 Wis. 546, 48 N. W. 653. The prosecutrix in each of these cases was over the age

of consent. Hence they are not in point. In People v. Toutant, 133 Mich. 520, 95 N. W. 541, the record does not show the age of the prosecutrix.

The cases cited by appellant (where the female was under the age of consent) which he claims support his contention that the rule is the same in an assault with an intent to commit rape whether the prosecutrix is old or young, can, we think, be distinguished from the case at bar.

In Cromeans v. State, — Tex. Crim. Rep. —, 129 S. W. 1129, the prosecutrix was fourteen years old and the defendant sixteen. The prosecutrix was going through a gate when the defendant, who was on the other side of the gate, made indecent proposals to her. She declined, and he took hold of her hand. She jerked her hand away, and he laid his hand on her arm, when she passed on, and he molested her no further. The court reversed the conviction. The court uses this language: "We hold that the evidence, taking all the circumstances, the age of the parties, the surroundings, the meagerness of the interview, the few words, the slight act of touching, does not justify the verdict. We do not intend to be understood by anything in the foregoing utterances as holding that nothing short of an indecent handling of a child would be sufficient, when coupled with an intent to have carnal knowledge of her, to constitute or show an assault to rape, but do think and do hold that some act that can be fairly, according to human experiences, characterized as having an immediate relation to and preparation or the bringing about of a condition under which intercourse could be accomplished, must be shown by the proof before guilt ought to be inferred, otherwise a mere touching of the person of a woman, with a lascivious purpose (inasmuch as in such case there is an intent based on condition either of consent or force to have carnal knowledge), would be sufficient to constitute the offense."

In People v. Dowell, 136 Mich. 306, 99 N. W. 23, the prosecutrix was fifteen years old. The respondent was a neighboring farmer fifty-four years old, and lived with his family. The prosecutrix testified that at her house, defendant, in the presence of her mother and his own wife, followed her into the pantry, put his arm around her neck, kissed her, and invited her to his house. The prosecutrix fur-

ther testified that after that she went to the house of the defendant for duck eggs. He asked her to go through the woods and he would go with her. She told him, "No," she would go around the road, and then he took her by her arm, tried to pull her into a shed, and she would not go. The court says: "The intent is the gist of the offense, and every laying on of hands upon a female under the age of consent, even though improper, does not necessarily imply an intent to have sexual intercourse. Indecent liberties may be taken with a child without any such intent. The statute recognizes this in providing a penalty for taking indecent and improper liberties with a female child, without intending to commit the crime of rape." We have no such statute.

In Stephens v. State, 107 Ind. 185, 8 N. E. 94, the defendant took some liberties with a female child under the age of consent. The supreme court, by a divided court, reversed the judgment of conviction. This case, however, was later overruled by the case of Murphy v. State, 120 Ind. 115, 22 N. E. 106, by the same court. The court says in speaking of the case of Stephens v. State: "We are not willing to adhere to that case. The statute having made the act of sexual intercourse with a female child under twelve years of age a crime, it must follow as a logical conclusion that the abuse of her person with a view to the accomplishment of that act constitutes an assault and battery with the intent to commit a rape, if sexual intercourse does not take place. If, under the law, a female under twelve years of age is incapable of giving her consent to the act of sexual intercourse, then she is equally incapable of consenting to all familiarity with her person that necessarily precedes the consummation of the act. It was not the intention of the legislature that a female under twelve years of age, because of her tender years, should be protected from an accomplished act of seduction, but left entirely unprotected from all of the defiling acts of the seducer that lead up to her seduction. Whenever sexual intercourse is attempted with a female under twelve years of age, whether with or without her consent, there exists a felonious intent on the part of the male; and if the attempt miscarries, but in what is done there is a touching of the person of the female, it is an unlawful touching, in a rude and insolent manner, and constitutes an assault and battery, and, with the felonious intent which is present, is an assault and

battery with intent to commit a felony. We cannot imagine how it is possible for one person to touch the person of another, intending thereby to commit a felony, without the act of touching being rude, insolent, and unlawful."

The great weight of authority is against the contention of appellant, that the rule is the same on an assault with intent to commit rape, whether the prosecutrix is old or young. The true rule seems to be that if the assault was made under such circumstances that the act of sexual intercourse, if it had been accomplished, would have been a rape, then the accused is guilty of assault with intent to commit rape.

In case of Liebscher v. State, 69 Neb. 395, 95 N. W. 870, 5 A. & E. Ann. Cas. 351, the court says: "But where (as is the rule in most states) a connection with a female child under the age of consent is considered as rape, it is almost universally held that an attempt to have such connection is an assault with intent to commit rape, the consent of this child being wholly immaterial."

An exhaustive note cites the following-named states as supporting the rule: California, Dakota, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Oregon, Texas, Vermont, Virginia, Washington and Wisconsin. The following cases are also in point: Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; People v. McDonald, 9 Mich. 150; Hays v. People, 1 Hill, 351; Singer v. People, 13 Hun, 418; Brown v. State, 6 Baxt. 422; People v. Lourintz, 114 Cal. 628, 46 Pac. 613; State v. Wray, 109 Mo. 594, 19 S. W. 86; State v. Grossheim, 79 Iowa, 75, 44 N. W. 541; Polson v. State, 137 Ind. 519, 35 N. E. 907; State v. Sargent, 32 Or. 110, 49 Pac. 889; Farrell v. State, 54 N. J. L. 416, 24 Atl. 723; Re Lloyd, 51 Kan. 501, 33 Pac. 307; Comer v. State, — Tex. Crim. Rep. —, 20 S. W. 547; Addison v. People, 193 Ill. 405, 62 N. E. 235; Murphy v. State, 120 Ind. 115, 22 N. E. 106; 2 Am. & Eng. Enc. Law, p. 988; 10 Enc. Ev. p. 586, and cases in note 20; People v. Goulette, 82 Mich. 36, 45 N. W. 1124; Com. v. Roosnell, 143 Mass. 32, 8 N. E. 747; Crew v. State, — Tex. Crim. Rep. —, 22 S. W. 973; State v. Shroyer, 104 Mo. 441, 24 Am. St. Rep. 344, 16 S. W. 286; State v. Mathews, 202 Mo. 143, 100 S. W. 420; Austin v. State, 51 Tex. Crim. Rep. 327, 101

S. W. 1162; State v. Katon, 47 Wash. 1, 91 Pac. 250; Tuttle v. State, 83 Ark. 379, 104 S. W. 135; Boyd v. State, 74 Ga. 356; Hanes v. State, 155 Ind. 112, 57 N. E. 704; State v. Jerome, 82 Iowa, 749, 48 N. W. 722; State v. Prather, 136 Mo. 20, 37 S. W. 805; Wilson v. State, — Tex. Crim. Rep. —, 73 S. W. 16; Glover v. Com. 86 Va. 382, 10 S. E. 420; State v. Juneau, 88 Wis. 180, 24 L.R.A. 857, 43 Am. St. Rep. 877, 59 N. W. 580; People v. Roach, 129 Cal. 33, 61 Pac. 574; People v. Courier, 79 Mich. 366, 44 N. W. 571.

In State v. Shroyer, 104 Mo. 441, 24 Am. St. Rep. 344, 16 S. W. 286, the accused entered a room in which a fourteen-year-old girl was sleeping. He touched her arm, and lay down close to her. He then commenced to unbutton his pants, when an alarm was raised by an elder sister who was sleeping in the same room, and the accused ran off. Held, there was evidence to sustain a conviction for an assault with intent to rape.

In Hanes v. State, 83 Ark. 379, 104 S. W. 135, defendant, a man of mature years, followed a girl, who had not yet attained the age of consent, into a barn, where he put his arm about her, and tried to throw her down, at the same time telling her that he would not hurt her. It was also shown that he had, on previous occasions, followed the girl and attempted to make arrangements with her to see her privately. Held, sufficient to warrant a verdict of assault and battery with intent to commit rape.

In Addison v. People, 193 Ill. 405, 62 N. E. 235, it was held that a man over sixteen years of age who attempts by any act to have carnal knowledge of a girl under fourteen years, may be convicted of an assault with intent to commit rape, although he makes no attempt to use force.

In People v. Roach, 129 Cal. 33, 61 Pac. 574, the court says: "There were certain unmentionable acts on his part which clearly showed his intent to have sexual intercourse with the girl, and from all the facts and circumstances we think it sufficiently appeared that his intent was to have carnal intercourse with the girl. If he had succeeded it would have been rape, with or without force and with or without her consent, and it must follow that as his intent was to violate the person of the girl, it constituted an assault with intent to commit rape."

The following language of the learned trial court, in denying defendant's motion for a new trial, meets with our approval: "After hearing counsel at length, I am persuaded that to grant this motion would require the state, in cases of assault with intent to commit rape upon a female under the age of consent, to produce more testimony than would be required to convict of the offense of rape itself. In other words, if the crime of rape can be committed upon a female under the age of consent without the perpetrator having used force, then it seems to me that the element of force is necessarily removed from the consideration of the question involved, and the only remaining question would be whether the defendant actually intended, even without force, to commit the act, and added to that intent the asasult."

In absence of a statute or rule of law requiring corroboration, no corroboration of the prosecutrix is necessary to convict for an assault with intent to commit rape. 33 Cyc. Law & Proc. p. 1512, and cases cited; State v. Rhoades, 17 N. D. 580, 118 N. W. 233.

Appellant next insists that the court erred in not of its own motion charging the jury upon the elementary law set forth in his 19th, 20th, 21st, 22d, 23d, and 24th assignments of error. It would render this opinion too long to set forth these assignments of error in full. Suffice it to say that the 19th assignment complains of the court neglecting and omitting in the charge to the jury to caution them that no class of prosecutions are attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance, as rape cases, and that when the state's case rests wholly upon the sole testimony of the prosecutrix, they should be cautious in rendering a conviction on such uncorroborated testimony, and cautioning them against the danger of prejudice and popular excitement, unconsciously influencing their verdict.

The 24th assignment relates principally to the neglect of the court to charge the jury that the defendant could not be convicted unless the assault was made with intent to overcome the resistance which might be offered by her, to view the testimony with great caution, etc.; not to allow the gravity of the charge, nor the fact that the defendant is a Japanese and the prosecuting witness a white girl, to in any way sway or bias the judgment of the jury. Suffice it to say that before the charge was given it was reduced to writing and submitted to the coun-

sel for the state and the defendant, and they were asked if they had any exception to the written charge. Both counsel replied in the negative. What we have hereinbefore stated as to the law of the case disposes of appellant's 20th, 21st, 22d, and 23d assignments of error. No requests for instructions were made by either party. The charge of the court to the jury fully and fairly states the law, and is as favorable to the defendant as he is entitled to.

The defendant next complains of the misconduct of counsel for the state in argument. We have carefully examined the record in regard to the remarks complained of. In our opinion counsel for the state made no remarks in the arguments not warranted by the evidence.

These are the principal assignments relied upon by counsel for appellant, and are the only ones argued by him. We have, however, examined the other assignments of error and find there is no merit in them. The defendant has had a fair and impartial trial, was found guilty by the jury, and the trial court refused to set aside the verdict. After a careful examination of the record we are convinced that no error was committed.

The orders and judgment appealed from are affirmed. All concur.

INGA TRONSRUD v. FARM LAND FINANCE COMPANY.

(129 N. W. 359.)

Taxation — Tax Sale — Notice of Redemption.

Service of the notice of the time when the period for redemption from a tax sale will expire must be made upon the owner of the land personally, if known to be a resident of the state; but, if the owner be a nonresident, service shall be made by registered letter addressed to the owner's last known postoffice address, and must also be served personally upon the person in possession.

Opinion filed December 31, 1910.

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

Action by Inga Tronsrud against Farm Land & Finance Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Purcell & Divet, for appellant.

O. S. Sem, for respondent.

CARMODY, J. This action was brought in statutory form to determine adverse claims to the following described land, situated in the county of Sargent and state of North Dakota, to wit: The east half of the southwest quarter and lots Nos. 3 and 4 of section 31, township 132, north of range 56 west. On August 24th, 1891, plaintiff obtained the government patent for the land in controversy, and recorded the same in the office of the register of deeds of Sargent county on January 18th, 1893; and was at the time of the trial of this action the owner of the land, unless devested thereof by reason of the tax deed hereinafter mentioned, and under which tax deed appellant claims title. Appellant claims title under the tax deed issued February 4th, 1904, for the taxes of the year 1899. The court held that the taxes and tax sale were valid, but the deed was ineffectual as a conveyance of title, because no notice of the expiration of the redemption period was served on plaintiff, Inga Tronsrud, and decreed the plaintiff to be the owner of the land subject to a lien for taxes paid by appellant. The defendant appeals from the judgment, without demanding a retrial of the entire case, and specifies that it desires a review of specific questions of fact only, being the specific facts that would be embraced in the ultimate question, was notice of the expiration of the period of redemption given to Inga Tronsrud? The findings show that in the year 1899, plaintiff, Inga Tronsrud, was the owner of the land; that in the year 1899, and each year thereafter until 1904, the land was assessed in the name of Inga Frangsrud; that on the 4th day of December, 1900, such land was sold for the 1899 taxes to E. E. Hughson, to whom a certificate of sale was issued; that said certificate of sale was by said Hughson assigned to one D. F. Vail; that Vail paid the taxes for the years 1900, 1901, and 1902; that on the 28th day of September, 1903, said Vail presented said certificate of sale to the county auditor of Sargent county, who thereupon gave due and legal notice of the expiration of the period of redemption from said sale, aforesaid, to Inga

Frangsrud, the party in whose name said land was assessed, and caused the same to be placed in the hands of the sheriff of Sargent county for service, and the same was duly and legally served upon said Inga Frangsrud; that on the 4th day of February, 1904, the auditor of Sargent county duly issued his deed of said premises to D. F. Vail; that said Vail duly sold and conveyed the premises to appellant; that no notice of the expiration of the period of redemption from the tax sale aforesaid was ever served upon Inga Tronsrud, or notice thereof given to her.

The appellant specifies ten questions of fact which it desires this court to review, but all go to the question as to whether notice of the expiration of the period of redemption was given to plaintiff, Inga Tronsrud.

The evidence shows that on the 28th day of September, 1903, the county auditor of Sargent county issued a notice of the expiration of the period of redemption in due and legal form to Inga Frangsrud, and addressed to her a registered letter containing such notice, at Harlem, North Dakota, her last known postoffice address, which letter was returned to the county auditor uncalled for. The notice of the expiration of the period of redemption was on the 1st day of October, 1903, delivered to the sheriff of Sargent county for service, and was returned by him on said 1st day of October, 1903, with his return indorsed thereon that said land was unoccupied; that he made diligent search and inquiry to serve the same upon Inga Frangsrud, but was unable to serve the same upon her, for the reason that said Inga Frangsrud was not a resident of Sargent county and state of North Dakota.

There is no proof that service was made by publication, except the recitals in the deed issued by the county auditor to said Vail.

D. J. Johns, the sheriff of Sargent county, sworn as a witness for appellant, testified that he found no person occupying the land. On cross-examination he testified that he drove across the corner of section 31; that the country around there was not settled; that he was looking for Inga Frangsrud; did not find her; inquired about her of a hired man working on a neighboring farm about a half a mile or a mile from the land; that witness could not say who was in the posession of the land in 1899, 1900, 1901, 1902, 1903, or 1904; that he could not find anybody on the land; could not say whether he drove

up to the buildings; did not know whether there were any buildings on the land; supposed if there were buildings he drove up to them; did not remember; if there was anyone on the land he would have found him and served the notice to him.

Plaintiff testified by deposition that her name was Inga Tronsrud; that she was in the possession of the land during the years 1899, 1900, 1901, 1902, 1903, and 1904; that no notice of the expiration of the period of redemption was served upon her; that she thought her husband attended to the payment of the taxes.

Section 106, chapter 126, Laws of 1897, being the law under which the sale was made, requires notice to the person in whose name the land was assessed, and it requires that this notice be served upon the owner of the land personally, if known to be a resident of the state; but, if the owner be a nonresident, service shall be made by registered letter addressed to the owner's last known postoffice address. This service by registered mail is required in all cases where the owner is a nonresident, in addition to service by publication and in addition to service upon the person in possession. The notice was not mailed to the then record owner, Inga Tronsrud, the plaintiff in this action. The only service made, or attempted to be made by registered mail or otherwise, was upon Inga Frangsrud. Inga Tronsrud, the plaintiff herein, was the owner of the land within the meaning of the law, and notice should have been served upon her. No notice having been served upon her, the tax deed issued to D. F. Vail February 4, 1904, is void as a conveyance of title. See Hodgson v. State Finance Co. 19 N. D. 139, 122 N. W. 336.

The judgment appealed from is affirmed. All concur.

JOHN J. LEE, as Sheriff of Ward County, North Dakota, v. JOHN CHARMLEY and V. J. Winset and A. E. Paulson.

(— L.R.A.(N.S.) —, 129 N. W. 448.)

Officers — Sheriff and Constables — Official Bonds.

1. The sureties upon the official bond of a deputy sheriff, who undertake that

Note.—While a police officer who makes an arrest on a reasonable suspicion of felony and in good faith will not be liable although no felony has in fact been com-

he shall faithfully and impartially discharge the duties of his office, are liable for any unlawful or oppressive act done by such officer, under color or by virtue of his office.

Officers — Liability on an Official Bond.

2. The purpose of an official bond is to provide indemnity against malfeasance and misbehavior in public office, the misuse of powers belonging to the office, and the assumption under guise of official action of powers not belonging to it. All acts so performed, though unlawful or wrongful, are official acts within the meaning of an undertaking that an officer shall faithfully and impartially discharge the duties of his office; and as such may be reasonably considered to have been within the contemplation of the sureties, at the time they entered into the undertaking, as constituting a breach of its conditions.

Sheriffs and Constables — Liability on Official Bond.

3. A deputy sheriff who falsely claiming to have a warrant for the arrest of a person not formally charged with crime of any kind goes to his house in the nighttime and under guise of the authority of his office arrests and takes such person into custody, has committed an unauthorized and unlawful act under color of his office, for which the sureties upon his official bond are liable in a proper action.

Opinion filed December 31, 1910.

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

Action by John J. Lee as sheriff of Ward county against John Charmley and others upon the official bond of defendant Charmley as deputy sheriff. From an order overruling a demurrer to plaintiff's complaint, defendant's sureties appeal.

Affirmed.

Murphy & Wooledge, for appellants.

"Color of office" implies presence of apparent real authority. State, Allen, Prosecutor, v. Conover, 28 N. J. L. 224, 78 Am. Dec. 54; Taylor v. Parker, 43 Wis. 78; Gerber v. Ackley, 32 Wis. 233, 37 Wis. 43,

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mitted, it is well established, as shown by a review of the authorities in a note in 51 L.R.A. 203, that he will be liable if he has not such reasonable grounds for believing that a felony has been committed, or if he acts in bad faith or oppressively. And the general rule is, as shown by the authorities in 51 L.R.A. 222, that an action may be maintained on the officer's bond for making an unlawful arrest if the wrongful acts are done by virtue of his office, although there is a conflict of authority as to liability on the bond for wrongful acts done by color of his office. In some cases the liability is controlled by statute.

19 Am. Rep. 751; Kendall v. Aleshire, 28 Neb. 707, 26 Am. St. Rep. 367, 45 N. W. 167; Marquis v. Willard, 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889; Huffman v. Koppelkom, 8 Neb. 344, 1 N. W. 243; Ottenstein v. Alpaugh, 9 Neb. 237, 2 N. W. 219; State use of Wilson v. Fowler, 88 Md. 601, 42 L.R.A. 849, 71 Am. St. Rep. 452, 42 Atl. 201; Feller v. Gates, 40 Or. 543, 56 L.R.A. 630, 91 Am. St. Rep. 492, 67 Pac. 416; Greenberg v. People, 225 Ill. 174, 8 L.R.A. (N.S.) 1223, 116 Am. St. Rep. 127, 80 N. E. 100; McLendon v. State, 92 Tenn. 520, 21 L.R.A. 738, 22 S. W. 200; State ex rel. Bruns v. Clausmeier, 154 Ind. 599, 50 L.R.A. 73, 77 Am. St. Rep. 511, 57 N. E. 541; Leger v. Warren, 62 Ohio St. 500, 51 L.R.A. 193, 78 Am. St. Rep. 738, 57 N. E. 506; Brown v. Wallis, 100 Tex. 546, 12 L.R.A. (N.S.) 1019, 101 S. W. 1070; Allison v. People, 6 Colo. App. 83, 39 Pac. 903; Palmer v. St. Albans, 60 Vt. 427, 6 Am. St. Rep. 131, 13 Atl. 569; State ex rel. Russell v. Hendricks, 88 Mo. App. 560; Dysart v. Lurty, 3 Okla. 601, 41 Pac. 724; San Luis Obispo County v. Farnum, 108 Cal. 562, 41 Pac. 445.

Sureties on an officer's bond guarantee strictly official conduct and no more. Feller v. Gates, 40 Or. 543, 56 L.R.A. 630, 91 Am. St. Rep. 492, 67 Pac. 416; Gerber v. Ackley, 32 Wis. 233, 37 Wis. 43, 19 Am. Rep. 751; Kendall v. Aleshire, 28 Neb. 707, 26 Am. St. Rep. 367, 45 N. W. 167; Marquis v. Willard, 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889; State use of Wilson v. Fowler, 88 Md. 601, 42 L.R.A. 849, 71 Am. St. Rep. 452, 42 Atl. 201; State use of German v. Timmons, 90 Md. 10, 78 Am. St. Rep. 420, 44 Atl. 1003; Prairie School Twp. v. Haseleu, 3 N. D. 328, 55 N. W. 938; and Mechem, Pub. Off. §§ 282, 283.

John E. Greene, R. H. Bosard, and *G. W. Twiford,* for respondents.

Acts done under the color of office are within the protection of an official bond. Murfree, Official Bonds, § 211; Clancy v. Kenworthy, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427; Hall v. Tierney, 89 Minn. 407, 95 N. W. 219; Turner v. Sisson, 137 Mass. 191.

ELLSWORTH, J. The action in which this appeal is taken is brought by the plaintiff as sheriff of Ward county against defendant Charmley, as a deputy sheriff, appointed by him and the other defendants as sureties upon the deputy's bond. The conditions of the bond as

set out in the complaint are to the effect that, "if the said John Charmley shall faithfully and impartially discharge the duties of said office of deputy sheriff, and render a true account of all moneys and property of every kind that shall come into his hands as such officer, and pay over and deliver the same according to law, then the above obligation to be void," etc. Then follows an allegation in these words: "That on or about the 8th day of July, 1905, at or about the hour of 11:30 P. M., in the nighttime, in the city of Kenmare, Ward county, North Dakota, the defendant, John Charmley, as deputy sheriff, did go to the home of one Edward J. Brown, and did, as deputy sheriff, wrongfully, unlawfully and without reasonable cause or authority of law place under arrest and take into custody the said Edward J. Brown; that said John Charmley, as deputy sheriff, at the time said arrest was made, had no warrant for the arrest of said Edward J. Brown, nor was there at such time any complaint filed charging the said Edward J. Brown with a crime, nor was any crime committed by the said Edward J. Brown; that the said John Charmley, as deputy sheriff, represented at the time said arrest was made that he had a warrant for the arrest of Edward J. Brown, which statement was false, and the said John Charmley compelled the said Edward J. Brown to accompany him, as such deputy sheriff, and as such deputy sheriff took him into custody; that said acts were a violation of the duties of said John Charmley, as deputy sheriff, and by reason thereof the said John Charmley did not faithfully and impartially perform his duties as deputy sheriff in the premises; that such acts were in violation of the conditions of the bond of said John Charmley as deputy sheriff hereinbefore set forth, for the faithful performance of his duties as such deputy sheriff."

Then follows allegations to the effect that, by reason of said unlawful acts of defendant Charmley, the plaintiff, as sheriff of Ward county, was sued by said Edward J. Brown, and a judgment recovered against him by said Brown in the sum of $652.65; that the defendant sureties were duly notified to come in and defend said action, and that one of them appeared and took some steps in the procedure; that the plaintiff was compelled to pay the amount of said judgment, and to expend large sums of money in the defense of said action, to his damage in

the aggregate in the sum of $906.65, for which sum he demands judgment against defendants.

The defendant sureties appeared and jointly interposed a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action against them. A trial upon the issues of law presented by this demurrer was had before the district court of Ward county, which made an order overruling the demurrer. From this order of the district court the sureties have appealed to this court.

The only point, therefore, presented by this appeal or urged in this court is that based upon the contention of appellant's counsel, that the complaint does not state a cause of action against appellant sureties, for the reason that the facts set forth in the complaint do not, though admitted, constitute such a breach of the official bond given by defendant Charmley as deputy sheriff, as to render liable the appellants as sureties; that the complaint negatives the conclusion that the acts complained of were the official acts of the deputy sheriff, or that he acted under "color of office," and, on the contrary, show that he was a mere private trespasser.

The courts, in their consideration of those acts of public officers which result in liability to the sureties upon their official bonds, have found it convenient to divide such acts into three distinct classes: (1) Acts done by virtue of office; (2) acts done under color of office; and (3) acts done in a purely private or individual capacity. By an absolute agreement of authority, the sureties upon an official bond are liable for wrongful acts within the first class, and are not liable for those of the third class. Regarding those acts falling within the second class there has been for generations an irreconcilable conflict of authority. We are cited to long lines of cases in which the holding of liability or nonliability of the sureties is based entirely upon the distinction between acts done *virtute officii* and *colore officii,* the courts of many different states having announced holdings that are diametrically opposed. The learned discussions contained in the opinions handed down in these cases are interesting, and serve admirably to accentuate the remark of the supreme court of Maryland, that when authorities so eminent as Chief Justice Green of New Jersey, Judge Cowen, of New York, and Judge Ruffin, of North Carolina are found in accord with one principle of liability, and Judge Shaw of Massachusetts,

Tilghman of Pennsylvania, Bronson of New York, Thurman of Ohio, and Justice Gray of the Supreme Court of the United States, are committed to the opposite view, "it is apparent that the question is one of much difficulty." State use of Wilson v. Fowler, 88 Md. 601, 42 L.R.A. 849, 71 Am. St. Rep. 452, 42 Atl. 201.

The distinction made between the official acts that serve as the basis of these conflicting lines of authority is that "acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly or abuses the confidence which the law reposes in him; while acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them." Brandt, Suretyship, 3d ed. § 690; Gerber v. Ackley, 37 Wis. 43, 19 Am. Rep. 751; People ex rel. Kellogg v. Schuyler, 4 N. Y. 187. Under the rule of the common law adopted by the courts of New York, New Jersey, North Carolina, and Wisconsin, the sureties upon an official bond were held liable only for wrongful acts of the officer done *virtute officii*. Acts done *colore officii* within the meaning of the definition above quoted were classed as unofficial acts, in doing which the officer was a mere trespasser and for which the sureties were not bound. State, Allen, Prosecutor, v. Conover, 28 N. J. L. 224, 78 Am. Dec. 54.

The almost uniform current of the later cases, however, regards wrongful acts of a public officer *colore officii* as official acts, for which the sureties upon his bond are liable. Such is the holding of the courts of last resort of Pennsylvania, Maine, Massachusetts, Ohio, Virginia, Kentucky, Missouri, Iowa, Nebraska, Texas, California, Minnesota, Illinois, and of the Supreme Court of the United States. And, in reviewing these authorities, this court in one of its former opinions has remarked, "While there is a dispute among the authorities whether the sureties on a sheriff's bond are liable for the wrongful act of their principal in seizing the property of a third person, the more numerous decisions are found arrayed in support of the rule that they are liable, and these cases appear to us to have the best of the argument. See Lammon v. Feusier, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286, where the authorities are reviewed and where the doctrine we deem sound is enunciated." Welter v. Jacobson, 7 N. D. 32, 66 Am. St. Rep. 632, 73 N. W. 65. In accepting the principle that the sure-

ties upon an official bond are liable for the acts of the officer done *colore officii* as well as *virtute officii,* we are aided by the admission of appellants' counsel in his brief, to the effect that, "if the court hold that under the allegations of the complaint, Charmley acted under color of office, then these appellants are bound; if it should be held that he acted individually—unofficially—respondent has failed to state a proper cause of action, and appellants are not liable."

With whatever controversy, therefore, that has waged between conflicting principles based on the distinction of official acts done by virtue of office and by color of office, we are not concerned, and the only point that remains for our determination is, Were the acts of defendant Charmley done either by virtue of office, or color of office, or were they such as lacked all official character?

Summarized, the allegations of the complaint are to the effect that Charmley, as deputy sheriff, in the nighttime, went to the home of Brown, and, announcing that he had in his possession a warrant for the arrest of Brown, as such deputy sheriff, took him into custody and compelled him to accompany him, which acts being wrongful, unlawful, and without reasonable cause or authority of law, caused the damage upon which the suit against his principal, the sheriff, was based. By reason of such acts, it is alleged, Charmley did not faithfully and impartially perform his duties as deputy sheriff in accordance with the conditions of his bond.

This status of fact admitted, appellant strenuously contends that "the acts alleged by the complaint do not constitute such a breach of the official bond of said deputy sheriff as to hold these appellants liable as sureties;" that "an officer must have something other than mere holding of office, which appears to give him authority to act which, if valid, would authorize the act." This contention has apparent support in many cases which seem to predicate color of office wholly upon the fact that the officer was armed with a warrant, or some process of that character directing him to do some official act; and this being the case, the fact that the unlawful act complained of was committed against the person or property of a party not named in the writ did not deprive it of the "color" requisite to its official character. Lammon v. Feusier, supra, and cases cited therein. Distinctions such as this, however, seem to us to be fanciful refinements, rather than substantial reason-

ing. It is true that Charmley, as deputy sheriff, was authorized to make an arrest at night without a warrant only in case he had reasonable cause to believe that the person arrested had committed a felony. Rev. Codes 1905, § 9733. It is also true that the complaint expressly negatives any such authority, by the statement that, at the time of the arrest, the man arrested had not committed any crime, and that his arrest was made, "without reasonable cause or authority of law." Yet it appears that Charmley went to Brown's house, demeaning himself as an officer, claiming that he had authority for making an arrest, and made the arrest, and compelled Brown to accompany him in this official character. In such character he was authorized to make the arrest if provided with a warrant, or without in case he had reasonable cause for believing that Brown had committed a felony. He pretended to have such authority, and intimidated, as we may presume, by such pretense, Brown, without resistance, submitted to arrest and to being held in custody. Charmley's official insignia was the means by which he was enabled to accomplish the wrongful act. It may safely be assumed that, had he gone at such time and under such circumstances as a private citizen, he would have met with immediate resistance. He abused authority derived wholly from the fact that he held the office of deputy sheriff. An act so performed by a public officer seems to us clearly to have been done under color of office within any accepted definition of that term. Certainly, his act was given a color as distinctive as though he had held a warrant directed against a person other than Brown, which state of fact, according to the holding of all later authority, constitutes color of office. Viewed from any standpoint it was gross misbehavior in office, the wrongful character of which was greatly aggravated by reason of being done under pretense of official authority. It is argued that the authority he assumed to exercise was wholly usurped; but "it is as much his duty as an officer to refrain from corruptly usurping or assuming powers not pertaining to his office, as to refrain from corruptly exercising those which properly belong to it." State v. Wedge, 24 Minn. 150; Hall v. Tierney, 89 Minn. 407, 95 N. W. 219. The condition of his bond to which the defendant sureties subscribed was that he should, "faithfully and impartially discharge the duties of said office of deputy sheriff." To use the powers pertaining to such

office as a means of maltreating, oppressing, or injuring another within the jurisdiction in which he was authorized to exercise the functions of his office, was not a faithful or impartial discharge of its duties. As said by the supreme court of Iowa in a case where a constable arrested without a warrant and maltreated a person whom he had no reasonable cause to believe was guilty of crime, "his act was in the line—direction—of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions, he violated his duty and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he, of course, is not liable." Clancy v. Kenworthy, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427. "An official act . . . means any act done by the officer in his official capacity under color and by virtue of his office." Turner v. Sisson, 137 Mass. 191.

We think, therefore, that the allegations of the complaint set out a wrongful malfeasance of Charmley committed under the guise of an official act, unquestionably under color of office, and with characteristics which might almost warrant a holding that it was done by virtue of office. Certainly it is such an act as the sureties upon his official bond should reasonably be held to have had in contemplation as constituting a breach of its conditions, at the time they entered into their undertaking. Greenberg v. State, 8 L.R.A.(N.S.) 1223, and note (225 Ill. 174, 116 Am. St. Rep. 127, 80 N. E. 100).

The action of the District Court in holding that the complaint stated facts constituting a cause of action against the defendant sureties was proper, and its order is affirmed.

All concur, except CARMODY, J., who did not participate in the decision.

RICHARD G. P. VALLANCEY v. MARTHA HUNT and John C. Hunt.

(— L.R.A.(N.S.) —, 129 N. W 455.)

Sales — Conditional Sale.

1. In an action by the assignee of a mortgage to recover possession of the mortgaged chattels, the mortgagors contended that such chattels were sold to them under a conditional sale merely, and that such conditional sale never became absolute. Hence, that such mortgage does not confer upon plaintiff a special property in such chattels, nor the right to the possession thereof. *Held:* that the evidence discloses that such conditional sale subsequently became absolute, and such contention is therefore untenable.

Claim and Delivery — Counterclaim and Set-off — Pleading.

2. In claim and delivery by a mortgagee, or his assignee, to recover possession of the mortgaged property which was sold to defendant, and the mortgage given to secure the purchase price thereof, defendant may counterclaim or set-off damages arising from a breach of the warranty of the goods sold, but the matter constituting such defense, set-off, or counterclaim must be specially pleaded in the answer, and cannot be proved under a general denial.

Action by Assignee — Waiver — Set-off and Counterclaim.

3. Where the debtor by his conduct induces the assignee to believe that the obligation will be met, and that there is no defense thereto, he will be held to have waived the right to avail himself of a set-off against the assignor in an action by the assignee.

Opinion filed December 31, 1910.

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

Action by Richard G. P. Vallancey against Martha Hunt and John C. Hunt. From a judgment in favor of defendants, plaintiff appeals.

Reversed, with directions.

W. H. Thomas and *Skulason & Burtness,* for appellant.

New matter must be specially pleaded. Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Bliss, Code Pl. §§ 323, 339, et seq.; Fitnam, Trial Proc. § 567; Iselin v. Simon, 62 Minn. 128, 64 N. W. 143;

Note.—As to rights and liabilities of vendor and vendee by conditional sale generally on default of payment, see note in 32 L.R.A. 455.

1 Enc. Pl. & Pr. p. 830; Reynolds v. Reynolds, 45 Mo. App. 622; Riggins v. Missouri River Ft. S. & G. R. Co. 73 Mo. 598.

To rescind a contract, one must act with reasonable despatch, before third party's rights intervene. Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692; Whitcomb v. Hardy, 73 Minn. 285, 76 N. W. 29; Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798, 10 Mor. Min. Rep. 445; Hayward v. Eliot Nat. Bank, 96 U. S. 611, 24 L. ed. 855; McLean v. Clapp, 141 U. S. 429, 35 L. ed. 804, 12 Sup. Ct. Rep. 29; Lockwood v. Fitts, 90 Ala. 150, 7 So. 467; Johnson v. Whitman Agri. Co. 20 Mo. App. 100; Booth v. Ryan, 31 Wis. 45; Thomas v. McCue, 19 Wash. 287, 53 Pac. 161; Aultman, M. & Co. v. Mickey, 41 Kan. 348, 21 Pac. 254; Hercules Iron Works v. Dodsworth, 57 Fed. 556; Benjamin, Sales, 1899 ed. p. 736; J. I. Case Threshing Mach. Co. v. Vennum, 4 Dak. 92, 23 N. W. 563; Kingman v. Watson, 97 Wis. 596, 73 N. W. 438; James v. Bekkedahl, 10 N. D. 120, 86 N. W. 226; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145.

C. R. Gailfus and *Burke, Middaugh, & Cuthbert,* for respondent.

To constitute estoppel there must have been a duty to speak, and the adverse party must have been misled. 16 Cyc. Law & Proc. p. 770; Smith v. Roach, 59 Mo. App. 115; Blair v. Wait, 69 N. Y. 116; Welland Canal Co. v. Hathaway, 8 Wend. 480, 24 Am. Dec. 51; Modern Woodmen v. Davis, 184 Ill. 236, 56 N. E. 300; Supreme Tent, K. M. v. Stensland, 206 Ill. 124, 99 Am. St. Rep. 137, 68 N. E. 1098; Combs v. Cooper, 5 Minn. 254, Gil. 200; Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; Brookhaven v. Smith, 118 N. Y. 634, 7 L.R.A. 755, 23 N. E. 1002.

Carmody, J. Action to recover the possession of personal property consisting of a threshing machine and traction engine. Plaintiff bases his right to recover the possession of such property under a chattel mortgage dated September 3, 1901, and given to secure the payment of a promissory note for the sum of $645, executed and delivered by defendant to one James O'Loughlin on said date, and transferred to plaintiff prior to the commencement of the action. The complaint alleges the execution and delivery of said note and mortgage by defendant to O'Loughlin, and the assignment thereof by the

latter to the plaintiff, as aforesaid. It also alleges nonpayment of the note, a demand for the possession of the property, and that defendants wrongfully refused to surrender possession thereof to the plaintiff. The prayer is in the usual form. The answer is a general denial merely.

At the trial defendants, over plaintiff's objection, were permitted to show that such note was given to O'Loughlin as a portion of the purchase price of the threshing machine and engine described in the mortgage, and that the oral agreement between defendants and O'Loughlin was to the effect that if the machine, after a fair trial, did not work satisfactorily, all papers delivered by defendants to O'Loughlin representing the purchase price of the rig should be returned to defendants, and defendants should return such rig to O'Loughlin. Defendants also were permitted to prove that such machine did not work satisfactorily, and that they, from time to time, notified O'Loughlin thereof. The proof shows, however, that the defects complained of were remedied from time to time, and that defendants have never returned the rig, but on the contrary used it during the entire threshing seasons of 1901, 1902, 1903, and several seasons thereafter. Defendants also were permitted to show, over plaintiff's objection, that they were induced by O'Loughlin to keep the machine under the promise that he, O'Loughlin, would make good to them all the damages which they suffered by reason of the defects aforesaid, and they were permitted to prove that O'Loughlin warranted the machine to be a good machine in every respect; that there was a breach of such warranty, and that the damages on account of such breach or warranty exceed the amount due on said note. At the conclusion of the testimony both parties moved for a directed verdict, whereupon the jury was excused from further service, and the court in due time made findings of fact and conclusions of law favorable to defendants, and ordered the action dismissed. From the judgment rendered on such findings and conclusions, plaintiff appeals.

Numerous assignments of error are urged by appellant's counsel, but those relied upon for a reversal of the judgment may be summarized as follows:

1. The alleged improper admission under the general denial of evidence duly objected to.

2. Error in holding that the contract of sale was conditional, and not absolute.

3. That defendants waived their right to urge any of the defenses urged by them, and as to plaintiff they are estopped to urge such defenses.

Regarding the defense of conditional sale, it is, we think, entirely clear from the record that, even if the sales contract was conditional when made, that it became an absolute sale when defendants were induced to keep the machinery under the promise on O'Loughlin's part that he would make good to them all damages suffered by reason of defects in the machinery or breach of warranty.

The defendant John C. Hunt testified that he gave to O'Loughlin, as a part of the consideration for the purchase price of this machinery, deeds to three quarter sections of land, and that O'Loughlin agreed to hold such deeds, and not place them of record until Hunt had an opportunity to try the machine; that thereafter, and in the month of September, Hunt learned of the fact that O'Loughlin had placed said deeds on record, but he never at any time protested or objected thereto, but on the contrary continued to use the threshing rig throughout the threshing season, not only of that year but for four or five years thereafter; not only this, but he paid one note given as a portion of the purchase price of said rig and paid the interest on the $645 note; not only this, but he was present at the time the note in suit was indorsed by O'Loughlin to plaintiff, and he actually handed the note to O'Loughlin for the purpose of indorsement over to plaintiff. All of these acts on defendant's part are wholly inconsistent with his theory that such sale never became absolute, and they unmistakably show an executed sale. The sale having become an executed contract, it follows that plaintiff, as the assignee of the note and chattel mortgage, which are past due and unpaid, has a special property in such separator and engine, and is entitled to the possession thereof for the purpose of foreclosing the chattel mortgage, unless defendants have established a legal defense thereto, and this brings us to the question whether, under the general denial in the answer, it was error to permit defendants to prove a warranty, a breach thereof, and damages resulting from such breach. We are entirely clear on principle and authority that such evidence was wholly

inadmissible. Manifestly, such defense consisted of new matter, and must be specially pleaded. It was in the nature of a set-off or counterclaim. It did not directly tend, in the least, to deny or refute any of the allegations of the complaint. The authorities are practically unanimous to the effect that such a defense cannot be proved under a general denial.

In 31 Cyc. Law & Proc. p. 697, it is said: "A counterclaim or set-off must, under Code procedure, always be specially pleaded." Citing many authorities from Code states, including Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847. In 34 Cyc. Law & Proc. p. 1417, the correct rule regarding the right of a defendant in a replevin action to interpose a set-off or counterclaim is stated as follows: "Since the adoption of Codes in most of the states, the doctrine of set-off and counterclaim has undergone much change. At first counterclaims were held not to be available in any action for a tort, and therefore not in replevin, which sounds in tort. But this rule has been so far modified as to allow the interposition of a counterclaim in the full sense of the Code, whether arising on contract or based upon a tort in an action of replevin, whenever such counterclaim is founded upon a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or whenever it is connected with the subject of the action." In the note at the bottom of the page is the following: "In replevin by a mortgagee to recover possession of the mortgaged property, which was sold to defendant, and the mortgage given to secure the purchase price thereof, defendant may counterclaim damages arising from a breach or warranty of the goods sold. McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544, 79 S. W. 745; Wilson v. Hughes, 94 N. C. 182; Minneapolis Threshing Mach. Co. v. Darnall, 13 S. D. 279, 83 N. W. 266; Aultman Co. v. McDonough, 110 Wis. 263, 85 N. W. 980." Many authorities are therein collated holding that, in an action of replevin, defendant may plead matters by way of set-off and counterclaim. Why such holding, if, as here contended, all such matters may be proven under a mere general denial? Expressions may be found in many cases to the effect that, under a general denial, defendant may prove any defense tending to refute any of the material allegations in the complaint, but it will be found that almost invariably where such

expressions were used the courts were dealing with defenses in the strict technical meaning of the word, as, for instance, in Dewey v. Bobbitt, 79 Kan. 505, 100 Pac. 77, where the defense was failure of consideration; or, as in Payne v. McCormick Harvesting Mach. Co. 11 Okla. 318, 66 Pac. 287, where the defense was fraud and deception in obtaining the mortgage under which plaintiff sought to recover the property, or, as in Wylie v. Marinofsky, 201 Mass. 583, 88 N. E. 448, where the defense was that the plaintiff, through his agent, had sold the property to defendant. In the latter case, which was an action of replevin to recover a horse, among other things it was said: "The plaintiff, in order to prevail, must establish by a preponderance of the creditable evidence that he is at least entitled to the possession of the property in question. . . . The burden of proving this proposition rests on him throughout the trial. In the present case the answer of the defendant, which was a general denial, rendered competent any evidence which tended to controvert this contention of the plaintiff. . . . The plaintiff asserted ownership as the foundation of her right to possession. She assumed, therefore, the burden of proving title in herself. This burden did not shift. Indeed, the burden of proof does not shift under the law of this commonwealth. . . . When the plaintiff has closed his case, defendant may then attack it. If he merely introduces evidence which breaks down the case of the plaintiff, he assumes no burden of proof. In a replevin case he may attempt to show that the plaintiff never had title, or has disposed of his title. But this is still merely an attack upon the plaintiff's case, namely, his right to immediate possession of the property. . . . He does not thereby raise a new technical issue. His evidence directed to these points is all admissible under a general denial, and does not require specification in the answer. . . . The defendant undertook to do no more in this case. He did not defend on any ground of confession and avoidance; he asserted facts directly at variance with those proffered by the plaintiff. It was analogous to the familiar defense in actions of contract, that a different contract from that claimed by the plaintiff was in fact made, which is provable under a general denial, and as to which the burden is not on the defendant, but continues on the plaintiff. Starratt v. Mullen, 148 Mass. 570, 2 L.R.A. 697, 20 N. E. 178; Phipps

v. Mahon, 141 Mass. 471, 5 N. E. 835. If the defendant sets up any independent defense outside the issue raised by the pleadings of the plaintiff, then he assumes the burden of proving that distinct and independent allegation. Sayles v. Quinn, 196 Mass. 492, 82 N. E. 713; Powers v. Russell, 13 Pick. 69. But the evidence by the defendant in the present case, that the plaintiff's agent, either by original authority or subsequent ratification and adoption, has sold the horse to him, went to the root of the plaintiff's claim, which it was fundamentally necessary for her to establish, that she was the owner and entitled to possession."

In Aultman Co. v. McDonough, 110 Wis. 263, 85 N. W. 980, the facts were quite analogous to those in the case at bar, but the defendant specially alleged, by way of counterclaim, the matters which defendants were permitted in the case at bar to prove under the general denial. We quote from the opinion: "As indicated in the statement, the plaintiff, as mortgagee, brought this action of replevin by reason of the defendant's default in payment of a part of the purchase price of the machinery covered by the mortgage. The right to maintain such an action is undisputed. Gage v. Wayland, 67 Wis. 566, 31 N. W. 108; Rice v. Kahn, 70 Wis. 323, 35 N. W. 465; Hill v. Merriman, 72 Wis. 483, 40 N. W. 399. Of course, the plaintiff's special interest in the property is limited by the amount of the mortgage debt. Gage v. Allen, 84 Wis. 323, 54 N. W. 627.

"The defendant, by way of counterclaim, sought to extinguish or reduce such special interest by alleging damages for the breach of warranty on his purchase of the engine covered by the mortgage, and also damages for loss of time and expenses in trying to operate the engine returned to the plaintiff, and for which the engine covered by the mortgage was, in part, taken in exchange. Such counterclaim arose out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, and is connected with the subject of the action, within the meaning of the statute, especially as the plaintiff is a nonresident. Stats. 1898, subd. 1, 3, § 2656."

It is true the court nowhere says that such defenses might not have been proven under a general denial, but, if such is the court's understanding, it seems queer that they should waste time in giving reasons why such counterclaim was properly interposed. A very clear

statement of what defenses are admissible under a denial, and what are new matter and must be specially pleaded, may be found in Pomeroy's Code Remedies, 3d ed. § 673. See also Id. §§ 686, et seq. Professor Pomeroy, among other things, says: "All facts which directly tend to disprove any one or more of these averments may be offered under the general denial; all facts which do not thus directly tend to disprove some one or more of these averments, but tend to establish a defense independently of them, cannot be offered under the denial; they are new matter, and must be specially pleaded." § 673.

If respondents' contention be sound that they could prove these damages without alleging them by way of a set-off or counterclaim, then it would inevitably and logically follow that in claim and delivery actions every conceivable defense, whether consisting of new matter or not may be proved under a general denial, and that consequently set-offs and counterclaims are total strangers to an answer in such cases. Such a doctrine is contrary both to the letter and spirit of all rules of pleading. The books are full of cases in which set-offs and counterclaims have been upheld in actions of this nature, but they were specially pleaded in all except a very few, which we will here notice.

The appellate court of Indiana in Aultman & Co. v. Forgey, 10 Ind. App. 397, 36 N. E. 939, seems to have squarely held that a breach of warranty constitutes matters of defense, and is available under a general denial without an affirmative plea. The opinion is clearly unsound, and is not supported by any of the authorities therein cited and relied on.

Another case apparently supporting respondents' view is that of Davis v. Culver, 58 Neb. 265, 78 N. W. 504. The opinion was written by Ragan, C. That was a replevin action, the answer consisting of a general denial. One defense proved was that the note held by plaintiff was tainted with usury, and it was very properly held that such fact was admissible under the general denial. Such defense directly tended to show that the note was void. Defendant was, however, permitted to prove an indebtedness from plaintiff to defendant for blacksmith work, and the court upheld the ruling, but in so doing used this language: "It is insisted on the argument that this $2.75 due from Davis to Culver could not be set off in this action

against what was due on the note. We fail to appreciate the force of this contention. If this was a suit at law upon the note, Culver could have pleaded as a set-off the $2.75 due him from Davis, the holder of the note. In order for Davis to recover in this action, it was incumbent upon him to show that there was some amount due him from Culver on the note when the action was brought; and under a general denial it was competent for Culver to show that he was entitled to be credited for the work he had done for Davis, and that therefore there was nothing due Davis on the note." The writer of the opinion in that case gives as a reason why Culver could prove as a set-off this blacksmith bill under a general denial, the fact that if the suit was on the note Culver could have *pleaded as a set-off* such blacksmith bill. We fail to appreciate the logic of such reasoning.

The case of Plano Mfg. Co. v. Daley, 6 N. D. 330, 70 N. W. 277, is strictly in line with our views above expressed. It was there merely held that, under a denial, fraud or mistake in the execution of the mortgage under which plaintiff based his title and right to possession could be proved. Of course such matters were strictly defensive, as they directly tended to break down plaintiff's alleged title and right to possession.

Aultman, M. & Co. v. Stichler, 21 Neb. 72, 31 N. W. 241, when carefully analyzed, merely announces the same rule. The defense in that case was, in effect, a failure of consideration for the mortgage in question.

In Lane v. O'Toole, 8 N. D. 210, 78 N. W. 77, the defense was that the contract under which plaintiff based his right of recovery never took effect.

But one more question remains to be disposed of, which is that defendants waived their right to urge any of the defense urged by them, and as to plantiff they are estopped to urge such defense.

Plaintiff testifies that he became the owner of the note about November 15th, 1901; that afterwards, and on or about the 7th day of December, 1901, the note was indorsed to him by O'Loughlin; that on that day he paid $1,000 to O'Loughlin; that the $1,000 was not paid for this note alone but as part consideration for the land and the entire transaction, and at that time the land was transferred to plaintiff.

Defendant Hunt was present at the time the note was indorsed, and paid plaintiff a $235 note that plaintiff purchased from O'Loughlin as part of the transaction in which he, plaintiff, acquired the note in controversy and the land; also paid plaintiff the interest to December, 1901, on the note in controversy, and in the fall of 1902 paid plaintiff the interest on the said note to December, 1902. Defendant Hunt testifies that plaintiff and O'Loughlin figured the amount due on the $235 note and the interest on the note in controversy to December, 1901, and defendant gave a check for it; says he called plaintiff's attention to the fact that the interest was not indorsed on the note in controversy, and that plaintiff indorsed it; says that plaintiff told him that he, plaintiff, had taken up the deal, and that he was getting the land from O'Loughlin; that plaintiff and O'Loughlin made out a new note to take the place of the note in controversy, and asked defendant Hunt to sign it, but he refused, and asked plaintiff if it would not do just as well if O'Loughlin indorsed the note in controversy to plaintiff as for defendant to sign the new note, and plaintiff said if O'Loughlin indorsed it it would be all right, and defendant Hunt handed it to O'Loughlin, who indorsed it; that before plaintiff took up the deal, Michael O'Loughlin told defendant that he was going to bring a man out to look at the land, and asked defendant to tell him about it, and not put any cloud on it, but make it as good as possible; that O'Loughlin came, introduced plaintiff to defendant Hunt, who may have said at that time that the machine was running all right; that he, defendant, knew the note was past due at the time O'Loughlin indorsed it; if it had not been, there would have been a kick made at that time.

It seems to us that defendants, as far as plaintiff is concerned, waived any defense they might have had to the note in controversy. Defendant John C. Hunt knew O'Loughlin put the deeds on record in violation of his agreement; knew that plaintiff had taken up the deal from O'Loughlin, in fact was present when the deal was closed; paid a $235 note to plaintiff on that day; paid the interest on the note in controversy to December 7, 1901; paid the interest the next year; when requested to sign a new note to take the place of the note in controversy, asked plaintiff if the present note was not all

right if O'Loughlin indorsed it. Plaintiff said it was, and that he, defendant, handed the note to O'Loughlin, who indorsed it.

In 34 Cyc. Law & Proc. p. 750, it is said: "If the debtor promise the assignee of a chose in action to pay the debt to him, he cannot afterward avail himself in set-off of claims he may have against the assignor, as such a promise amounts to a waiver of any right of set-off he may have against the assignor. Similarly, the debtor by his conduct in inducing the assignee to believe that the obligation will be met, and that there is no defense thereto, may be held to have waived the right to avail himself of a set-off against the assignor in an action by the assignee, particularly where the assignee was induced to purchase the obligation in consequence of representations by the obligor that he had no defense to it." The defendant Hunt apparently studiously avoided disclosing to plaintiff any information regarding these alleged set-offs to the note. Batavian Bank v. Minneapolis, St. P. & S. Ste. M. R. Co. 123 Wis. 389, 101 N. W. 687; King v. Fowler, 16 Mass. 397; Downer v. Read, 17 Minn. 493, Gil. 470; Lee v. Kirkpatrick, 14 N. J. Eq. 265; Tylee v. Yates, 3 Barb. 222; Buck v. Wood, 85 Me. 204, 27 Atl. 103.

In King v. Fowler, supra, the court says: "The set-off claimed by Fowler cannot be allowed; for it would be manifestly unjust. The assignment by King to Ives was for a valuable consideration; and Fowler, having had notice that it was about to be made, should have given notice of his counterdemand against King, in season to prevent Ives from giving up his remedy upon execution. Instead of which he was silent not only then, but on the day when the assignment was made, having had previous notice for a week. Further, after formal notice that the assignment was actually made, he does not object, but conceals his intention, until a suit is commenced against him and the other defendants by Ives. This conduct must be considered in equity, as a waiver of any right to set off, and an acquiescence in the assignment."

In Tylee v. Yates, supra, which was an action by the assignee of a promissory note, the court says: "A party who sees his obligation transferred to a bona fide purchaser for a valuable consideration, without giving notice of any defense or set-off which he may claim against it, is estopped from setting up any defense against such purchaser."

In Lee v. Kirkpatrick, supra, which was an action to foreclose a mortgage, defense was that the mortgage was excessive. The court says: "As a general rule, the assignee, it is conceded, takes the mortgage subject to all the equities subsisting against it in the hands of the original mortgagee. He can recover no more than the amount actually due upon the mortgage at the date of the assignment. But if the mortgagor, when applied to for information, conceals his equitable defense; if he misleads the party by word or acts as to the amount due upon the bond; nay, if he stands silently by and permits a party in good faith to pay his money and take an assignment for its full nominal value,—he cannot afterwards set up his equitable defense against the claim of the mortgage for the payment of the entire debt. The defendant was applied to by the complainant before he took the mortgage, and apprised that the complainant was about to take it for its full value. If the defendant had any equitable defense against it, he was bound then and there to make it known. He was in a situation where he was bound to speak. His silence was constructively fraudulent."

In 16 Cyc. Law & Proc. p. 722, it is said: "Estoppel by misrepresentation or equitable estoppel is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence, induce another to believe certain facts to exist, and such other rightfully relies and acts on such belief so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth to deprive the party who has acted upon it of the benefit obtained."

The trial court should have granted plaintiff's motion to direct a verdict in his favor, as prayed for.

The judgment is reversed and the District Court is directed to enter a judgment in favor of plaintiff as prayed for in his said motion. All concur, except MORGAN, Ch. J., dssenting.

MORGAN, Ch. J. (dissenting). I respectfully dissent from all the conclusions reached by the court in this case. I do not disagree with much that is said in the opinion, nor with most of the cases cited in support of the conclusion reached. The proof does not show that the defects in the machine were remedied. The evidence is practically undisputed that the machine failed to do good work up to and including the year 1905, when this action was commenced. The trial court expressly found that such defect continued until 1905.

This is an action at law, decided by the court after each party had moved for a directed verdict, and that fact gives to the court's findings the weight that follows the verdict of a jury. This fact renders the statement in the opinion, that the defects were all remedied, wholly unfounded, and if the record showed a conflict on this question, the findings could not be assailed under prior decisions of this court.

So far as the question of estoppel is concerned, there is no evidence that the plaintiff relied upon any act or declaration of the defendant Hunt. The evidence also shows that plaintiff has not been damaged, if such reliance was placed on Hunt's acts. O'Loughlin indorsed the note, and would be responsible to plaintiff as holder under such indorsement. Two essential elements of estoppel are therefore wanting, —reliance on acts or representations, and resultant damage.

In regard to the conditional sale having become an absolute sale, I will only say that the payment of the note and retention of the machine until the defects were remedied were done under the express request and consent of O'Loughlin each year from the sale, including the year 1904. If such request to retain the machine was renewed each year, it is not apparent how the conditional sale became absolute.

So far as the admission of evidence under a general denial is concerned, there seems to be a misapprehension as to the nature of the action. The issue in the case is the right to the possession of the machine. In other words, Does the defendant wrongfully detain the possession thereof?

There is no question of counterclaim or set-off involved. The defendant maintains that his possession is not wrongful, because it is in pursuance of O'Loughlin's request and express consent. This fact, therefore, if proven, directly controverts the allegation of the complaint is that plaintiff is entitled to the possession of the property. The plaintiff purchased the note after maturity, and any defense to the mortgage or note can be maintained as against plaintiff that could be maintained against O'Loughlin. There is no question of new matter in this case. The contract that the defendant should retain the machine until all the defects were remedied refutes and controverts the proof, on plaintiff's part, that there was a sale of the machine to defendants. This brings the case, in my judgment, within the principle mentioned in the majority opinion, that anything may be shown under a general denial that controverts the material allegations of the complaint, and in this case, that is plaintiff's right to the immediate possession of the property.

I shall not cite additional authorities than those referred to in the majority opinion. Every text-book on pleading or on replevin establishes this principle as sound, as I understand them.

The direction for judgment in plaintiff's favor is also erroneous. All that this court should do is to reverse the judgment of the district court and remand the cause for further proceedings.

In my opinion the judgment should be affirmed.

THE STATE OF NORTH DAKOTA EX REL. H. E. DORVAL v. J. K. HAMILTON as Auditor of Cavalier County, North Dakota.

(129 N. W. 916.)

Constitutional Law — Voters and Elections — Special Legislation — Uniformity of Laws.

1. The primary election law of this state, in common with all general laws

Note.—The question of the validity of primary election laws has been treated, with a review of all the authorities, in a note in 22 L.R.A.(N.S.) 1136, while the cases which has passed upon the question whether primary elections are "elections" within the meaning of Constitutions or statutes relating to elections generally are collated in a note in 18 L.R.A.(N.S.) 412.

regulating the elective franchise, is in all its parts within the constitutional requirements that it must be just and reasonable, must have a uniform operation throughout the state, and must bear with substantial equality upon parties, candidates, and all classes of citizens.

Constitutional Law — Voters and Elections — Special Legislation — Classification.

2. In case it is apparent that from the nature of a general law and the ends it purposes to effect that its aims can be attained only through the medium of groups or aggregations of persons, a certain classification of objects to be affected differently by the operation of the law may be made. Such classification, if made, however, must rest upon some difference which bears a true and just relation to the act in reference to which the classification is proposed, and must be reasonable and natural, not artificial or arbitrary.

Constitutional Law — Voters and Elections — Uniformity of Laws — Classifications.

3. A standard prescribed by a general law for the determination of a basis of classification that is from its nature and character unstable, illogical, inconstant, and arbitrary cannot serve as a means for the computation of groups that must bear to it and to each other the natural, constant, and unvarying relation required by the Constitution; and a law that operates diversely upon classes so determined cannot have a just, reasonable and uniform operation.

Constitutional Law — Primary Elections — Special Legislation — Classification.

4. Under the provisions of the general primary election law, the classification provides by the requirement of § 12, chap. 109, Laws of 1907, to the effect that no nomination shall be made unless the vote cast for state, district, or county offices is at least 30 per cent of the total number of votes cast for the candidate for secretary of state of each political party at the last general election, is arbitrary, unnatural, and lacks uniformity in the different counties of the state, by reason of the fact that the standard provided for determining the basis of classification places the party group authorized to make a nomination in each county in a relation to the actual party strength and to each other that is unstable, inconstant, and without uniformity in the different counties of the state. Such provision of the law is therefore unconstitutional and void. On this point the holding of State ex rel. Montgomery v. Anderson, 18 N. D. 149, 118 N. W. 22, is overruled.

Opinion filed December 24, 1910.

Appeal from Cavalier county; *Honorable W. J. Kneeshaw,* J.

Mandamus by the State of North Dakota on the relation of H. E.

Dorval against J. K. Hamilton as auditor of Cavalier county, North Dakota. Writ denied and plaintiff appeals.

Reversed.

Jeff M. Myers, W. B. Dickson (*Engerud, Holt, & Frame,* of counsel), for appellant.

W. E. McIntyre, J. B. Wineman, and *F. E. Smith,* for respondent.

ELLSWORTH, J. The name of appellant was regularly upon the ballot used at the primary election of June 29th, 1910, as Democratic candidate for nomination to the office of county judge of Cavalier county. At such election he received 341 votes, and there were no votes cast for any other person as Democratic candidate for nomination to such office. These facts were shown by the abstract of the county canvassing board which canvassed the result of said primary election, and within a reasonable time after the preparation and filing of its abstract, appellant demanded of the defendant to this action as county auditor of Cavalier county that his name be placed upon the official ballot to be used in said county at the next general election as Democratic candidate for the office of county judge. This the defendant refused to do, and declared his purpose to omit the name of appellant from such ballot, stating as the ground of his action in the premises and the only reason and excuse therefor, that notwithstanding the fact that appellant received the highest number of votes cast for any person for nomination as Democratic candidate for the office of county judge of said county, he did not receive a vote equal to 30 per cent of the total number of votes cast for the Democratic candidate for secretary of state, in said Cavalier county, at the general election of 1908. At such general election, it appears that Joseph Mann, the Democratic nominee and candidate for secretary of state of North Dakota, received a total vote in Cavalier county of 1,152, of which 30 per cent is 346. At the primary election of June 29, 1910, more than 346 electors of said county called for and used Democratic primary election ballots; but such persons voted for appellant to the number only of 341, as above stated.

After a formal showing of the facts hereinbefore narrated, appellant applied to and received from the district court for Cavalier

county an alternative writ of mandamus requiring defendant, as auditor of said county, to place his name upon the official ballot to be used at the general election of November, 1910, or to show cause why he should not be required to do so. The county auditor, as such defendant, thereupon interposed a demurrer to the allegations of said alternative writ on the ground that the same did not state facts sufficient to constitute a cause of action, and are not upon their face sufficient to authorize the granting of the relief mentioned in the alternative writ or any relief whatever. Upon a hearing duly had the district court sustained defendant's demurrer, and directed that the alternative writ of mandamus issued to him be quashed and dismissed. From such order of the district court this appeal is taken.

Upon the hearing before this court the defendant justifies his declared purpose to omit the name of appellant from the official ballot to be prepared by him for the general election of November, 1910, by reference to that portion of the primary election act in force at the time, in these words: "If the total vote cast for any party candidate or candidates for any office for which nominations are herein provided for shall equal less than 30 per cent of the total number of votes cast for secretary of state of the political party he or they represented at the last general election, no nomination shall be made in that party for such office, but if 30 per cent or more of such vote is cast, and there is more than one candidate for any such office, the person receiving the highest number of votes shall be declared the nominee of such party for such office." Laws 1907, chap. 109, § 12. Appellant admits that if this law is operative and applicable to nominations for the county officers, its provisions would appear to warrant the acts and attitude of defendant; but claims that that portion of the act quoted above, in so far as it authorizes the omission of appellant's name from the general election ballot, is an unreasonable and unwarrantable exercise by the legislature of the police powers of the state, and is therefore unconstitutional and void.

The principal question presented by this appeal is not before this court for the first time. Two years ago, in a case presenting points that, in the abstract, seem to be identical with those of the case at bar, a majority of this court concurred in holding: (1) That the provisions of § 12, chap. 109, Laws of 1907, apply to district and

county as well as state offices; and (2) that as a regulation of the elective franchise its requirements are reasonable, and not within the inhibition of any constitutional limitation. State ex rel. Montgomery v. Anderson, 18 N. D. 149, 118 N. W. 22. With the first holding this court as at present constituted fully agrees, and in its application to the case at bar we simply reiterate our adherence to that principle. Highly important and in a sense controlling in the disposition of the case at bar, however, are considerations that were not present in the case of State ex rel. Montgomery v. Anderson. At the time of the decision of that case but one election had been held under the primary election law enacted in 1907, and the survey of its practical operation then presented to the court was obviously limited and obscure. The court, from the very necessity of the case, was compelled to form its judgment largely upon abstract principle, and to base the same upon facts that might be expected to arise out of the practical operation of the law, rather than on those that had arisen. While, therefore, we still adhere to much of the general principle announced in the case of State ex rel. Montgomery v. Anderson, a majority of this court, under the additional facts now brought to its consideration, feel impelled to a conclusion materially at variance with that therein announced.

It is now well settled that under the Constitution of this state, the legislature may adopt measures regulating the exercise of the elective franchise in the nomination of candidates by political parties, as well as in the election of public officers. It is equally well recognized and settled that such regulation must be just and reasonable, and operate on voters and candidates of the same class with substantial equality. This latter principle was unequivocally recognized in the decision in the case of State ex rel. Montgomery v. Anderson, and we accept it without material qualification. In applying it to a determination of the facts of this case, however, it is necessary that we should delve somewhat below the principle itself and determine the constitutional fundament on which it rests.

Thus examined it will be observed that at least three important provisions of the Constitution are interwoven more or less closely with the basis of this principle: (1) Intimately associated as is the elective franchise with the general rights of citizens, all attempted regu-

lation necessarily comes within the scope of the immutable Declaration of Rights contained in § 1 of the Constitution; (2) all legislative regulation of the elective franchise throughout the state is a general law, that must bear with substantial equality upon parties, candidates, and all classes of citizens, or, in other words, must have a uniform operation as required by the Constitution, § 11; (3) while rising as a corollary from the last preceding proposition, is the constitutional guaranty that "no citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens." Const. § 20.

Viewed in these constitutional lights, the reason underlying the principle that legislative regulation of party nominations must not only be just and reasonable in its requirements, but must bear with substantial equality upon the rights of all groups or classes of citizens affected by its operation, is at once apparent. It is clear beyond question that in the concrete application to the facts of a case such as this of the foregoing principle, the term "classes," as therein used, includes within its scope the respective political parties, not only in their state-wide organization, but in these smaller groups comprising the party membership in the different counties. Therefore, in failing to comply with the tests prescribed by this precept, such attempted regulation falls under the ban of "class legislation" pronounced against those laws that practically operate in such manner as to affect diversely various persons or aggregations of persons not differentiated from each other by any natural or reasonable lines of demarcation.

It is doubtless true that, notwithstanding constitutional inhibitions such as those contained in §§ 11 and 20, the legislature may provide a certain classification of citizens to be differently affected by the same general rule. The limitation imposed upon legislation of this character is, however, that any classification provided as the basis for distinctive or special operation of the law must be natural, not artificial. "It must stand on some reason having regard to the character of the legislation." Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970. "It must rest on some difference which has a reasonable and just relation to the act in respect to which the classification is proposed." "It is not necessary that a law shall operate upon all alike, but . . . it must operate alike upon all

who are in like situation. The law need not have a universal operation, but it must be uniform. Proper classification is permitted, but arbitrary and unreasonable discrimination is forbidden." Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33. It must "rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; Powers Elevator Co. v. Pottner, 16 N. D. 359, 113 N. W. 703.

Nothing more than a casual survey of the primary election law is necessary to demonstrate that it is not designed to operate with absolute uniformity upon the rights of individual citizens. On the other hand, from a consideration of its nature and the ends it purposes to effect, it is clearly apparent that its declared purpose can be carried out only through the medium of groups or aggregations of persons with little reference to individual rights. Under a system such as this, proper classification becomes a necessity. The classification prescribed by the law is somewhat complex, regulating, primarily, the respective rights of political parties in their entirety and in their relation to each other; and, secondarily, the rights and powers of that portion of each party in the state at large and in the political subdivisions thereof, authorized to give expression to the party will, in its relation to the entire membership, state or local, as the case may be. As classification, within the limits hereinbefore mentioned is permissible, the only further inquiry pertinent to our investigation is, Are the groups defined by the law differentiated from each other reasonably, and not arbitrarily, and is the relation of each group to the basis of classification constant, just, and natural?

Applying these tests, there can be no question but that the classification primarily declared on the well-defined lines of party organization is natural and reasonable. This narrows the field of our research to a consideration of the secondary classification by which is prescribed the means of estimating the entire party strength, and the proportion thereof, that in each political subdivision may declare the party will to make a nomination under the provisions of the law.

The reason that renders expedient a provision that 30 per cent of the party strength shall be represented in order to make a party

nomination is discussed at considerable length in State ex rel. Montgomery v. Anderson; and the conclusions there grouped under three different heads might, we think, be summarized in the general principle, that the legislative purpose in inserting this clause was to define what in the operation of the law shall be accepted as an expression of the will or intent of a political party to make a nomination for a certain office; and, incidentally, to restrain the action of voters within the lines of the party to which they belong. The purpose is legitimate and proper, but its expression in the law introduces a certain difficulty by making it necessary for the legislature to further enact some means of forming a just estimate of party strength at a given period. If it were practicable to take a census of the different political parties, at stated intervals, a safe and sure method of determining their numerical strength within the state and its political subdivisions would be thus provided. As there is not, and from the very nature of the case probably could not be, a census of this kind, it follows that some other means of determination must be devised. Through this impossibility of exact computation, the legislature was driven somewhat into the realm of conjecture, and there compelled to select a measure of party strength whose best promise was that of reasonable approximation to actual fact. The total number of votes cast for the candidate for secretary of state of each political party at the last preceding general election was fixed as the standard of party strength. By adopting this measure and declaring a constant ratio of 30 per cent between the number so determined and the number necessary to make a nomination applicable alike to state, district, and county offices, as before suggested, the legislature has declared a classification of objects upon which the law shall operate not only in the state at large, but in each county of the state. It therefore becomes necessary, in order that the statute may not be violative of the constitutional principles that serve as landmarks to our investigation, that the party fraction authorized to make a nomination shall in each county of the state bear a constant, just, and uniform relation to the basis upon which it is classified, or, in other words, to the party strength in that county.

It is readily perceived that the character of that entity which serves as the basis of classification is an important and powerful factor in determining the quality of any reasonable system of grouping. If the

basis is logical, natural, and real, the entire classification will partake of the same character. If the basis is shifting, inconstant, arbitrary, or artificial, it is apparent that any grouping founded thereon is as a house built on the sand, without stability, strength, or uniformity. In determining the character of this classification, we will test it by resort to governing principles applied in the light of special facts attending the operation of the law in those instances in which its practical workings are brought to our notice.

At this point in our investigation appellant invites our attention to certain statistical facts now a part of our public history, with reference to the practical operation of the primary election law, which bear with direct and material force on the controlling principle of our decision. At the general election of 1908, in Bottineau county, the Democratic candidate for secretary of state received 1,148 votes. At the primary election of 1910 the highest number of Democratic ballots called for and votes in that county was 351. By the application of the 30 per cent rule 345 votes, or 98 per cent of the highest number of that party voting at that election was necessary to enable it to make a nomination for any county office whatever. In Stark county the entire number of votes cast for the Democratic candidate for secretary of state in 1908, was 464. The Democratic vote at the primary election of 1910 was 150. As 139 votes were necessary to nomination, it required 93 per cent of the party vote cast at this election to nominate. In Morton county the vote cast for the Democratic candidate for secretary of state in 1908 was 908. The Democratic vote at the primary election of 1910 was 201. As the number required to nominate was 272, it would require 136 per cent or 36 per cent more than the entire party vote cast at the primary election to make a nomination. A discrepancy still more highly magnified between the party strength as ascertained by the provisions of § 12, Laws of 1907, and that shown by the practical result of participation in an election, is that returned from Adams county where the vote cast for the Democratic candidate for secretary of state in 1908 was 182. The highest Democratic vote at the primary election of 1910 was 13. The number required to nominate was 55, and in order to make a nomination it was necessary for the Democratic party to cast a vote equivalent to 424 per cent of its entire strength as demonstrated

by its vote at the primary election. As these statistics are selected at random from a list of the counties of the state, it is a fair inference that conditions thus shown to prevail in *any* county obtain in *every* county, differing only in degree.

It is urged that the comparatively small use of ballots prepared for the Democratic party at the primary election of 1910 is due to the fact that in all of these counties a large proportion of the members of that party, instead of calling for and voting the ballot provided for them, became so interested in the Republican nominations that they voluntarily called for and used Republican ballots instead. There is no proof, however, of such assertion, and to accept it would require that this court should presume that reputable and law-abiding citizens in large numbers, and in all parts of the state, deliberately violated the purpose and intent of the primary election law and laid themselves liable to certain penalties. We are not permitted to indulge such presumption as this. On the other hand, the inference that properly and naturally arises is that, pursuant to the provisions of the law, the members of each party called for and used the ballots provided for that party, and that the vote cast at the primary election of 1910 was a fair indication of the strength of the party in that county as it existed at that time.

It is further apparent that the vote of a party candidate for secretary of state at a general election is much more likely to be unduly magnified or diminished by causes that operate locally than the party vote at a primary election. It is a well-known fact that any candidate for a state office, without reference to his party affiliation, receives a vote in each county which increases or diminishes in direct proportion to his personal popularity in the locality in which the vote is cast. At a general election his name appears in a party column on the ballot which is given alike to voters of all parties.

Whether or not it be true, as sometimes stated, that the law countenances rather than discourages the voting of a split ticket, it is unquestionably true that it provides every facility for the accomplishment of that purpose by the voter. The voter, screened from observation and outside influence, with the name of the candidates of all parties on the ballot before him, in his markings, may readily pass from one column to the other, and, by voting for a candidate of a party

other than his own, perform an act that is not censurable, and is, in many instances, creditable. An honest and law-abiding citizen may, therefore, at a general election, freely vote for the candidate of a party other than his own, without incurring either a consciousness of having failed to observe the law, or any penalty for its violation. The result is, it will be noted, the exact converse of a like act performed at a primary election. It is therefore fairly inferable that the entire party vote cast at a primary election in any county is a much more reliable measure of the party strength, at that time, than the vote received by the candidate of that party for secretary of state at the general election held more than eighteen months before. If the vote at the primary election be regarded as the true standard of party strength at that time existing, however, it is at once apparent that in practical operation the primary election law outrages party rights, as, in instances such as those cited above. In order to make a nomination that will be officially recognized, a party must in some counties cast votes that exceed in numbers many times its entire strength, and in others produce a percentage of its strength so large as to be clearly unreasonable.

Whether or not in actual fact the measure of party strength prescribed by the primary election law, in its relation to the party group authorized to declare the party will, produces results that in this manner shock all sense of reason and justice, we think it clearly appears that the vote cast for a party candidate for secretary of state, at a preceding general election, is not a true, just, or stable basis for estimating the existing strength of the party at a primary election; and that the party group authorized to make a nomination, whose numbers are computed at a percentage of such vote, does not in the different counties of the state stand in true, just, constant, and uniform relation to the actual party strength, the fact on which the classification provided by the primary election law is obviously designed to rest. If the means provided by the law operated to determine with reasonable accuracy the party strength, we might hesitate to hold that the requirement that 30 per cent of that strength be necessary to constitute an expression of the party will was unreasonable. The percentage seems large, but the legislature having so declared, this court could not in a matter of expediency "run a race with the legislature" and assume that its

act was unwarrantable. If the percentage was greatly advanced and fixed at 60 per cent, however, all fair-minded men would agree, we think, in declaring it excessive; and certainly if 75 per cent was the number required, there could be no question but what all reasonable bound was exceeded. Yet, here we have a provision of law that, while it apparently contemplates a number equivalent to but 30 per cent of the estimated party strength as necessary to give expression to the party will, yet, as is shown by practical operation, by means of an arbitrary, false, and inconstant standard established as a measure of the basis of classification, may result in requiring in one county 98 per cent, in another county 136 per cent, and in another 424 per cent of the entire party vote as cast at an election actually held, to be given to the candidates for a certain office, before the party can nominate a candidate for that office. Any feature of an election law that in its practical operation produces results such as these can only be regarded as an unreasonable regulation of the elective franchise. Therefore, while the requirement that that portion of a party authorized to make a nomination shall bear a ratio of 30 per cent to the actual party strength may not be unreasonable, the system of classification adopted in determining therefrom the numbers of the party group that may act in making a nomination, in practice produces results that lack reasonable uniformity in the different counties of the state; and under which the basis of classification does not bear to the thing classified that natural, constant, and unvarying relation required by the Constitution.

In view of the foregoing considerations, it becomes necessary for us to hold that § 12, chapter 157, Laws of 1907, is not a just and reasonable regulation of the elective franchise, and does not operate on voters and candidates of the same class with substantial equality. We regret that this conclusion operates to overrule the holding of the court upon the same point in State ex rel. Montgomery v. Anderson. Such holding has been the law of the state for two years and more. It is not a rule of property, however, upon which any party could have acted to his pecuniary disadvantage during that period. It is merely a rule of construction which for obvious reasons may be changed with greater facility to accord with varying conditions and the somewhat broader view obtained by this court from a more ad-

vanced standpoint. We believe that a proper regard for the constitutional guaranties and safeguards of our citizens requires that this feature of the primary election law should be held inoperative. The other provisions are, of course, unaffected by this holding.

The order of the District Court is reversed.

All concur, except MORGAN, Ch. J., and SPALDING, J., who dissent.

SPALDING, J. (dissenting). This appeal presents the identical question decided in State ex rel. Montgomery v. Anderson, 18 N. D. 149, 118 N. W. 22. In that case a majority of the court held that the 30 per cent requirement in the primary election law was intended to prevent the nomination of candidates by accident, and to prevent a nomination when the party did not intend to make one; to restrain the action of voters at primary elections within the parties to which they belong; and to define and fix the number of votes necessary to constitute an expression of the party, and to determine what is the act of a party as a party, and that, while undoubtedly simpler and perhaps more effective or reasonable rules and regulations might have been provided than this provision furnishes, yet that that was a question for the legislature, and not for the courts, as long as the method provided was not clearly unreasonable, and that the feature complained of was not so unreasonable as to justify the court in holding it to be invalid. The different political parties accepted and acted upon the decision of the court in that case until the fall of 1910, when a political exigency and the fact of this court having in the meantime been increased in numbers by the addition of two members, furnished the appellant the occasion, as well as the excuse, for reopening the question. No new reasons for holding the provision invalid were advanced on argument, and it has been conceded that the position of the appellant and the opinion of the present majority of the court is without support by any reported authority. It is also conceded that the question of per cent is at most of trifling significance; that the same principle would be involved and the law equally invalid if the per cent were either considerably greater or materially less. The arguments presented were confined almost literally to the suggestions of Judge Fisk, made in the dissenting opinion in the Anderson Case. I construe them analyzed as resolving into at most

only two propositions: First, that the legislature has not provided the most efficient and the simplest method or classification which it might have found to accomplish its purpose; second, that because of the changes of residence, of political faith, or a decrease in party interest or loyalty, the fixing of the standard as the party vote cast at the general election next preceding the holding of the primary (less than twenty months), relates to a time so remote as to be unreasonable. The reasons which appeal to me most strongly, in support of the law, were stated in the opinion of the court in the Anderson Case, to which I refer, and a restatement of those reasons is unnecessary. I shall therefore address my suggestions to the argument of the majority of the court in its opinion in the case at bar.

The proposition that the law is invalid because the legislature has not provided the most efficacious and the simplest method of arriving at or enforcing the principles in view, and the object sought to be attained by the provision questioned, requires but brief comment. If the legislative assembly were required to discover and only provide the wisest, most efficacious, or the simplest plan known for accomplishing the object sought to be attained, in all the numerous laws from time to time enacted by it, particularly those relating to the administration of the fiscal affairs of state and its various subdivisions, and the exercise of the right of franchise, one would be left in some doubt as to the validity of most of our laws relating to such subjects. If any legislature ever attains that degree of superior wisdom and perfection which enables it in all such cases to see and affirmatively act upon the wisest method, it may well be held up to the attention of the civilized world as the only perfect and allwise legislative body known to history. I am unable to grasp any such principle. Apply this test to our revenue laws, as well as to many others, and I fear that they would shortly cease to operate, and the state and all its subdivisions would be found bankrupt. The logical, as well as practical, effect of adhering to this doctrine, would only result in disaster, as must be clearly apparent.

It is said in the majority opinion that, "by adopting this measure and declaring a constant ratio of 30 per cent between the number so determined and the number necessary to make a nomination applicable alike to state, district, and county offices, as before suggested, the legis-

lature has declared a classification of objects upon which the law shall operate not only in the state at large, but in each county of the state," and that to render the law valid it must not violate the principle that the party fraction authorized to make a nomination shall in each county of the state bear a constant, just, and uniform relation to the basis upon which it is classified, or, in other words, to the party strength in that county. It then proceeds to assume that the party strength is evidenced by the party vote at the primary, rather than at the general, election next preceding, and that because the statute fixes the measure of the party strength as its vote at the general election, rather than at the primary, it is invalid. In their discussion of this principle, and possibly out of undue consideration for the court, as constituted when the Anderson Case was decided, it is said with reference to that decision that "the court, from the very necessity of the case, was compelled to form its judgment largely upon abstract principle, and to base the same upon facts that might be expected to arise out of the practical operation of the law, rather than on those that had arisen. While, therefore, we still adhere to much of the general principle announced in the case of State ex rel. Montgomery v. Anderson, a majority of this court, under the additional facts now brought to its consideration, feel impelled to a conclusion materially at variance with that herein announced." In other words, that the difference between the votes of the election of 1908 and the primary in 1910 furnishes a reason, not formerly before this court, for holding the provision in question invalid. This reason leads to the result that when a party is on the increase, and the vote at any election is greater than that at the preceding election, the regulation or classification of the state will be reasonable and therefore valid as to party, but at the time invalid as to any party whose adherents decrease in number from year to year. To me, this is a novel doctrine. But assuming this line of reasoning to be applicable and proper, it appears to me that the court has omitted a factor necessary to be considered in determining the reasonableness or unreasonableness of the regulation or classification, and which must be stated to enable one to arrive at a correct conclusion.

Notwithstanding the decrease shown in the vote of one party between the 1908 election and the 1910 primary, the members of that

party resumed their allegiance at the 1910 general election, and the vote of that party regained its normal proportions. The returns show that in one of the counties referred to the vote of that party in November, 1910, exceeded the party vote cast in 1908, while in the others it was not disproportionate, although slightly smaller. I have not taken pains to make an examination of the vote cast in counties not named, but am content to suggest that the figures given, when supplemented by those of the same party cast at the 1910 general election, fall somewhat short of furnishing the mathematical demonstrations of the unreasonableness and invalidity of the law attempted, but that if they tend to prove anything in this direction, it is that enough members of one party were so apathetic, that they neglected to participate in making nominations, or that many in some counties were so disloyal to their party and indifferent to the prohibitions of the statute, that they preferred a voice in making nominations of another party, to having their own represented on the ballot, and thereby prevented nominations being made in some instances.

Applying the reasoning of the majority opinion to these facts leads to the further conclusion that the regulation or classification complained of was unreasonable in June, 1910, but on the return of the voters to the party in November, 1910, this provision became reasonable again. If the question is one of determining when the party census must be taken on which to base a decision of the question whether a party has acted, or expressed its opinion as to candidates for nomination, then it is purely a question of judgment. No party is likely to complain that it cast a large vote at a general election. Its ground for complaint is not against the law when its members desert the party and participate in the nomination of the candidates of another party at the primary. Its primary remedy lies in the direction of the advocacy of principles and the nomination of candidates which appeal to its members to lend them their support. The logic of the situation is that the appellant in this case appeals to the court to relieve him from the defeat occasioned by the inconstancy of the members of his party, or for the unattractiveness of the program which it presented to the voters, or, what is more probable, disapproval of his candidacy. He asks this court to nominate him for

an office for which the legislature and the voters have said he is not nominated.

The vote at the general election of 1910, as compared with that at the general election of 1908, hardly indicates that an appeal on the second ground mentioned is necessary, but when the vote in November, 1908, and 1910, are compared with the primary vote of 1910, a shocking lack of party loyalty seems to be disclosed in a few localities. It happens on this occasion to apply to one of the great parties, but it is just as likely to apply to the other some other time. For this reason I am unable to discover that the mere circumstance of this applying to one party at this time, and placing it at a disadvantage in certain localities in certain matters only, is fatal to the law. As far as we know it may at this time apply to the other party also. As a matter of classification it is not questioned that some regulation is necessary, otherwise the number of party ballots to be printed at public expense would be innumerable. Any classification of this nature is in a sense arbitrary. The legislature might with just as great reason have fixed it at 29 or 31 per cent. The difference would be so inconsequential as to be unnoticed. But in my apprehension this question of classification has been reached from an erroneous standpoint by the majority of this court. The question is: Is a classification provided which operates with substantial uniformity as between the parties? Not as between counties. Yet it does operate with substantial uniformity between counties or other subdivisions, because the same conditions effect the same result in one county as in another. The fact that one county casts less than 30 per cent, and another more, at the primary does not destroy the uniformity of application of the provision complained of. If neither casts 30 per cent, a candidate for neither party is nominated by the primary method. If the failure to nominte in any subdivision of the state resulted in a total failure of candidates for a party, or in the prevention of the organization of new parties, a different question might be before us, but as held in State ex rel. Hagendorf v. Blaisdell, — N. D. —, 127 N. W. 720, the law provides for new parties, and secures them the same privileges at elections that old parties have, and ample means is provided for placing the names of candidates with their party designation on the ballot used at the general election, irrespective of the

result of the primary. According to the majority opinion, the party census must be taken as disclosed by the vote at the primary. In the legislative judgment, the appropriate time to take a party census is at the general election. This is a purely political question for the legislature to decide. If we may be permitted to draw analogies from party rules and proceedings prior to the enactment of the primary law, we may call attention to the well-known fact that representation in county and state conventions was then based upon a party census, sometimes taken in one manner and sometimes in another, the basis being in each case determined either by the preceding convention or by the party committee in calling the convention. Sometimes it was on the vote for presidential electors, four years prior to the election of delegates to a convention; sometimes on the vote for governor, and sometimes on an average of the votes for certain state offices, and at other times on the vote for candidates for Congress. The discretion formerly vested in the party management or party convention, of necessity is now vested in the legislature, and as long as it gives each party of the same class, that is, each party casting a certain number or percentage of votes, the same opportunity, I see no serious grounds for complaint. I know of no method which has been found, and can think of none which is likely to be devised, that will anything more than approximate absolute equality. This identical principle and question was argued before the supreme court of Wisconsin, after the argument was had in the case at bar. The opinion of that court has been handed down, sustaining the law of that state on this subject. It has not yet been published, but a copy has been before us for several weeks. The law in that state required a 20 per cent vote as compared with the vote for governor at the preceding general election. Judge Marshall wrote a most profound and exhaustive opinion on the subject, in the course of which it is held that the right to vote is not simply a privilege, as held by the courts of most states, and as I had supposed was the case, but that it is an inherent right under our state Constitutions, practically an inalienable right. If this be correct, it follows that the power of the legislature to regulate the exercise of the right to vote must be considerably restricted and limited, as compared with its power where the right is held to be only a privilege, thus making the conclusion of the Wisconsin court far more difficult to reach than had the right to

vote been held a privilege merely. It is held in that case that the validity of the law depends upon the answers to two questions: First, Is the purpose legitimate? second, Are the means employed to effect the purpose legitimate? And that if the purpose is legitimate and the means employed to effect the purpose reasonably adapted to that end, the law is entitled to judicial approval, and that court answers both questions in the affirmative. I should be pleased to quote extensively from that opinion, but the reasonable limits of this dissent, after what was said in the Anderson Case, renders it inadvisable and unnecessary. See State ex rel. McGrael v. Phelps, 144 Wis. 1, — L.R.A.(N.S.) —, 128 N. W. 1041.

The supreme court of Minnesota in State ex rel. Fitz v. Jensen, 86 Minn. 19, 89 N. W. 1126, passed upon a statute where the principle involved was identical with this, but the percentage was 10 per cent of the entire vote of the state, and the provision was held constitutional; and in concluding its opinion that court says: "We are of the opinion that the legislature may classify political parties with reference to differences in party conditions and numerical strength, and prescribe how each class shall select its candidates; but it cannot do so arbitrarily, and confer upon one class important privileges and partisan advantages, and deny them to another class, and hamper it with unfair and unnecessary burdens and restrictions in the selection of its candidates. While it seems to some of us that the percentage of the vote selected as the basis of the classification in this act is larger than necessary, yet it was a question for the legislature, and we are not justified in holding that the classification was arbitrary."

In Ledgerwood v. Pitts, 122 Tenn. 570, 125 S. W. 1036, a case decided in 1910, the supreme court of that state passed upon a provision that excluded from the benefits of the primary election law, political parties casting less than 10 per cent of the entire vote of the state at the preceding November general election, and held that such classification and exclusion was not unreasonable, arbitrary, capricious, or partial.

See also Ladd v. Holmes, 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714.

These are only a few of the many authorities which might be cited, sustaining the decision in the Anderson Case, and they conflict with

the opinion of the majority in the case at bar. But the principle which I contend for has recently been passed upon by this court in an opinion which met with the approval of each member who now joins in the majority opinion. In State ex rel. Hagendorf v. Blaisdell, supra, a question in every respect analogous to the one at bar was before us, and the law sustained. That case is cited by the Wisconsin court in State ex rel. McGrael v. Phelps, supra, as the latest pronouncement upon the question. I still think the decision in the Hagendorf Case sound, although in effect overruled by the majority opinion herein.

Chief Justice Marshall said many years ago: "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional."

This principle must apply with far greater force to the powers of a legislature of a state, than those of Congress.

Another reason for affirming the judgment here appealed from is presented in respondent's brief. Under circumstances of this case, I express no opinion regarding this point, but must call attention to the principle and some authorities sustaining it. The principle is laid down, that where the statute has been held to be constitutional by the appellate court, the community has a right to expect with confidence that, in subsequent cases, the court will adhere to its former decision, made after full argument and upon due consideration; and by some courts this principle is emphasized where an attack is renewed after a change in the *personnel* of the court. Fisher v. Horicon Iron & Mfg. Co. 10 Wis. 355; Gibbons v. Ogden, 17 Johns. 488; Amoskeag Mfg. Co. v. Goodale, 62 N. H. 66; Stout v. Grant County, 107 Ind. 343, 8 N. E. 222. Mr. Justice White, now chief justice of the Supreme Court of the United States, discussed this subject, in Pollock v. Farmers' Loan & T. Co. 157 U. S. 608, 39 L. ed. 828, 15 Sup. Ct. Rep. 673, and I quote briefly from his opinion:

"A distinguished writer aptly points out the wrong which must result to society from a shifting judicial interpretation. He says:

"'If results and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes

the times; if the decisions of one case were not to be ruled by, or depend at all upon, former determinations in other cases of a like nature, I should be glad to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase. No reliance could be had upon precedents; former resolutions upon titles of the same kind could afford him no assurance at all. Nay, even a decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security; the principle upon which it was founded might in the course of a few years become antiquated; the same title might be again drawn into dispute; the taste and fashion of the times might be improved, and on that ground a future judge might hold himself at liberty (if not consider it his duty) to pay as little regard to the maxims and decisions of his predecessor as that predecessor did to the maxims and decisions of those who went before him.' Fearne, Contingent Remainders, London ed. 1801, p. 264.

"The disastrous consequence to flow from disregarding settled decisions thus cogently described must evidently become greatly magnified in a case like the present, when the opinion of the court affects fundamental principles of the government by denying an essential power of taxation long conceded to exist and often exerted by Congress. If it was necessary that the previous decisions of this court should be repudiated, the power to amend the Constitution existed, and should have been availed of . . . the conservation and orderly development of our institutions rest on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. In the discharge of its function of interpreting the Constitution, this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theater of political strife, and its action will be without coherence or consistency. There is no great principle of our constitutional

law, such as the nature and extent of the commerce power, or the currency power, or other powers of the Federal government, which has not been ultimately defined by the adjudications of this court after long and earnest struggle. If we are to go back to the original sources of our political system, or are to appeal to the writings of the economists in order to unsettle all these great principles, everything is lost, and nothing saved to the people. The rights of every individual are guaranteed by the safeguards which have been thrown around them by our adjudications. If these are to be assailed and overthrown, as is the settled law of income taxation by this opinion, as I understand it, the rights of property, so far as the Federal Constitution is concerned, are of little worth. My strong convictions forbid that I take part in a conclusion which seems to me so full of peril to the country. I am unwilling to do so, without reference to the question of what my personal opinion upon the subject might be if the question were a new one, and was thus unaffected by the action of the framers, the history of the government, and the long line of decisions by this court. The wisdom of our forefathers in adopting a written Constitution has often been impeached upon the theory that the interpretation of a written instrument did not afford as complete protection to liberty as would be enjoined under a Constitution made up of the traditions of a free people. Writing, it has been said, does not insure greater stability than tradition does, while it destroys flexibility. The answer has always been that by the foresight of the fathers the construction of our written Constitution was ultimately confided to this body, which, from the nature of its judicial structure, could always be relied upon to act with perfect freedom from the influence of faction, and to preserve the benefits of consistent interpretation. The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court, without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."

Seeing no sound reason for overruling the Anderson Case, I dissent.

MORGAN, Ch. J., concurs fully in the foregoing dissent.

SCHOOL DISTRICT NO. 94, a Corporation, v. W. W. KING, D. B. Shaw, F. D. Rice, C. M. Thompson, S. F. Sherman, constituting the Board of Education of the Village of Tower City, N. D., and A. G. Lewis, County Auditor of Cass County, N. D.

(127 N. W. 515.)

Constitutional Law — Amendment of Statutes — Title of Acts.

1. An amendatory act is not contrary to § 61 of the state Constitution, requiring the subject of the act to be expressed in the title, when it does not relate directly to the provisions of the section amended. It is sufficient if the amendment is germane to the subject of the act of which the amended section is a part, and the same is within the title of the original act.

Constitutional Law — Schools and School Districts — Consolidation and Division — Legislative Discretion.

2. Laws enacted for the consolidation or division of school districts are valid as resting solely on legislative discretion or policy, unless they are contrary to some constitutional provision.

Constitutional Law — Due Process of Law — Division of School Districts.

3. Chapter 106, Laws 1907, relating to division of school districts and attaching parts thereof to a city, town, or village for school purposes, is not unconstitutional as taking property without an opportunity for a hearing or as depriving school districts of their property without due process of law.

Constitutional Law — Due Process of Law — Division and Consolidation of School Districts.

4. A division or partial consolidation of school districts under chapter 106, Laws 1907, is not in violation of the Constitution forbidding the taking of property without due process of law. The ownership of the property in such cases is not of private property. It is property devoted to state purposes, and subject to legislative control, unless the legislature violates some constitutional provision in reference to the same.

Note.—As to effect of changing boundaries of school district upon rights in real property, see note in 26 L.R.A.(N.S.) 486.

Injunction — Continuance or Dissolution Rests in the Sound Discretion of the Trial Court.

5. Whether a preliminary injunction shall be continued in force pending the trial on the merits of the action, or dissolved on motion, rests in the sound judicial discretion of the trial judge, and his action thereon will be upheld unless such discretion has been manifestly abused.

Opinion filed June 29, 1910.

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

Action to restrain the defendants from executing an order attaching certain territory to the defendant for school purposes. Injunction dissolved. Plaintiff appeals.

Affirmed.

MORGAN, Ch. J. The complaint alleges the following facts: That plaintiff is a duly organized school district of the county of Cass, and as such owns a schoolhouse in which is conducted school for at least nine months each year; that the territory comprising said district consists of sections 1 to 12, inclusive, of township 140, range 55: that the schoolhouse owned by said district is situated on section 9: that the defendants compose the board of education of the village of Tower City, in said county the said board of education is duly organized for the purpose of carrying on a public school in said village: that the defendants, as such board of education, did, on the 3d day of June, A. D. 1909, make an order attaching to the village of Tower City, for school purposes, all of sections 4, 5, 6, 7, 8, and 9 in said township and range: that said order was based upon a petition which was fraudulently presented to said board, and said order was void for the reason that the petition was not signed by a majority of the voters of the territory to be attached to the village of Tower City for school purposes: that said territory to be annexed to the village of Tower City for school purposes is more than 3 miles from the central school, in said village, and the petition was not signed by two thirds of the school voters residing in the territory that is more than 3 miles from the central school: that the board, in making said order, acted illegally and in violation of § 949, Rev. Codes 1905, as amended by chapter 106, of the Laws of 1907, and said chapter 106 is unconstitutional and void: that said de-

fendants are threatening to carry out such illegal and void proceedings, and if not restrained from so doing, their action will greatly injure the plaintiff and the inhabitants thereof, and that they have no adequate remedy at law.

The relief demanded is that the defendants be restrained from proceeding with the carrying out of the order. An order to show cause was issued by the trial court, why the defendants should not be restrained as prayed for in the complaint, and a temporary restraining order was issued. Upon the return day of the order to show cause on the 21st day of June, 1909, the district court denied the application to make the order permanent, and denied the application to continue the same in force pending the trial of the action. A stay of proceedings for ten days was granted to the plaintiff, to perfect an appeal to the supreme court, and a supersedeas bond was ordered to be given in the sum of $1,500. The plaintiff has appealed from the order denying the application to make the injunction permanent, or to continue the same in force pending the trial of the action.

In this court the appellant relies upon the following grounds for a reversal of the order:

1. That the statute under which defendant seek to proceed is unconstitutional, for the reason that it does not provide for any fair and legitimate mode of hearing on the part of the parties concerned.

2. By annexing section 9 of said territory, the defendants confiscated and destroyed the schoolhouse property belonging to school district No. 94.

3. That the defendants, in making the order in question, perpetrated a fraud upon the inhabitants of school district No. 94.

4. That said chapter 106, of the Laws of 1907, is void, as contravening the provisions of § 61 of the Constitution.

5. "Conceding that said act is constitutional, it was error to deny an injunction, *pendente lite,* where great public interests were involved, as in this case."

Section 949, Rev. Codes 1905, pursuant to which the defendants are proceeding, is as follows, to wit: "When any city, town, or village has been organized for school purposes, and provided with a board of education under any general law, or a special act, or under the provisions of this article, territory, outside the limits thereof but adjacent

thereto may be attached to such city, town, or village for school purposes by the board of education thereof, upon application in writing signed by a majority of the voters of said adjacent territory; provided, that no territory shall be annexed which is at a greater distance than 3 miles from the central school in such special district, except upon petition signed by two thirds of the school voters residing in the territory which is at a greater distance than 3 miles from the central school in such special district; and, upon such application being made, if such board shall deem it proper and to the best interests of the school of such corporation and of the territory to be attached, an order shall be issued by such board attaching such adjacent territory to such corporation for school purposes, and the same shall be entered upon the records of the board. Such territory shall, from the date of such order, be and compose a part of such corporation for school purposes only. Such adjacent territory shall be attached for voting purposes to such corporation, or, if the election is held in wards, to the ward or wards or election precinct or precincts to which it lies adjacent; and the voters thereof shall vote only for school officers and upon such school questions; provided, that the county commissioners shall detach any part of such adjacent territory which is at a greater distance than 3 miles from the central school in such special district, and attach to any adjacent school or special district or districts, upon petition to do so, signed by three fourths of the legal voters of such adjacent territory, and all assets and liabilities shall be equalized according to section 864."

So far as the unconstitutionality of chapter 106, Laws of 1907, on the alleged ground that it infringes on section 61 of the state Constitution relating to titles, is concerned, it appears that said act is an amendment of § 949, Rev. Codes 1905. The amendment in the 1907 law in no way changes the original act as to any question affecting this case. It confers upon the county commissioners, under certain conditions, authority to attach certain portions of a school district, after division thereof, to a school district of another county. The fact that this amendement confers the authority upon county commissioners to attach certain portions of a school district to a school district of another county is immaterial so far as the rights of this plaintiff or any inhabitant of the plaintiff district are concerned. Whether the con-

ferring of such authority upon the county commissioners is or is not a constitutional enactment, we need not, therefore, determine, as no such authority was exercised or attempted to be exercised in the case at bar. The plaintiff, therefore, cannot urge the invalidity of the 1907 act under the facts of this case.

The title of the act of 1907 is as follows: "An Act to Amend § 949 of the Revised Code of 1905, Relating to Education." Section 949 was originally enacted as a state law in 1890, but the same was in force before 1890 as a part of the territorial statutes. The section has been continued in force in the revision as originally enacted, so far as any question here involved is concerned. The title of the act of 1890, of which § 949 was a part, was, "An Act to Provide for a Uniform System of Free Public Schools Throughout the State and Prescribe Penalties for Violations of the Provisions Thereof." The title of the act of 1890 is sufficiently broad and comprehensive to include § 170 of that act, which was the same substantially as § 949, until amended in 1907. The general subject of public schools includes the division of school districts. Under the decisions of this court since Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841, § 61 of the Constitution is complied with so far as amendatory acts are concerned, where the number of the act or section to be amended is given in the title of the amendatory act, and the subject-matter of the amendment is germane to the subject of the original act, and within its title.

This question has recently been considered by this court in State v. Fargo Bottling Works Co. 19 N. D. 396, 26 L.R.A.(N.S.) 872, 124 N. W. 387, and the rule adhered to that "it is a sufficient compliance with the constitutional requirement if the subject-matter of such amendment is germane to the subject-matter of the original act . . . and is within the title of that act."

In Erickson v. Cass County, this principle was announced in the following language: "It is not necessary that the provisions embodied in an amendment to a section of a statute shall relate directly to the particular provisions contained in the section amended. It is sufficient if the subject-matter of the amendment is germane to the subject of the act of which the amended section is a part, and is within the title of the original act."

Under these decisions, there is no ground to uphold the contention that the act is in violation of § 61 of the Constitution.

The next objection to the statute in question and to the proceedings is that no hearing is provided for to enable those that may desire to do so to present objections or protests. It is therefore argued by the appellant that the property of the plaintiff district was taken without due process of law. No authorities have been cited sustaining this contention, and none have been found, except such as are against the contention. Although similar enactments have been criticized as often unwise and subject to abuse and injustice, they have been uniformly sustained, unless they have contravened some constitutional provision. In other words, the policy and wisdom of such legislation rest finally with the legislature, and unless some constitutional provision can be found that the law is opposed to, it will be sustained.

The right to a hearing or notice is not regarded as fatal to the law. The property of the district is regarded as state property, subject to the action of the legislature, or school boards, which are deemed state agencies when empowered by a statute to act. As stated by an eminent authority, "not only may the legislature originally fix the limits of the corporation, but it may, unless specially restrained in the Constitution, subsequently annex, or authorize the annexation of, contiguous or other territory, and this without the consent, or even against the remonstrance of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation that the property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the legislature to determine." Dill. Mun. Corp. 4th ed. § 185.

In Abbott on Municipal Corporations, vol. 1, § 35, the same principle is stated: "The fact that at the time of its organization it includes or is included within certain limits does not prevent the passage of future legislation enlarging boundaries or dividing territory, or preclude annexation or division under existing laws. To state the principle more concisely, a public corporation, of whatever class, may have its territorial limits, under authority of law, arbitrarily or otherwise enlarged or reduced. The paramount question, if action is taken of this

character, is that of legislative authority, and the extent and manner of such annexation is a question solely within the discretion of the legislature, except as restraind by constitutional provisions, with which the courts cannot interfere."

In Keweenaw Asso. v. School Dist. No. 1, 98 Mich. 437, 57 N. W. 404, the court said: "It is no new thing for the legislature to fix the boundaries of school districts. It is done in the charter of nearly every city or village in the state, and some of them go so far as to provide exceptional methods of electing officers, and limiting the classes entitled to vote. Mudge v. Jones, 59 Mich. 165, 26 N. W. 325. Certainly, these are as destructive of the system referred to as the act in question, but none of these acts have ever been held invalid. On the contrary the legislative intent has been invariably carried out where they have been brought before the court."

In Atty. Gen. ex rel. Kies v. Lowrey, 131 Mich. 639, 92 N. W. 289, the court said: "The authority of the legislature to change the boundaries of counties, townships, and school districts does not necessarily involve the obligation to reimburse the portion deprived of the use of public property. Frequently such laws contain provisions for the purpose, but it is not necessary. The property is public property, held and used for the purposes of the state, which may, in the absence of constitutional prohibition, make such disposition of it as it sees fit."

The case last cited came before the Supreme Court of the United States, and is reported in 199 U. S., at page 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27. In disposing of the case the court said: "Plaintiff in error broadened in this court his objections to the act, based on the Constitution of the United States. He urges, besides, the contract clause of the Constitution, that provision of the 14th Amendment which protects private property from deprivation without due process of law, and § 4, art. IV. which provides, 'The United States shall guarantee to every state in the union a republican form of government.' But the grounds all depend ultimately upon the same arguments. If the legislature of the state has the power to create and alter school districts and divide and apportion the property of such districts, no contract can arise. No property of a district can be said to be taken, and the action of the legislature is compatible with a republican form of government even if it be admitted that § 4, art. IV.,

of the Constitution applies to the creation of, or the powers or rights of property of, the subordinate municipalities of a state. We may omit, therefore, that section and article from further consideration. The decision of the other grounds urged we may rest upon the opinion of the supreme court of the state, and the case of Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552. It is there said in many ways, with citation of many supporting cases, that the legislature of a state has absolute power to make and change subordinate municipalities."

The case cited in vol. 92 U. S. 307, contains a review of many cases bearing on this question, and fully sustains such laws as against the objection here urged. There is no constitutional provision in this state to which the statute under consideration is repugnant. It may further be stated concerning the objection, that the plaintiff will be deprived of its property by being deprived of the schoolhouse on Section 9, that § 864, Rev. Codes 1905, authorizes distribution of the property of the district under the facts of this case.

The record shows that every requirement of the law was strictly complied with. The defendant does not contend otherwise. The allegation of the complaint, that the petition was "falsely and fraudulently" presented to the board of education, is not followed by any proof to substantiate that general allegation. This allegation, even if deemed sufficient, must fail as not substantiated by proof.

The same is true of the allegation in the complaint that the petition is not signed by a requisite number of the legal voters of the territory attached to the village of Tower City for school purposes. As stated before, the defendants have shown, by undisputed testimony, that every requirement of the statute was literally complied with.

For these reasons the application to continue the injunction was properly denied. Appellant strenuously contends in argument that the trial court committed prejudicial error in refusing to continue the injunction pending the trial of the issues in regular order on the merits. The trial court disallowed the application, on the ground that there was no showing that the proceedings were irregular or unauthorized, and no attempt was made to show their irregularity by proof, at the hearing. On this state of the record, the trial court dissolved the preliminary injunction. We do not think that such action was erroneous, even, and it is certain that this court would not be warranted in hold-

ing such action to be an abuse of discretion, which is the test by which to determine a matter on appeal.

Counsel relies on Gile v. Stegner, 92 Minn. 429, 100 N. W. 101, to sustain his contention. In that case public authorities had been enjoined from taking certain action in calling a special election, and the trial court refused to dissolve the injunction. The supreme court reversed the order of the trial court refusing to dissolve the injunction. In that case, as in this, the facts were undisputed, and the question presented was in reality one of law.

The other cases cited by appellant have been examined, but they are not in point.

The order is affirmed.

STATE OF NORTH DAKOTA, EX REL. ARTHUR HAGENDORF, et al., v. ALFRED BLAISDELL, as Secretary of State of the State of North Dakota.

(127 N. W. 720.)

Constitutional Law — Original Writ — Seasonable Application — Court will not Act Summarily except in Urgency Cases.

1. This court will not decide grave constitutional questions, raised by original applications for writs which must be acted upon summarily, except in instances when the circumstances are such that a decision is imperative and the application could not readily have been made earlier.

Elections — Primary Law — Its Purpose — Regulation of Party Nominations.

2. Chap. 109, Laws 1907, known as the primary election law, is not intended to provide for and regulate the nomination of candidates who do not stand for or represent a political principle or party; it being intended only to regulate party nominations.

Note.—While some of the provisions in nearly all of the primary election laws, the validity of which has been tested in the courts, have been held void, the laws themselves have generally been upheld, though sometimes only after an amendment of the state Constitution, as shown by the note in 22 L.R.A.(N.S.) 1136, in which are reviewed all the cases in which the question of the validity of such laws has been passed upon by the courts.

Primary Elections — Nominations by Petition.

3. Section 501, Rev. Codes 1899, providing for nominations by petition, and the placing of the names of candidates so nominated upon the Australian ballot for use at the general election, is still in force, and provides a method whereby persons may be nominated as candidates for state and congressional offices as representing a collection of individuals too few in number to be entitled to a party ballot at the primary or a separate column on the ballot at the general election.

Voters and Elections — Australian Ballot Law — Designation of Party — Statutory Provisions.

4. Section 501, Rev. Codes 1899, supra, makes certain requirements of parties nominated by petition to entitle them to have their names placed upon the Australian ballot, and, among others, that the certificate of nomination or petition shall state in not more than five words the party or principle which the candidate represents. *Held* that this party designation should appear after the candidate's name as printed on the Australian ballot.

Voters and Elections — Primary Law — Party Ballot.

5. Neither chapter 109, Laws 1907, nor § 10 thereof, supra, which reads, "Any citizen otherwise eligible by law, affiliated with or representing the principles enumerated in the national platform of the following parties, are eligible to nomination under this act; the Republican, the Democratic party, or any party designation that cast 5 per cent of the votes cast for governor at the last general election, and it shall be unlawful for any person to call for or vote a ballot at the primary election herein provided for, except a ballot representing the party or principle with which he affiliates, . . ." is invalid as furnishing no method by which new parties may secure the printing of party ballots for use at the primary election, inasmuch as a party represented by candidates whose names have appeared in the individual column, followed by the party designation on the Australian ballot used at the general election and who have received 5 per cent of the votes cast for governor, is entitled to a separate ballot at the next primary election.

Voters and Elections — Primary Law — Party Ballot — Authority of Legislature.

6. *Held*, the legislature has, within reasonable limits, the power to determine how many voters acting together for the purpose of making nominations shall be entitled to a party ballot, and that the provision above quoted providing only for the printing of ballots for parties casting 5 per cent of the votes cast for governor at the next preceding general election is a reasonable regulation of an election held to make party nominations.

Opinion filed September 14, 1910.

Original application for a writ of Mandamus.

Application denied.

Arthur Le Suer, for relators.

SPALDING, J. This is an original application in the name of the State on the relation of Arthur Hagendorf and other citizens of North Dakota, for the issuance by this court of its writ commanding the secretary of state to cause to be printed upon the official primary election ballot to be used at the primary election to be held throughout the state on the 29th of June, 1910, the names of the relators as candidates of the Socialist party for nomination to the several congressional and state offices, and directing the secretary of state to file the petitions of the relators, and print an official ballot of the Socialist party for such primary election.

Rule xxxix, requires a memorandum of authorities to accompany such application. The relators have filed a memorandum brief, but it cites no authorities in support of their contention and in no manner aids the court in reaching a decision of the very important constitutional questions sought to be raised. No one appeared in behalf of the respondent. Under such circumstances this court would be amply justified in declining to consider the application, and particularly so in view of the fact that it was not brought to the attention of the court until three or four days before the date when the ballots for the primary election are required to be printed. Other courts have refused to decide grave constitutional questions in a summary manner on applications of this nature when no excuse was shown for postponing the application until a day so late that it became impossible to give it that consideration and devote to the subject that research which such questions require, and which the court is entitled to have the opportunity to make except in rare and imperative instances. Our first impression was that we would decline to issue the writ on this ground alone, but in view of the overwhelming weight of authorities against the position taken by the relators and the apparent soundness of the reasoning of the several courts which have passed upon these or analogous questions, we have concluded that we may as well settle it at this time on the merits. We, however, deem it proper to call the attention of the bar to the propriety and the necessity of presenting applications which require the determination of questions of serious import, and particularly the construction of constitutional provisions, where nothing stands in the way of doing so, a sufficient length of time before a decision is necessary, so the court may fairly consider such

questions, and not be subject to the commission of grave error by reason of insufficient time in which to investigate and inform itself as to the principles governing and the authorities applicable to the same.

The legislative assembly in 1907 enacted a law providing for the nomination of party candidates for office in years when general elections are held by the people, in lieu of party caucuses and conventions. If we were to consider the object sought to be accomplished by the legislative assembly through such enactment, the reasons for our conclusions in the case at bar would be emphasized, but we deem it unnecessary to enter upon a discussion of the objects which the legislature sought to effect by the measure in question. They are well understood by the public. Much misapprehension and misconception of the primary election law is prevalent. The writer has heard it remarked many times that voters ought to have the privilege of voting for members of any party, or for members of no party, at the primary, and that votes cast for Democrats by Republicans ought to count toward the nomination of candidates of the Democrat party. All such ideas are beside the mark. The law is not intended to, and does not, provide for nonpartisan nominations. Its sole purpose is to provide for and regulate the nomination of candidates by political parties. Those who belong to no party or to parties not casting the percentage of votes necessary to bring them within the terms of the primary election law as parties, may proceed in another manner, as provided by statute, and their rights to become candidates, or to make nominations within their respective parties or political circles, are not infringed.

As we read the memorandum brief filed by the relators, we gather from it that it is sought to raise the question of the constitutionality of § 10 of the primary law, chapter 109, Laws of 1907, which reads: "Any citizen, otherwise eligible by law, affiliated with or representing the principles enumerated in the national platform of the following parties, are eligible to nomination under this act; the Republican, the Democratic party, or any party designation that cast 5 per cent of the votes cast for governor at the last general election, and it shall be unlawful for any person to call for or vote a ballot at the primary election herein provided for, except a ballot representing the party or principle with which he affiliates. . . ."

It is apparent that this section limits the application of the primary

law to those parties which cast 5 per cent of the votes cast for governor at the last general election next preceding the primaries. It is equally apparent that if any two or three people believing in certain principles in common might designate themselves as a political party, and thereby secure the printing at public expense of a ballot for their so-called party, there would be no end to party ballots in use at the primary elections, and that the effect would be to greatly increase the size of the Australian ballot at the general election, rendering it practically unintelligible to voters, and confusing rather than simplifying and regulating. It is eminently proper that some standard be fixed as to the number of voters who, under the law, shall be deemed to constitute a party and entitled to a party ballot. The legislature has, for the purpose of the primary election, determined that a 5 per cent vote is necessary to constitute a party worthy of recognition as such for the purpose of making party nominations. If this provision is invalid it would seem to follow by analogy that any provision requiring a fixed number of signers to a petition to place a person's name on the primary ballot, or to make an individual nomination and place the name of a candidate on the ballot at the general election, must also be invalid and that each voter in the state may, without the concurrence of other electors, secure the printing of his name upon a separate ballot.

The question must be looked at from a practical standpoint. It appears in the application before us that the Socialist party cast less than the required 5 per cent for any of its candidates at the last general election, and there is no claim that, if the provisions of § 10 under consideration are valid, their petition should be filed and a ballot printed as representing the Socialist party. It is urged that by the provisions of the primary law and of the Australian ballot law, which has a similar limitation, the formation of new parties is prevented, and that on the organization of a new party, regardless of the percentage of electors who compose it, it can never have a ballot representing such party at the primary or a separate party column on the ballot used at the general election. If this is correct we might be justified in holding the provision invalid, but we do not so construe the two laws. Section 501, Rev. Codes 1899, is still in force, and provides that candidates for public office may be nominated by means of a certificate of nomina-

tion containing the name of the candidate for the office to be filled, giving his postoffice address, the office for which he is named, and, in not more than five words, the party or principle which he represents, and must be signed by electors residing within the district or political division to a certain per cent of the votes cast therein, not in any case requiring more than 300 signatures. Such name then appears upon the Australian ballot used at the general election in the individual column, followed by the designation of the party to which he belongs. When nominations so made and printed upon the Australian ballot have been voted upon at the general election, and have received the necessary 5 per cent of the votes cast for governor, it follows that at the next primary the members of such party, on complying with the statute, are entitled to a party ballot. These provisions seem clear to us, and to provide a reasonable and simple method whereby the nominees of new parties may take advantage of the primary election, as parties, at the election after it appears that they come within the terms of the law as to the number of members. We conclude that the provisions of § 10, chapter 109, Laws of 1907, are not invalid for any of the reasons urged in the present instance. Similar provisions have been sustained where the ratio was fixed all the way from 1 to 10 per cent by other states. California is the only state in which we have been able to discover that a similar provision has been held invalid, and the reasons for so holding in that state are not altogether applicable in this state.

We are disposed to think that the provision might also be sustained on the ground that it is a reasonable classification of parties. It has been sustained for that reason in some states. But it is not necessary to enter upon a discussion from that standpoint. See People ex rel. Breckon v. Election Comrs. 5 A. & E. Ann. Cas. 565 and authorities cited in note; Note 4 A. & E. Ann. Cas. 144.

The application is denied. All concur.

THE STATE OF NORTH DAKOTA EX REL. JOHN E. WILLIAMS v. PAUL S. MEYER, as County Auditor of M'Lean County, North Dakota.

(127 N. W. 834.)

Constitutional Law — Primary Election — Classification of Senators — Legislature — Its Right to Pass upon Qualification of its Members — Power to Compel Filing of Petition — Courts — Powers of Courts as to Election of Members of Legislature — Mandamus.

Section 27 of the Constitution fixes the term of state senators at four years, "except as hereinafter provided." Section 29 authorizes the legislative assembly to fix the number of senators, and divide the state into senatorial districts, with one senator for each district. Section 30 requires the senatorial districts to be numbered consecutively from one upward, and the senators to be divided into two classes, one class composed of senators from even-numbered districts and the other from odd-numbered districts, and that the determination of the two classes shall be by lot so that one half of the senators, as nearly as practicable, may be elected bienially, and that one class elected in the year 1890 shall hold their office for two years and the other for four years. Section 35 requires a reapportionment of the senatorial districts commencing with 1895 and every five years thereafter, and permits it at other times. The senate of the second legislative assembly elected in 1890 divided that body into two classes. The senators in the odd-numbered districts elected in 1890 held office two years and those from the even-numbered districts for four years. As originally districted, the senate was composed of thirty-one senators representing thirty-one senatorial districts. In 1901 a reapportionment was made, and the number of senatorial districts increased to forty. In 1907 the number was again increased to forty-seven.

Held, that the governing principle of these provisions of the Constitution is the requirement that the senate be at all times composed of two classes of senators, as nearly equal in number as practicable. *Held*, further, that the expiration of the term of senators depends upon the original classification made in 1891, and that the terms of senators elected from districts created by reapportionment and at the same time with those of the same class elected from the old districts, thus making the terms of senators from all even-numbered districts expire simultaneously, and those from all odd-numbered districts expire two years later. *Held*, further, that the courts have power to direct the county auditor to file the petition of a candidate for senator and direct the publication of his name upon a ballot to be used at the primary election. *Held*, further, that § 47 of the Constitution, which provides that each house shall be the judge of the election returns and qualifications of its own members, is not infringed upon by courts in passing upon the duties of county auditors in

the matter of filing petitions for nomination and printing names upon ballots, and that, under the circumstances of this case, the omission to join the secretary of state as a party defendant was not fatal to relator's right to a writ commanding the auditor to file his petition, and print his name upon the primary ballot.

Opinion filed September 14, 1910.

An application for an original writ directing the auditor of McLean county to file a petition of the relator and print his name upon the Republican ballot for use at the primary election of 1910.

Writ granted.

Hyland & Neussle and *Guy C. H. Corliss,* for relator.

J. E. Nelson and *Jas. T. McCulloch,* for defendant.

SPALDING, J. The question to be determined on this application is the length of the term of a state senator from an even number district elected at the general election held in 1908, when such district was created by the reapportionment of senatorial districts made at the session of the legislative assembly held in 1907. The relator is a Republican candidate for nomination at the June, 1910, primary election from the forty-sixth district. One Neal was elected as the senator for that district at the general election in 1908, and received a certificate reciting that he was elected for a term of four years. The secretary of state certified no vacancy in that office to the county auditor between the first days of April and May, as he is required to do when a vacancy exists, and the county auditor refuses to file relator's petition which is in due form, or to print his name upon the official Republican ballot for use at the primary. § 10, chap. 109, Laws of 1907. The relator's contention is that, although Neal duly qualified and acted and the certificate read as stated, his term of office expired at the end of two years.

A complete understanding of the question requires reference to certain constitutional provisions, and to the acts of the legislative assembly intended to carry them into effect, and to the different acts of that body reapportioning the state into senatorial districts, and increasing their number. Section 26 of the Constitution reads: "The senate shall be composed of not less than thirty nor more than fifty members." Section 27: "Senators shall be elected for the term of

four years, except as hereinafter provided." Section 29: "The legislative assembly shall fix the number of senators and divide the state into as many senatorial districts as there are senators, which districts, as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation. Each district shall be entitled to one senator, and no more, and shall be composed of compact and contiguous territory; and no portion of any county shall be attached to any other county or part thereof so as to form a district. The districts, as thus ascertained and determined, shall continue until changed by law." Section 30: "The senatorial districts shall be numbered consecutively from one upwards according to the number of districts prescribed, and the senators shall be divided into two classes. Those elected in the districts designated by even numbers shall constitute one class, and those elected in districts designated by odd numbers shall constitute the other class. The senators of one class elected in the year 1890 shall hold their office for two years. Those of the other class shall hold their office four years, and the determination of the two classes shall be by lot, so that one half of the senators, as nearly as practicable, may be elected biennially."

Section 35: "The members of the house of representatives shall be apportioned to and elected at large from each senatorial district. The legislative assembly shall in the year 1895 and every tenth year cause an enumeration to be made of all the inhabitants of this state, and shall, at its first regular session after each enumeration, and also after each Federal census, proceed to fix by law the number of senators which shall constitute the senate of North Dakota and the number of representatives which shall constitute the house of representatives of North Dakota within the limits prescribed by this Constitution, and at the same session shall proceed to reapportion the state into senatorial districts as prescribed by this Constitution and to fix the number of members of the house of representatives to be elected from the several senatorial districts, provided that the legislative assembly may at any regular session redistrict the state into senatorial districts and apportion the senators and representatives respectively."

Section 47: "Each house shall be the judge of the election returns and qualifications of its own members."

The first legislative assembly was elected in October, 1889, at the

election at which the Constitution was adopted, and in accordance with its provisions. The Constitution took effect on the 2d day of November 1889, and § 214 fixed the size of the two branches of the legislative assembly until otherwise provided by law, the senate containing thirty-one members as so fixed. The terms of the senators first elected all expired in January, 1891, and in 1890 a new senate and a new house of representatives were elected, and on the drawing of lots as required by § 30, supra, the senators elected in 1890 in odd-numbered districts, held office two years and those in the even-numbered districts four years.

By chapter 143 of the Laws of 1901 the legislative assembly reapportioned the state and increased the number of senatorial districts from thirty-one to forty, and by chapter 165, Laws of 1907, the state was again reapportioned and the number of senatorial districts increased to forty-seven. It was in the forty-sixth district, so created, that Neal was elected in 1908 and that the relator seeks a nomination for senator in 1910. If all senators elected at general elections after 1890 are elected for the terms of four years, Neal's term of office has not expired and the relator is not entitled to have his petition filed or his name printed on the Republican primary election ballot. On the one hand it is contended that the provisions of § 27, supra, that senators shall be elected for the term of four years, controls, while the relator urges that the exception to that section, namely, "except as hereinafter provided," applies in this instance; that the provision of § 30, that the senators shall be divided into two classes,—those in the even-numbered districts constituting one class, and those in the odd-numbered districts the other class,—so that one half of the senators, as nearly as practicable, may be elected biennially, is controlling. We are of the opinion that the contention of the relator must be sustained. It was the clear intent of the constitutional convention to provide a senate which should at all times, as nearly as practicable, be composed of members, one half of whom were experienced in the duties of their offices. The terms of senators and members of the house of representatives, unlike those of most officials, expire at the end of the term for which they are elected. They do not hold until their successors are elected and qualify. In the event of a failure to elect, a vacancy results and continues until it is filled either at a special or

general election. The house of representatives is a new body every two years. After each general election the house ceases to exist as a body, and the new membership becomes the new house. Not so with the senate. It is a continuous body. It never goes out of existence and the purpose of the constitutional provisions on this subject which we have quoted was to maintain a senate which should, at all times, have one half its members, as nearly as practicable, experienced men. The plan adopted is analogous to that of the senate of the United States. The term of United States senators being for six years, the members were divided into three classes, the term of one such class expiring at the end of each Congress, approximately two thirds of the senators being thus old senators. The adjustment of those classes has been so carried forward that the successor of any senator always takes his place in the class to which his predecessor was assigned. If the contention of the respondent in this case be correct, the senate is not composed of two classes as nearly equal in number as practicable, when a reapportionment is made, as was done in 1907, and the number of districts largely increased. If, however, those senators elected in new districts after a reapportionment, from the odd-numbered districts, are elected for terms which expire at the same time that the terms of those in the old odd-numbered districts expire, and those in the new even-number districts expire when those from the old even-numbered districts expire, the program mapped out to begin with the session of 1891 is consistently adhered to, and the purpose of the provisions cited is accomplished. While the provisions are not as clear as they might have been if stated in some other form, yet this construction is much clearer and much easier to reach from the language employed, when we remember the division sought to be made, than would be that contended for by the respondent. The phrase, "except as hereinafter provided," referred to, relates not only to the senators of the even class elected in 1890, but it is applicable to those elected after any reapportionment at which new districts are created, so far as necessary to bring them into harmony with the plan of the Constitution regarding the membership of the senate and the terms of office of the senators. It happened in this instance that the even-number senators were elected for two years only. Had the apportionment taken place at the preceding session of the legislative assembly, the senators from even-

numbered districts would have held for four years and those from the odd-numbered districts for only two years. The respective endings of the terms of the two classes of senators was forever established by the lot drawn in 1891. To place a literal interpretation on the four-year provision as to the term of senators would classify some odd-numbered with some even-numbered districts, and interminable confusion and disorder would result. An illustration is convincing. By the reapportionment made in 1901, nine new senatorial districts were created and the election of nine new senators provided for. If these nine new senators were all elected for four years and their districts thereby added to one of the two classes as fixed in 1891, the fundamental principle that the two classes remain as nearly as practicable equal in number would be clearly violated and one would thereafter have contained fifteen members and the other twenty-five, and had a second reapportionment followed in a corresponding year, new districts created by the second reapportionment would still further have increased the disproportion in the numbers of the districts in the two classes.

It appears that the senate has construed these provisions in harmony with our understanding of the intent of the constitutional convention. After the reapportionment made in 1901 it was at least assumed that those in one class held for two years and those in the other for four years. We are not advised that any question was ever raised as to the correctness of this construction, but we are advised that elections were held at the expiration of the two-year terms of the senators in one class, and new senators were elected and seated without question.

It is suggested that any decision of this court will be of no force and effect, for the reason that by § 47 the senate is made the judge of the election returns and qualifications of its own members. This court does not attempt to say what members shall be seated. It is simply passing upon the question of law presented with a view to determining whether the action of the county auditor is legal in refusing to file relator's petition and to print his name as a candidate for senator upon the primary election ballot. It is unnecessary for us to consider whether our decision may have any effect upon the action of the senate in the premises should a new senator be elected, and both he and the old senator claim seats in the upper branch of the legislature. The question of the power of the courts to direct the action of the auditor

in such case has been so often passed upon that we deem it unnecessary to discuss it. While it would have been entirely proper for the state to have made the secretary of state a party, yet the proceeding cannot be defeated because he was not joined with the county auditor as a party defendant. When this application was made, the time had long since passed in which the secretary of state was required to certify to the county auditor the offices which were to be filled, and when this court can still reach the officer whose duty it is to receive the petition and print the name upon the ballot, it would be absurd to hold that the right of the public and of candidates were defeated because the secretary of state had not been joined as a defendant. When the court determines that an office is to be filled and directs the action of the county auditor, the ministerial act of certifying a vacancy by the secretary of state becomes of little moment.

The motion to quash is denied and the writ granted. All concur.

A. B. BICKFORD, Contestant and Appellant, v. WARD COUNTY and C. C. Willis, A. J. Delance, Ralph Abbott, S. H. Elliott, and R. H. Emerson, as The Board of County Commissioners of Ward County, Contestees and Respondents.

(127 N. W. 103.)

Opinion filed June 3, 1910.

Geo. A. Bangs and *Geo. L. Reyerson,* for appellant.

L. F. Clausen, Scott Rex, Gray & Gray, P. M. Clark (*Engerud, Holt, & Frame*), for respondents.

PER CURIAM. This is an appeal from a judgment of the district court of Ward county in a contest proceeding over the election held in 1908, on the creation of the county of Burke from a portion of Ward county. The defendants and respondents had judgment in the trial court, which held that such county did not receive sufficient votes at such election to establish it.

The facts are identical with those presented in the case of Fitzmaurice against the same defendants, the opinion in which has been

filed this day, with the exception that the apparent majority against the creation of Burke county was less than that against the creation of Renville county, and our decision in that case would not only govern us in the case at bar, but, in addition, counsel, after the submission of the case, filed a stipulation in writing whereby it was agreed that the decision should be rendered in this case that is made in the Renville county case.

Discovering, on the findings and judgment, no reason to the contrary, the judgment of the district court is accordingly reversed and that court is directed to enter its judgment in favor of the contestant and on the lines described in the findings of the trial court.

For the reason stated in the Renville county case the remittitur will be transmitted to the District Court forthwith. All concur.

STERNBERG, WEIL, & COMPANY v. JAMES A. LARSON & COMPANY.

(127 N. W. 993.)

Appeal and Error — Abstract — Specification of Error — Statement of Case.

The abstract on appeal must embody all material parts of the record, to the end that this court may have before it for convenient reference everything essential to a proper understanding of the questions involved. Only in exceptional cases will this court explore the original record for the purpose of supplying deficiencies in the abstract. Specifications of error are a vital part of the statement of case and, unless abstracted, such statement will be disregarded. No errors having been assigned on the judgment roll proper, and the abstract not embodying any specifications, *held*, there is nothing properly before us for review.

Opinion filed September 14, 1910.

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

Action by Sternberg, Weil, & Company against James A. Larson & Company. From a judgment in plaintiffs' favor, defendants appeal.

Affirmed.

L. D. Gooler and *R. Goer*, for appellants.
Bowen & Adams, for respondents.

FISK, J. The judgment appealed from must be affirmed for the following reasons: The statement of case as set out in appellants' abstract fails to disclose any specifications of error upon which appellants intend to rely. The specifications are a vital part of the statement, and without them such statement must be disregarded. This is the settled practice in this state and is prescribed both by statute and the rules of this court. Whether the statements as incorporated in the original record contains the necessary specifications is immaterial. Only in exceptional cases will this court explore the original record for the purpose of supplying deficiencies in the abstract. Such abstract should embody all material portions of the record, to the end that this court may have before it for convenient and ready reference everything essential to a proper understanding of the questions involved. No errors are assigned upon the judgment roll proper. Hence, there is nothing properly before us for review.

Notwithstanding the condition of the abstract, as above stated, we have examined the record sufficiently to satisfy us that no prejudicial error was committed in the court below, and that substantial justice was done. That the goods, to recover the purchase price of which this action is prosecuted, were purchased for defendants by one O'Mala, who had the management of defendants' store, with authority to purchase goods, and that such purchase price has not been paid, are, apparently, uncontroverted facts in the case. All that defendants attempted to prove was that Larson, one of the defendants, had the active management of the business of the firm in charge, and that he never authorized O'Mala to purchase goods "on time." Such attempted defense is without merit in the light of the undisputed facts in the case.

Judgment affirmed.

All concur, except MORGAN, Ch. J., not participating.

A. H. LOWRY v. FERDINAND PIPER.

(127 N. W. 1046.)

Appeal and Error — New Trial — Sufficiency of Evidence to Support Verdict.

1. Where an order overruling a motion for new trial is challenged solely on the grounds of insufficiency of the evidence to justify the verdict and that such verdict is against law, this court, in reviewing same, will only inquire whether there is legal evidence of a substantial character supporting the verdict.

New Trial — Evidence — Documentary Proof — Conclusiveness.

2. The fact that one item of evidence is of a documentary nature will not take the case out of the above rule, where such documentary proof is not conclusive, and there is conflicting oral testimony supporting the verdict.

New Trial — Sufficiency of Evidence — Verdict.

3. Evidence examined and *held* that there is legal proof of a substantial character supporting the verdict, and hence it was not an abuse of discretion to deny defendant's motion for a new trial.

Opinion filed September 14, 1910.

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

Action by A. H. Lowry against Ferdinand Piper. Appeal from order denying defendant's motion for a new trial.

Affirmed.

Stambaugh & Fowler, for appellant.

Pierce, Tenneson, & Cupler, for respondent.

FISK, J. Action to recover a balance alleged to be due plaintiff from defendant as commission on the sale of land. Plaintiff was successful in the district court, and defendant appeals from an order overruling his motion for a new trial. The sole grounds of the motion were that the evidence is insufficient to justify the verdict and that such verdict is against law.

Under a well-settled rule when applied to the facts disclosed by the record, we are not warranted in disturbing the order appealed from. There is a square conflict in the testimony over the vital and sole issue of fact as to the actual agreement between the parties governing the amount of such commission. The testimony is amply sufficient to sup-

port plaintiff's contention. This being true, it was not an abuse of discretion to make the order complained of.

Appellant's counsel recognize the general rule that this court, in cases like this, will not ordinarily review the testimony except to the extent of determining whether there is evidence of a substantial character supporting the verdict; but they contend that certain documentary evidence in the form of a letter written by plaintiff to defendant touching the matter of such commission is controlling, and hence the above rule has no application. We do not thus view the matter. Such letter considered in the light of plaintiff's oral testimony is not necessarily inconsistent with plaintiff's version of the contract. On the contrary, it is susceptible of a construction harmonizing therewith. The jury, as well as the trial judge, evidently adopted such construction. Furthermore, the rule contended for by appellant's counsel does not apply to appeals like the case at bar wherein the evidence consists both of oral and documentary proofs. 4 Cyc. Law & Proc. p. 564, and cases cited. Also 3 Cyc. Law & Proc. pp. 377, 378. Counsel for appellant cite Dickey v. Davis, 39 Cal. 569, but we discover nothing therein inconsistent with our views above expressed; nor does it support counsel's contention herein.

In disposing of this appeal we are controlled by the rule announced in Magnusson v. Linwell, 9 N. D. 154, 8 N. W. 746; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988, and other like decisions of this court too numerous to mention.

As before stated, there is legal evidence of a substantial character supporting the verdict, and hence we deem it our clear duty to sustain the action of the trial court. The order denying defendant's motion for a new trial is accordingly affirmed.

All concur, except MORGAN, Ch. J., not participating.

G. S. SCHWARTZ v. NICK HENDRICKSON.

(128 N. W. 117.)

Trial — Motion by Both Parties for Directed Verdict.

1. Plaintiff proved his case and rested. No testimony was offered by defendant. Thereupon the latter moved for a directed verdict, and later a similar motion was made in plaintiff's behalf. The court denied plaintiff's motion and granted defendant's, whereupon a verdict was entered in defendant's favor. *Held*, both rulings were erroneous.

Appeal and Error — Harmless Error.

2. Plaintiff, instead of moving for a new trial, moved for judgment notwithstanding such verdict. Thereupon defendant moved that the verdict be vacated and that he be allowed to furnish proof of the defenses alleged in his answer. The latter motion was granted on terms, and plaintiff's motion denied.

Held, that such order, although irregularly issued, is nonprejudicial to plaintiff, as he is not entitled to judgment *non obstante veredicto*, but merely to a new trial, and this, in effect, was granted by the order complained of.

Opinion filed September 14, 1910.

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

Action by G. S. Schwartz against Nick Hendrickson. From an order denying plaintiff's motion for judgment notwithstanding the verdict, and granting defendant's application to vacate the verdict and for leave to furnish proof in support of the defenses alleged, plaintiff appeals.

Affirmed.

F. B. Lambert, for appellant.

An election once made by one having the right to make it, is final. Moline Plow Co. v. Rodgers, 53 Kan. 743, 42 Am. St. Rep. 317, 37 Pac. 111; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; Bailey v. Hervey, 135 Mass. 173; Crompton v. Beach, 62 Conn. 25, 18 L.R.A. 187, 36 Am. St. Rep. 323, 25 Atl. 446; Gray v. St. John, 35 Ill. 222; Nield v. Burton, 49 Mich. 53, 12 N. W. 906.

Motion for new trial is statutory, and must be made as the statute directs. Parrott v. Hot Springs, 9 S. D. 202, 68 N. W. 329; Illstad v. Anderson, 2 N. D. 167, 49 N. W. 659; Thuet v. Strong, 7 N. D. 565, 75 N. W. 922; McTavish v. Great Northern R. Co. 8 N. D.

94, 76 N. W. 985; Gould v. Duluth & D. Elevator Co. 2 N. D. 217, 50 N. W. 969; Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114; Fletcher Bros. v. Nelson, 6 N. D. 94, 69 N. W. 53; Henry v. Maher, 6 N. D. 413, 71 N. W. 127.

Verdict cannot be set aside on the court's own motion except it is a plain violation of instructions, or evidence, or the result of passion. Rev. Codes 1905, 7066; Gould v. Duluth & D. Elevator Co. 2 N. D. 216, 50 N. W. 969; Clement v. Barnes, 6 S. D. 483, 61 N. W. 1126; Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195.

James Johnson, for respondent.

The motion and affidavit, papers and proceedings warranted a reopening of the case, in the discretion of the court. Finch v. Martin, 13 S. D. 274, 83 N. W. 263; Gotzian v. McCollum, 8 S. D. 186, 65 N. W. 1068; Finney v. Northern P. R. Co. 3 Dak. 270, 16 N. W. 500; Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63; Sim v. Rosholt, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 112 N. W. 50; Clopton v. Clopton, 10 N. D. 569, 88 Am. St. Rep. 749, 88 N. W. 562; Wolmerstadt v. Jacobs, 61 Iowa, 372, 16 N. W. 217; State v. Dougherty, 70 Iowa, 439, 30 N. W. 685; Flickinger v. Omaha Bridge & Terminal R. Co. 98 Iowa, 358, 67 N. W. 372.

FISK, J. The record on this appeal presents a somewhat unusual state of facts. In brief the complaint alleges that plaintiff furnished to defendant certain nursery stock and performed certain labor for him in transplanting same at the agreed price and reasonable value of $2,200, no part of which has been paid. The answer admits that the nursery stock and labor were furnished to him, but not by plaintiff, except as the agent and representative of the Itaska Park Region Nursery Company. Such answer also alleges that payment to and settlement with such company was made by defendant with plaintiff's full knowledge and consent. The issues thus framed were tried to the jury, and the only testimony offered was that offered by plaintiff, who called defendant for cross-examination under the statute, and he identified a certain written agreement signed by himself and plaintiff individually, and in effect admitted that the nursery stock and labor were furnished to him as alleged in the complaint. The agreed price and value thereof were not in dispute. At the conclusion of such testimony plaintiff

rested, whereupon defendant's counsel moved for a directed verdict in defendant's favor, and thereafter plaintiff's counsel made a similar motion in plaintiff's behalf. The latter motion was denied and plaintiff excepted to the ruling. The court then granted defendant's motion, and a directed verdict was accordingly returned and entered over plaintiff's objection. In due time plaintiff, instead of moving for a new trial, moved for judgment notwithstanding such verdict. After this motion was argued and submitted, but before a decision, defendant's counsel served on plaintiff's counsel a notice of motion for leave to open the case and be allowed to introduce evidence. The latter motion was entertained by the court and apparently treated as a motion for a new trial. In support of such motion, the affidavit of defendant was presented, in which the truth of the various facts alleged in the answer is reaffirmed and in which defendant, among other things, prays "that he be allowed a day in court to prove the facts set forth." No excuse is furnished for not making such proof at the proper time. Notwithstanding this, the court, over plaintiff's objection, granted the latter motion and denied plaintiff's motion. These rulings, together with those previously mentioned, form the basis of appellant's assignments of error.

The court, no doubt, committed error in granting defendant's motions. There was absolutely no testimony to support a verdict in defendant's favor, nor is there any warrant for the procedure subsequently adopted, whereby defendant, who certainly is not the aggrieved party, should in effect be awarded a new trial.

On the other hand we fail to perceive how plaintiff is in any respect prejudiced by the vacation of the erroneous verdict against him. It occurs to us that plaintiff is in no position to complain of the various rulings, unless he is entitled to judgment notwithstanding the verdict. We do not think he is entitled to such relief. A new trial has, in effect, been ordered. This is all he is entitled to. This court, in Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614, under analogous facts, so held.

For the above reasons the order appealed from is affirmed.

All concur, except MORGAN, Ch. J., not participating.

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

(127 N. W. 993.)

Railroads — Accidents at Crossings — Contributory Negligence — Jury.

1. In an action to recover for personal injuries caused by a collision at a public crossing over defendant's railroad track, evidence examined and *held* that the question of plaintiff's contributory negligence was properly submitted to the jury.

Verdict — Excessive Damages.

2. The jury awarded plaintiff damages in the sum of $1,250. *Held*, not excessive.

Opinion filed September 17, 1910.

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

Action to recover for personal injuries inflicted by defendant's train at a public crossing over defendant's railway track. From a judgment in plaintiff's favor and from an order denying defendant's motion for a new trial, defendant appeals.

Affirmed.

Lee Combs, John L. Erdall (Alfred H. Bright, of counsel), for appellant.

Herman Winterer and *David S. Ritchie*, for respondent.

Note.—As to contributory negligence in crossing railroad tracks, see notes in 36 L. ed. U. S. 1064; 11 L.R.A.(N.S.) 963; and 8 Am. St. Rep. 813.

Employees in charge of railway trains must be on lookout at every crossing, and give the signals. Bertelson v. Chicago, M. & St. P. R. Co. 5 Dak. 313, 40 N. W. 531; Johnson v. Great Northern R. Co. 7 N. D. 284, 75 N. W. 250. Where exercise of due care requires other precautions than those provided by law, they must be used. Coulter v. Great Northern R. Co. 5 N. D. 568, 67 N. W. 1046. But see Mankey v. Chicago, M. & St. P. R. Co. 14 S. D. 468, 85 N. W. 1013. Failure to give signals, and running trains at too rapid speed, by railroad company, does not excuse plaintiff's negligence. West v. Northern P. R. Co. 13 N. D. 221, 100 N. W. 254. One crossing a railroad track must use care commensurate with the known and reasonably apprehended danger. Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531. Driving rapidly, over frozen road, with head covered to shield from cold, failing to look for train, etc., is contributory negligence. Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997. Doctrine of "last clear chance" inapplicable. Ibid.

FISK, J. Action to recover for personal injuries occasioned by a collision with defendant's train at a public crossing. Plaintiff had judgment in the court below and defendant appeals both from the judgment and from the order denying its motion for a new trial.

The assignments of error are all grouped under two subdivisions in appellant's brief, its contentions, briefly stated, being, first, that the plaintiff, as a matter of law, was guilty of contributory negligence in approaching and driving upon the crossing in question at the time of the accident, precluding a recovery; and second, that the verdict is excessive and that the court erred in denying defendant's motion for a new trial for that reason.

The rules governing the courts in determining the question of contributory negligence in cases of this character are too well settled to require restatement at this time. Counsel do not disagree as to the rules of law applicable, and therefore we deem it necessary merely to call attention to the recent case of Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531, and cases therein cited, for a full and, as we believe, accurate statement of the law upon this subject. In this, as in most cases of this nature, the chief controversy between counsel arises over the application of such rules to the particular facts involved. It becomes necessary, therefore, to review the facts in the case at bar, as far as material, and to those facts apply such settled rules, stating our conclusions therefrom. In narrating the facts, those regarding which there is a substantial conflict will and properly should be stated in the light most favorable to plaintiff.

With these preliminary observations, we proceed to a consideration of the facts.

At the time of the accident, being at about 10 o'clock A. M. of June 9, 1908, plaintiff, a man eighty-two years of age, was *en route* from Valley City, this state, to his farm, located about eight miles southeast of said place. He was alone and was driving a team of horses hitched to a light platform buggy. The accident happened at a public crossing over defendant's railroad track some few miles from Valley City, over which crossing plaintiff was required to pass and had passed on many previous occasions in going to and returning from his farm. At this crossing the highway runs in an easterly or northeasterly direction and the defendant's railroad track runs from the

southeast toward the northwest. In approaching the crossing from the west, and just before reaching a point 125 feet from the railroad track, there is a dip or depression in the highway, and from a point 125 feet from the crossing the highway is slightly down grade until it reaches such crossing. For a considerable distance southeast from the crossing, defendant's roadbed lies in a cut several feet deep, and on the westerly side of such cut there were four stacks or piles of snow fences placed in such a position that plaintiff's view of defendant's track was materially obstructed while he was driving along the highway from a point about 125 feet southwest of the crossing until he reached a point about 25 feet therefrom. Plaintiff testified that his team was walking when he reached the rise in the highway 125 feet from the crossing, and that at that place he took the precaution to look both ways along the track to see if there was a train approaching, and that he could neither see nor hear a train, although his eyesight and hearing were reasonably good. He thereupon drove his team on a slow trot of about 4 or 5 miles an hour over the remaining strip of the road leading to the track, until he had arrived at a point about 6 feet from the crossing, when he pulled the team down to a walk, looked up the track, saw the train approaching at what he considered a rate of 30 to 35 miles per hour, when he attempted to stop his team, but it was too late to prevent the accident. The team was struck by a train consisting of about 20 flat cars loaded with gravel. The team was killed and plaintiff was thrown from the buggy, receiving injuries about his shoulder, back, head, and lower limbs. Plaintiff testified that no warning was given by whistle, bell, or otherwise of the approach of such train, which was being pushed backwards through said cut. He is corroborated by several witnesses, both as to the speed of the train and the failure to give crossing signals. At a point 25 feet from the crossing, plaintiff had an unobstructed view of the track to the southeast for a considerable distance, but between that point and the rise in the highway, at which place plaintiff looked and listened, it appears from the photographs introduced in evidence that the view of plaintiff, while not entirely obstructed, was very materially interfered with by the embankment and snow fences on the westerly side of defendant's track. After plaintiff left the brow of the hill in the highway about 125 feet from the crossing aforesaid, it does not appear that

he took any further precaution to avert a collision until he arrived within about 6 feet of the planking of the crossing. The foregoing are, we think, substantially all the material facts bearing upon the plaintiff's conduct in approaching the crossing in question, and from such evidence we are required to determine whether, as a matter of law, plaintiff was guilty of a failure to exercise such care as a reasonably prudent person would exercise under the like circumstances. It is quite apparent from the testimony that the exercise of a little more care on his part would have avoided the accident, but this is no doubt true as to nearly every person receiving injuries. That defendant, according to plaintiff's testimony, was guilty of culpable negligence in backing its train through said cut at such a high rate of speed, without giving any warning of its approach at such crossing, is beyond question. Plaintiff, on approaching such crossing, had a right to assume that defendant would give signals before reaching the crossing.

In the light of the facts as above narrated, although the question is not free from doubt, we do not feel justified in holding as a matter of law that plaintiff was guilty of such a want of care as to preclude a recovery. It is only in rare cases that a court is warranted in determining the question of contributory negligence as a matter of law. If it can be said that different minds might honestly differ as to the inferences and conclusions to be drawn from the testimony, it is properly a case for the jury. Under the state of the proof as disclosed in this record, we are not prepared to say that reasonable minds might not honestly differ upon the question as to whether plaintiff exercised that degree of care for his safety which ordinarily prudent persons would be expected to exercise under the like conditions. The care exercised by plaintiff in the case at bar is, we think, fully as great, if not greater, than that exercised by Coulter in his case against the Great Northern Railway Company (5 N. D. 568, 67 N. W. 1046), yet this court held there that the question was one properly for the jury. We conclude that the trial court did not err in submitting the case to the jury.

Appellant's only remaining contention is that the damages awarded by the jury are excessive and are the result of prejudice and passion of the jury. We are unable to concur in this view. One thousand two hundred and fifty dollars is the sum awarded. In view of the nature

of the injuries as testified to by plaintiff, the imputation against the jury is, we think, unwarranted. At least we are unwilling to hold that the amount awarded is so grossly excessive as necessarily to indicate passion and prejudice of the jury. The judgment and order appealed from are affirmed.

All concur, except MORGAN, Ch. J., who did not participate in the decision.

PRICE E. MORRIS v. E. R. BRADLEY.

(128 N. W. 118.)

Principal and Agent — Breach of Contract by Agent — Sufficiency of the Evidence.

1. In an action by a principal against his agent to recover damages for a breach of such agent's duty in failing to exercise due care in procuring "fair" security for the purchase price of personal property sold by him pursuant to the agency contract, *held*, that plaintiff's evidence relative to defendant's negligent performance of duty was amply sufficient to require its submission to the jury. Such evidence not only showed negligence, but bad faith on defendant's part. It was therefore error to direct a verdict in defendant's favor.

Principal and Agent — Duty of Agent.

2. An agent owes to his principal the exercise of good faith and fair dealing in the performance of his duties, and when he is authorized to sell his principal's property on time, and to take "fair" securities for the purchase price, a failure to exercise reasonable diligence in so doing renders him liable to his principal for the resulting loss.

Sufficiency of Evidence — Submission to Jury.

3. Evidence examined and *held*, that the proof submitted by plaintiff upon the questions of the worthlessness of the security and the resulting loss sustained by him was sufficient, prima facie, to require its submission to the jury.

Opinion filed September 21, 1910.

Note.—Agent's liability to principal for disregard of orders or for negligence, see note in 7 L. ed. U. S. 606.

Appeal from District Court, Barnes county; *Edward T. Burke,* J.
From a judgment in defendant's favor, plaintiff appeals.
Reversed and new trial ordered.
T. F. McCue, for appellant.
Page & Englert, for respondent.

Fisk, J. Plaintiff seeks to recover damages from the defendant for alleged misconduct in the performance of his duties as plaintiff's agent in the sale of a certain second-hand threshing rig. The complaint is very lengthy and inartistically drawn, but in brief it alleges that on August 23, 1901, plaintiff, being the owner of such rig, entered into a contract with defendant by the terms of which the latter was authorized to sell said second-hand outfit and to receive as his commission therefor all he could get above $1,000. It was stipulated that the security to be taken for the purchase price was to be "fair." It is alleged that on or about September 11th of said year, defendant represented to plaintiff that he had sold said property to perfectly responsible parties for the sum of $1,400, but that certain repairs would have to be made thereto before such purchasers would accept the same. Then follow allegations with reference to an alleged mutual modification of the agency contract relating to the amount of defendant's commission, in consideration of which plaintiff expended certain moneys in making the necessary repairs, and that as a further inducement for making such repairs it is alleged that defendant represented to plaintiff that the proposed purchasers were financially responsible and that the promissory notes and securities to be taken representing the purchase price would be bankable paper. It is next alleged that defendant took said rig to Kenmare and delivered the same to one D. P. Show and one Jessie Show, taking from them three notes payable to defendant aggregating $400, and three notes payable to plaintiff aggregating $1,000, signed by said D. P. and Jessie Show. Also at the same time he took as security for the payment of such notes a chattel mortgage covering the threshing rig aforesaid and certain other personal property running to defendant and also a similar chattel mortgage in plaintiff's favor to secure the payment of the notes aforesaid. That defendant caused the mortgage running to himself to be first filed for record and thereafter sold and assigned the notes

and mortgages taken in his name to an innocent purchaser for value, payment of which notes was thereafter enforced through a sale of the personal property mortgaged.

It is further alleged that plaintiff was not acquainted with the Shows, and knew nothing of their financial responsibility, but that he relied wholly upon the representations and statements made by defendant that they were perfectly solvent and the notes bankable and that plaintiff was induced to and did accept the notes payable to his order because of such representations. That such representations were false; that said Shows were insolvent and wholly unable to pay said notes at said time or at any other time. That at the time plaintiff accepted said notes he had no knowledge that defendant had taken and filed the chattel mortgage constituting a prior lien upon said property. Then follows allegations of plaintiff's inability to collect the amount due on the notes thus accepted by him, or any part thereof, except the sum of $188.26. That defendant retained in his possession, for the purpose of collection, the said notes, and during the time he had such notes as aforesaid he collected the sum of $200, applying the same upon the alleged commission notes taken in his name. It is then alleged that defendant, in making the sale of the threshing rig aforesaid, acted in bad faith toward plaintiff, and falsely and fraudulently made the representation aforesaid with reference to the financial ability of the said Shows, and that he connived and acted in bad faith in obtaining a first mortgage upon the property for his own use and benefit, and in applying on the commission notes the $200 aforesaid. By reason of which facts plaintiff alleges that he has been damaged in the sum of $1,000, less the amount collected by him of $188.26.

The various allegations of the complaint were put in issue by defendant's answer, and at the trial plaintiff furnished proof in support of the allegations of the complaint, and rested; whereupon defendant moved for a directed verdict, which motion was granted. Thereafter a judgment was entered in defendant's favor upon such verdict, from which this appeal is prosecuted.

The only assignment of error which we need notice relates to the correctness of the court's ruling in directing the verdict. The ruling forming the basis of appellant's fifth assignment is in no way challenged by any specification in the settled statement, hence the same

cannot be noticed. The ruling challenged in the third assignment is rendered nonprejudicial, in view of the conclusion arrived at by us as to the disposition of this appeal. The other assignments are embraced within the matters covered by the first assignment.

We are agreed that appellant's contention under his first assignment must be sustained and a new trial ordered. The allegations of the complaint allege, and the proof tended to show, a gross violation of duty owing by defendant to plaintiff under the agency contract. It is difficult to conceive of a more flagrant breach of duty and bad faith on the part of an agent toward his principal, than that presented by this record, and it would, indeed, be strange if such conduct on the part of an agent would not subject him to liability to his principal. It is an elementary rule of law that the agent owes to his principal the exercise of the utmost good faith and fair dealing. As well stated in 2 Enc. L. & P. p. 1053, "The paramount and vital principle of all agencies is good faith, for without it the relation of principal and agent could not well exist. So sedulously is this principle guarded that all departures from it are esteemed frauds upon the confidence bestowed. An agent, therefore, will not be allowed to put himself in a position antagonistic to that of his principal, or to speculate in the subject on the agency." Leaving out of consideration the question of defendant's bad faith amounting to fraud, and conceding the correctness of respondent's contention that the original agency contract was not modified as claimed by appellant, still, we think it entirely clear that appellant established a case requiring its submission to a jury upon the ground of defendant's breach of duty in failing to exercise reasonable diligence in procuring "fair" security, as the terms of the agency contract required. Defendant owed the duty of exercising reasonable diligence in ascertaining the trustworthiness of the purchasers, and his failure to exercise such diligence renders him liable for the resulting loss. Frick & Co. v. Larned, 50 Kan. 776, 32 Pac. 383; The Robinson Mach. Works v. Vorse, 52 Iowa, 207, 2 N. W. 1108. Respondent contends that the ruling complained of was correct for the following reasons:

1st. That the complaint does not state facts sufficient to constitute a cause of action based upon false representations made by the defend-

ant in inducing the plaintiff to accept certain notes secured by mortgage, and for damage occasioned thereby.

2d. The plaintiff failed to establish an executed oral agreement modifying or supplanting the original agency contract.

3d. The plaintiff failed to establish fraud; and,

4th. He failed to establish any damages.

There is no merit to any of these contentions. In the first place the fact, if conceded, that the complaint fails to state facts sufficient to constitute a cause of action, affords no basis for defendant's motion to direct a verdict. Furthermore, if it be conceded that the complaint insufficiently alleges a cause of action for false representations, it unquestionably is sufficient under which a recovery may be had for a breach of the agency contract, and the facts presented also justify a recovery upon the theory of an action on the case at common law. Cairnes v. Bleecker, 12 Johns. 300.

Respondent's second reason urged in support of the ruling need not be considered, as we shall dispose of the case upon the theory that the original agency contract is controlling. Regarding his third reason, all that need be said is that plaintiff is not required to establish fraud in order to make out his cause of action, as we have heretofore stated. By this we do not mean to intimate that plaintiff has not made out a complete case entitling him to recover for fraud and wilfully false representations, but we deem it a waste of time to discuss this feature of the case.

Respondent's next and last reason urged in support of the ruling is the alleged failure of plaintiff to establish any damages. It is said that he failed to prove the value of the securities described in the mortgage. Such contention is wholly devoid of merit. Plaintiff established the fact of the utter insolvency of the Shows, and the worthlessness of the securities, and we think the proof was amply sufficient, in the absence of evidence to the contrary, to entitle him to recover the amount demanded in the complaint.

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

All concur, except ELLSWORTH, J., who, being disqualified, took no part in the decision.

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ABANDONMENT. See Vendor and Purchaser, 86.

ABSTRACTS. See Appeal and Error, 635.

ABUSE OF DISCRETION. See Discretion, 197, 211, 518, 525, 537, 555, 614.

ACKNOWLEDGMENT. See Recording Transfers, 295.

1. Sec. 5013, Rev. Codes 1905, provides for acknowledgment of an instrument without the state, and prescribes the requirements to entitle it to record. Among these is one, that it shall be acknowledged before one of certain officers named therein. A court commissioner is not among these, and the record of an instrument purporting to be acknowledged before him is not competent evidence, unless it appears that he was authorized, by the laws of the state where he acted, to take acknowledgments. Goss v. Herman, 295.

ACTION. See Assignments, 579; Judgments, 225; Limitation of Actions, 27; Notice, 225; Parties, 295; Res Adjudicata, 86.

1. Under chapter 29, Comp. Laws of 1887, an action to determine adverse claims to and for the possession of real estate was maintainable to the same effect as an action of ejectment under the common law. Ottow v. Friese, 86.

ADVERSE CLAIMS. See Pleading, 493; Public Lands, 55; Quieting Title, 86.

1. In an action by parties out of possession against one in possession to determine adverse claims to real estate, based upon a mortgage owned by defendant and a tax deed, which mortgage authorized the owner thereof to pay the delinquent taxes upon the mortgaged premises and add the amount to his mortgage debt, before plaintiffs are entitled to the relief prayed for,

ADVERSE CLAIMS—continued.

they must do equity, and reimburse the defendant for all taxes paid by him, and also pay him the amount due upon his mortgage. Bleasett v. Turcotte, 151.

2. In an action to determine adverse claims, where a defendant pleads title in himself paramount to plaintiff's, such defendant becomes plaintiff, and may maintain his counterclaim in his grantor's name, as if he had been the party initiating the suit. Goss v. Herman, 295.
3. Knowledge being an essential element of laches in an action to determine adverse claims, a defendant alleging title in himself is not precluded from maintaining a defense by lapse of time while he was ignorant of the adverse claims, prior to bringing the action. Goss v. Herman, 295.

AFFIDAVIT. See New Trial, 512.

1. Under the Compiled Laws of 1887, an affidavit of mortgage sale, reciting that sale was made at a place other than that named in the notice, may be corrected, as against the mortgagor, by another filed after the sale, showing the sale made as advertised. Ottow v. Friese, 86.
2. The affidavits on which the contempt proceeding is based,—examined and *held*, for reasons set forth in the opinion, to make out a prima facie case for the state. State v. Heiser, 357.

AMENDMENT. See Mortgages, 86.

ANSWER. See Pleading, 579.

APPEALABLE ORDERS. See Appeal and Error, 197.

APPEAL AND ERROR. See Custom and Usage, 169; Fraud, 72; Judgment, 525; Pleading, 493; Stipulation, 197; Verdict, 512.

1. In an action under the statute to try title to office, it appeared from the pleadings that appellant received a majority of the votes for sheriff of McLean county at the general election in 1908; he was declared elected, certificate of election issued to him, and he qualified as required by law, entered upon and performed the duties of his office, claiming title thereto, and refused to surrender to plaintiff as his successor. Respondent in support of his title, over objection, offered parts of the minutes of the county commissioners, reciting a resolution of such commissioners, passed January 7, 1909, declaring the office of sheriff vacant, because John A. Beck, party elected thereto, was not a resident of said county as then constituted; on

APPEAL AND ERROR—continued.

January 8, 1909, said commissioners appointed Gilbert Holtan as sheriff, and accepted his bond. Respondent offered in evidence primary election petition of Beck, stating that on March 14, 1908, he was a resident of McClusky, which after December 24, 1908, was in the newly segregated county of Sheridan; also copy of poll list showing that on June 24, 1908, Beck voted in that precinct. On such testimony respondent rested, and appellant offered no testimony. *Held*, respondent failed to sustain his action, and that the trial court should have sustained appellant's motion to dismiss at close of plaintiff's testimony. Holtan v. Beck, 5.

2. On appeal from an order denying a motion by defendant for a directed verdict, if the sufficiency of the evidence to support the verdict is in some doubt, and the jury found in plaintiff's favor, the ruling of the trial court submitting the case will not be disturbed. Forzen v. Hurd, 42.

3. Instructions containing no exposition of the elemental principles upon which depends the liability of a party, and which make the law of the case entirely dependent upon inferences from the testimony or resolvable from the degree of credibility to be given the different witnesses, are misleading and insufficient. Forzen v. Hurd, 42.

4. Where undertaking on appeal to the supreme court is not served with the notice, as required by sec. 7220, Rev. Codes 1905, *held*, failure not jurisdictional; and under the facts, appellant may invoke the aid of sec. 7224, which provides, when notice of appeal is given, through mistake or accident some other act is omitted, the court from which the appeal is taken, or judge thereof, or the supreme court, or the justices thereof, may permit an amendment or the proper act to be done on terms. Beddow v. Flage, 66.

5. Defendant was convicted of keeping and maintaining a liquor nuisance in a certain building in Minot, a particular description of the place not being designated. At date of offense, defendant conducted a hotel, 3 feet from the rear of which was a small building, with sidewalk and passageway between, to enter which it was necessary to pass through the hotel; proof showed sale, in basement of hotel and this little building. *Held*, within the meaning of sec. 9373, Rev. Codes 1905, both constituted "one place" for the maintenance of such nuisance; hence, it was no error to deny defendant's motion to require the prosecution to elect which building they would rely on as the place in which nuisance was maintained. State v. Ildvedsen, 62.

6. The judgment upon a conviction for keeping and maintaining a liquor nuisance adjudged that a lien be established for the amount of the fine and costs against the property in which the evidence disclosed that such nuisance was maintained. *Held*, that, even if this was error, it was nonprejudicial, for the reason that the proof discloses defendant to be the owner

APPEAL AND ERROR—continued.

of such property, and under sec. 9379, Rev. Codes 1905, such fine and costs are made a lien on all of defendant's property until paid. State v. Ildvedsen, 62.

7. It is not error to refuse to dismiss a criminal action for failure to arraign a defendant under sec. 9871, Rev. Codes 1905, at the next term of the court after the information is filed. State v. Fleming, 105.
8. It is not error to refuse to dismiss a prosecution under sec. 10307, Rev. Codes 1905, where the next term of court mentioned in that section is one at which the defendant could not have been regularly tried. State v. Fleming, 105.
9. It is not prejudicial misconduct on the part of a state's attorney to state, in reference to an objection by defendant's attorney to a question asked him on his cross-examination at the trial, "Counsel was a little slow in coming to the assistance of the witness,"—especially in view of a prompt caution from the court to the jury to disregard the remark. State v. Fleming, 105.
10. The failure to instruct that the jury are the sole judges of questions of fact, if ever prejudicial error, is not so where the charge in substance so states and there is no request on that point. State v. Fleming, 105.
11. Sustaining objections to questions which, if answered favorably to the party inquiring, would furnish only cumulative evidence on a subject relating to which no conflict in evidence arises, is not necessarily reversible error. State v. Moeller, 114.
12. Over defendant's objection, statements made by the witness P., not in the presence of the defendant, and not in furtherance or prosecution of the offense charged, but merely reciting acts that had been done or were in contemplation, were received in evidence. The contention by the state that this did not constitute error because the nature of the questions was such that they did not disclose to the court whether the answers would be competent or incompetent, and that defendant should have moved to strike out the answer, is met by the fact that after some of the questions referred to had been propounded it must have been apparent to the court that they related to incompetent declarations. State v. Moeller, 114.
13. While the first award has never been affirmed, and the time has elapsed for making application for an order affirming the same, an action will lie in respondent's favor on such award, under sec. 7710, Rev. Codes 1905. Hence, appellant would gain nothing by a reversal of the judgment, and such reversal would, no doubt, merely result in further litigation ending in a judgment in respondent's favor. Hackney v. Adam, 130.
14. It was not error, for reasons stated in the opinion, to deny appellant's motion submitted April 20, 1908, to vacate the order affirming the second award, even conceding the invalidity of the first. Hackney v. Adam, 130.

APPEAL AND ERROR—continued.

15. The statute governing appeals in cases triable to the court without a jury has no application to the case at bar. We can review on this appeal only the alleged errors of law appearing in the record, duly excepted to. Hackney v. Adam, 130.

16. In this case, tried under sec. 7229, Rev. Codes 1905, counsel for appellants, after the entry of judgment, caused to be served upon counsel for respondents a proposed statement of the case, consisting of six type-written pages relating to eighty-seven exceptions, also containing a specification that appellants desire a review of the entire case in the supreme court. No proposed amendments were ever served. In due time and without notice to respondents, the trial court made an order settling a statement of the case, containing a complete and literal transcript of the stenographer's minutes, including all objections, motions, rulings, and exceptions appearing therein, and all of the evidence offered, including exhibits and proceedings had upon the trial. A motion by respondents to strike the proposed statement of the case, excepting only the six typewritten pages relating to the eighty-seven exceptions, and also to strike from the printed abstract so much of the same as relates to the statement of the case, and the stenographer's minutes, and the exhibits and all of the abstract, excepting the judgment roll, is denied. Blessett v. Turcotte, 151.

17. Assignments upon rulings as to offered testimony as to defendant's system and manner of transacting business, *held*, without merit; *held*, further that appellant's assumption that he was not permitted to show payment is not justified by the records, but, on the contrary, no competent evidence was offered to prove such payment. Cochrane v. National Elevator Co. 169.

18. The issue being whether grain was delivered as alleged, and, if so, if paid for, testimony was properly excluded relative to private instructions given by defendant to its local agent, not communicated to plaintiff, regarding receipt of grain and violation of such instructions. Cochrane v. National Elevator Co. 169.

19. Writings bearing plaintiff's genuine signature were introduced to aid the jury in determining whether other exhibits purporting to bear plaintiff's signature were forgeries. *Held*, their exclusion was erroneous but nonprejudicial, for reasons stated in the opinion. Cochrane v. Nat'l Elev. Co. 169.

20. The note in suit was for the purchase price of a threshing machine sold by plaintiff to the defendants, Wheeler & Moffat, upon a written order, providing, should any part of the machinery be defective it should be returned to them at the place where received. The order contained the following: "If inside of six days after the date of its first use, it shall fail in any respect to fill the warranty, written notice to be given immediately by the

APPEAL AND ERROR—continued.

purchaser to the plaintiff at its office in Peoria, Illinois, by registered letter, stating particularly, in said letter and notice, what and wherein it failed to fill the warranty." Also the following: "No agent or any other person shall be authorized to make any different warranty, or vary or modify any of its terms, or waive any of the conditions of this one, and any attempt to do so shall not bind the company or affect this contract." On receipt of the machinery at Wimbledon, before unloading, certain belts belonging to the separator were water-soaked and unfit for use, and other parts were missing. Wheeler & Moffat claimed to be induced to execute the note and the two others solely upon plaintiff's agent's representation that all missing parts would be immediately furnished, and accepted the machine upon that condition, and none other. Wheeler & Moffat took the machine, relying upon such representations, and kept it for a few days; such missing parts were never delivered, and Wheeler & Moffat returned the threshing machine to plaintiff's agents. Verdict was directed for plaintiff for the amount of the note. The trial court set aside the verdict on the ground that the motion directing it was not properly granted. *Held*, that the order setting aside the verdict and granting a new trial is erroneous. Colean Mfg. Co. v. Feckler, 188.

21. The jury were instructed that conversion took place, if at all, on September 25th. The instruction was not challenged in the trial court, and became the law of the case. Appellant's contention in this court, that conversion took place in October, and that there is no evidence showing the highest market value or any value after such date, is untenable. Cochrane v. National Elevator Co. 169.

22. A stipulation embracing all issues but one was made in good faith after careful consideration, and relied on by defendant's counsel for nearly six years, after which time the cause was submitted upon such stipulation and testimony not covered thereby, findings of fact, conclusions of law, and entry of judgment followed. Defendant's counsel then sought to settle statements of the case for an appeal to the supreme court; later, plaintiff moved that defendant show cause why such findings of fact, conclusions of law, order for judgment, and judgment be not vacated and plaintiff relieved from a portion of the stipulation, and a portion of the facts stipulated eliminated, or why the party should not be relieved *in toto* from such stipulation. Order was made vacating findings, conclusions, order for judgment, and judgment. *Held*, (1) that such order, so far as it vacates the findings of facts, and relieves the party from such stipulation, is appealable under subd. 4, sec. 7225, Rev. Codes 1905, upon the ground that it "'involves the merits' of the action or some part thereof." N. P. Ry. Co. v. Barlow, 197.

23. Whether such order, in effect, grants a new trial, and therefore is appealable

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under the provisions of subdivision 3 of said section, not determined. N. P. Ry. Co. v. Barlow, 197.
24. While trial courts, in the exercise of a sound discretion and in furtherance of justice, may relieve from stipulations, and while the supreme court will not interfere with the exercise of such discretion, except for clear abuse, the facts presented disclose an abuse of discretion in granting the order appealed from. N. P. Ry. Co. v. Barlow, 197.
25. Grain was raised by A under the ordinary cropper's contract, with the plaintiff. By its terms, title to all crops was reserved in plaintiff to secure the performance by A of all the terms thereof and until division of the grain. Prior to such division, defendant, with A's consent, took 405 bushels of wheat, which, upon full compliance with the contract by A, and the payment of all advances to him, would belong to A. The question of conversion of the wheat was tried on the theory that plaintiff could not recover if the equitable title of said wheat was in A. *Held*, such theory must prevail in the appellate court, and questions on appeal be determined in accordance therewith. Casey v. First Bank of Nome, 211.
26. The verdict of the jury having substantial support in the evidence, the appellate court will not weigh conflicting evidence, nor disturb the order refusing a new trial. Casey v. First National Bank of Nome, 211.
27. Application for a new trial is addressed to the sound discretion of the trial court, and its order denying a new trial will not be reversed except for abuse of discretion. Casey v. First National Bank of Nome, 211.
28. Certain instructions of the court to the jury relative to the burden of proof, and also as to certain matters which the jury should consider in determining the status of the account between plaintiff and A, considered, and *held*, for reasons stated in the opinion, not erroneous. Casey v. First National Bank of Nome, 211.
29. Assignments of error not supported in appellant's brief or citation of authorities, will not be noticed in appellate courts. Rule 14 (10 N. D. xlvi.), applicable to the preparation of briefs, provides: "In the body of his brief appellant shall present his reasons in support of each error assigned, with a concise statement of the principles of law applicable thereto with authorities supporting the same, treating each assignment relied upon separately, and such errors as are merely assigned and not supported in the body of the brief by reasons or authorities will be deemed to have been abandoned." Such rule will be enforced unless exceptional reasons appear why it should be relaxed. State v. Wright, 216.
30. The presumption obtains, in criminal as well as civil appeals, that the record is free from error, and the appellant has the burden of affirmatively showing the existence of error. State v. Wright, 216.
31. Following State v. Johnson, 17 N. D. 554, 118 N. W. 230, *held*, when the sufficiency of the allegations in an information is first challenged by a

APPEAL AND ERROR—continued.

motion in arrest of judgment, they will be construed with less strictness than when raised by demurrer; and when the information states facts constituting an offense in general words and substantially in the language of the statute, the information will be held sufficient on motion in arrest of judgment. State v. Wright, 216.

32. On appeal from an order refusing to vacate a judgment in divorce, motion was made to dismiss the appeal on the ground that appellant accepted benefits under the judgment prior to the motion to vacate; appellant had accepted no benefits under the order appealed from. *Held*, that the motion to dismiss be denied. Wiemer v. Wiemer, 268.

33. The rule in Tuttle v. Tuttle, 19 N. D. —, 124 N. W. 429, has no application to the motion at bar. A favorable ruling on respondent's motion to dismiss the appeal will deprive the appellant of the right of an adjudication on the merits as to the correctness of the order refusing to vacate the judgment. Wiemer v. Wiemer, 268.

34. Where it appears that a district court has unquestioned jurisdiction of persons and subject matter in a foreclosure action, error of the court in determining the effect to be given certain evidence introduced, does not vitiate the judgment so as to render it void upon collateral attack. The remedy in such case, is by appeal, and, if no appeal is taken, the conclusiveness of the decree upon points properly adjudicated, in a subsequent suit by the same parties will not be affected. Borden v. McNamara, 225.

35. When the bar of a former judgment in an action between the same parties is properly pleaded and proof of the issues involved therein and the judgment rendered, is made by competent evidence, such proof is conclusive of all facts adjudicated in the prior action; and it is error to disregard the legal effect of the facts adjudicated by, or involved in, the rendition of the former judgment. Borden v. McNamara, 225.

36. The plaintiff had a verdict which the trial court refused to set aside; it will not be disturbed where it appears there is substantial conflict in the evidence. Patrick & Co. v. Austin, 261.

37. The mere fact that testimony which constitutes a part of the plaintiff's original case was admitted in rebuttal after the testimony of the defendant had been closed does not constitute error. Patrick & Co. v. Austin, 261.

38. Objections on the ground that the questions were leading cannot be raised for the first time on appeal. State v. Merry, 337.

39. Appellant was convicted of contempt for violating an injunction enjoining him from maintaining a liquor nuisance, and sentenced to imprisonment for five months, and fined $650, in default of payment of which he was to be imprisoned for one hundred days additional. Judge Burr, of the ninth judicial district, heard the contempt proceedings at the written request of

APPEAL AND ERROR—continued.

Judge Crawford of the tenth. Omitting the formal parts such request is as follows: "You are hereby requested to act as district judge, and take full charge of the above entitled action, including all matters and contempt proceedings therein which are now in issue or which may hereafter be brought before you by any person, authority, or officer lawfully entitled to do so, or otherwise, as law and justice may require. By the Court. W. C. Crawford, Judge." The assignments challenge: (1) The jurisdiction of Judge Burr to hear and determine such contempt proceeding; (2) the sufficiency of the affidavits upon which the warrant of attachment was issued; (3) the authority of F. C. Heffron, as assistant attorney general, to institute and prosecute the proceeding; and (4) the validity of the judgment and sentence of the court. *Held*, for reasons stated in the opinion, that each of such assignments are untenable. State v. Heiser, 357.

40. Sec. 7068, Rev. Codes 1905, providing that upon good cause shown and in furtherance of justice, a district court may extend the time within which any of the acts mentioned in secs. 7058 and 7065 may be done, either before or after the time limited therefor has expired, is a remedial statute, and must be liberally construed in favor of the purposes obviously intended to be served by its enactment. Smith v. Hoff, 419.

41. The purpose of providing a limited time for proposing and settling a statement of the case to be used on appeal is fully served if these steps are taken at such time and in such manner as not to interfere with the prompt and orderly disposition of the case upon appeal. Smith v. Hoff, 419.

42. If from the showing of an applicant for an extension of time for the purpose of settling a statement of the case to be used on appeal, it appears that the appellant is prosecuting the appeal in good faith upon meritorious grounds, and that there is reasonable excuse for his failure to take the preliminary steps within the time limited by law, it is an abuse of discretion to deny him a reasonable extension of time for these purposes. Smith v. Hoff, 419.

43. Among other things the court instructed the jury as follows: "Gentlemen of the jury, I charge you to pay no attention to any remarks or statements made by counsel; you are the sole judges of the questions of fact in this case, the court will give you the law, it is your duty to decide the case, according to the law given you by the court." *Held*, error. State v. Gutterman, 432.

44. Where the verdict is supported by substantial evidence and the trial court declines to disturb it for insufficiency of evidence, such ruling will not be reversed on appeal. Acton v. F. & M. St. Ry. Co. 434.

45. A judgment will not be reversed by an erroneous instruction, if answers to interrogatories show that it did not influence the verdict. Acton v. F. & M. St. Ry. Co. 434.

APPEAL AND ERROR—continued.

46. The court refused to instruct that, though the motorman saw the plaintiff driving along, and on the track, and (if he was driving thereon) he had a right to assume that the plaintiff would exercise ordinary care to observe the approach of the car, and would get out of danger before the car would reach him, and that the motorman is not required to check his car (if said car is ruuning at an ordinary rate of speed) until he has reasonable cause to believe that there is actual danger of a collision. *Held*, not error, under the facts of the case. Acton v. F. & M. St. Ry. Co. 434.

47. There was no evidence that the will was executed under undue influence practiced upon testatrix, and it was proper to refuse to submit such issue to the jury. Auld v. Cathro, 461.

48. The failure of the trial court to have the testimony of a witness read at the request of the jury, *held*, under the circumstances of the case at bar, not error. Auld v. Cathro, 461.

49. The refusal to give certain requested instruction, *held*, not error. Lohr v. Honsinger, 500.

50. Objections to certain questions considered in the opinion and the ruling thereon, *held*, prejudicially erroneous. Lohr v. Honsinger, 500.

51. The charge as a whole states the law correctly. Hence, no error was committed in refusing defendant's requests for instructions. State v. Miller, 509.

52. Refusal of a new trial for misconduct of a juror will not be disturbed except for abuse of discretion. State v. Robidou, 518.

53. Application to vacate a default judgment or order not for irregularities of procedure, but for "mistake, inadvertance, surprise, or excusable neglect" of the moving party, rests not upon legal right, but is addressed to the discretion of the court whose ruling will not be disturbed, except for abuse of discretion. Cline v. Duffy, 525.

54. The questions raised in this case as to the denial of defendant's demand for a bill of particulars, and allowing questions leading and assuming facts unproven, are identical with those passed upon in State v. Empting, 21 N. D. —, 128 N. W. 1119, and disposed of therein. State v. Albertson, 512.

55. Sec. 9794, Rev. Codes 1905, requires names of all witnesses for the state, known to the state's attorney when the information is filed, to be indorsed thereon, but provides that other witnesses may testify, whose names are not so indorsed. *Held*, it is not error to allow the examination of such witnesses. State v. Albertson, 512.

56. The information covers the time from January 1st, 1909, until May 18, 1910. The attorney general, against the objection of defendant, was permitted to ask some of the witnesses this question: "How many times have you drunk malt or beer there in the last year and a half?" The objection

APPEAL AND ERROR—continued.

to the question that it embraced more time than alleged in the information was overruled. This ruling, even if erroneous, is not prejudicial. The time inquired about was at best but a slight variance, and numerous witnesses answered substantially the same question without any objection on the part of the defendant. State v. Albertson, 512.

57. Refusal to advise the jury to acquit is not error as the jury are not bound by that advice. State v. Albertson, 512.

58. The admission of incompetent evidence which could have prejudiced the defendant, the facts having been established by other undisputed and competent testimony, is not ground for reversal. State v. Staber, 545.

59. The charge as a whole states the law correctly. Hence, no error was committed in refusing defendant's requests for instructions. State v. Staber, 545.

60. A trial court's decision upon the qualification of a juror will be disturbed only for abuse of discretion. State v. Fujita, 555.

61. Continuing a temporary injunction pending suit or dissolving it rests in the discretion of the judge to be interfered with only for abuse. School Dist. No. 94 v. King, 614.

62. The abstract must embody all material parts of the record so that the supreme court may have before it everything essential to a proper understanding of the case. Only in exceptional cases will it explore the record to supply deficiencies in the abstract. Specifications of error are a vital part of statement of case, and, unless abstracted, such statement will be disregarded. No errors being assigned on the judgment roll, and the abstract embodying no specifications, *held*, there is nothing to review. Sternberg, Weil & Co. v. Larson & Co. 635.

63. Where the denial of a new trial is challenged solely for insufficiency of evidence to justify the verdict, and that the verdict is against law, the appellate court will only inquire whether there is evidence to support the verdict. Lowry v. Piper, 637.

64. The fact that one item of evidence was documentary will not take the case out of the above rule, if such documentary proof is not conclusive and there is conflicting oral testimony supporting the verdict. Lowry v. Piper, 637.

65. Evidence examined, and *held*, that there is legal proof to support the verdict and it was no abuse of discretion to deny defendant a new trial. Lowry v. Piper, 637.

66. Plaintiff, instead of moving for a new trial, moved for judgment notwithstanding such verdict. Thereupon defendant moved that the verdict be vacated and that he be allowed to furnish proof of the defenses alleged in his answer. The latter motion was granted on terms, and plaintiff's motion denied. *Held*, that such order, although irregularly issued, is non-

APPEAL AND ERROR—continued.

prejudicial to plaintiff, as he is not entitled to judgment *non obstante veredicto*, but merely to a new trial, and this in effect was granted by the order complained of. Schwartz v. Hendrickson, 639.

67. In an action by a principal against his agent for damages for not procuring "fair" security for the price of property sold by him under his agency contract, *held*, evidence sufficient to go to the jury, as showing not only negligence, but bad faith, and it was error to direct a verdict for defendant. Morris v. Bradley, 646.

ARBITRATION AND AWARD.

1. Parties to an action submitted their differences to arbitration, and an award was made and filed in plaintiff's favor. The arbitrators, deeming such award void for their failure to take the oath and swear the witnesses, proceeded on notice to make and file a second award, which was affirmed by the court and judgment ordered. From such judgment and from an order denying defendant's motion to vacate the second award, defendant appeals. *Held* (1) That there is no competent proof showing a noncompliance with the statute requiring an oath to be taken and the witnesses sworn; (2) conceding such noncompliance with the statute, such irregularities were waived by the parties where both parties were present, failed to object to such failure, and appeared and submitted their case without calling attention to such failure until award was made and filed. Hackney v. Adam, 130.
2. By making and filing the first award the powers of the arbitrators were exhausted; hence, the second award is a nullity, since it was identical in amount with the first, except costs, and the order for judgment complained of not being prejudicial to appellant except as to the excessive costs over those of the first award. The judgment is modified to the extent of such excess, and, as thus modified, affirmed. Hackney v. Adam, 130.
3. While the first award has never been affirmed, and the time has elapsed for making application for an order affirming the same, an action will lie in respondent's favor on such award under sec. 7710, Rev. Codes 1905. Hence, appellant would gain nothing by a reversal of the judgment, and such reversal would, no doubt, merely result in further litigation ending in a judgment in respondent's favor. Hackney v. Adam, 130.
4. It was not error, for reasons stated in the opinion, to deny appellant's motion submitted April 20, 1908, to vacate the order affirming the second award, even conceding the invalidity of the first award. Hackney v. Adam, 130.
5. The statute governing appeals in cases triable to the court without a jury

ARBITRATION AND AWARD—continued.

has no application to the case at bar. We can review on this appeal only the alleged errors of law appearing in the record, duly excepted to. Hackney v. Adam, 130.

ARRAIGNMENT. See Criminal Law, 105.

ASSAULT AND BATTERY. See Criminal Law, 105.

ASSIGNMENT FOR BENEFIT OF CREDITORS. See Evidence, 295.

ASSIGNMENTS. See Sales, 579; Warehousemen, 18.

1. By virtue of his purchase of the premises in controversy from Galloway in the summer of 1896, appellant, E. L. Turcotte, succeeded to whatever rights Galloway had in said premises, and became the equitable assignee of the mortgage executed by plaintiff Blessett to Galloway, January 25, 1890. Blessett v. Turcotte, 151.
2. Where the debtor induces the assignee to believe that his obligation will be met and that there is no defense thereto, he will be held to have waived a set-off against the assignor in an action by the assignee. Vallancey v. Hunt, 579.

ATTACHMENT. See Contempt, 357; Homestead, 484.

ATTORNEY AND CLIENT. See Attorneys' Fees, 18.

1. Among other things the court instructed the jury as follows: "Gentlemen of the jury, I charge you to pay no attention to any remarks or statements made by counsel; you are the sole judges of the questions of fact in this case; the court will give you the law, it is your duty to decide this case according to the law given you by the court." *Held*, error. State v. Gutterman, 432.

ATTORNEY GENERAL. See Contempt, 357; Criminal Law, 512.

1. The attorney general under the Constitution and existing statutes, either personally or by his assistants, may institute and prosecute actions for violating the prohibition law and for contempts for violation of injunctions restraining liquor nuisances. Ex parte Corliss, 16 N. D. 470, 114 N. W. 962, distinguished. State v. Heiser, 357.

ATTORNEYS' FEES.

1. When a purchaser sued for conversion of personal property by the holder of a chattel mortgage thereon requests the seller from whom he bought such property to defend the action, and he fails to so defend, such purchaser, in addition to the amount of the chattel mortgage and costs, may recover as special damages a reasonable attorneys' fee when pleaded and proven. St. A. & D. Elev. Co. v. Dawson, 18.

AUSTRALIAN BALLOTS. See Voters and Elections, 622.

BAIL.

1. It is a good defense by the sureties on a bail bond that the state, between the time of the bond and the time for the principal's appearance, arrested the latter on a charge in another county and confined him in jail until after the time designated in the bond for his appearance. State v. Funk, 145.
2. By such arrest and detention of the principal, performance of the conditions of the bail bond was rendered impossible by the state, the obligee in the bond, and therefore the default of the principal in failing to appear is excusable. State v. Funk, 145.

BAILOR.

1. There may be an implied warranty of title to personal property on a sale thereof, although only in the constructive possession of the seller as bailor. St. A. & D. Elev. Co. v. Dawson, 18.

BALLOTS. See Voters and Elections, 622.

BANKRUPTCY. See Evidence, 295.

BANKS AND BANKING.

1. Where the cashier of a bank misappropriated its funds or became indebted thereto as treasurer of an elevator company, drew checks upon it payable to the bank, used the same to pay his personal indebtedness to the bank, such checks are notice to the bank of a misappropriation of the funds of the elevator company, and the bank with such notice cannot predicate upon them a claim of liability against the elevator company. Emerado Farmers Elev. Co. v. Farmers Bank, 270.
2. Where the cashier of a bank misappropriated its funds or otherwise became indebted to it, to conceal his defalcation or pay his indebtedness, transfers funds of an elevator company of which he was treasurer, to the bank, charges the amount of the same to the elevator company upon the books

BANKS AND BANKING—continued.

of the bank, which accepted such payment through its cashier, it cannot retain the benefits of his acts without accepting the consequences of his knowledge; such bank can retain such funds only by ratification of the act of its agent the cashier; by so doing it becomes *particeps criminis* with the cashier and liable to the elevator company for the amount so fraudulently misappropriated. Emerado Farmers Elev. Co. v. Farmers Bank, 270.

3. A bank is not authorized to pay out funds intrusted to it to some person known by it to stand in a trust relation to the depositor, when it has notice that such person intends to misappropriate such funds; and in case such payment is made, the amount can be recovered by the depositor. Emerado Farmers Elev. Co. v. Farmers Bank, 270.
4. Where the cashier of a bank has the entire management and conduct of its affairs, and is the sole representative in the receipt and disbursement of deposits, who, while so acting, draws checks of an elevator company of which he is treasurer, payable to the bank, presents such checks as treasurer to himself as cashier, misappropriates the money paid thereon, the bank is charged with knowledge of its fraudulent purpose, and can have no claim for the funds misappropriated, against the elevator company. Emerado Farmers Co. v. Farmers Bank, 270.

BILL OF PARTICULARS. See Crimianal Law, 512.

BRIEFS. See Rules of Courts, 216.

CASES CRITICISED, MODIFIED, AND OVERRULED.

1. Where the insurer, knowing the facts which render a policy void, issues and delivers the same, receiving premium therefor, he waives such forfeiture, and cannot urge the invalidity of the policy in an action for a loss. Certain language contained in the opinions in Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799, and J. P. Lamb Co. v. Merchants' Ins. Co. 18 N. D. 253, 119 N. W. 1048, approving the Federal rule to the contrary is disapproved. Leisen v. St. P. F. & M. Ins. Co. 316.
2. The attorney general, under the Constitution and existing statutes, either personally or by his assistants, may institute and prosecute actions violating the prohibition law and for contempts for violation of injunctions restraining liquor nuisances. Ex parte Corliss, 16 N. D. 470, 114 N. W. 962, distinguished. State v. Heiser, 357.
3. Under sec. 1585, Rev. Codes 1905, the fee owner of land not subject to taxation or a person claiming to be such, can recover from the county moneys paid to redeem from a tax sale, even though such tax sale has not

CASES CRITICISED, MODIFIED, ETC.,—continued.
been previously adjudged void. Van Nest v. Sargent County, 7 N. D. 139, 73 N. W. 1083, distinguished. Tisdale v. Ward Co. 401.

4. Sec. 12, chap. 109, Laws of 1907, which provides that no nomination shall be made unless the vote for state, district, or county offices is 30 per cent of the vote cast for secretary of state by each political party at the last general election, is arbitrary, unnatural, and lacks uniformity in the different counties, because the standard provided for determining the basis of classification places the party group authorized to nominate in each county, in a relation to the actual party strength and to each other, that is unstable, inconstant and without uniformity in the different counties in the state. It is therefore unconstitutional and void. State ex rel. Montgomery v. Anderson, 18 N. D. 149, 118 N. W. 22, is overruled. State v. Hamilton, 592.

CHATTEL MORTGAGES.

1. One who sells personal property on which there is a valid mortgage, which the purchaser is compelled to pay after its validity is adjudicated, is liable to the purchaser for the amount of the mortgage and costs. St. A. & D. Elev. Co. v. Dawson, 18.
2. When a purchaser, sued for conversion of personal property by the holder of a chattel mortgage thereon, requests the seller from whom he bought such property to defend the action, and he fails to so defend, such person, in addition to the amount of the chattel mortgage and costs, may recover as special damages a reasonable attorney's fee when pleaded and proven. St. A. & D. Elev. Co. v. Dawson, 18.
3. In an action by the assignee of a mortgage for the possession of the mortgaged chattels, the mortgagors claimed that they were sold to them under a conditional sale, which never became absolute. Hence, such mortgage confers upon plaintiff no special property in the chattels, nor right to possession thereof. *Held*, under the evidence the sale subsequently became absolute, and such contention is untenable. Vallancey v. Hunt, 579.
4. In claim and delivery by a mortgagee or his assignee for possession of mortgaged property sold to defendant, for the purchase price of which the mortgage was given, defendant may counterclaim damages for breach of warranty of the goods sold, but such set-off or counterclaim must be specially pleaded, and cannot be proved under a general denial. Vallancey v. Hunt, 579.

CHECKS. See Criminal Law, 337.

1. Checks are property so far as the criminal act of obtaining them by false pretenses is concerned. State v. Merry, 337.

CLAIM AND DELIVERY.

1. In claim and delivery by a mortgagee or his assignee for possession of mortgaged property sold to defendant for the purchase price of which the mortgage was given, defendant may counterclaim damages for breach of warranty of the goods sold, but such set-off or counterclaim must be specially pleaded, and cannot be proved under a general denial. Vallancey v. Hunt, 579.

COLLATERAL ATTACK. See Judgment, 225; Schools and School Districts, 393.

COMMON CARRIERS. See Streets and Highways, 434.

1. Action to recover damages for negligently killing three horses belonging to plaintiff while being shipped from Grand Rapids, Minnesota, to Hunter, North Dakota. Plaintiff, in the fall of 1907, shipped twenty-two horses from Hunter, North Dakota, to Grand Rapids, Minnesota, to the firm of Sutton & Mackey, over defendant's line. Sutton & Mackey were engaged in logging in northern Minnesota during the winter months, and plaintiff's horses were shipped by him to them for work in the woods. Under the agreement, plaintiff was to and did pay the expenses of shipping the horses from Hunter, North Dakota, to Grand Rapids, Minnesota. Sutton & Mackey, in addition to the compensation paid plaintiff for the use of his horses, were to deliver them, after the season was ended, to plaintiff at Hunter, North Dakota, free of charge. On March 19, 1908, one of Sutton & Mackey's men, Crocker by name, brought the horses to Grand Rapids, and shipped them over defendant's line to plaintiff at Hunter. Defendant's agent at Grand Rapids filled out the ordinary form of live stock shipping contract, upon information given by Crocker, and Crocker executed the contract in the name of the plaintiff, by Crocker. The rate charged on this shipment was based on a valuation of $75 per head. *Held*, that plaintiff was not a party to the contract between Sutton & Mackey and defendant, that Crocker had no right to sign plaintiff's name to the contract, and that plaintiff was entitled to recover the full value of the horses killed. Schlosser v. Gt. N. R. Co. 406.

COMPLAINT. See Pleading, 1, 307, 401, 493.

CONDITIONAL SALE. See Sales, 579.

CONSPIRACY. See Criminal Law, 114.

CONSTITUTIONAL LAW. See Attorney General, 357; Fraud, 72; Legislature, 372; Statutory Construction, 484; Voters and Elections, 622.

1. Under the Constitution the jurisdiction of the supreme court to issue original writs, except in the exercise of appellate jurisdiction or supervision over inferior courts, extends only to prerogative writs, which will issue only in cases *publici juris*, involving sovereignty of the state, its franchises, prerogatives, or the liberties of citizens. State v. Norton, 180.
2. That part of sec. 21, chap. 109, Laws of 1907, providing that the list of names of those voting at the primary election shall take the place of the first registration of the voters now required, and that notice only shall be given of the date of the second day of registration, is an attempt to amend the law providing for the registration of electors, and is in conflict with sec. 61 of the state Constitution, which provides that no bill shall embrace more than one subject, which shall be expressed in its title, and is void. Fitzmaurice v. Willis, 372.
3. The title to chap. 109, Laws of 1907, is "An Act to Provide for the Selection of Candidates for Election, by Popular Vote, and Relating to Their Nomination, and the Perpetuation of Political Parties." Such title in no manner expresses the substance of the attempted amendment to the registration law, and such amendment is not germane to the subject expressed in the title; hence the act in question embraces more than one subject. Fitzmaurice v. Willis, 372.
4. The primary election law, with all other laws regulating the elective franchise, is in all its parts within the constitutional requirements that it must be just and reasonable, have a uniform operation throughout the state, and must bear with substantial equality upon all parties, candidates, and classes of citizens. State v. Hamilton, 592.

   In case it is apparent that from the nature of a general law and the ends it purposes to effect, that its aims can be attained only through the medium of groups or aggregations of persons, a certain classification of objects to be affected differently by the operation of the law may be made. Such classification if made, however, must rest upon some difference which bears a true and just relation to the act in reference to which the classification is proposed, and must be reasonable and natural, not artificial or arbitrary. State v. Hamilton, 592.
6. A standard prescribed by a general law for the determination of a basis of classification, that is from its nature and character unstable, illogical, inconstant, and arbitrary, cannot serve as a means for the computation of groups that must bear to it and to each other the natural, constant, and unvarying relation required by the Constitution; and a law that operates

CONSTITUTIONAL LAW—continued.
diversely upon classes so determined cannot have a just, reasonable, and uniform operation. State v. Hamilton, 592.
7. Sec. 12, chap. 109, Laws of 1907, provides that no nomination shall be made unless the vote for state, district, or county offices is 30 per cent of the vote cast for secretary of state of each political party at the last general election, is arbitrary, unnatural, and lacks uniformity in the different counties, because the standard provided for determining the basis of classification places the party group authorized to nominate in each county in a relation to the actual party strength and to each other that is unstable, inconstant, and without uniformity in the different counties in the state. It is therefore unconstitutional and void. State ex rel. Montgomery v. Anderson, 18 N. D. 149, 118 N. W. 22, is overruled. State v. Hamilton, 592.
8. An amendatory act is not contrary to sec. 61 of the state Constitution, requiring the subject of the act to be expressed in the title, when it does not relate directly to the provisions of the section amended. It is sufficient if the amendment is germane to the subject of the act of which the amended section is a part, and the same is within the title of the original act. School District No. 94 v. King, 614.
9. Laws enacted for the consolidation or division of school districts are valid as resting solely on legislative discretion or policy, unless they are contrary to some constitutional provision. School Dist. No. 94 v. King, 614.
10. Chap. 106, Laws of 1907, for division of school districts and attaching parts thereof to a city, town, or village, is not unconstitutional as taking property without a hearing or due process of law. School Dist. No. 94 v. King, 614.
11. Division or partial consolidation of school districts under chap. 106, Laws of 1907, is not unconstitutional as taking property without due process of law; such property is devoted to state purposes under legislative control, unless the legislature violates some constitutional provision. School Dist. No. 94 v. King, 614.
12. The supreme court will not decide grave constitutional questions raised upon application for original writs to be acted upon summarily, except where a decision is imperative and the application could not readily have been made earlier. State v. Blaisdell, 622.
13. Sec. 47 of the Constitution, which provides that each house of the legislature shall be the judge of the election returns and all qualifications of its members, is not infringed upon by the courts in passing upon the duties of county auditors as to filing petitions for nominations and printing ballots. State v. Meyer, 628.
14. The provision of the Constitution fixing the terms of state senators at four years, "except as hereinafter provided," authorized the legislature to fix

CONSTITUTIONAL LAW—continued.

the number of senators, divide the state into districts with one senator for each, requiring such districts to be numbered from 1 upward, and senators to be divided into two classes, one from the even-numbered, the other from the odd-numbered districts, and the determination of the classes by lot, so that the half may be elected bienially, and one class elected in 1890 shall hold for two years and the other for four, and requiring a reapportionment of districts every five years, and permitting it at other times; under the division of 1890, those in the odd-numbered districts held for two years, and those in the even-numbered for four, etc. *Held*, the governing principle of the Constitution is that the senate be at all times composed of two classes, but as nearly equal in number as practicable. *Held*, further, the expiration of the terms depends upon the classification made in 1891, that the terms of senators from districts created by reapportionment and at the same time with those of the same class elected from the old districts make the terms of the senators from all even-numbered districts expire simultaneously, and those from the odd-numbered, two years later. *Held*, further, that the courts have power to direct the county auditor to file a senator's petition, and publish his name upon the ballot to be used at the primary election. *Held*, further, that sec. 47 of the Constitution, providing that each house shall be the judge of the election returns and qualifications of its members, is not infringed upon by the courts in passing upon the duties of the county auditor in the matter of filing petitions for nomination and printing ballots, and that, under the circumstances of this case, nonjoinder of the secretary of state as a defendant is not fatal to relator's right to a writ commanding the auditor to file the petition and print his name upon the ballot. State v. Meyer, 628.

CONTEMPT.

1. Appellant was convicted of contempt. Judge Burr acted at the written request of Judge Crawford of the tenth judicial district; such request is as follows: "You are hereby requested to act as district judge, and take full charge of the above-entitled action, including all matters and contempt proceedings therein which are now in issue or which may hereafter be brought before you by any person, authority, or officer lawfully entitled to do so, or otherwise, as law and justice may require. By the Court. W. C. Crawford, Judge." The assignments challenge: (1) The jurisdiction of Judge Burr to hear and determine such contempt proceding; (2) the sufficiency of the affidavits upon which the warrant of attachment was issued; (3) the authority of F. C. Heffron, as assistant attorney general, to institute and prosecute the proceeding; and (4) the validity of the judgment and sentence of the court. *Held*, for reasons stated in the opinion, that each of such assignments is untenable. State v. Heiser, 357.

CONTEMPT—continued.

2. While a criminal contempt proceeding where attachment issues is an original special proceeding under sec. 7555, Rev. Codes 1905, it is not an independent proceeding, as it grows out of and is connected with the main action. Such contempt proceeding is dependent upon those in the main action and the violation of the injunction therein issued. The written request of Judge Burr warrants him in assuming and exercising jurisdiction both in the main action and in the contempt proceedings, for violation of such injunction, whether the contempt proceeding was pending or not when the request was made. State v. Heiser, 357.
3. The affidavit on which the contempt proceeding is based, examined, and *held*, for reasons set forth in the opinion, to make out a prima facie case for the state. State v. Heiser, 357.
4. The judgment is not open to attack: (1) That it designates time when imprisonment shall commence while the oral sentence fails to; (2) that the fine imposed is excessive. That the fine consists partly of costs is immaterial as the total fine does not exceed that permitted by statute. Within the limits fixed by law trial courts have absolute discretion as to punishment. A fine of $500, and costs $150, was intended as an aggregate fine of $650, and is within the maximum fixed by the statute. State v. Heiser, 357.

CONTRACTS. See Deeds, 96; Insurance, 316; Principal and Agent, 646; Sales, 1, 188; Vendor and Purchaser, 86.

1. Grain was raised by A under the ordinary cropper's contract entered into with the plaintiff. By its terms, title to all crops was reserved in plaintiff to secure the performance by A of all the terms thereof and until division of the grain. Prior to such division defendant, with A's consent, took 405 bushels of wheat, which, upon full compliance with the contract by A, and the payment of all advances to him, would belong to A. The question for conversion of the wheat was tried on the theory that plaintiff could not recover if the equitable title of said wheat was in A. *Held*, such theory must prevail in the appellate court and questions on appeal be determined in accordance therewith. Casey v. Bank, 211.
2. The complaint considered, and *held* to set forth a cause of action for a violation of a duty not to render a highway dangerous by placing and leaving dirt thereon in a negligent manner, and not to state a cause of action on a breach of contract. Solberg v. Schlosser, 307.
3. One contracting to construct a drain under plans and specifications, and having sole control of the work, and the drainage board having no control or superintendence thereof, is an independent contractor, and not an agent of the board. Solberg v. Schlosser, 307.
4. Action to recover damages for negligently killing three horses belonging to plaintiff while being shipped from Grand Rapids, Minnesota, to Hunter,

CONTRACTS—continued.

North Dakota. Plaintiff, in the fall of 1907, shipped twenty-two horses from Hunter, North Dakota, to Grand Rapids, Minnesota, to the firm of Sutton & Mackey, over defendant's line. Sutton & Mackey were engaged in logging in northern Minnesota during the winter months, and plaintiff's horses were shipped by him to them for work in the woods. Under the agreement, plaintiff was to, and did, pay the expenses of shipping the horses from Hunter, North Dakota, to Grand Rapids, Minnesota. Sutton & Mackey, in addition to the compensation paid plaintiff for the use of his horses, were to deliver them, after the season was ended, to plaintiff at Hunter, North Dakota, free of charge. On March 19, 1908, one of Sutton & Mackey's men, Crocker by name, brought the horses to Grand Rapids, and shipped them over defendant's line to plaintiff in Hunter. Defendant's agent at Grand Rapids filled out the ordinary form of live stock shipping contract, upon information given by Crocker, and Crocker executed the contract in the name of the plaintiff, by Crocker. The rate charged on this shipment was based on a valuation of $75 per head. *Held*, that plaintiff was not a party to the contract between Sutton & Mackey and defendant, that Crocker had no right to sign plaintiff's name to the contract, and that plaintiff was entitled to recover the full value of the horses killed. Schlosser v. Gt. N. Ry. Co. 406.

5. In an action by a principal against his agent for damages for not procuring "fair" security for the price of property sold by him under his agency contract, *held*, evidence sufficient to go to the jury, as showing not only negligence, but bad faith, and it was error to direct verdict for defendant. Morris v. Bradley, 646.

CONTRIBUTORY NEGLIGENCE. See Negligence, 307, 434, 642.

CONVEYANCE. See Deeds, 96.

CORPORATIONS.

1. The treasurer of plaintiff was cashier of defendant bank, where plaintiff had money on deposit, and such treasurer was authorized to draw checks in plaintiff's name thereon, and pay plaintiff's debts and obligations. Where such treasurer misappropriates funds of the bank to cover a shortage in the bank's fund until he could replace the same, draws checks of the plaintiff payable to defendant bank, charges them to the plaintiff on the books of the bank, without intention to transfer funds from one corporation to the other, but to temporarily conceal his defalcation, such checks create no liability in favor of the bank against the plaintiff. Emerado Farmers Elev. Co. v. Farmers Bank, 270.

CORPORATIONS—continued.

2. Where the cashier of a bank misappropriated its funds or became indebted thereto as treasurer of an elevator company, drew checks upon it payable to the bank, and used the same to pay his personal indebtedness to the bank, such checks are notice to the bank of a misappropriation of the funds of the elevator company, and the bank with such notice cannot predicate upon them a claim of liability against the elevator company. Emerado Farmers Elev. Co. v. Farmers Bank, 270.
3. Where the cashier of a bank misappropriated its funds or otherwise became indebted to it, to conceal his defalcation or pay his indebtedness, transfers funds of an elevator company of which he was treasurer to the bank, charges the amount of the same to the elevator company upon the books of the bank, which accepted such payment through its cashier, it cannot retain the benefits of his acts without accepting the consequences of his knowledge; such bank can retain such funds only by ratification of the act of its agent, the cashier; by so doing it becomes *particeps criminis* with the cashier and liable to the elevator company for the amount so fraudulently misappropriated. Emerado Farmers Elevator Co. v. Farmers Bank, 270.

COSTS. See Arbitration and Award, 130; Contempt, 357; Intoxicating Liquors, 62

1. A person convicted of assault and battery, and sentenced to pay a fine and costs which are taxed, and not paid, may be imprisoned as provided by sec. 10104, Rev. Codes 1905, for the nonpayment of the costs as well as the fine. State v. Fleming, 105.
2. Appellant was sentenced to imprisonment in the county jail of Adams county for a period of eight months, to pay a fine of $200, and the costs of prosecution, taxed at the sum of $500, and in default of said fine and costs to be imprisoned in the county jail of Adams county for a further period of two months. Sec. 10104, Rev. Codes 1905, provides for such a judgment. Hence, no error was committed by the court in rendering such judgment. State v. Merry, 337.
3. In imposing a fine of $500 and costs taxed at $150, it is clearly the intention of the court to impose an aggregate fine of $650, which was within the maximum limit fixed by statute. State v. Heiser, 357.

COUNTERCLAIM. See Pleading, 295, 579.

COUNTIES. See Voters and Elections, 372.

1. The right of action by one county against another, to enforce the liability

COUNTIES—continued.

charged upon defendant county by the legislature segregating from plaintiff county a part of its territory and annexing it to defendant county, is upon a specialty created by statute, and not within the provisions of the statute of limitations. Burleigh County v. Kidder County, 27.

2. A county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund, without first showing that it has provided such fund. Burleigh County v. Kidder County, 27.
3. When detached territory from one county is annexed to another, the division and apportionment of the debts between such counties belongs to the legislature, and not to the courts; when the legislature has acted the courts cannot interfere. Burleigh County v. Kidder County, 27.
4. For reasons stated in the opinion, *held*, defendant county cannot successfully invoke the doctrine of laches as a defense. Burleigh County v. Kidder County, 27.
5. Electors cannot vote on the division of a county and creation of a new county, at a general election, unless their names are on the registry list, in cities of 800 inhabitants or more, without furnishing the affidavit prescribed as a substitute for registration. Fitzmaurice v. Willis, 372.

COUNTY AUDITOR. See Courts, 628; Taxation, 295; Voters and Elections, 405.

COUNTY COURTS. See Criminal Law, 105.

1. Statutes and rules of practice pertaining to district courts in this state apply to proceedings in county courts with increased jurisdiction, under sec. 8289, Rev. Codes 1905. State v. Fleming, 105.
2. Sec. 8300, Rev. Codes 1905, is expressly applicable to the dismissal of prosecutions in county courts with increased jurisdiction for failure to prosecute in cases where defendants are under bonds to appear at such courts. State v. Fleming, 105.

COURTS. See Appeal and Error, 197, 419; Criminal Law, 105; Discretion, 211, 555; Evidence, 295; Jury, 555.

1. Courts cannot take judicial notice of foreign assignments or bankruptcy laws. Goss v. Herman, 295.
2. A trial court may reduce an excessive verdict, and require the prevailing party to take the reduced amount, or submit to a new trial. Lohr v. Honsinger, 500.
3. Courts have power to direct the county auditor to file the petition of a

COURTS—continued.

candidate for senator, and publish his name upon the primary election ballot. State v. Meyer, 628.

4. Sec. 47 of the Constitution which provides that each house of the legislature shall be the judge of the election returns and all qualifications of its members, is not infringed upon by the courts in passing upon the duties of county auditors, as to filing petitions for nominations and printing ballots. State v. Meyer, 628.

CRIMINAL LAW. See Evidence, 337, 555; Instructions, 555; Jury, 555; New Trial, 518; Verdict, 555.

1. Defendant was convicted of keeping and maintaining a liquor nuisance in a certain building in Minot, a particular description of the place not being designated. At date of offense defendant conducted a hotel, 3 feet from the rear of which was a small building, with sidewalk and passageway between, to enter which it was necessary to pass through the hotel; proof showed sale in basement of hotel and this little building. *Held*, within the meaning of sec. 9373, Rev. Codes 1905, both constituted "one place" for the maintenance of such nuisance; hence, it was no error to deny defendant's motion to require the prosecution to elect which building they would rely on as the place in which the nuisance was maintained. State v. Ildvedsen, 62.

2. Following the rule announced in State v. Poull, 14 N. D. 557, 105 N. W. 717, *held*, that, upon conviction for keeping and maintaining a liquor nuisance the court is not authorized to direct the abatement of such nuisance, where the indictment or information fails to particularly describe the place where such nuisance is maintained. State v. Ildvedsen, 62.

3. The judgment upon a conviction for keeping and maintaining a liquor nuisance adjudged that a lien be established for the amount of the fine and costs against the property in which the evidence disclosed that such nuisance was maintained. *Held*, that, even if this was error, it was nonprejudicial, for the reason that the proof discloses defendant to be the owner of such property, and under sec. 9379, Rev. Codes 1905, such fine and costs are made a lien on all of defendant's property until paid. State v. Ildvedsen, 62.

4. A term of court within sec. 9791, Rev. Codes 1905, means a term of court actually held, and not one that may be held; and a criminal action should not be dismissed for failure to file an information at a term of court at which a defendant cannot be regularly tried by a jury. State v. Fleming, 105.

5. It is not error to refuse to dismiss a criminal action for failure to arraign a defendant under sec. 9871, Rev. Codes 1905, at the next term of the court after the information is filed. State v. Fleming, 105.

CRIMINAL LAW—continued.

6. Under chap. 68, Laws of 1907, a jury is not necessarily to be summoned unless there is a criminal case "awaiting trial," and no case is "awaiting trial" where the return of the committing magistrate only is filed, and the defendant is at large on bail. State v. Fleming, 105.
7. It is not error to refuse to dismiss a prosecution under sec. 10307, Rev. Codes 1905, where the next term of court mentioned in that section is one at which the defendant could not have been regularly tried. State v. Fleming, 105.
8. Sec. 8300, Rev. Codes 1905, is expressly applicable to the dismissal of prosecutions in county courts with increased jurisdiction for failure to prosecute in cases where defendants are under bonds to appear at such courts. State v. Fleming, 105.
9. Whether a criminal action should be dismissed where a defendant is at liberty under a bond for his appearance, by reason of failure to prosecute the action as provided by statute, unless a trial is demanded, not decided. State v. Fleming, 105.
10. It is not prejudicial misconduct on the part of a state's attorney to state, in reference to an objection by defendant's attorney to a question asked him on his cross-examination at the trial, "Counsel was a little slow in coming to the assistance of the witness,"—especially in view of a prompt caution from the court to the jury to disregard the remark. State v. Fleming, 105.
11. The failure to instruct that the jury are the sole judges of questions of fact, even if prejudicial error, is not so where the charge in substance so states and there is no request on that point. State v. Fleming, 105.
12. A person convicted of assault and battery, and sentenced to pay a fine and costs which are taxed, and not paid, may be imprisoned as provided by sec. 10104, Rev. Codes 1905, for the nonpayment of the costs as well as the fine. State v. Fleming, 105.
13. The principle upon which declarations of a co-conspirator not on trial are sometimes admissible in evidence against the conspirator who is on trial is that by the act of conspiring together the parties doing so have assumed as a body the attribute of individuality as relates to the prosecution of the common design or purpose; hence, what is done or said by any one in furtherance of that design is the act of all. Evidence of such statement is also admissible on the ground of agency. State v. Moeller, 114.
14. In the trial of a physician on the charge of unintentionally causing the death of a patient by inflicting upon her a mortal wound while attempting to induce and procure a miscarriage, testimony of one P. was admitted relating to certain statements made to him by one D., a third party, who, it was claimed, had entered into a conspiracy with the defendant to commit the offense. Such statements, regardless of whether a conspiracy had been

CRIMINAL LAW—continued.

proved or not, were incompetent, for the reason that they were not made in the presence of the defendant, related to acts previously done or to be done in the future, and were not made in furtherance or in prosecution of the common purpose. State v. Moeller, 114.

15. An instruction to the jury relating to the testimony of the witness P. charging that if they found a conspiracy between the person D. and the defendant existed, statements made or acts done by D. while either he or the defendant contemplated the formation of such a conspiracy afterwards carried into execution, or attempted to be carried into execution, by such conspirators, or were so made or done while either or both of them were carrying or attempting to carry into execution the plan and procure such unlawful miscarriage as the result of such conspiracy, might be considered, is erroneous in that it omits the necessary element that such acts must have been done or statements made in furtherance and prosecution of the object of the conspiracy. State v. Moeller, 114.

16. Sustaining objections to questions which, if answered favorably to the party inquiring, would furnish only cumulative evidence on a subject relating to which no conflict in evidence arises, is not necessarily reversible error. State v. Moeller, 114.

17. Over defendant's objection, statements made by the witness P., not in the presence of the defendant, and not in furtherance of prosecution of the offense charged, but merely reciting acts that had been done or were in contemplation, were received in evidence. The contention by the state that this did not disclose to the court whether the answers would be competent or incompetent, and that defendant should have moved to strike out the answer, is met by the fact that after some of the questions referred to had been propounded it must have been apparant to the court that they related to incompetent declarations. State v. Moeller, 114.

18. It is a good defense by the sureties on a bail bond, that the state between the time of the giving of the bond and the time for the principal's appearance arrested the latter on a charge in another county, and confined him in jail until after the time designated in the bond for his appearance. State v. Funk, 145.

19. By such arrest and detention of the principal, performance of the conditions of the bail bond was rendered impossible by the state, the obligee in the bond, and therefore the default of the principal failing to appear is excusable. State v. Funk, 145.

20. The presumption obtains in criminal as well as civil appeals that the record is free from error, and the appellant has the burden of affirmatively showing the existence of error. State v. Wright, 216.

21. Following State v. Johnson, 17 N. D. 554, 118 N. W. 230, *held*, when the sufficiency of the allegations in an information is first challenged by a

CRIMINAL LAW—continued.

motion in arrest of judgment, they will be construed with less strictness than when raised by demurrer; and when the information states facts constituting an offense in general words and substantially in the language of the statute, the information will be held sufficient on motion in arrest of judgment. State v. Wright, 216.

22. Error cannot be predicated upon the refusal of the court to advise an acquittal in a criminal action; the jury are not bound by such advice, and the court cannot say, as a matter of law, that the evidence is insufficient to support a conviction, nor prevent the jury from giving a verdict, but such question may be disposed of by the court on motion for a new trial in case of conviction. State v. Wright, 216.

23. Assignments of error not supported in appellant's brief or citations of authorities will not be noticed in appellate courts. Rule 14 (10 N. D. xlvi), applicable to the preparation of briefs, provides: "In the body of his brief appellant shall present his reasons in support of each error assigned, with a concise statement of the principles of law applicable thereto with authorities supporting the same, treating each assignment relied upon separately, and such errors as are merely assigned and not supported in the body of the brief by reasons or authorities will be deemed to have been abandoned." Such rule will be enforced unless exceptional reasons appear why it should be relaxed. State v. Wright, 216.

24. Murder is divided into two degrees, dependent upon the absence or presence of premeditation or deliberation attending the killing. These degrees are not distinct crimes, but degrees of the crime of murder. State v. Noah, 281.

25. Sec. 8807, Rev. Codes, 1905, providing that, whenever one prosecuted for murder pleads guilty, the plea shall designate whether it is for murder in the first or second degree. It is not a compliance therewith that he pleads "guilty as charged in the information;" the plea should be positive and definite as to degree, and any indefiniteness is not remedied by reference to the information, where the offense is divided into degrees. State v. Noah, 281.

26. Under an information charging murder in the first degree by express averments, and designating that degree by name, a plea that defendant is "guilty as charged in the information" is indefinite as to the degree to which he pleads guilty, as murder in the second degree is also charged in the information. State v. Noah, 281.

27. The fact that the information designates the offense as murder in the first degree does not control as to the degree, as that depends upon the facts alleged, and not upon the conclusion of the pleader or grand jury. State v. Noah, 281.

28. The fact that the offense is so designated is mere surplusage, and does

CRIMINAL LAW—continued.

not subject the information to attack on that ground. State v. Noah, 281.

29. Where a jury is impaneled to fix the punishment upon a plea of guilty in murder cases, it is error to instruct the jury that they may consider the demeanor of the defendant in court, where he is not called as a witness. State v. Noah, 281.

30. Where the jury is impaneled to fix the penalty in a murder case, it is improper to charge the jury that the court can reduce the penalty inflicted if they impose the death penalty, as it imports to the jury that the whole responsibility is not with them. State v. Noah, 281.

31. Defendant was convicted upon an information charging that he, with intent to cheat and defraud John G. Johns, did falsely pretend to him that defendant was agent of the Commercial Club of Dickinson, authorized to solicit and collect money for a preliminary survey and other work in connection with a proposed railroad from Williston to Dickinson and Hettinger; that Johns believing such, and being deceived thereby, delivered a check for $100, etc. *Held*, that the information stated facts sufficient to constitute the crime of obtaining property by false pretenses. State v. Merry, 337.

32. When the intent or knowledge of the accused is a material ingredient in the issue of the case, other similar acts and declarations tending to establish such intent or knowledge are admissible in evidence, if not too remotely connected with the offense charged. State v. Merry, 337.

33. It is not necessary, to constitute the offense of obtaining property by false pretenses, that the owner has been induced to part with his property solely and entirely by pretenses which are false; nor that the pretenses be the paramount cause of delivery to defendant. It is sufficient if they are a part of the moving cause, and, without them, the defrauded party would not have parted with his property. State v. Merry, 337.

34. The mere fact that the money was to be used in paying the cost of a preliminary survey and the organization of the railroad company makes no difference; obtaining the check by false representation is the gist of the offense. The quality of the act is not determined by the subsequent use of the money, but by the means used in obtaining it. State v. Merry, 337.

35. Under sec. 9246, Rev. Codes 1905, the offense is completed when the defendant, with intent to cheat or defraud another, obtains from such person any money or property. The fraud is completed when such person parts with his property. State v. Merry, 337.

36. Appellant was sentenced to imprisonment in the county jail of Adams county for a period of eight months, to pay a fine of $200, and the costs of prosecution, taxed at the sum of $500, and, in default of said fine and costs, to be imprisoned in the county jail of Adams county for a further period

CRIMINAL LAW—continued.

of two months. Sec. 10104, Rev. Codes 1905, provides for such a judgment. Hence, no error was committed by the court in rendering such judgment. State v. Merry, 337.

37. The court instructed the jury as follows: "Gentlemen of the Jury, I charge you to pay no attention to any remarks or statements made by counsel; you are the sole judges of the questions of fact in this case, the court will give you the law, it is your duty to decide this case according to the law given you by the court." *Held*, error. State v. Gutterman, 432.

38. On a prosecution for importing into this state intoxicating liquors for sale or gift as a beverage, proof that defendant did, within one or two months prior to the time fixed in the information, sell intoxicating liquors, is admissible only as to the intent with which the act charged in the information was done. State v. Miller, 509.

39. The questions raised in this case as to the denial of defendant's demand for a bill of particulars and allowing questions leading and assuming facts unproven are identical with those passed upon in State v. Empting, 21 N. D. ——, 128 N. W. 1119, and disposed of therein. State v. Albertson, 512.

40. Sec. 9794, Rev. Codes 1905, requires names of all witnesses for the state known to the state's attorney when the information is filed, to be indorsed thereon, but provides that other witnesses may testify whose names are not so indorsed. *Held*, it is not error to allow the examination of such witnesses. State v. Albertson, 512.

41. The information covers the time from January 1st, 1909, until May 18, 1910. The attorney general, against the objection of defendant, was permitted to ask some of the witnesses this question: "How many times have you drunk malt or beer there in the last year and a half?" The objection to the question that it embraced more time than alleged in the information was overruled. This ruling, even if erroneous, is not prejudicial. The time inquired about was, at best, but a slight variance, and numerous witnesses answered substantially the same question without any objection on the part of the defendant. State v. Albertson, 512.

42. Refusal to advise the jury to acquit is not error, as the jury are not bound by that advice. State v. Albertson, 512.

43. It is not error to permit the state after it has rested to reopen the case for the introduction of testimony; in the exercise of its judicial discretion, the court may permit this. State v. Albertson, 512.

44. The admission of incompetent evidence which could not have prejudiced the defendant, the facts having been established by other undisputed and competent testimony, is not ground for reversal. State v. Staber, 545.

45. Following State v. Ekanger, 8 N. D. 559, 80 N. W. 482, and State v. Werner, 16 N. D. 83, 112 N. W. 60, *held*, that a juror who has formed and entertains an opinion as to the guilt or innocence of the accused, requiring

CRIMINAL LAW—continued.

evidence to remove, is not disqualified, if such opinion is based wholly upon newspaper accounts, common street gossip, if the juror can and will, notwithstanding such opinion, fairly and impartially try the case on the testimony and the law. State v. Fujita, 555.

46. A man who attempts to have carnal knowledge of a girl under the age of consent may be convicted of an assault with intent to commit rape. State v. Fujita, 555.

CROSS-EXAMINATION. See Evidence, 114.

DAMAGES. See Common Carriers, 406; Trover and Conversion, 169.

1. One who sells personal property on which there is a valid mortgage which the purchaser is compelled to pay after its validity is adjudicated, is liable to the purchaser for the amount of the mortgage and costs. St. A. & D. Elev. Co. v. Dawson, 18.

2. When a purchaser, sued for conversion of personal property, by the holder of a chattel mortgage thereon, requests the seller from whom he bought such property to defend the action, and he fails to so defend, such person, in addition to the amount of the chattel mortgage and costs, may recover as special damages a reasonable attorneys' fee when pleaded and proven. St. A. & D. Elev. Co. v. Dawson, 18.

3. An instruction that a defendant may be held liable for damages occasioned by a prairie fire if the jury find the fact to be that the men who set and tended the fire were working for the defendant "at the time in the course of their usual employment on the farm, and doing his work the same as your men do when you are gone," contains a misdirection as to the law, as it incorrectly assumes that the ordinary and usual work of a farm permits or requires the setting of fire to the prairie grass under conditions that render such act extremely hazardous. Forzen v. Hurd, 42.

4. Where shade trees are destroyed by the wrongful acts of another, and they have no separable and independent value, or when their value is nominal, the measure of damages is the difference between the value of the land before and after they were destroyed. Cleveland School Dist. v. Gt. N. Ry. Co. 124.

5. The measure of damages for misrepresenting the price paid for an article by the vendor, in a contract for the sale thereof, wherein he agreed to sell for the price at which he purchased, and thereby induced the purchaser to pay a greater sum than was paid by the vendor, is the difference between the price which he paid and that which he represented he paid and received from his vendee. Page Farmers' Elev. Co. v. Thompson, 256.

6. Any person who wrongfully renders a public highway dangerous for travel

DAMAGES—continued.

by placing obstructions thereon, must respond in damages to anyone injured in consequence of such obstruction. Solberg v. Schlosser, 307.

7. A street railway company is liable for injuries sustained by a collision between a vehicle and a car, where those in charge of the car by ordinary care could have avoided the accident notwithstanding the negligence of the driver in first placing himself in the situation of peril. Acton v. F. & M. St. R. Co. 434.
8. The jury awarded plaintiff $2,450, damages, without interest. *Held*, not excessive. Acton v. F. & M. St. Ry. Co. 434.
9. In an action for personal injuries caused by a collision at a crossing over defendant's track, *held*, under the evidence, that the question of plaintiff's contributory negligence was properly submitted to the jury. Hollinshead v. Soo Ry. Co. 642.
10. The jury awarded plaintiff damages in the sum of $1,250. *Held*, not excessive. Hollinshead v. Soo Ry. Co. 642.
11. In an action by a principal against his agent for damages for not procuring "fair" security for the price of property sold by him under his agency contract, *held*, evidence sufficient to go to the jury, as showing not only negligence, but bad faith; and it was error to direct a verdict for defendant. Morris v. Bradley, 646.

DEBTOR AND CREDITOR.

1. Indorsement and unconditional delivery by the holder of a warehouse receipt to a creditor for valuable consideration passes title to the grain represented therein, and is a sale of the grain to such creditor. St. A. & D. Elev. Co. v. Dawson, 18.
2. A security contract may be changed to an absolute conveyance, subject to an option to repurchase under fixed terms. On such issues the intention of the parties is the test, but the fairness of the transaction will be scrutinized to see that the act was not influenced by financial circumstances of the debtor, or the oppression of the creditor. Miller v. Smith, 96.
3. Where the contest is between the husband's creditors and the wife over property which the wife claims, but which there are probable grounds for believing belongs to the husband, it is incumbent on the wife to show by satisfactory evidence that she purchased and paid for the property from her separate estate. Meighen v. Chandler, 238.

DEEDS. See Acknowledgments, 295; Recording Transfers, 295.

1. A deed of real estate absolute in terms will not be declared a mortgage, unless the evidence is clear, specific, satisfactory, and convincing that such was the intention of the parties. Miller v. Smith, 96.

DEEDS—continued.

2. On the question whether a deed is a mortgage, one of the most decisive tests is whether there exists a debt from the grantor to the grantee as there can be no mortgage without a debt or liability to be secured. Miller v. Smith, 96.
3. On the question whether a deed is a mortgage, the form of the conveyance is not controlling, and parol evidence is admissible to show the real agreement. Miller v. Smith, 96.
4. The declarations of the parties at the time and subsequently are also admissible to determine what the real intention was. Miller v. Smith, 96.
5. A contract to reconvey on fixed terms does not necessarily show that the transaction was for security purposes, although the sum to be paid on a reconveyance is a sum equal in amount to the sum secured by a former mortgage. Miller v. Smith, 96.
6. A security contract may be changed to an absolute conveyance, subject to an option to repurchase under fixed terms. On such issues the intention of the parties is the test, but the fairness of the transaction will be scrutinized to see that the act was not influenced by financial circumstances of the debtor, or the oppression of the creditor. Miller v. Smith, 96.
7. Evidence considered, and *held* not to show that a deed and accompanying contract are a mortgage, but an absolute deed, with the privilege of a reconveyance on payment of a definite sum on or before a day certain. Miller v. Smith, 96.
8. A tax deed executed in the name of the county instead of the state is void and conveys no title. Goss v. Herman, 295.
9. Whether a deed by a foreign assignee for the benefit of creditors, which has annexed thereto and as part of it a decree of a foreign court confirming the sale, which such deed purports to have been made to carry out, and ordering the execution and delivery thereof, such decree containing recitals to the effect that it is granted on the petition of the assignee, conveys title to the land in this state, wherein no assignment was in fact made, and no proceeding ancillary to the foreign assignment having taken place, in the absence of proof that it was under a voluntary assignment, is not determined. Goss v. Herman, 295.

DEMURRER. See Pleading, 493.

1. Following State v. Johnson, 17 N. D. 554, 118 N. W. 230, *held*, when the sufficiency of the allegations in an information is first challenged by a motion in arrest of judgment, they will be construed with less strictness than when raised by demurrer; and when the information states facts constituting an offense in general words and substantially in the language of the statute, the information will be held sufficient on motion in arrest of judgment. State v. Wright, 216.

DISCRETION. See Appeal and Error, 66; Statutory Construction, 419; Stipulation, 197.

1. While trial courts in the exercise of a sound discretion and in furtherance of justice may relieve from stipulations, and while the supreme court will not interfere with the exercise of such discretion except for clear abuse, the facts presented disclose an abuse of discretion in granting the order appealed from. N. P. R. Co. v. Barlow, 197.
2. Application for a new trial is addressed to the sound discretion of the trial court, and its order denying a new trial will not be reversed except for abuse of discretion. Casey v. Bank, 211.
3. The mere fact that testimony which constitutes a part of the plaintiff's original case was admitted in rebuttal after the testimony of the defendant had been closed does not constitute error. Patrick v. Austin, 261.
4. If from the showing of an applicant for an extension of time for the purpose of settling a statement of the case to be used on appeal, it appears that the appellant is prosecuting the appeal in good faith, upon meritorious grounds, and that there is reasonable excuse for his failure to take the preliminary steps within the time limited by law, it is an abuse of discretion to deny him a reasonable extension of time for these purposes. Smith v. Hoff, 419.
5. The competency of an expert witness is for the court; it is also a question of judicial discretion. The rule that such discretion will not be reversed except for abuse applies to nonexperts and experts called to express opinions on the issue of insanity. Auld v. Cathro, 461.
6. Refusal of a new trial for misconduct of a juror will not be disturbed except for abuse of discretion. State v. Robidou, 518.
7. It is not error to permit the state after it has rested to reopen the case for the introduction of testimony; in the exercise of its judicial discretion the court may permit this. State v. Albertson, 512.
8. The trial court has a large discretion in permitting leading questions. State v. Fujita, 555.
9. A trial court's decision upon the qualification of a juror will be disturbed only for abuse of discretion. State v. Fujita, 555.
10. Application to vacate a default judgment or order, not for irregularities of procedure, but for "mistake, inadvertence, surprise, or excusable neglect" of the moving party, rests not upon legal right, but is addressed to the discretion of the court, whose ruling will not be disturbed, except for abuse. Cline v. Duffy, 525.
11. Persons seeking relief from default judgments for "mistake, inadvertence, surprise, or excusable neglect" must show diligence, or the court will not exercise its discretion. Applicant must show facts excusing the default, a meritorious defense, and proper diligence in prosecuting his remedy,

DISCRETION—continued.
and application must be made with due diligence after notice of the default. On the facts of the case, *held*, abuse of discretion in denying the motion. Cline v. Duffy, 525.
12. Continuing a temporary injunction pending suit, or dissolving it, rests with the discretion of the judge, to be interfered with only for abuse. School Dist. No. 94 v. King, 614.
13. Evidence examined, and *held*, that there is legal proof to support the verdict, and it was no abuse of discretion to deny defendant a new trial. Lowry v. Piper, 637.

DISTRICT COURT. See Appeal and Error, 66; Courts, 500; Discretion, 512; Jurisdiction, 86, 137.

DIVORCE. See Appeal and Error, 268.
1. On appeal from an order refusing to vacate a judgment in divorce, motion was made to dismiss the appeal on the ground that appellant accepted benefits under the judgment prior to the motion to vacate; appellant had accepted no benefits under the order appealed from; *held*, that the motion to dismiss be denied. Wiemer v. Wiemer, 268.

DRAINS. See Contracts, 307.

DUE PROCESS OF LAW. See Constitutional Law, 614.

EJECTMENT.
1. Action to determine adverse claims is the same as the common-law action of ejectment. Ottow v. Friese, 86.

ELEVATORS. See Warehousemen, 18.

EMBEZZLEMENT. See Banks and Banking, 270.

EQUITABLE MORTGAGES. See Mortagages, 96.

EQUITY. See Mortgages, 151.
1. In an action in equity to obtain a new trial of an action at law, or to be relieved from a judgment entered in such action, on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that in the trial thereof matters

EQUITY—continued.

were determined adversely to the party complaining, to the prejudice of his interests, and that he was, by fraud or accident, deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault. Bruegger v. Cartier, 72.

2. A deed of real estate, absolute in terms, will not be declared a mortgage unless the evidence is clear, specific, satisfactory, and convincing that such was the intention of the parties. Miller v. Smith, 96.
3. In an action by parties out of possession against a party in, to determine adverse claims to real estate, based upon a mortgage owned by defendant and tax deed, which mortgage authorized the owner thereof to pay the delinquent taxes upon the premises covered by the mortgage and add the amount to his mortgage debt, before plaintiffs are entitled to the relief prayed for, they must do equity and reimburse the defendant for all taxes paid by him, and also pay him the amount due upon his mortgage. Blessett v. Turcotte, 151.

ESTATES OF DECEDENTS. See Executors and Administrators, 261.

ESTOPPEL.

1. If a promise to allow a redemption after the year has expired is made and relied on to the redemptioner's detriment, the purchaser is estopped from denying the right to redeem. Kenmare Hard Coal B. & T. Co. v. Riley, 182.
2. That the estoppel of a judgment may be effective, a party claiming its benefits must plead the adjudication in bar of a subsequent action, and establish it by competent proof; a failure to do either is a waiver of all rights depending on such estoppel. Borden v. McNamara, 225.
3. If one attempts to present a claim to an administrator or executor for allowance, and fails to properly do so, he is not estopped to again present it in due form within the proper time. Patrick v. Austin, 261.
4. A holder of a sheriff's certificate under a mortgage foreclosure sale effected insurance, and paid the premium, which was retained by defendant company. The policy, standard form, contained the following: "This entire policy shall be void if the insured has concealed or misrepresented in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein. . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, . . . if the interest of the insured be other than unconditional and sole ownership. This policy is made and accepted subject to the foregoing stipulations and condition, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and

ESTOPPEL—continued.

no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached." Plaintiff acquainted defendant and his agent with the facts regarding his interest in the property, and such agent carelessly and negligently omitted to state in the policy the nature of plaintiff's said interest. A loss occurred. Defendant seeks to escape liability on the ground that such policy by its terms is void on account of the above facts. *Held*, that defendant is estopped to escape such defense. Leisen v. St. P. F. & M. Co. 316.

5. Where the insurer, knowing the facts which renders a policy void, issues and delivers the same, receiving premium therefor, he waives such forfeiture, and cannot urge the invalidity of the policy in an action for a loss. Certain language contained in the opinions in Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799, and J. P. Lamb Co. v. Merchants' Ins. Co. 18 N. D. 253, 119 N. W. 1048, approving the Federal rule to the contrary, is disapproved. Leisen v. St. P. F. & M. Ins. Co. 316.

6. Under the facts stated in the opinion, *held*, that the plaintiffs are estopped from questioning the validity of the proceedings of the board of education in annexing adjacent territory to Hannaford special school district. Greenfield School District v. Hannaford School District, 393.

7. Where the debtor induces the assignee to believe that his obligation will be met, and that there is no defense thereto, he will be held to have waived a set-off against the assignor in an action by the assignee. Vallancey v. Hunt, 579.

EVIDENCE. See Criminal Law, 512; Judgment, 525; Negligence, 434; Sales, 188, 579; Stipulation, 197; Trial, 434.

1. In an action under the statute to try title to office, it appeared from the pleadings that appellant received a majority of the votes for sheriff of McLean county at the general election of 1908; he was declared elected, certificate of election issued to him, and he qualified as required by law, entered upon and performed the duties of his office, claiming title thereto, and refused to surrender to plaintiff as his successor. Respondent in support of his title, over objection, offered parts of the minutes of the county commissioners, reciting a resolution of such commissioners, passed

EVIDENCE—continued.

January 7, 1909, declaring the office of sheriff vacant because John A. Beck, party elected thereto, was not a resident of said county as then constituted; on January 8, 1909, said commissioners appointed Gilbert Holtan as sheriff, and accepted his bond. Respondent offered in evidence primary election petition of Beck, stating that on March 14, 1908, he was a resident of McClusky, which, after December 24, 1908, was in the newly segregated county of Sheridan; also copy of poll list showing that on June 24, 1908, Beck voted in that precinct. On such testimony respondent rested, and appellant offered no testimony. *Held*, plaintiff has failed to sustain his action, and that the trial court should have dismissed at close of plaintiff's testimony. Holtan v. Beck, 5.

2. When a purchaser sued for conversion of personal property by the holder of a chattel mortgage thereon requests the seller from whom he bought such property to defend the action, and he fails to so defend, such person, in addition to the amount of the chattel mortgage and costs, may recover as special damages a reasonable attorneys' fee when pleaded and proven. St. A. & D. Elev. Co. v. Dawson, 18.
3. A county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund, without first showing that it has provided such fund. Burleigh County v. Kidder County, 27.
4. On appeal from an order denying a motion by defendant for a directed verdict, if the sufficiency of the evidence to support the verdict is in some doubt, and the jury found in plaintiff's favor, the ruling of the trial court submitting the case will not be disturbed. Forzen v. Hurd, 42.
5. Instructions containing no exposition of the elemental principles upon which depends the liability of a party, and making the law of the case entirely dependent upon inferences from the testimony, or resolvable from the degree of credibility to be given the different witnesses, are misleading and insufficient. Forzen v. Hurd, 42.
6. In an action in equity to obtain a new trial of an action at law, or to be relieved from a judgment entered in such action, on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that in the trial thereof matters were determined adversely to the party complaining, to the prejudice of his interests, and that he was, by fraud or accident, deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault. Bruegger v. Cartier, 72.
7. A judgment signed by the judge and entered in the judgment book is a "final judgment," and may be proved as a former adjudication of the issues in the suit. Ottow v. Friese, 86.
8. A former adjudication may be pleaded and proven where the issues in the former action and in the pending action are the same. Ottow v. Friese, 86

EVIDENCE—continued.

9. Evidence considered, and, *held*, to show a valid foreclosure, and that the plaintiff has the title to the land in suit. Ottow v. Friese, 86.
10. A deed of real estate, absolute in terms, will not be declared a mortgage unless the evidence is clear, specific, satisfactory, and convincing that such was the intention of the parties. Miller v. Smith, 96.
11. On the question whether a deed is a mortgage, one of the most decisive tests is whether there exists a debt from the grantor to the grantee as, there can be no mortgage without a debt or liability to be secured. Miller v. Smith, 96.
12. On the question whether a deed is a mortgage, the form of the conveyance is not controlling, and parol evidence is admissible to show the real agreement. Miller v. Smith, 96.
13. The declarations of the parties at the time and subsequently are also admissible to determine what the real intention was. Miller v. Smith, 96.
14. A contract to reconvey on fixed terms does not necessarily show that the transaction was for security purposes, although the sum to be paid on a reconveyance is a sum equal in amount to the sum secured by a former mortgage. Miller v. Smith, 96.
15. A security contract may be changed to an absolute conveyance, subject to an option to repurchase under fixed terms. On such issues the intention of the parties is the test, but the fairness of the transaction will be scrutinized to see that the act was not influenced by financial circumstances of the debtor, or the oppression of the creditor. Miller v. Smith, 96.
16. Evidence considered, and held, not to show that a deed and accompanying contract are a mortgage, but an absolute deed, with the privilege of a reconveyance on payment of a definite sum on or before a day certain. Miller v. Smith, 96.
17. The principle upon which declarations of a co-conspirator not on trial are sometimes admissible in evidence against the conspirator who is on trial is that by the act of conspiring together the parties doing so have assumed as a body the attribute of individuality as relates to the prosecution of the common design or purpose; hence what is done or said by any one in furtherance of that design is the act of all. Evidence of such statements is also admissible on the ground of agency. State v. Moeller, 114.
18. In the trial of a physician on the charge of unintentionally causing the death of a patient by inflicting upon her a mortal wound while attempting to induce and procure a miscarriage, testimony of one P. was admitted, relating to certain statements made to him by one D., a third party, who, it was claimed, had entered into a conspiracy with the defendant to commit the offense. Such statements, regardless of whether a conspiracy had been proved or not, were incompetent, for the reason that they were not made in the presence of the defendant, related to acts previously done

EVIDENCE—continued.

or to be done in the future, and were not made in furtherance or in prosecution of the common purpose. State v. Moeller, 114.

19. Sustaining objections to questions which, if answered favorably to the party inquiring, would furnish only cumulative evidence on a subject relating to which no conflict in evidence arises, is not necessarily reversible error. State v. Moeller, 114.

20. When a defendant, on cross-examination, has drawn from a witness parts of a conversation with a third party relating to a given subject, the plaintiff may properly require the witness to testify as to the remaining portions of the conversation on the same subject. State v. Moeller, 114.

21. Over defendant's objection, statements made by the witness P., not in the presence of the defendant, and not in furtherance or prosecution of the offense charged, but merely reciting acts that had been done or were in contemplation, were received in evidence. The contention by the state that this did not constitute error because the nature of the questions was such that they did not disclose to the court whether the answers would be competent or incompetent, and that defendant should have moved to strike out the answer, is met by the fact that, after some of the questions referred to had been propounded, it must have been apparent to the court that they related to incompetent declarations. State v. Moeller, 114.

22. If a proper objection is made, a judgment cannot be proven by introducing in evidence the judgment docket containing an abstract of such judgment, nor by parol evidence, in the absence of a showing that will allow the offer of a secondary evidence. Yokell v. Elder, 142.

23. In an action for conversion of grain claimed to have been delivered by plaintiff to defendant, evidence examined, and, *held*, competent and sufficient to establish the quantity of grain delivered. Cochrane v. Natl. Elev. Co. 169.

24. Evidence as to highest market value between the conversion and trial examined; *held*, both competent and sufficient to support the verdict. Cochrane v. National Elev. Co. 169.

25. Assignments upon rulings as to offered testimony as to defendant's system and manner of transacting business, *held*, without merit. *Held*, further, that rulings, not being excepted to, cannot be noticed. *Held*, further, that appellant's assumption that he was not permitted to show payment is not justified by the records, but, on the contrary, no competent evidence was offered to prove such payment. Cochrane v. National Elev. Co. 169.

26. The issue being whether grain was delivered as alleged, and, if so, if paid for, testimony was properly excluded relative to private instructions given by defendant to its local agent, not communicated to plaintiff, regarding receipt of grain and violation of such instruction. Cochrane v. National Elev. Co. 169.

EVIDENCE—continued.

27. Writings bearing plaintiff's genuine signature were introduced to aid the jury in determining whether other exhibits purporting to bear plaintiff's signature were forgeries. *Held*, their exclusion was erroneous, but nonprejudicial, for reasons stated in the opinion. Cochrane v. Nat. Elev. Co. 169.
28. Plaintiff was permitted over objection to show the custom and usage at Grand Harbor in receiving grain at defendant's elevator, and issuing the tickets therefor at a later date. *Held*, nonprejudicial. Cochrane v. National Elev. Co. 169.
29. Irrelevant papers are inadmissible as a standard of comparison of handwriting; there is an exception to the rule where the papers offered are conceded by the opposite party to be genuine, or are such as he is estopped to deny, or where for other reasons no collateral issues can be raised by their introduction. Cochrane v. National Elev. Co. 169.
30. The jury were instructed that conversion took place, if at all, on September 25th. The instruction was not challenged in the trial court, and became the law of the case. Appellant's contention in this court, that conversion took place in October, and that there is no evidence showing the highest market value after such date, is untenable. Cochrane v. Natl. Elev. Co. 169.
31. The right to redeem from a mortgage foreclosure upon real estate after the time allowed by law under a claim of relying on the purchaser's promise to accept payment at redemptioner's convenience will not be upheld except upon clear and convincing evidence that promise was made and in good faith relied on. Kenmare Hard Coal B. & T. Co. v. Riley, 182.
32. In a letter from the purchaser at such foreclosure sale to the owner of said land, the following language was used: "We will also say that if you do not care to pay up this matter now, let it go to suit your convenience, as the matter is drawing interest at the rate of 12 per cent." *Held*, in view of the indefinite character of the statement, and the evidence in relation to the intention of the owner to redeem within the year, that the right to redeem after the year expired was not shown by that clear and convincing evidence required in this class of cases. Kenmare Hard Coal B. & T. Co. v. Riley, 182.
33. Where the contest is between the husband's creditors and the wife over property which the wife claims, but which there are probable grounds for believing belongs to the husband, it is incumbent on the wife to show by satisfactory evidence that she purchased and paid for the property from her separate estate. Meighen v. Chandler, 238.
34. The verdict of the jury having substantial support in the evidence, the appellate court will not weigh conflicting evidence, nor disturb the order refusing a new trial. Casey v. Bank, 211.

EVIDENCE—continued.

35. Certain instructions of the court to the jury relative to the burden of proof, and also as to certain matters which the jury should consider in determining by the status of the account between plaintiff and A., considered, and *held*, for reasons stated in the opinion, not erroneous. Casey v. First Bank of Nome, 211.
36. Application for a new trial for alleged insufficiency of evidence is addressed to the sound discretion of the trial court, and its order denying a new trial will not be reversed except for abuse of discretion. Casey v. First Bank of Nome, 211.
37. Error cannot be predicated upon the refusal of the court to advise an acquittal in a criminal action; the jury are not bound by such advice, and the court cannot say, as a matter of law, that the evidence is insufficient to support a conviction, nor prevent the jury from giving a verdict, but such question may be disposed of by the court on motion for a new trial in case of conviction. State v. Wright, 216.
38. The presumption obtains in criminal as well as civil appeals that the record is free from error, and the appellant has the burden of affirmatively showing the existence of error. State v. Wright, 216.
39. The mere fact that testimony which constitutes a part of the plaintiff's original case was admitted in rebuttal after the testimony of the defendant had been closed does not constitute error. Patrick v. Austin, 261.
40. Courts cannot take judicial notice of foreign assignment of bankruptcy laws. Goss v. Herman, 295.
41. A copy of a deed of assignment for the benefit of creditors, certified to be a copy by a court commissioner of the circuit court of Wisconsin, with no acknowledgment by the grantor therein, is not entitled to record in this state, in the county where the lands claimed to be conveyed are situated. Goss v. Herman, 295.
42. Notwithstanding a copy of a deed of assignment as described in the preceding paragraph was in fact recorded, such record is not evidence of title to the land therein described. Goss v. Herman, 295.
43. Where it appears that a district court has unquestioned jurisdiction of persons and subject-matter in a foreclosure action, error of the court in determining the effect to be given certain evidence introduced does not vitiate the judgment so as to render it void upon collateral attack. The remedy in such case is by appeal, and, if no appeal is taken, the conclusiveness of the decree upon points properly adjudicated, in a subsequent suit by the same parties, will not be affected. Borden v. McNamara, 225.
44. That the estoppel of a judgment may be effective, a party claiming its benefits must plead the adjudication in bar of a subsequent action, and establish it by competent proof; a failure to do either is a waiver of all rights depending upon such estoppel. Borden v. McNamara, 225.

EVIDENCE—continued.

45. When the bar of a former judgment in an action between the same parties is properly pleaded, and proof of the issues involved therein and the judgment rendered as made by competent evidence, such proof is conclusive of all facts adjudicated in the prior action. Borden v. McNamara, 225.

46. Sec. 5013, Rev. Codes 1905, provides for acknowledgment of an instrument without the state, and prescribes the requirements to entitle it to record. Among these is one that it shall be acknowledged before one of certain officers named therein. A court commissioner is not among these, and the record of an instrument purporting to be acknowledged before him is not competent evidence, unless it appears that he was authorized by the laws of the state where he acted to take acknowledgments. Goss v. Herman, 295.

47. Records of proceedings and decrees of foreign courts not exemplified, but only certified as correct copies or transcripts by a court commissioner of such court, not under seal, are incompetent as evidence in courts of this state, on the trial of actions therein. Goss v. Herman, 295.

48. Whether a deed by a foreign assignee for the benefit of creditors, which has annexed and as part of it a decree of a foreign court confirming the sale which such deed purports to have been made to carry out, and ordering the execution and delivery thereof, such decree containing recitals to the effect that it is granted on the petition of the assignee, conveys title to the land in this state, wherein no assignment was in fact made and no proceedings ancillary to the foreign assignment have taken place, in the absence of proof that it was under a voluntary assignment, is not determined. Goss v. Herman, 295.

49. While possession of real estate affords a presumption of title, it does not preclude evidence of want of title in the party in possession. Goss v. Herman, 295.

50. Under the facts of the case, although in the supreme court for trial *de novo*, in view of the lack of evidence on some questions relative to the title of both parties, it is remanded for a new trial. Goss v. Herman, 295.

51. Upon conflicting evidence as to the condition of a highway at the point therein claimed to be dangerous for travel, the jury is to determine. Solberg v. Schlosser, 307.

52. Where different persons may reasonably reach different conclusions upon the evidence, defendant's negligence and plaintiff's contributory negligence are questions for the jury. Solberg v. Schlosser, 307.

53. When the intent and knowledge of the accused is a material ingredient in the issue of the case, other similar acts and declarations tending to establish such intent or knowledge are admissible in evidence, if not too remotely connected with the offense charged. State v. Merry, 337.

54. It is not necessary, to constitute the offense of obtaining property by false pretenses, that the owner has been induced to part with his property solely

EVIDENCE—continued.

and entirely by such pretenses; nor that the pretenses be the paramount cause of delivery to defendant. It is sufficient if they are a part of the moving cause, and without them the defrauded party would not have parted with his property. State v. Merry, 337.

55. The mere fact that the money was used in paying the cost of a preliminary survey and the organization of the railroad company makes no difference; obtaining the check by false representation is the gist of the offense. The quality of the act is not determined by the subsequent use of the money, but by the means used in obtaining it. State v. Merry, 337.

56. Under sec. 9246, Rev. Codes 1905, the offense is completed when the defendant, with intent to cheat or defraud another, obtains from such person any money or property. The fraud is complete when such person parts with his property. State v. Merry, 337.

57. Objections on the ground that the questions were leading cannot be raised for the first time on appeal. State v. Merry, 337.

58. Evidence examined, and *held* sufficient to sustain the verdict. State v. Merry, 337.

59. The board of education of Hannaford special school district, under sec. 949, Rev. Codes 1905, annexed adjacent territory upon an application signed by fourteen voters of such territory. *Held*, that the question as to whether such application was signed by a majority of the voters of such territory is not open to attack at this time. *Held*, further, such board having ordered such annexation, it is presumed that it did everything which the statute required it to do before it made the order. Greenfield School Dist. v. Hannaford School Dist. 393.

60. Under the facts of the case, *held*, that the plaintiffs are estopped from questioning the validity of the proceedings of the board of education in annexing adjacent territory to Hannaford special school district. Greenfield School Dist. v. Hannaford School District, 393.

61. Where the verdict is supported by substantial evidence, and the trial court declines to disturb it for insufficiency of evidence, such ruling will not be reversed on appeal. Acton v. F. & M. St. Ry. Co. 4[illegible].

62. There was no evidence that the will was executed under undue influence practised upon testatrix, and it was proper to refuse to submit such issue to the jury. Auld v. Cathro, 461.

63. Under the privilege of secrecy to all information acquired by a physician while attending a patient, in a contest of a decedent's will, the testimony and opinion of such physician, based on information derived while treating and for treatment of testator, are properly excluded. Auld v. Cathro, 461.

64. The failure of the trial court to have the testimony of a witness read at the

EVIDENCE—continued.

request of the jury, *held*, under circumstances of the case at bar, not error. Auld v. Cathro, 461.

65. The rule is that a nonexpert will be allowed to express an opinion upon an issue of sanity only after he has testified to acts, conversations, or conduct which to some extent indicate sanity. Auld v. Cathro, 461.

66. The competency of an expert witness is for the court; it is also a question of judicial discretion. The rule that such discretion will not be reversed, except for abuse, applies to nonexperts and experts called to express opinions on the issue of insanity. Auld v. Cathro, 461.

67. Objections to certain questions considered in the opinion, and the rulings thereon, *held*, prejudically erroneous. Lohr v. Honsinger, 500.

68. On a prosecution for importing into this state intoxicating liquors for sale or gift as a beverage, proof that defendant did, within one or two months prior to the time fixed in the information, sell intoxicating liquors, is admissible only as to the intent with which the act charged in the information was done. State v. Miller, 509.

69. The information covers the time from January 1st, 1909, until May 18th, 1910. Over objection the following question was permitted: "How many times have you drunk malt or beer there in the last year and a half?" The objection that it embraced more time than alleged in the information was overruled. This ruling, even if erroneous, is not prejudicial. The time inquired about was at best but a slight variance, and numerous witnesses answered substantially the same question without any objection on the part of the defendant. State v. Albertson, 512.

70. It is not error to permit the state, after it has rested, to reopen the case for the introduction of testimony; in the exercise of its judicial discretion the court may permit this. State v. Albertson, 512.

71. Where the statements in affidavits on a motion for a new trial are purely impeaching, such evidence does not furnish ground for granting a new trial. State v. Albertson, 512.

72. The question of the insufficiency of the evidence to justify the verdict is not properly raised. State v. Albertson, 512.

73. The admission of incompetent evidence which could not have prejudiced the defendant, the facts having been established by other undisputed and competent testimony, is not ground for reversal. State v. Staber, 545.

74. Records of a railway station showing articles billed to defendant, receipted for by him, are competent evidence to show the nature of such articles. State v. Staber, 545.

75. Following State v. Ekanger, 8 N. D. 559, 80 N. W. 482 and State v. Werner, 16 N. D. 83, 112 N. W. 60, *held*, that a juror who has formed and entertains an opinion as to the guilt or innocence of the accused, requiring evidence to remove, is not disqualified, if such opinion is based wholly

EVIDENCE—continued.

upon newspaper accounts and common street gossip, if the juror can and will, notwithstanding such opinion, fairly and impartially try the case on the testimony and the law. State v. Fujita, 555.

76. The trial court has a large discretion in permitting leading questions. State v. Fujita, 555.

77. Evidence examined, and, *held*, sufficient to sustain the verdict. State v. Fujita, 555.

78. Record examined. *Held*, that counsel for the state made no remarks in the arguments to the jury not warranted by the evidence. State v. Fujita, 555.

79. In claim and delivery by a mortgagee or his assignee for possession of mortgaged property sold to defendant for the purchase price of which the mortgage was given, defendant may counterclaim damages for breach of warranty of the goods sold, but such set-off or counterclaim must be specially pleaded, and cannot be proved under a general denial. Vallancey v. Hunt, 579.

80. Where the denial of a new trial is challenged solely for insufficiency of evidence to justify the verdict, and that the verdict is against law, the appellate court will only inquire whether there is evidence to support the verdict. Lowry v. Piper, 637.

81. The fact that one item of evidence was documentary will not take the case out of the above rule, if such documentary proof is not conclusive and there is conflicting oral testimony supporting the verdict. Lowry v. Piper, 637.

82. Evidence examined, and, *held*, that there is legal proof to support the verdict, and it was no abuse of discretion to deny defendant a new trial. Lowry v. Piper, 637.

83. In an action for personal injuries caused by a collision at a crossing over defendant's track, *held*, under the evidence, that the question of plaintiff's contributory negligence was properly submitted to the jury. Hollinshead v. Soo Ry. Co. 642.

84. In an action by a principal against his agent for damages for not procuring "fair" security for the price of property sold by him under his agency contract, *held*, evidence sufficient to go to the jury, as showing not only negligence, but bad faith, and it was error to direct a verdict for defendant. Morris v. Bradley, 646.

85. Evidence examined, and *held*, that the proof submitted by plaintiff upon the questions of the worthlessness of the security and the resulting loss sustained by him was sufficient, prima facie, to require its submission to the jury. Morris v. Bradley, 646.

EXECUTION. See Homestead, 484.

EXECUTORS AND ADMINISTRATORS. See Evidence, 461.

1. If one attempts to present a claim to an administrator or executor for allowance, and fails to properly do so, he is not estopped to again present it in due form within the proper time. Patrick v. Austin, 261.
2. The verification of the claim presented to the executor on September 11, 1906, substantially complied with sec. 8100, Rev. Codes 1905. Patrick v. Austin, 261.

EXEMPTION. See Homestead, 484.

EXPERT TESTIMONY. See Evidence, 461.

FALSE PRETENSES. See Criminal Law, 337.

FINDINGS.

1. The special findings made by the jury are sufficient to sustain the general verdict. If the questions not answered, or where the answers are not proved, were all answered favorably to appellant, the general verdict would still be consistent with the special findings. Acton v. F. & M. St. Ry. Co. 434.

FINE. See Criminal Law, 337.

1. In imposing a fine of $500 and costs taxed at $150, it was clearly the intention of the court to impose an aggregate fine of $650, which was within the maximum limit fixed by statutes. State v. Heiser, 357.

FIRE INSURANCE. See Insurance, 316.

FORCIBLE ENTRY AND DETAINER.

1. In an action to determine adverse claims to real estate under chap. 29, Comp. Laws 1887, the district court had original jurisdiction, and the facts essential to a cause of action thereunder were not the same as those for forcible entry and detainer. Ottow v. Friese, 86.

FORECLOSURE. See Insurance, 316; Mortgages, 86, 182, 225.

FOREIGN COURTS. See Evidence, 295.

FORFEITURE.

1. A forfeiture resulting from the failure of the grantee to perform certain conditions required of it by the act of July 2, 1864, within the period limited by the terms of the act, cannot be asserted by a private party, or by any party except the United States. N. P. R. Co. v. Aas, 247.

FRAUD. See Criminal Law, 337; Fraudulent Conveyance, 238.

1. In an action in equity to obtain a new trial of an action at law, or to be relieved from a judgment entered in such action, on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that in the trial thereof matters were determined adversely to the party complaining, to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault. Bruegger v. Cartier, 72.
2. The measure of damages for misrepresenting the price paid for an article by the vendor, in a contract for the sale thereof, wherein he agreed to sell for the price at which he purchased, and thereby induced the purchaser to pay a greater sum than was paid by the vendor, is the difference between the price which he paid and that which he represented he paid and received from his vendee. Page Farmers Elev. Co. v. Thompson, 256.
3. Where a policy of insurance has been delivered and premium collected, with full knowledge of all facts, it will be fraud upon the insured to permit the insurer to avoid the policy after a loss by urging its invalidity at its inception on account of stipulations therein. Leisen v. St. P. F. & M. Ins. Co. 316.

FRAUDULENT CONVEYANCE.

1. Where the contest is between the husband's creditors and the wife over property which the wife claims, but which there are probable grounds for believing belongs to the husband, it is incumbent on the wife to show by satisfactory evidence that she purchased and paid for the property from her separate estate. Meighen v. Chandler, 238.

HANDWRITING. See Evidence, 169.

HARMLESS ERROR. See Appeal and Error, 434.

HIGHWAYS. See Streets and Highways, 307, 434.

HOMESTEAD. See Public Lands, 155.

1. Constitutional and statutory provisions declaring homestead exemption should be liberally construed. Deiter v. Fraine, 484.
2. Homestead exemption is not only for the head of the family, but for the protection and preservation of the home, for the family as a whole. Dieter v. Fraine, 484.
3. Homestead is exempt from all process, and is not waived by the failure or negligence of the head of the family to claim it. Dieter v. Fraine, 484.
4. Judicial sale of premises known to the officer to be the debtor's homestead is void, and a sheriff's certificate issued thereon conveys no title. Dieter v. Fraine, 484.

HOMICIDE. See Criminal Law, 281.

HUSBAND AND WIFE. See Divorce, 268.

1. Where the contest is between the husband's creditors and the wife over property which the wife claims, but which there are probable grounds for believing belongs to the husband, it is incumbent on the wife to show by satisfactory evidence that she purchased and paid for the property from her separate estate. Meighen v. Chandler, 238.

INDICTMENT AND INFORMATION. See Criminal Law, 509.

1. Defendant was convicted of keeping and maintaining a liquor nuisance in a certain building in Minot, a particular description of the place not being designated. At date of offense defendant conducted a hotel, 3 feet from the rear of which was a small building, with sidewalk and passageway between, to enter which it was necessary to pass through the hotel; proof showed sale in basement of hotel and this little building. *Held*, within the meaning of sec. 9373, Rev. Codes 1905, both constituted "one place" for the maintenance of such nuisance; hence it was no error to deny defendant's motion to require the prosecution to elect which building they would rely on as the place in which nuisance was maintained. State v. Ildvedsen, 62.
2. Following State v. Poull, 14 N. D. 557, 105 N. W. 717, *held*, that upon conviction for keeping and maintaining a liquor nuisance the court is not authorized to direct the abatement of such nuisance, where the indictment or information fails to particularly describe the place where such nuisance is maintained. State v. Ildvedsen, 62.
3. A term of court within sec. 9791, Rev. Codes 1905, means a term of court actually *held*, and not one that may be *held;* and a criminal action should not be dismissed for failure to file an information at a term of court at

INDICTMENT AND INFORMATION—continued.
which a defendant cannot be regularly tried by a jury. State v. Fleming, 105.

4. Following State v. Johnson, 17 N. D. 554, 118 N. W. 230, *held*, when the sufficiency of the allegations in an information is first challenged by a motion in arrest of judgment, they will be construed with less strictness than when raised by demurrer; and when the information states facts constituting an offense in general words and substantially in the language of the statute, the information will be held sufficient on motion in arrest of judgment. State v. Wright, 216.
5. Sec. 8807, Rev. Codes 1905, provides that, whenever one prosecuted for murder pleads guilty, the plea shall designate whether it is of murder in the first or second degree. It is not a compliance therewith that he pleads "guilty as charged in the information;" the plea should be positive and definite as to degree, and any indefiniteness is not remedied by reference to the information, where the offense is divided into degrees. State v. Noah, 281.
6. Under an information charging murder in the first degree by express averments, and designating that degree by name, a plea that defendant is "guilty as charged in the information" is indefinite as to the degree to which he pleads guilty, as murder in the second degree is also charged in the information. State v. Noah, 281.
7. The fact that the information designates the offense as murder in the first degree does not control as to the degree, as that depends upon the facts alleged, and not upon the conclusion of the pleader or grand jury. State v. Noah, 281.
8. The fact that the offense is so designated is mere surplusage, and does not subject the information to attack on that ground. State v. Noah, 281.
9. Defendant was convicted upon an information charging that he, with intent to cheat and defraud John G. Johns, did falsely pretend to him that defendant was agent of the Commercial Club of Dickinson, authorized to solicit and collect money for a preliminary survey and other work in connection with a proposed railroad from Williston to Dickinson and Hettinger; that Johns believing such and being deceived thereby, delivered a check for $100, etc. *Held*, that the information stated facts sufficient to constitute the crime of obtaining property by false pretenses. State v. Merry, 337.
10. Sec. 9794, Rev. Codes 1905, requires names of all witnesses for the state known to the state's attorney when the information is filed to be indorsed thereon, but provides that other witnesses may testify, whose names are not so indorsed. *Held*, it is not error to allow the examination of such witnesses. State v. Albertson, 512.
11. The information covers the time from January 1st. 1909, until May 18th,

INDICTMENT AND INFORMATION—continued.

1910. Over objection there was answered the question: "How many times have you drunk malt or beer there in the last year and a half?" The objection to the question that it embraced more time than alleged in the information was overruled. This ruling, even if erroneous, is not prejudicial. The time inquired about was at best but a slight variance and numerous witnesses answered substantially the same question without any objection on the part of the defendant. State v. Albertson, 512.

INJUNCTION. See Contempt, 357; Intoxicating Liquors, 357; Supreme Court, 180.

1. Continuing a temporary injunction pending suit, or dissolving it, rests in the discretion of the judge, to be interfered with only for abuse. School Dist. No. 94 v. King, 614.

INSANITY.

1. The rule is that a nonexpert will be allowed to express an opinion upon the issue of sanity only after he has testified to acts, conversations, or conduct which to some extent indicate sanity. Auld v. Cathro, 261.
2. The competency of an expert is for the court; it is also a question of judicial discretion. The rule that such discretion will not be reversed except for abuse applies to nonexperts and experts called to express opinions on the issue of insanity. Auld v. Cathro, 461.

INSTRUCTIONS.

1. Instructions containing no exposition of the elemental principles upon which depends the liability of a party, and making the law of the case entirely dependent upon inferences from the testimony, or resolvable from the degree of credibility to be given the different witnesses, are misleading and insufficient. Forzen v. Hurd, 42.
2. An instruction that a defendant may be held liable for damages occasioned by a prairie fire, if the jury find the fact to be that the men who set and tended the fire were working for the defendant "at the time, in the course of their usual employment on the farm, and doing his work the same as your men do when you are gone," contains a misdirection as to the law, as it incorrectly assumes that the ordinary and usual work of a farm permits or requires the setting of fire to the prairie grass under conditions that render such act extremely hazardous. Forzen v. Hurd, 42.
3. Oral instructions can only be given when the parties deliberately and voluntarily consent thereto, and such consent is entered on the minutes so as not to prejudice the rights of either parties. Forzen v. Hurd, 42.

INSTRUCTIONS—continued.

4. The failure to instruct that the jury are the sole judges of questions of fact, if ever prejudicial error, is not so where the charge in substance so states, and there is no request on that point. State v. Fleming, 105.
5. An instruction to the jury, relating to the testimony of the witness P, charging that if they found a conspiracy between the person D and the defendant existed, statements made or acts done by D while either he or the defendant contemplated the formation of such a conspiracy afterwards carried into execution, or attempted to be carried into execution, by such conspirators, or which were so made or done while either or both of them were carrying or attempting to carry into execution the plan and procure such unlawful miscarriage as the result of such conspiracy, might be considered, is erroneous in that it omits the necessary element that such acts must have been done or statements made in furtherance and prosecution of the object of the conspiracy. State v. Moeller, 114.
6. The jury were instructed that conversion took place, if at all, on September 25th. The instruction was not challenged in the trial court, and became the law of the case. Appellant's contention in this court, that conversion took place in October, and that there is no evidence showing the highest market value or any value after such date, is untenable. Cochrane v. Natl. Elev. Co. 169.
7. Certain instructions of the court to the jury relative to the burden of proof, and also as to certain matters which the jury should consider in determining the status of the account between plaintiff and A, considered, and *held*, for reasons stated in the opinion, not erroneous. Casey v. First Bank of Nome, 211.
8. Where a jury is impaneled to fix the punishment upon a plea of guilty in murder cases, it is error to instruct the jury that they may consider the demeanor of the defendant in court, where he is not called as a witness. State v. Noah, 281.
9. Where the jury is impaneled to fix the penalty in a murder case, it is improper to charge the jury that the court can reduce the penalty inflicted if they impose the death penalty, as it imports to the jury that the whole responsibility is not with them. State v. Noah, 281.
10. The court instructed as follows: "Gentlemen of the jury, I charge you to pay no attention to any remarks or statements made by counsel; you are the sole judges of the questions of fact in this case; the court will give you the law; it is your duty to decide this case according to the law given you by the court." *Held*, error. State v. Gutterman, 432.
11. The court charged as follows: "I charge you, gentlemen of the jury, as a matter of law, that even if you find from a preponderance of the evidence that the plaintiff in this action was guilty of contributory negligence in

INSTRUCTIONS—continued.

going upon the defendant's track, under all the circumstances of the case, that nevertheless, if the defendant or its employees in charge of the car were aware, or should by the exercise of reasonable diligence and care have become aware, of the dangerous position of the plaintiff in time to have, by the exercise of reasonable diligence and care, avoided the collision with the buggy of the plaintiff, that the prior negligence of the plaintiff would not bar his right to recover in this action." This instruction states the law correctly. Acton v. F. & M. St. Ry. Co. 434.

12. An instruction to the jury that the answers to the separate questions must be of such a nature that they will fully support the general verdict, *held*, not error. Acton v. F. & M. St. Ry. Co. 434.
13. Where the jury found that the motorman did not exercise ordinary care and reasonable diligence to stop the car and prevent the accident, after he saw, or with reasonable diligence might have seen, plaintiff's danger, for reasons stated in the opinion, appellant was not prejudiced by the instructions complained of. Acton v. F. & M. St. Ry. Co. 434.
14. A judgment will not be reversed for an erroneous instruction, if answers to interrogatories show that it did not influence the verdict. Acton v. F. & M. St. Ry. Co. 434.
15. The court refused to instruct that, though the motorman saw the plaintiff driving along, and on the track, and (if he was driving thereon) he had a right to assume that the plaintiff would exercise ordinary care to observe the approach of the car, and would get out of danger before the car would reach him, and that the motorman is not required to check his car (if said car is running at an ordinary rate of speed) until he has reasonable cause to believe that there is actual danger of a collision, *held*, not error, under the facts of the case. Acton v. F. & M. St. Ry. Co. 434.
16. The charge of the court relating to the disposition a testator or testatrix can make of his or her property under the laws of this state correctly states the law. Auld v. Cathro, 461.
17. The refusal to give certain requested instructions, *held*, not error. Lohr v. Honsinger, 500.
18. The charge as a whole states the law correctly. Hence, no error was committed in refusing defendant's requests for instructions. State v. Miller, 509.
19. Refusal to advise the jury to acquit is not error, as the jury are not bound by that advice. State v. Albertson, 512.
20. The charge as a whole states the law correctly. Hence no error was committed in refusing defendant's request for instructions. State v. Staber, 545.
21. The charge of the court to the jury fully and fairly states the law of the case. State v. Fujita, 555.

INSURANCE.

1. A holder of a sheriff's certificate under a mortgage foreclosure sale effected insurance, paid the premium, which was retained by defendant company. The policy, standard form, contained the following: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein. . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, . . . if the interest of the insured be other than unconditional and sole ownership. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." Plaintiff acquainted defendant and his agent with the facts regarding his interest in the property, and such agent carelessly and negligently omitted to state in the policy the nature of plaintiff's said interest. A loss occurred. Defendant seeks to escape liability on the ground that such policy, by its terms, is void on account of the above facts. Leisen v. St. P. F. & M. Ins. Co. 316.
2. Where the insurer, knowing the facts which render a policy void, issues and delivers the same, receiving premium therefor, he waives such forfeiture, and cannot urge the invalidity of the policy in an action for a loss. Certain language contained in the opinions in Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799, and J. P. Lamb Co. v. Merchants' Ins. Co. 18 N. D. 253, 119 N. W. 1048, approving the Federal rule to the contrary, is disapproved. Leisen v. St. P. F. & M. Ins. Co. 316.
3. Where a policy of insurance has been delivered and premium collected, with full knowledge of all facts, it will be fraud upon the insured to permit the insurer to avoid the policy after a loss by urging its invalidity at its inception on account of stipulations therein. Leisen v. St. P. F. & M. Ins. Co. 316.
4. Restrictions in a policy limiting the power of agents to waive conditions, except in a certain manner, cannot be held to apply to those conditions which relate to the inception of the contract, where the agent, with full

INSURANCE—continued.

knowledge of the facts, issues the policy and collects the premium and the insured has acted in good faith. Leisen v. St. P. F. & M. Ins. Co. 316.

INTEREST. See Municipal Corporation, 427.

INTOXICATING LIQUORS. See Contempt, 357.

1. Defendant was convicted of keeping and maintaining a liquor nuisance in a certain building in Minot, a particular description of the place not being designated. At date of offense defendant conducted a hotel, 3 feet from the rear of which was a small building, with sidewalk and passageway between, to enter which it was necessary to pass through the hotel; proof showed sales in basement of hotel and this little building. *Held*, within the meaning of sec. 9373, Rev. Codes 1905, both constituted "one place" for the maintenance of such nuisance; hence it was not error to deny defendant's motion to require the prosecution to elect which building they would rely on as the place in which the nuisance was maintained. State v. Ildvedsen, 62.

2. Following State v. Poull, 14 N. D. 557, 105 N. W. 717, *held*, that, upon conviction for keeping and maintaining a liquor nuisance, the court is not authorized to direct the abatement of such nuisance, where the indictment or information fails to particularly describe the place where such nuisance is maintained. State v. Ildvedsen, 62.

3. The judgment upon a conviction for keeping and maintaining a liquor nuisance adjudged that a lien be established for the amount of the fine and costs against the property on which the evidence disclosed that such nuisance was maintained. *Held*, that, even if this was error, it was nonprejudicial, for the reason that the proof discloses defendant to be the owner of such property, and under sec. 9379, Rev. Codes 1905, such fine and costs are made a lien on all of defendant's property until paid. State v. Ildvedsen, 62.

4. The attorney general, under the Constitution and existing statutes, either personally or by his assistants, may institute and prosecute actions violating the prohibition law, and for contempts for violation of injunctions restraining liquor nuisances. Ex parte Corliss, 16 N. D. 470, 114 N. W. 962, distinguished. State v. Heiser, 357.

5. On a prosecution for importing into this state intoxicating liquors for sale or gift as a beverage, proof that defendant did, within one or two months prior to the time fixed in the information, sell intoxicating liquors, is admissible only as to the intent with which the act charged in the information was done. State v. Miller, 509.

INTOXICATING LIQUORS—continued.

6. Appellant was convicted of contempt for violating an injunction enjoining him from maintaining a liquor nuisance, and sentenced to imprisonment for five months and fine of $650, in default of payment of which he was to be imprisoned for 100 days additional; Judge Burr, of the ninth judicial district, heard the contempt proceedings at the written request of Judge Crawford, of the tenth judicial district. Omitting the formal parts such request is as follows: "You are hereby requested to act as district judge, and take full charge of the above-entitled action, including all matters and contempt proceedings therein which are now in issue or which may hereafter be brought before you by any person, authority, or officer lawfully entitled to do so, or otherwise as law and justice may require. By the Court. W. C. Crawford, Judge." The assignments challenge: (1) The jurisdiction of Judge Burr to hear and determine such contempt proceeding; (2) the sufficiency of the affidavits upon which the warrant of attachment was issued; (3) the authority of F. C. Heffron, as assistant attorney general, to institute and prosecute the proceeding; and (4) the validity of the judgment and sentence of the court. *Held*, for reasons stated in the opinion, that each of such assignments is untenable. State v. Heiser, 357.
7. The information covers the time from January 1st, 1909, until May 18, 1910. Over objection witness answered the following question: "How many times have you drunk malt or beer there in the last year and a half?" The objection to the question that it embraced more time than alleged in the information was overruled. This ruling, even if erroneous, is not prejudicial. The time inquired about was at best but a slight variance, and numerous witnesses answered substantially the same question without any objection on the part of the defendant. State v. Albertson, 512.
8. Records of a railway station showing articles billed to defendant, and receipted for by him, are competent evidence to show the nature of such articles. State v. Staber, 545.

JUDGES. See Discretion, 614.

1. Appellant was convicted of contempt for violating an injunction enjoining him from maintaining a liquor nuisance, and sentenced to imprisonment for five months and fine of $650, in default of payment of which he was to be imprisoned for 100 days additional; Judge Burr, of the ninth judicial district, heard the contempt proceedings at the written request of Judge Crawford, of the tenth judicial district. Omitting the formal part such request is as follows: "You are hereby requested to act as district judge and take full charge of the above-entitled action, including all matters and contempt proceedings therein which are now in issue, or which may hereafter be brought before you by any person, authority, or officer lawfully

JUDGES—continued.

entitled to do so, or otherwise as law and justice may require. By the Court, W. C. Crawford, Judge." The assignments challenge: (1) The jurisdiction of Judge Burr to hear and determine such contempt proceeding: (2) the sufficiency of the affidavits upon which the warrant of attachment was issued; (3) the authority of F. C. Heffron, as assistant attorney general, to institute and prosecute the proceeding; and (4) the validity of the judgment and sentence of the court. *Held*, for reasons stated in the opinion, that each of such assignments is untenable. State v. Heiser, 357.

2. While a criminal contempt proceeding where attachment issues is an original special proceeding under sec. 7555, Rev. Codes 1905, it is not an independent proceeding, as it grows out of and is connected with the main action. Such contempt proceeding is dependent upon those in the main action and the violation of the injunction therein issued. The written request of Judge Burr warrants him in assuming and exercising jurisdiction, both in the main action and in the contempt proceedings, for violation of such injunction, whether the contempt proceeding was pending or not when the request was made. State v. Heiser, 357.

3. Sec. 6765, Rev. Codes 1905, provides: "No judge of the district court shall hear or determine any action, special proceeding, motion, or application, or make any order or give any judgment in any action or proceeding not pending in the judicial district for which he is elected, except in the following cases: 1. Upon the written request of the judge of the district in which such action or proceeding is at the time pending. *Held*, it was not the intent to restrict the jurisdiction of the requested judge to causes only then pending," the words "in which such action or proceeding is at the time pending" designate the judge to make the request, and have no reference to the subject-matter upon which the requested judge may assume jurisdiction. State v. Heiser, 357.

JUDGMENTS. See Appeal and Error, 197, 434, 635; Contempt, 357; Criminal Law, 337; Evidence, 142, 295; Homestead, 484; Schools and School Districts, 393.

1. The judgment upon a conviction for keeping and maintaining a liquor nuisance adjudged that a lien be established for the amount of the fine and costs against the property on which the evidence disclosed that such nuisance was maintained. *Held*, that, even if this was error, it was nonprejudicial, for the reason that the proof discloses defendant to be the owner of such property, and under sec. 9379, Rev. Codes 1905, such fine and costs are made a lien on all of defendant's property until paid. State v. Ildvedsen, 62.

2. Sec. 7039, Rev. Codes 1905, providing that upon the trial of an issue of

JUDGMENTS—continued.

fact by the court, its decision and conclusions of law and direction for entry of judgment must be given in writing and filed within sixty days after the cause has been submitted, does not make void a judgment rendered after that period. Bruegger v. Cartier, 72.

3. After an action in Williams county was tried and before it was decided, the county was detached from the second judicial district, and formed into the eighth. *Held*, that a judgment in such action, entered on an order of the judge of the said second district, filed thereafter, was at most voidable, and no application to vacate the same, as provided by sec. 6766, Rev. Codes 1905, having been made, the judgment is valid. Bruegger v. Cartier, 72.

4. In an action in equity to obtain a new trial of an action at law, or to be relieved from a judgment entered in such action, on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that in the trial thereof matters were determined adversely to the party complaining, to the prejudice of his interests, and that he was, by fraud or accident, deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault. Bruegger v. Cartier, 72.

5. A judgment signed by the judge and entered in the judgment book is a "final judgment," and may be proved as a former adjudication of the issues in the suit. Ottow v. Friese, 86.

6. The rule in Tuttle v. Tuttle, 19 N. D. —, 124 N. W. 429, has no application to the motion at bar. A favorable ruling on respondent's motion to dismiss the appeal will deprive the appellant of the right of an adjudication on the merits as to the correctness of the order refusing to vacate the judgment. Wiemer v. Wiemer, 268.

7. Where it appears that a district court has unquestioned jurisdiction of persons and subject-matter in a foreclosure action, error of the court in determining the effect to be given certain evidence introduced does not vitiate the judgment so as to render it void upon collateral attack. The remedy in such case is by appeal, and, if no appeal is taken, the conclusiveness of the decree upon points properly adjudicated, in a subsequent suit between the same parties, will not be affected. Borden v. McNamara, 225.

8. That the estoppel of a judgment may be effective, a party claiming its benefits must plead the adjudication in bar of a subsequent action, and establish it by competent proof; a failure to do either is a waiver of all rights depending on such estoppel. Borden v. McNamara, 225.

9. When the bar of a former judgment in an action between the same parties is properly pleaded, and proof of the issues involved therein and the judgment rendered is made by competent evidence, such proof is conclusive of all facts adjudicated in the prior action; and it is error to disregard the

JUDGMENTS—continued.

legal effect of the facts adjudicated by or involved in the rendition of the former judgment. Borden v. McNamara, 225.

10. Where more than one action involving the same facts has been tried between the same parties, the last judgment rendered in point of time by a court having jurisdiction to render it prevails over any rendered prior thereto, on all points properly adjudicated. Borden v. McNamara, 225.
11. Where an action involving title to real estate is brought, and notice of *lis pendens* duly filed, one purchasing the title after the record of such notice is bound by all points thereafter adjudicated against his grantor by the decree, to the same extent that the grantor is bound. Borden v. McNamara, 225.
12. The judgment is not open to attack: 1. That it designates the time when imprisonment shall commence while the oral sentence fails to, 2. that the fine imposed is excessive, that the fine consists partly of costs is immaterial as the total fine does not exceed that permitted by statute. Within the limits fixed by law, trial courts have absolute discretion as to punishment. A fine of $500 and costs $150 was intended as an aggregate fine of $650, and is within the maximum fixed by the statutes. State v. Heiser, 357.
13. Application to vacate a default judgment or order, not for irregularities of procedure, but for "mistake, inadvertence, surprise, or excusable neglect" of the moving party, rests not upon legal right, but is addressed to the discretion of the court, whose ruling will not be disturbed, except for abuse of discretion. Cline v. Duffy, 525.
14. Persons seeking relief from default judgments for "mistake, inadvertence, surprise, or excusable neglect" must show diligence, or the court will not exercise its discretion. Applicant must show facts excusing the default, a meritorious defense, and proper diligence in prosecuting his remedy, and application must be made with due diligence after notice of the default. On the facts of the case, *held*, abuse of discretion in denying the motion. Cline v. Duffy, 525.

JUDICIAL DISTRICTS. See Jurisdiction, 357.

1. After an action in Williams county was tried and before it was decided, the county was detached from the second judicial district, and formed into the eighth. *Held*, that a judgment in such action, entered on an order of the judge of the said second district, filed thereafter, was, at most, voidable, and no application to vacate the same, as provided by sec. 6766, Rev. Codes 1905, having been made, the judgment is valid. Bruegger v. Cartier, 72.

JUDICIAL NOTICE. See Evidence, 295.

JURISDICTION.

1. In an action to determine adverse claims to real estate under chap. 29, Comp. Laws 1887, the district court had original jurisdiction, and the facts essential to a cause of action thereunder were not the same as those for forcible entry and detainer. Ottow v. Friese, 86.
2. On appeal from a default judgment in a justice court, serving appellant's pleading with the undertaking is prerequisite to the jurisdiction of the district court. Aneta Merc. Co. v. Groseth, 137.
3. The service of appellant's pleading in such cases pertains to the jurisdiction of the district court over the cause and subject-matter, and was not waived by the stipulation of the parties to continue the case over the January, 1909, term of the district court. Aneta Merc. Co. v. Groseth, 137.
4. Under the Constitution the jurisdiction of the supreme court to issue original writs, except in the exercise of appellate jurisdiction or supervision over inferior courts, extends only to prerogative writs, which will issue only in cases *publici juris*, involving sovereignty of the state, its franchises, prerogatives, or the liberties of citizens. State v. Norton, 180.
5. A district court, having rendered a decree of foreclosure for a portion of a mortgage debt due upon instalments, may entertain another suit for the foreclosure upon other instalments not included in the first foreclosure. Borden v. McNamara, 225.
6. Where it appears that a district court has unquestioned jurisdiction of persons and subject-matter in a foreclosure action, error of the court in determining the effect to be given certain evidence introduced does not vitiate the judgment so as to render it void upon collateral attack. The remedy in such case is by appeal, and, if no appeal is taken, the conclusiveness of the decree upon points properly adjudicated, in a subsequent suit by the same parties, will not be affected. Borden v. McNamara, 225.
7. Appellant was convicted of contempt for violating an injunction enjoining him from maintaining a liquor nuisance, and sentenced to imprisonment for five months and fine of $650, in default of payment of which he was to be imprisoned for 100 days additional; Judge Burr, of the ninth judicial district, heard the contempt proceedings at the written request of Judge Crawford, of the tenth. Such request was as follows: "You are hereby requested to act as district judge and take full charge of the above-entitled action, including all matters and contempt proceedings therein which are now in issue or which may hereafter be brought before you by any person, authority, or officer lawfully entitled to do so, or otherwise, as law and

JURISDICTION—continued.

justice may require. By the Court, W. C. Crawford, Judge." The assignments challenge: (1) The jurisdiction of Judge Burr to hear and determine such contempt proceeding; (2) the sufficiency of the affidavits upon which the warrant of attachment was issued; (3) the authority of F. C. Heffron, as assistant attorney general, to institute and prosecute the proceeding; and (4) the validity of the judgment and sentence of the court. *Held*, for reasons stated in the opinion, that each of such assignments is untenable. State v. Heiser, 357.

8. While a criminal contempt proceeding where attachment issues is an original special proceeding under sec. 7555, Rev. Codes 1905, it is not an independent proceeding, as it grows out of and is connected with the main action. Such contempt proceeding is dependent upon those in the main action and the violation of the injunction therein issued. The written request of Judge Burr warrants him in assuming and exercising jurisdiction, both in the main action and in the contempt proceeding, for violation of such injunction, whether the contempt proceeding was pending or not when the request was made. State v. Heiser, 357.

9. Sec. 6765, Rev. Codes 1905, provides: "No judge of the district court shall hear or determine any action, special proceeding, motion, or application, or make any order or give any judgment in any action or proceeding not pending in the judicial district for which he is elected, except in the following cases: 1. Upon the written request of the judge of the district in which such action or proceeding is at the time pending. *Held*, it was not the intent to restrict the jurisdiction of the requested judge to causes only then pending," the words "in which such action or proceeding is at the time pending" designate the judge to make the request, and have no reference to the subject-matter upon which the requested judge may assume jurisdiction. State v. Heiser, 357.

JURY. See Criminal Law, 105; Instructions, 42, 211, 434; Trial, 434, 461; Verdict, 211, 261.

1. On appeal from an order denying a motion by defendant for a directed verdict, if the sufficiency of the evidence to support the verdict is in some doubt, and the jury found in plaintiff's favor, the ruling of the trial court submitting the case will not be disturbed. Forzen v. Hurd, 42.

2. Under chap. 68, Laws 1907, a jury is not necessarily to be summoned, unless there is a criminal case "awaiting trial," and no case is "awaiting trial" where the return of the committing magistrate only is filed and the defendant is at large on bail. State v. Fleming, 105.

3. Error cannot be predicated upon the refusal of the court to advise an acquittal in a criminal action; the jury are not bound by such advice, and the

JURY—continued.

court cannot say, as a matter of law, that the evidence is insufficient to support a conviction, nor prevent the jury from giving a verdict, but such question may be disposed of by the court on motion for a new trial, in case of conviction. State v. Wright, 216.

4. Where a jury is impaneled to fix the punishment upon a plea of guilty in murder cases, it is error to instruct the jury that they may consider the demeanor of the defendant in court, where he is not called as a witness. State v. Noah, 281.

5. Where the jury is impaneled to fix the penalty in a murder case, it is improper to charge the jury that the court can reduce the penalty inflicted, if they impose the death penalty, as it imports to the jury that the whole responsibility is not with them. State v. Noah, 281.

6. Where the evidence is conflicting as to the condition of a highway, at the point therein claimed to be dangerous for travel, the jury is to determine whether it was so or not. Solberg v. Schlosser, 307.

7. Where different persons may reasonably reach different conclusions upon the evidence, defendant's negligence and plaintiff's contributory negligence are questions for the jury. Solberg v. Schlosser, 307.

8. The special findings made by the jury are sufficient to sustain the general verdict. If the questions not answered, or where the answers are not proved, were all answered favorably to appellant, the general verdict would still be consistent with the special findings. Acton v. F. & M. St. Ry. Co. 434.

9. Refusal of a new trial for misconduct of a juror will not be disturbed, except for abuse of discretion. State v. Robidou, 518.

10. The failure of the trial court to have the testimony of a witness read at the request of the jury, *held*, under the circumstances of the case at bar, not error. Auld v. Cathro, 461.

11. Refusal to advise the jury to acquit is not error, as the jury are not bound by such advice. State v. Albertson, 512.

12. Remarks of the state's attorney in his address to the jury, as set forth in the opinion, *held*, not prejudicial. State v. Staber, 545.

13. Following State v. Ekanger, 8 N. D. 559, 80 N. W. 482 and State v. Werner, 16 N. D. 83, 112 N. W. 60, *held*, that a juror who has formed and entertains an opinion as to the guilt or innocence of the accused, requiring evidence to remove, is not disqualified, if such opinion is based wholly upon newspaper accounts, common street gossip, if the juror can and will, notwithstanding such opinion, fairly and impartially try the case on the testimony and the law. State v. Fujita, 555.

14. A trial court's decision upon the qualification of a juror will be disturbed only for abuse of discretion. State v. Fujita, 555.

15. In an action by a principal against his agent for damages for not procuring

JURY—continued.

"fair" security for the price of property sold by him under his agency contract, *held*, evidence sufficient to go to the jury, as showing not only negligence but bad faith, and it was error to direct a verdict for defendant. Morris v. Bradley, 646.

16. Evidence examined, and *held*, that the proof submitted by plaintiff upon the questions of the worthlessness of the security and the resulting loss sustained by him was sufficient, prima facie, to require its submission to the jury. Morris v. Bradley, 646.

JUSTICE OF THE PEACE.

1. On appeal from a default judgment in a justice court, serving appellant's pleading with the undertaking is prerequisite to the jurisdiction of the district court. Aneta Merc. Co. v. Groseth, 137.
2. The service of appellant's pleading in such cases pertains to the jurisdiction of the district court over the cause and subject-matter, and was not waived by the stipulation of the parties to continue the case over the January, 1909, term of the district court. Aneta Merc. Co. v. Groseth, 137.

LACHES. See Counties, 27.

1. Knowledge being an essential element of laches in an action to determine adverse claims, a defendant alleging title in himself is not precluded from maintaining a defense by lapse of time while he was ignorant of the adverse claims, prior to bringing the action. Goss v. Herman, 295.

LAND GRANT. See Public Lands, 247.

LAST CLEAR CHANCE. See Negligence, 434.

LEGISLATURE. See Constitutional Law, 372, 614; Counties, 27.

1. When detached territory from one county is annexed to another, the division and apportionment of the debts between such counties belongs to the legislature, and not to the courts; when the legislature has acted, the courts cannot interfere. Burleigh County v. Kidder County, 27.
2. The legislature may prescribe reasonable regulations to prevent fraud, insure order and a fair election, and prescribe the method of proving qualifications of electors, and prohibit the receipt of votes without such proof. Fitzmaurice v. Willis, 372.
3. The prohibition contained in sec. 738, Rev. Codes 1905, reading, "No vote shall be received at any election in this state if the name of the voter

LEGISLATURE—continued.

offering such vote is not on the registration list, unless such persons shall furnish to the judges of the election his affidavit stating that he is a resident of such precinct, giving his place of residence," etc.,—is within the power delegated to the legislative assembly to prescribe reasonable regulations for making proof of the qualifications of those offering to vote at an election. Fitzmaurice v. Willis, 372.

4. School property is subject to legislative control within constitutional limits. School Dist. No. 94 v. King, 614.
5. *Held*, the legislature has, within reasonable limits, the power to determine how many voters acting together for the purpose of making nominations shall be entitled to a party ballot, and that the provision providing only for the printing of ballots for parties casting 5 per cent of the votes cast for governor at the next preceding general election is a reasonable regulation of an election held to make party nominations. State v. Blaisdell, 622.
6. Sec. 47 of the Constitution, which provides that each house of the legislature shall be the judge of the election returns and all qualifications of its members, is not infringed upon by the courts in passing upon the duties of county auditors as to filing petitions for nominations and printing ballots. State v. Meyer, 628.
7. Under the provision of the Constitution fixing the terms of state senators at four years, "except as hereinafter provided," authorizing the legislature to fix the number of senators, divide the state into districts with one senator for each, requiring such districts to be numbered from one upward, and senators to be divided into two classes, one from the even-numbered, the other from the odd-numbered districts, and the determination of the classes by lot, so that the half may be elected biennially, and one class elected in 1890 shall hold for two years and the other for four, and requiring a reapportionment of districts every five years, and permitting it at other times; under the division of 1890 those in the odd-numbered districts held for two years and those in the even-numbered for four, etc. *Held*, the governing principle of the Constitution is that the senate be at all times composed of two classes, but as nearly equal in number as practicable. *Held*, further, the expiration of the terms depends upon the classification made in 1891, that the terms of senators from districts created by reapportionment and at the same time with those of the same class elected from the old districts make the terms of the senators from all even-numbered districts expire simultaneously, and those from the odd-numbered two years later. *Held*, further, that the courts have power to direct the county auditor to file a senator's petition and publish his name upon the ballot to be used at the primary election. *Held*, further, that Sec. 42 of Constitution as to election returns and qualifications of its members is not infringed upon by the courts in passing upon the duties of the county auditor in the matter of filing petitions for nomination and

LEGISLATURE—continued.

printing ballots, and that, under the circumstances of this case, nonjoinder of the secretary of state as a defendant is not fatal to relator's right to a writ commanding the auditor to file the petition and print his name upon the ballot. State v. Meyer, 628.

LIENS. See Intoxicating Liquors, 62; Mechanics' Liens, 412; Municipal Corporations, 427.

LIMITATION OF ACTIONS.

1. The right of action by one county against another to enforce the liability charged upon defendant county by the legislature segregating from plaintiff county a part of its territory, and annexing it to defendant county, is upon a specialty created by statute, and not within the provisions of the statute of limitations. Burleigh County v. Kidder County, 27.
2. A county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund, without first showing that it has provided such fund. Burleigh County v. Kidder County, 27.

MANDATORY PROVISIONS. See Voters and Elections, 372.

MASTER AND SERVANT.

1. To hold one liable for loss by prairie fire which he neither sets nor negligently permits to escape from his control, it must appear that those who originated the fire, in so doing acted under his express or immediate direction, or were in his employ and required and directed by him to do certain work the performance of which involved the setting of fire to the prairie grass. Forzen v. Hurd, 42.
2. An instruction that a defendant may be held liable for damages occasioned by a prairie fire, if the jury find the fact to be that the men who set and tended the fire were working for the defendant "at the time in the course of their usual employment on the farm, and doing his work the same as your men do when you are gone,"—contains a misdirection as to the law, as it incorrectly assumes that the ordinary and usual work of a farm permits or requires the setting of fire to the prairie grass under conditions that render such act extremely hazardous. Forzen v. Hurd, 42.
3. One contracting to construct a drain under plans and specifications, and having sole control of the work, and the drainage board having no control or superintendence thereof, is an independent contractor, and not an agent of the board. Solberg v. Schlosser, 307.

MASTER AND SERVANT—continued.

4. A street railway company is liable for injuries sustained by a collision between a vehicle and a car, where those in charge of the car by ordinary care could have avoided the accident, notwithstanding the negligence of the driver in first placing himself in the situation of peril. Acton v. F. & M. St. Ry. Co. 434.

MEASURE OF DAMAGES. See Damages, 256.

MECHANICS' LIENS.

1. When two persons have a joint contract with a builder for the erection of a building to be placed on two adjoining lots owned in severalty by each of said persons, and a subcontractor furnishes building material, which is used for the erection of such building, under an entire contract with the builder, he is entitled to a joint lien, but not to a separate lien against one lot and the part of the building standing thereon. Stoltze v. Hurd, 412.

MISTAKE. See Fraud, 72.

MORTGAGEE IN POSSESSION. See Mortgages, 151.

MORTGAGES. See Insurance, 316.

1. Under the Compiled Laws of 1887, an affidavit of mortgage sale reciting that sale was made at a place other than that named in the notice may be corrected, as against the mortgagor, by another filed after the sale, showing sale made as advertised. Ottow v. Friese, 86.
2. Evidence considered, and *held*, to show a valid foreclosure, and that the plaintiff has the title to the land in suit. Ottow v. Friese, 86.
3. A deed of real estate, absolute in terms, will not be declared a mortgage unless the evidence is clear, specific, satisfactory, and convincing that such was the intention of the parties. Miller v. Smith, 96.
4. On the question whether a deed is a mortgage, one of the most decisive tests is whether there exists a debt from the grantor to the grantee, as there can be no mortgage without a debt or liability to be secured. Miller v. Smith, 96.
5. On the question whether a deed is a mortgage, the form of the conveyance is not controlling, and parol evidence is admissible to show the real agreement. Miller v. Smith, 96.
6. The declarations of the parties at the time and subsequently are also admissible to determine what the real intention was. Miller v. Smith, 96.

MORTGAGES—continued.

7. A contract to reconvey on fixed terms does not necessarily show that the transaction was for security purposes, although the sum to be paid on a reconveyance is a sum equal in amount to the sum secured by a former mortgage. Miller v. Smith, 96.
8. A security contract may be changed to an absolute conveyance, subject to an option to repurchase under fixed terms. On such issues the intention of the parties is the test, but the fairness of the transaction will be scrutinized to see that the act was not influenced by financial circumstances of the debtor or the oppression of the creditor. Miller v. Smith, 96.
9. Evidence considered, and *held*, not to show that a deed and accompanying contract are a mortgage, but an absolute deed, with the privilege of a reconveyance on payment of a definite sum on or before a day certain. Miller v. Smith, 96.
10. By virtue of his purchase of the premises in controversy from Galloway in the summer of 1896, appellant E. L. Turcotte succeeded to whatever rights Galloway had in said premises, and became the equitable assignee of the mortgage executed by plaintiff Blessett to Galloway January 25, 1890. Blessett v. Turcotte, 151.
11. In an action by parties out of possession against a party in possession to determine adverse claims to real estate, which adverse claims are based upon a mortgage owned by defendant and a tax deed, which mortgage authorized the owner thereof to pay the delinquent taxes upon the premises covered by the mortgage and add the amount to his mortgage debt, before plaintiffs are entitled to the relief prayed for, they must do equity and reimburse the defendant for all taxes paid by him, and also pay him the amount due upon his mortgage. Blessett v. Turcotte, 151.
12. The right to redeem from mortgage foreclosure upon real estate after the time allowed by law, under a claim of relying on the purchaser's promise to accept payment at redemptioner's convenience, will not be upheld except upon clear and convincing evidence that the promise was made and in good faith relied on. Kenmare, Hard Coal, B. & T. Co. v. Riley, 182.
13. If a promise to allow a redemption after the year has expired is made and relied on to the redemptioner's detriment, the purchaser is estopped from denying the right to redeem. Kenmare Hard Coal B. & T. Co. v. Riley, 182.
14. In a letter from the purchaser at such foreclosure sale to the owner of said land, the following language was used: "We will also say that if you do not care to pay up this matter now, let it go to suit your convenience, as the matter is drawing interest at the rate of 12 per cent." *Held*, in view of the indefinite character of the statement and the evidence in relation to the intention of the owner to redeem within the year, that the

MORTGAGES—continued.

right to redeem after the year expired was not shown by that clear and convincing evidence required in this class of cases. Kenmare Hard Coal B. & T. Co. v. Riley, 182.

15. The right to foreclose a real estate mortgage containing power of sale and payable in instalments is not exhausted by foreclosure upon one or more of such instalments; under the statute each instalment is a separate and independent mortgage, and the mortgage for each may be foreclosed as if a separate mortgage was given for each separate instalment. Borden v. McNamara, 225.

16. A district court, having rendered a decree of foreclosure for a portion of a mortgage debt due upon instalments, may entertain another suit for the foreclosure upon other instalments not included in the first foreclosure. Borden v. McNamara, 225.

17. Where it appears that a district court has unquestioned jurisdiction of persons and subject-matter in a foreclosure action, error of the court in determining the effect to be given certain evidence introduced does not vitiate the judgment so as to render it void upon collateral attack. The remedy in such case is by appeal, and, if no appeal is taken, the conclusiveness of the decree upon points properly adjudicated, in a subsequent suit by the same parties, will not be affected. Borden v. McNamara, 225.

MOTION. See Appeal and Error, 151, 268.

MUNICIPAL CORPORATIONS.

1. The owner of real property in a city on which is a special assessment may pay it in full, with interest to date of payment, and such payment will discharge the lien. State v. Murphy, 427.

2. A city issuing special assessment paving warrants may incorporate therein a stipulation that they may be paid before maturity, and thus stop interest. State v. Murphy, 427.

MURDER. See Criminal Law, 281.

NEGLIGENCE.

1. To hold one liable for loss by prairie fire which he neither sets or negligently permits to escape from his control, it must appear that those who originated the fire, in so doing acted under his express or immediate direction or were in his employ and required and directed by him to do certain work the performance of which involved the setting of fire to the prairie grass. Forzen v. Hurd, 42.

NEGLIGENCE—continued.

2. It is not negligence to drive upon a dangerous or defective highway by one knowing it to be such, unless its condition is such that a person of ordinary prudence would not attempt it. Solberg v. Schlosser, 307.
3. Knowledge of the dangerous condition of a highway, however, imposes a duty upon a traveler to exercise such care as the circumstances demand. Solberg v. Schlosser, 307.
4. Where different persons may reasonably reach different conclusions upon the evidence, defendant's negligence and plaintiff's contributory negligence are questions for the jury. Solberg v. Schlosser, 307.
5. The complaint considered, and *held*, to set forth a cause of action for a violation of a duty not to render a highway dangerous by placing and leaving dirt thereon in a negligent manner, and not to state a cause of action on a breach of contract. Solberg v. Schlosser, 307.
6. Any person who wrongfully renders a public highway dangerous for travel by placing obstructions thereon must respond in damages to anyone injured in consequence of such obstruction. Solberg v. Schlosser, 307.
7. A traveler may use every part of a city street, whether there is a street car track in it or not. It is the duty of free vehicles not to obstruct street cars unnecessarily, and turn aside when they meet them; but, subject to that and the respective powers of both, a car and wagon owe reciprocal duties to use reasonable care to avoid collision. Acton v. F. & M. St. Ry. Co. 434.
8. Street cars have precedence on their tracks. It must be exercised with proper caution and regard for others; that they have a prescribed route does not alter their duty to the public, who can travel on their track until overtaken by cars. Acton v. F. & M. St. Ry. Co. 434.
9. The court charged the jury as follows: "I charge you, gentlemen of the jury, as a matter of law, that even if you find from a preponderance of the evidence that the plaintiff in this action was guilty of contributory negligence in going upon the defendant's track, under all the circumstances of the case, that nevertheless, if the defendant or its employees in charge of the car were aware, or should by the exercise of reasonable diligence and care have become aware, of the dangerous position of the plaintiff, in time to have, by the exercise of reasonable diligence and care, avoided the collision with the buggy of the plaintiff, that the prior negligence of the plaintiff would not bar his right to recover in this action." This instruction states the law correctly. Acton v. F. & M. St. Ry. Co. 434.
10. The ground upon which plaintiff may recover, notwithstanding his own negligence, is that the defendant, after becoming aware of the danger to which plaintiff was exposed, failed to use a proper degree of care to avoid injuring him. Acton v. F. & M. St. Ry. Co. 434.
11. It is not necessarily negligent to drive a vehicle on a street car track in

NEGLIGENCE—continued.

either direction. But a driver should look out for cars approaching from front and rear, but he is not required to keep a constant watch to the rear for approaching cars. Acton v. F. & M. St. Ry. Co. 434.

12. Unless the negligence of the plaintiff proximately contributes to the injury, it does not constitute contributory negligence which bars a recovery. The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it. Acton v. F. & M. St. Ry. Co. 434.

13. A vehicle moving along a street railway track must leave it on the approach of cars; still, those in charge of cars must use reasonable diligence to prevent collisions, and the company is liable for failure to do so. Acton v. F. & M. St. Ry. Co. 434.

14. Where a street car is approaching from the rear a vehicle moving along the track, the motorman cannot proceed without regard to the presence of the vehicle, anticipating that it will leave the track in time for the car to pass. Acton v. F. & M. St. Ry. Co. 434.

15. When a street car approaches a vehicle in a line with its progress and an obstacle in the way, the car must be reduced to such control that it may be stopped if necessary. Acton v. F. & M. St. Ry. Co. 434.

16. A street railway company is liable for injuries sustained by a collision between a vehicle and a car, where those in charge of the car by ordinary care could have avoided the accident, notwithstanding the negligence of the driver in first placing himself in the situation of peril. Acton v. F. & M. St. Ry. Co. 434.

17. Such timely and reasonable warning of the approach of a street car must be given as will enable others in the exercise of due care to avoid injury from it. Acton v. F. & M. St. Ry. Co. 434.

18. If a motorman by the exercise of ordinary care could discover plaintiff's peril while driving a wagon on the track, in time to avoid the collision, and did not do so, plaintiff's failure to look back for an approaching car will not preclude his recovery. Whether such motorman made proper efforts to avoid the collision, or by the exercise of ordinary care could have seen plaintiff's peril, under the facts, was for the jury. Acton v. F. & M. St. Ry. Co. 434.

19. Where the jury found that the motorman did not exercise ordinary care and reasonable diligence to stop the car and prevent the accident, after he saw, or with reasonable diligence might have seen, plaintiff's danger, for reasons stated in the opinion, appellant was not prejudiced by the instructions complained of. Acton v. F. & M. St. Ry. Co. 434.

20. The court refused to instruct that, though the motorman saw the plaintiff driving along and on the track, and (if he was driving thereon) he had

NEGLIGENCE—continued.

a right to assume that the plaintiff would exercise ordinary care to observe the approach of the car, and would get out of danger before the car would reach him, and that the motorman is not required to check his car (if said car is running at an ordinary rate of speed) until he has reasonable cause to believe that there is actual danger of a collision, *held*, not error, under the facts of the case. Acton v. F. & M. St. Ry. Co. 434.

21. In an action for personal injuries by a collision at a crossing over defendant's track, *held*, under the evidence, that the question of plaintiff's contributory negligence was properly submitted to the jury. Hollingshead v. Soo Ry. Co. 642.
22. In an action by a principal against his agent for damages for not securing "fair" security for the price of property sold by him under his agency contract, *held*, evidence sufficient to go to the jury, as showing not only negligence but bad faith, and it was error to direct a verdict for defendant. Morris v. Bradley, 646.

NEW TRIAL. See Appeal and Error, 188.

1. The verdict of the jury having substantial support in the evidence, the appellate court will not weigh conflicting evidence nor disturb the order refusing a new trial. Casey v. First Bank of Nome, 211.
2. Application for a new trial is addressed to the sound discretion of the trial court, and its order denying a new trial will not be reversed except for abuse of discretion. Casey v. First Bank of Nome, 211.
3. Error cannot be predicated upon the refusal of the court to advise an acquittal in a criminal action; the jury are not bound by such advice, and the court cannot say, as a matter of law, that the evidence is insufficient to support a conviction, nor prevent the jury from giving a verdict, but such question may be disposed of by the court on motion for a new trial, in case of conviction. State v. Wright, 216.
4. Under the facts of the case, although in the supreme court for trial *de novo*, in view of the lack of evidence on some questions relative to the title of both parties, it is remanded for a new trial. Goss v. Herman, 295.
5. A trial court may reduce an excessive verdict, and require the prevailing party to take the reduced amount or submit to a new trial. Lohr v. Honsinger, 500.
6. Refusal of a new trial for misconduct of a juror will not be disturbed, except for abuse of discretion. State v. Robidon, 518.
7. Where the statements in affidavits on a motion for a new trial are purely impeaching, such evidence does not furnish ground for granting a new trial. State v. Albertson, 512.
8. Evidence examined, and *held*, that there is legal proof to support the verdict, 20 N. D.—46.

NEW TRIAL—continued.

and it was not abuse of discretion to deny defendants a new trial. Lowry v. Piper, 637.

9. Plaintiff, instead of moving for a new trial, moved for judgment notwithstanding such verdict. Thereupon defendant moved that the verdict be vacated and that he be allowed to furnish proof of the defenses alleged in his answer. The latter motion was granted on terms, and plaintiff's motion denied. *Held*, that such order, although irregularly issued, is nonprejudicial to plaintiff, as he is not entitled to judgment *non obstante veredicto*, but merely to a new trial, and this, in effect was granted by the order complained of. Schwartz v. Hendrickson, 639.

NOTICE. See Laches, 295; Streets and Highways, 309.

1. Where an action involving title to real estate is brought and notice of *lis pendens* duly filed, one purchasing the title after the record of such notice is bound by all points thereafter adjudicated against his grantor by decree to the same extent that the grantor is bound. Borden v. McNamara, 225.
2. Where the cashier of a bank misappropriated its funds or became indebted thereto as treasurer of an elevator company, drew checks upon it payable to the bank, used the same to pay his personal indebtedness to the bank, such checks are notice to the bank of a misappropriation of the funds of the elevator company and the bank with such notice cannot predicate upon them a claim of liability against the elevator company. Emerado Farmers Elev. Co. v. The Farmers Bank, 270.
3. A bank is not authorized to pay out funds entrusted to it to a person known by it to stand in a trust relation to the depositor, when it has notice that such person intends to misappropriate such funds; and in case such payment is made the amount can be recovered by the depositor. Emerado Farmers Elev. Co. v. The Farmers Bank, 270.
4. Where the cashier of a bank has the entire management and conduct of its affairs and is the sole representative in the receipt and disbursement of deposits, who, while so acting draws checks of an elevator company of which he is treasurer payable to the bank, presents such checks as treasurer to himself as cashier, misappropriates the money paid thereon, the bank is charged with knowledge of its fraudulent purpose and can have no claim upon the funds misappropriated against the elevator company. Emerado Farmers Elev. Co. v. The Farmers Bank, 270.
5. Courts cannot take judicial notice of foreign assignment or bankruptcy laws. Goss v. Herman, 295.
6. Service of notice of expiration of time for redemption from tax sale must be made personally upon the owner, known to be a resident of the state,

NOTICE—continued.
if a nonresident, by registered letter addressed to his last known postoffice and must also be personally served upon the person in possession. Tronsrud v. Farm Co. 567.

NUISANCE. See Criminal Law, 62; Intoxicating Liquors, 357.

OFFICERS. See Voters and Elections, 5, 622.

1. The presumption is that public officials do as the law and their duty require them. Greenfield School Dist. v. Hannaford School Dist. 393.
2. Sureties upon a deputy sheriff's bond, who undertake that he shall faithfully and impartially discharge the duties of his office, are liable for any unlawful or oppressive act done by him under color or by virtue of his office. Lee v. Charmley, 570.
3. Official bonds are to provide indemnity against malfeasance and misbehavior in office, the misuse of the powers belonging to it; and the assumption of those not belonging to it under guise of official action. All acts so performed, though unlawful or wrongful, are official acts within the scope of the official bond, that an officer shall faithfully and impartially discharge the duties of his office, and as such may be reasonably considered contemplated by the sureties when they sign the bond as constituting a breach of its conditions. Lee v. Charmley, 570.
4. A deputy sheriff who, falsely claiming to have a warrant for the arrest of a person not formally charged with crime of any kind, goes to his house in the nighttime and under guise of the authority of his office, arrests and takes such person into custody, has committed an unauthorized and unlawful act under color of office, for which the sureties upon his official bond are liable. Lee v. Charmley, 570.

OFFICIAL BONDS. See Sheriffs and Constables, 570.

1. Official bonds are to provide indemnity against malfeasance and misbehavior in office, the misuse of the powers belonging to it, and the assumption of those not belonging to it under guise of official action. All acts so performed, though unlawful or wrongful, are official acts within the scope of the official bond that an officer shall faithfully and impartially discharge the duties of his office, and as such may be reasonably considered contemplated by the sureties when they sign the bond, as constituting a breach of its conditions. Lee v. Charmley, 570.
2. A deputy sheriff who, falsely claiming to have a warrant for the arrest of a person not formally charged with crime of any kind, goes to his house in the nighttime and, under guise of the authority of his office, arrests

OFFICIAL BONDS—continued.

and takes such person into custody, has committed an unauthorized and unlawful act under color of office, for which the sureties upon his official bond are liable. Lee v. Charmley, 570.

ORDERS. See Discretion, 525.

PARTIES.

1. In an action to determine adverse claims, where a defendant pleads title in himself paramount to plaintiff's, such defendant becomes plaintiff and may maintain his counterclaim in his grantors' name as if he had been the party initiating the suit. Goss v. Herman, 295.
2. Demurrer for nonjoinder of parties will not be sustained if demurrant has no interest in the joinder of the omitted party, and is not prejudiced by the omission. Randall v. Johnstone, 493.
3. The secretary of state is not a necessary party in an action as to the duties of county auditors in the matter of filing petitions for nominations and printing names upon ballots. State v. Meyer, 628.

PAYMENT. See Sales, 1.

PERSONAL PROPERTY.

1. On a sale of personal property by the owner, there is an implied warranty of title free from encumbrance. St. A. & D. Elev. Co. v. Dawson, 18.
2. There may be an implied warranty of title of personal property on a sale thereof, although only in the constructive possession of the seller as bailor. St. A. & D. Elev. Co. v. Dawson, 18.
3. One who sells personal property on which there is a valid mortgage which the purchaser is compelled to pay after its validity is adjudicated is liable to the purchaser for the amount of the mortgage and costs. St. A. & D. Elev. Co. v. Dawson, 18.

PHYSICIAN.

1. Under the privilege of secrecy to all information acquired by a physician while attending a patient in a contest of a decedent's will, the testimony and opinion of such physician, based on information derived while treating and for treatment of testator, are properly excluded. Auld v. Cathro, 461.

PLEADING. See Assignments, 579; Counties, 27; Indictment and Information, 216, 281, 337; Insurance, 316; Laches, 295; Quieting Title, 86.

1. A complaint for money had and received is sufficient, where it appears that the money to be recovered is for overpayment by mistake of fact for goods purchased as result of a deficiency, although it appears that defendant during a certain season could supply such deficiency, and it does not allege such season had terminated when suit was brought, it being stipulated that no goods should be paid for until delivered. Scheer v. Clinton Falls Nursery Co. 1.
2. Plaintiff ordered from defendant, under a contract containing a stipulation as above stated, certain nursery stock consisting of trees. The next day, after delivering same, plaintiff discovered a deficiency in the shipment, and immediately demanded the return to him of the portion of the purchase price corresponding to such deficiency, or the balance of the trees. *Held*, that immediately upon a denial of such demand a cause of action accrued in plaintiff's favor for the recovery of such overpayment. Scheer v. Clinton Falls Nursery Co. 1.
3. When a purchaser sued for conversion of personal property by the holder of a chattel mortgage thereon requests the seller from whom he bought such property to defend the action, and he fails to so defend, such person, in addition to the amount of the chattel mortgage and costs, may recover as special damages a reasonable attorneys' fee when pleaded and proven. St. A. & D. Elev. Co. v. Dawson, 18.
4. A county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund, without first showing that it has provided such fund. Burleigh County v. Kidder County, 27.
5. A former adjudication may be pleaded and proven where the issues in the former action and in the pending action are the same. Ottow v. Friese, 86.
6. On appeal from a default judgment in a justice court, serving appellant's pleading with the undertaking is prerequisite to the jurisdiction of the district court. Aneta Merc. Co. v. Groseth, 137.
7. That the estoppel of a judgment may be effective, a party claiming its benefits must plead the adjudication in bar of a subsequent action, and establish it by competent proof; a failure to do either is a waiver of all rights depending on such estoppel. Borden v. McNamara, 225.
8. When the bar of a former judgment in an action between the same parties is properly pleaded, and proof of the issues involved therein and the judgment rendered is made by competent evidence, such proof is conclusive of all facts adjudicated in the prior action; and it is error to disregard the legal effect of the facts adjudicated by, or involved in, the rendition of the former judgment. Borden v. McNamara, 225.

PLEADING—continued.

9. The fact that the information designates the offense as murder in the first degree does not control as to the degree, as that depends upon the facts alleged, and not upon the conclusion of the pleader or grand jury. State v. Noah, 281.
10. The fact that the offense is so designated is mere surplusage, and does not subject the information to attack on that ground. State v. Noah, 281.
11. In an action to determine adverse claims, where a defendant pleads title in himself paramount to plaintiff's, such defendant becomes plaintiff, and may maintain his counterclaim in his grantor's name, as if he had been the party initiating the suit. Goss v. Herman, 295.
12. Knowledge being an essential element of laches in an action to determine adverse claims, a defendant alleging title in himself is not precluded from maintaining a defense by lapse of time while he was ignorant of the adverse claims prior to bringing the action. Goss v. Herman, 295.
13. The complaint considered, and *held*, to set forth a cause of action for a violation of a duty not to render a highway dangerous by placing and leaving dirt thereon in a negligent manner, and not to state a cause of action on a breach of contract. Solberg v. Schlosser, 307.
14. Complaint examined, and *held*, to state facts sufficient to constitute a cause of action. Tisdale v. Ward Co. 401.
15. Demurrer for nonjoinder of parties will not be sustained if demurrant has no interest in the joinder of the omitted party, and is not prejudiced by the omission. Randall v. Johnstone, 493.
16. Demurrer to complaint that causes of action were improperly united for reasons stated in the opinion was properly overruled. Randall v. Johnstone, 493.
17. Complaint examined, and *held*, that the facts therein alleged are sufficient to constitute a cause of action. Randall v. Johnstone, 493.
18. In claim and delivery by a mortgagee or his assignee for possession of mortgaged property sold to defendant for the purchase price of which the mortgage was given, defendant may counterclaim damages for breach of warranty of goods sold, but such set-off or counterclaim must be specially pleaded, and cannot be proved under a general denial. Vallancey v. Hunt, 579.

POLITICAL PARTIES. See Voters and Elections, 622.

POSSESSION. See Quieting Title, 86.

1. There may be an implied warranty of title of personal property on a sale thereof, although only in the constructive possession of the seller as bailor St. A. & D. Elev. Co. v. Dawson, 18.

POSSESSION—continued.

2. While possession of real estate affords a presumption of title, it does not preclude evidence of want of title in the party in possession. Goss v. Herman, 295.

3. In an action by the assignee of a mortgage for the possession of the mortgaged chattels, mortgagors claimed that they were sold to them under a conditional sale which never became absolute. Hence, such mortgage confers upon plaintiff no special property in the chattels, nor right to possession thereof. *Held*, under the evidence the sale subsequently became absolute, and such contention is untenable. Vallancey v. Hunt, 579.

PRACTICE. See Appeal and Error, 66, 419; Indictment and Information, 512; Judgment, 86; Jury, 555; Rules of Court, 216; Trial, 114, 512, 639.

1. Sec. 7039, Rev. Codes 1905, providing that upon the trial of an issue of fact by the court its decision and conclusions of law and direction for entry of judgment must be given in writing and filed within sixty days after the cause has been submitted, does not make void a judgment rendered after that period. Bruegger v. Cartier, 72.

2. After an action in Williams county was tried and before it was decided, the county was detached from the second judicial district, and formed into the eighth. *Held*, that a judgment in such action, entered on an order of the judge of the said second district, filed thereafter, was at most voidable, and no application to vacate the same as provided by sec. 6766, Rev. Codes 1905, having been made, the judgment is valid. Bruegger v. Cartier, 72.

3. Statutes and rules of practice pertaining to district courts in this state apply to proceedings in county courts with increased jurisdiction, under sec. 8289, Rev. Codes, 1905. State v. Fleming, 105.

4. It is not error to refuse to dismiss a criminal action for failure to arraign a defendant under sec. 9871, Rev. Codes 1905, at the next term of the court after the information is filed. State v. Fleming, 105.

5. In this case, which was tried under sec. 7229, Rev. Codes 1905, counsel for appellants, after the entry of judgment, caused to be served upon counsel for respondents a proposed statement of the case, consisting of six typewritten pages relating to eighty-seven exceptions, also containing a specification that appellants desire a review of the entire case in the supreme court. No proposed amendments were ever served. In due time and without notice to respondents, the trial court made an order settling a statement of the case, which statement contains a complete and literal transcript of the stenographer's minutes, including all objections, motions, rulings, and exceptions appearing therein, and all of the evidence offered, including exhibits and proceedings had upon the trial. A motion by re-

PRACTICE—continued.

spondents to strike the proposed statement of the case, excepting only the six typewritten pages relating to the eighty-seven exceptions, and also to strike from the printed abstract so much of the same as relates to the statement of the case and the stenographer's minutes and the exhibits and all of the abstract, excepting the judgment roll, is denied. Blessett v. Turcotte, 151.

6. Assignments upon rulings as to offered testimony as to defendant's system and manner of transacting business, *held*, without merit; *held*, further, that rulings not being excepted to, cannot be noticed; *held*, further, that appellant's assumption that he was not permitted to show payment is not justified by the records, but, on the contrary, no competent evidence was offered to prove such payment. Cochrane v. Natl. Elev. Co. 169.
7. Respondent's contention that appellant's proper remedy was an application to the board of county commissioners for an order abating the taxes considered, and *held*, untenable. Tisdale v. Ward Co. 401.
8. Demurrer for nonjoinder of parties will not be sustained if demurrant has no interest in the joinder of the omitted party, and is not prejudiced by the omission. Randall v. Johnstone, 493.
9. A trial court may reduce an excessive verdict and require the prevailing party to take the reduced amount, or submit to a new trial. Lohr v. Honsinger, 500.
10. Where the statements in affidavits on a motion for a new trial are purely impeaching, such evidence does not furnish ground for granting a new trial. State v. Albertson, 512.
11. Persons seeking relief from default judgments for "mistake, inadvertence, surprise, or excusable neglect" must show diligence, or the court will not exercise its discretion. Applicant must show facts excusing the default, a meritorious defense, and proper diligence in prosecuting his remedy; and application must be made with due diligence after notice of the default. On the facts of the case, *held*, abuse of discretion in denying the motion. Cline v. Duffy, 525.
12. Continuing a temporary injunction pending suit, or dissolving it, rests with the discretion of the judge, to be interfered with only for abuse. School Dist. No. 94 v. King, 614.
13. In an action for personal injuries by a collision at crossing over defendant's track, *held*, under the evidence, that the question of plaintiff's contributory negligence was properly submitted to the jury. Hollingshead v. Soo Ry. Co. 642.

PRAIRIE FIRE. See Negligence, 42.

PREJUDICE. See Appeal and Error, 545; Fraud, 72; Practice, 493.

1. Remarks of the state's attorney in his address to the jury, as set forth in the opinion, *held*, not prejudicial. State v. Staber, 545.

PREROGATIVE WRITS. See Supreme Courts, 180.

1. The supreme court will not decide grave constitutional questions raised upon original writs to be acted upon summarily, except where a decision is imperative and the application could not readily have been made earlier. State v. Blaisdell, 622.

PRESUMPTION. See Evidence, 216, 295, 393; Negligence, 434.

PRIMARY ELECTION LAWS. See Voters and Elections, 622.

PRIMARY ELECTIONS. See Voters and Elections, 592.

PRINCIPAL AND AGENT. See Banks and Banking, 270; Criminal Law, 114; Master and Servant, 307, 434.

1. To hold one liable for loss by prairie fire which he neither sets nor negligently permits to escape from his control, it must appear that those who originated the fire, in so doing acted under his express or immediate direction, or were in his employ and required and directed by him to do certain work the performance of which involved the setting of fire to the prairie grass. Forzen v. Hurd, 42.
2. An instruction that a defendant may be held liable for damages occasioned by a prairie fire, if the jury find the fact to be that the men who set and tended the fire were working for the defendant "at the time, in the course of their usual employment on the farm, and doing his work the same as your men do when you are gone," contains a misdirection as to the law, as it incorrectly assumes that the ordinary and usual work of a farm permits or requires the setting of fire to the prairie grass under conditions that render such act extremely hazardous. Forzen v. Hurd, 42.
3. The issue being whether grain was delivered as alleged, and if so, if paid for, testimony was properly excluded relative to private instructions given by defendant to its local agent, not communicated to plaintiff, regarding receipt of grain, and violation of such instructions. Cochrane v. Natl. Elev. Co. 169.
4. Where the cashier of a bank who misappropriated its funds, or otherwise

PRINCIPAL AND AGENT—continued.

became indebted to it, to conceal his defalcation or pay his indebtedness transfers funds of an elevator company of which he was treasurer to the bank, charges the amount of the same to the elevator company upon the books of the bank, which accepted such payment through its cashier, it cannot retain the benefits of his acts without accepting the consequences of his knowledge; such bank can retain such funds only by a ratification of the act of its agent the cashier; by so doing it becomes *particeps criminis* with the cashier, and liable to the elevator company for the amount so fraudulently misappropriated. Emerado Farmers Elev. Co. v. Farmers Bank, 270.

5. When the cashier of a bank has the entire management and conduct of its affairs, and is the sole representative in the receipt and disbursement of deposits, and while so acting draws checks of an elevator company of which he is treasurer payable to the bank, and presents such checks as treasurer to himself as cashier, and misappropriates the money paid thereon, the bank is charged with knowledge of its fraudulent purpose, and can have no claim for the funds misappropriated against the elevator company. Emerado Farmers Elev. Co. v. Farmers Bank, 270.

6. A holder of a sheriffs' certificate under a mortgage foreclosure sale effected insurance, and paid the premium, which was retained by defendant company. The policy, standard form, contained the following: "This entire policy shall be void if the insured has concealed or misrepresented in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein. . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, . . . if the interest of the insured be other than unconditional and sole ownership. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." Plaintiff acquainted defendant and his agent with the facts regarding his interest in the property, and such agent carelessly and negligently omitted to state in the policy the nature of plaintiff's said interest. A loss occurred. Defendant seeks to escape

liability on the ground that such policy, by its terms, is void on account of the above facts. *Held*, that defendant is estopped to escape such defense. Leisen v. St. P. F. & M. Ins. Co. 316.

7. Restrictions in a policy limiting the power of agents to waive conditions, except in a certain manner, cannot be held to apply to those conditions which relate to the inception of the contract, where the agent, with full knowledge of the facts, issues the policy and collects the premium, and the insured has acted in good faith. Leisen v. St. P. F. & M. Ins. Co. 316.

8. In an action by a principal against his agent for damages for not procuring "fair" security for the price of property sold by him under his agency contract, *held*, evidence sufficient to go to the jury, as showing not only negligence but bad faith, and it was error to direct a verdict for defendant. Morris v. Bradley, 646.

9. An agent owes to his principal the exercise of good faith and fair dealings in the performance of his duties; and when he is authorized to sell his principal's property on time, and to take "fair" securities for the purchase price, a failure to exercise reasonable diligence in so doing renders him liable to his principal for the resulting loss. Morris v. Bradley, 646.

10. Evidence examined, and *held*, that the proof submitted by plaintiff upon the question of the worthlessness of the security and the resulting loss sustained by him was sufficient, prima facie, to require its submission to the jury. Morris v. Bradley, 646.

11. Action to recover damages for negligently killing three horses belonging to plaintiff while being shipped from Grand Rapids, Minnesota, to Hunter, North Dakota. Plaintiff, in the fall of 1907, shipped twenty-two horses from Hunter, North Dakota, to Grand Rapids, Minnesota, to the firm of Sutton & Mackey, over defendant's line. Sutton & Mackey were engaged in logging in Northern Minnesota during the winter months, and plaintiff's horses were shipped by him to them for work in the woods. Under the agreement, plaintiff was to and did pay the expenses of shipping the horses from Hunter, North Dakota, to Grand Rapids, Minnesota. Sutton & Mackey, in addition to the compensation paid plaintiff for the use of his horses, were to deliver them, after the season was ended, to plaintiff at Hunter, North Dakota, free of charge. On March 19, 1908, one of Sutton & Mackey's men, Crocker by name, brought the horses to Grand Rapids, and shipped them over defendant's line to plaintiff at Hunter. Defendant's agent at Grand Rapids filled out the ordinary form of live-stock shipping contract, upon information given by Crocker, and Crocker executed the contract in the name of the plaintiff, by Crocker. The rate charged on this shipment was based on a valuation of $75 per head. *Held*, that plaintiff was not a party to the contract between Sutton & Mackey and defendant, that Crocker had no right to sign plaintiff's name

PRINCIPAL AND AGENT—continued.

to the contract, and that plaintiff was entitled to recover the full value of the horses killed. Schlosser v. Gt. N. R. Co. 406.

PRINCIPAL AND SURETY. See Bail, 145.

PROCESS.

1. Service of notice of expiration of time for redemption from tax sale must be made personally upon the owner if known to be a resident of the state; if a nonresident, by registered letter addressed to his last-known postoffice, and must also be personally served upon the person in possession. Tronsrud v. Farm Co. 567.

PUBLIC LANDS.

1. Axel Bergstrom made homestead entry, and later died intestate, leaving plaintiff, his brother, a citizen of the United States, and defendant, his mother, and alien and resident of Sweden, his only heirs. Plaintiff perfected the entry, and received the receiver's receipt, upon which patent issued "To the heirs of Axel Bergstrom." In an action to determine adverse claims, *held*, construing sec. 2291, U. S. Rev. Stat., that the alien mother could not make final proof and receive title from the government, which title is quieted in plaintiff, who is the sole heir capable of making such proof and receiving title from the government. Bergstrom v. Svenson, 55.
2. The grant of right of way over the public lands, made to the Northern Pacific Railroad Company by act of Congress passed July 2, 1864, chap. 217, 13 Stat. at L. 365, is a present, absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Upon such construction and its acceptance by the United States under the terms of the act, the Northern Pacific Railway Company became vested with title to a strip of land 400 feet wide for right-of-way purposes from the date of the act. N. P. R. Co. v. Aas, 247.
3. All parties acquiring rights in the public lands crossed by the line of route adopted by the Northern Pacific Railroad Company, initiated subsequent to July 2, 1864, the date of the passage and approval of the act, take the same subject to the right of way granted to the Northern Pacific Railroad Company by the terms of the act. N. P. R. Co. v. Aas, 247.
4. A forfeiture resulting from the failure of the grantee to perform certain conditions required of it by the act of July 2, 1864, within the period limited by the terms of the act, cannot be asserted by a private party or by any party except the United States. N. P. R. Co. v. Aas, 247.

PUBLIC LANDS—continued.

5. The plaintiff having shown with reasonable certainty that its predecessor and grantor, the Northern Pacific Railroad Company, had generally complied with the requirement of the act of July 2, 1864, in the construction and maintenance of a railroad and telegraph line as provided by the terms of the act, it is to be regarded as the owner for right-of-way purposes of said railroad over the lands that at the date of the passage of the act were part of the public domain. N. P. R. Co. v. Aas, 247.

QUIETING TITLE. See Adverse Claims, 295; Public Lands, 55.

1. Under chapter 29, Comp. Laws 1887, an action to determine adverse claims to and for the possession of real estate was maintainable to the same effect as an action of ejectment under the common law. Ottow v. Friese, 86.
2. In an action to determine adverse claims to real estate under chap. 29, Comp. Laws 1887, the district court had original jurisdiction, and the facts essential to a cause of action thereunder were not the same as those for forcible entry and detainer. Ottow v. Friese, 86.

RAILROADS. See Common Carriers, 406; Public Lands, 247.

1. Records of a railway station showing articles billed to defendant and receipted for by him are competent evidence to show the nature of such articles. State v. Staber, 545.

RAPE. See Evidence, 555; Instructions, 555.

REAL PROPERTY. See Adverse Claims, 295; Evidence, 295; Recording Transfer, 225, 275.

RECEIPTS.

1. Records of a railway station showing articles billed to defendant and receipted for by him are competent evidence to show the nature of such articles. State v. Staber, 545.

RECORDING TRANSFERS.

1. Where an action involving title to real estate is brought, and notice of *lis pendens* duly filed, one purchasing the title after the record of such notice is bound by all points thereafter adjudicated against his grantor by the decree, to the same extent that the grantor is bound. Borden v. McNamara, 225.

RECORDING TRANSFERS—continued.

2. A copy of a deed of assignment for the benefit of creditors, certified to be a copy by a court commissioner of the circuit court of Wisconsin, with no acknowledgment by the grantor thereon, is not entitled to record in this state, in the county where the lands claimed to be conveyed are situated. Goss v. Herman, 295.
3. Notwithstanding a copy of a deed of assignment as described in the preceding paragraph was in fact recorded, such record is not evidence of title to the land therein described. Goss v. Herman, 295.
4. Sec. 5013, Rev. Codes 1905, provides for acknowledgment of an instrument without the state, and prescribes the requirements to entitle it to record. Among these is one that it shall be acknowledged before one of certain officers named therein. A court commissioner is not among these, and the record of an instrument purporting to be acknowledged before him is not competent evidence, unless it appears that he was authorized by the laws of the state where he acted to take such acknowledgments. Goss v. Herman, 295.
5. Records of proceedings and decrees of foreign courts not exemplified, but only certified as correct copies or transcripts by a court commissioner of such court, not under seal, are incompetent evidence in courts of this state on the trial of actions therein. Goss v. Herman, 295.

REDEMPTION. See Mortgages, 182; Taxation, 567.

REGISTRATION. See Voters and Elections, 372.

REPLEVIN. See Claim and Delivery, 579.

RES ADJUDICATA. See Judgment, 225.

1. A judgment signed by the judge and entered in the judgment book is a "final judgment," and may be proved as a former adjudication of the issues in the suit. Ottow v. Friese, 86.
2. A former adjudication may be pleaded and proven where the issues in the former action and in the pending action are the same. Ottow v. Friese, 86.

RIGHT OF WAY.

1. The grant of right of way over the public lands made to Northern Pacific Railroad Company by act of Congress passed July 2, 1864, chap. 217, 13 Stat. at L. 365, is a present, absolute grant subject to no conditions except those necessarily implied, such as that the road shall be constructed and

RIGHT OF WAY—continued.
used for the purpose designed. Upon such construction and its acceptance by the United States under the terms of the act, the Northern Pacific Railway Company became vested with title to a strip of land 400 feet wide for right-of-way purposes from the date of the act. N. P. R. Co. v. Aas, 247.

ROADS. See Streets and Highways, 307.

RULES OF COURTS.

1. Statutes and rules of practice pertaining to district courts in this state apply to proceedings in county courts with increased jurisdiction, under sec. 8289, Rev. Codes 1905. State v. Fleming, 105.
2. Assignments of error not supported in appellant's brief or citation of authorities will not be noticed in appellate courts. Rule 14 (10 N. D. xlvi.), applicable to the preparation of briefs, provides: "In the body of his brief appellant shall present his reasons in support of each error assigned, with a concise statement of the principles of law applicable thereto, with authorities supporting the same, treating each assignment relied upon separately; and such errors as are merely assigned, and not supported in the body of the brief by reasons or authorities, will be deemed to have been abandoned." Such rule will be enforced unless exceptional reasons appear why it should be relaxed. State v. Wright, 216.

SALES. See Homestead, 484; Taxation, 540.

1. A complaint for money had and received is sufficient, where it appears that the money to be recovered is for overpayment, by mistake of fact, for goods purchased as result of a deficiency, although it appears that defendant during a certain season could supply such deficiency, and it does not allege such season had terminated when suit was brought, it being stipulated that no goods should be paid for until delivered. Scheer v. Clinton Falls Nursery Co. 1.
2. Plaintiff ordered from defendant, under a contract containing a stipulation as above stated certain nursery stock consisting of trees. The next day, after delivering same, plaintiff discovered a deficiency in the shipment, and immediately demanded the return to him of the portion of the purchase price corresponding to such deficiency, or the balance of the trees. *Held*, that immediately upon a denial of such demand a cause of action accrued in plaintiff's favor for the recovery of such overpayment. Scheer v. Clinton Falls Nursery Co. 1.
3. On a sale of personal property by the owner there is an implied warranty of title free from encumbrance. St. A. & D. Elev. Co. v. Dawson, 18.

SALES—continued.

4. There may be an implied warranty of title of personal property on a sale thereof, although only in the constructive possession of the seller as bailor. St. A. & D. Elev. Co. v. Dawson, 18.
5. Indorsement and unconditional delivery by the holder of a warehouse receipt to a creditor for valuable consideration passes title to the grain represented therein, and is a sale of the grain to such creditor. St. A. & D. Elev. Co. v. Dawson, 18.
6. Where such creditor delivered the storage ticket to the warehouseman and received the money thereon, it is a sale of the grain. St. A. & D. Elev. Co. v. Dawson, 18.
7. One who sells personal property on which there is a valid mortgage, which the purchaser is compelled to pay after its validity is adjudicated, is liable to the purchaser for the amount of the mortgage and costs. St. A. & D. Elev. Co. v. Dawson, 18.
8. When a purchaser sued for conversion of personal property by the holder of a chattel mortgage thereon requests the seller from whom he bought such property to defend the action, and he fails to so defend, such person, in addition to the amount of the chattel mortgage and costs, may recover as special damages a reasonable attorneys' fee when pleaded and proven. St. A. & D. Elev. Co. v. Dawson, 18.
9. The note in suit was for the purchase price of a threshing machine sold by plaintiff to the defendants, Wheeler & Moffat, upon a written order providing should any part of the machinery be defective it should be returned to them at the place where received. The order contained the following: "If inside of six days after the date of its first use it shall fail in any respect to fill the warranty, written notice is to be given immediately by the purchaser to the plaintiff at its office in Peoria, Illinois, by registered letter, stating particularly in said letter and notice what and wherein it failed to fill the warranty." Also the following: "No agent or any other person shall be authorized to make any different warranty, or vary or modify any of its terms, or waive any of the conditions of this one; and any attempt to do so shall not bind the company or affect this contract." On receipt of the machinery at Wimbledon, before unloading, certain belts belonging to the separator were water-soaked and unfit for use, and other parts were missing. Wheeler & Moffat claimed to be induced to execute the note and two others solely upon plaintiff's agents' representation that all missing parts would be immediately furnished, and accepted the machine upon that condition, and none other. Wheeler & Moffat took the machine, relying upon such representations, and kept it for a few days; such missing parts were never delivered; and Wheeler & Moffat returned the threshing machine to plaintiff's agents. Verdict was directed for plaintiff for the amount of the note. The trial court set

SALES—continued.

aside the verdict on the ground that the motion directing it was not properly granted. *Held*, that the order setting aside the verdict and granting a new trial was erroneous. Colean Mfg. Co. v. Feckler, 188.

10. The measure of damages for misrepresenting the price paid for an article by the vendor, in a contract for the sale thereof, wherein he agreed to sell for the price at which he purchased, and thereby induced the purchaser to pay a greater sum than was paid by the vendor, is the difference between the price which he paid, and that which he represented he paid and received from his vendee. Page Farmers Elev. Co. v. Thompson, 256.
11. In an action by the assignee of a mortgage for the possession of the mortgaged chattels, mortgagors claimed that they were sold to them under a conditional sale which never became absolute. Hence, such mortgage confers upon plaintiff no special property in the chattels, nor right to possession thereof. *Held*, under the evidence, the sale subsequently became absolute, and such contention is untenable. Vallancey v. Hunt, 579.
12. In claim and delivery by a mortgagee or his assignee for possession of mortgaged property sold to defendant for the purchase price of which the mortgage was given, defendant may counterclaim damages for breach of warranty of the goods sold, but such set-off or counterclaim must be specially pleaded, and cannot be proved under a general denial. Vallancey v. Hunt, 579.

SCHOOLS AND SCHOOL DISTRICTS.

1. The board of education of Hannaford special school district, under sec. 949, Rev. Codes 1905, annexed adjacent territory upon an application signed by fourteen voters of such territory. *Held*, that the question as to whether such application was signed by a majority of the voters of such territory is not open to attack at this time. *Held*, further, such board having ordered such annexation, it is presumed that it did everything which the statute required it to do before it made the order. Greenfield School Dist. v. Hannaford School Dist. 393.
2. Under the facts stated in the opinion, *held*, that the plaintiffs are estopped from questioning the validity of the proceedings of the board of education in annexing adjacent territory to Hannaford special school district. Greenfield School Dist. v. Hannaford School Dist. 393.
3. Laws enacted for the consolidation or division of school districts are valid as resting solely on legislative discretion or policy, unless they are contrary to some constitutional provision. School Dist. No. 94 v. King, 614.
4. Chap. 106, Laws 1907, for division of school districts and attaching parts thereof to a city, town, or village, is not unconstitutional as taking property without a hearing or due process of law. School Dist. No. 94 v. King, 614.

SCHOOLS AND SCHOOL DISTRICTS—continued.

5. Division or partial consolidation of school districts under chapter 106, Laws 1907, is not unconstitutional as taking property without due process of law; such property is devoted to state purposes under legislative control, unless the legislature violates some constitutional provision. School Dist. No. 94 v. King, 614.

SECRETARY OF STATE. See Parties, 628.

SENATORS. See Legislature, 628.

SHERIFFS AND CONSTABLES.

1. Judicial sale of premises known to the officer to be the debtor's homestead is void, and a sheriff's certificate issued thereon conveys no title. Dieter v. Fraine, 484.
2. Sureties upon a deputy sheriff's bond, who undertake that he shall faithfully and impartially discharge the duties of his office, are liable for any unlawful or oppressive act done by him under color or by virtue of his office. Lee v. Charmley, 570.
3. Official bonds are to provide indemnity against malfeasance and misbehavior in office, the misuse of the powers belonging to it, and the assumption of those not belonging to it under guise of official action. All acts so performed, though unlawful or wrongful, are official acts within the scope of his official bond that an officer shall faithfully and impartially discharge the duties of his office; and as such may be reasonably considered contemplated by the sureties when they sign the bond, as constituting a breach of its conditions. Lee v. Charmley, 570.
4. A deputy sheriff who, falsely claiming to have a warrant for the arrest of a person not formally charged with crime of any kind, goes to his house in the night-time, and, under guise of the authority of his office, arrests and takes such person into custody, has committed an unauthorized and unlawful act under color of office, for which the sureties upon his official bond are liable in a proper action. Lee v. Charmley, 570.

SPECIAL ASSESSMENTS. See Municipal Corporations, 437.

SPECIAL LEGISLATION. See Constitutional Law, 592.

SPECIALTY. See Limitation of Actions, 27.

STATEMENT OF CASE. See Appeal and Error, 151, 635.

STATE'S ATTORNEY.

1. It is not prejudicial misconduct on the part of a state's attorney to state, in reference to an objection by defendant's attorney to a question asked him on his cross-examination at the trial, "Counsel was a little slow in coming to the assistance of the witness,"—especially in view of a prompt caution from the court to the jury to disregard the remark. State v. Fleming, 105.
2. Remarks of the state's attorney in his address to the jury, as set forth in the opinion, *held*, not prejudicial. State v. Staber, 545.
3. Record examined. *Held*, that counsel for the state made no remarks in the arguments to the jury not warranted by the evidence. State v. Fujita, 555.

STATUTES.

1. Construing sec. 2291, U. S. Rev. Stat., an alien heir of the entryman cannot make final proof and take the title to public land, but any heir who is a citizen of the United States may do so. Bergstrom v. Svenson, 55.
2. Within the meaning of sec. 9373, Rev. Codes 1905, where two structures are used for the convenient conduct of the prohibited traffic in intoxicating liquors, they constitute "one place." State v. Ildvedsen, 62.
3. Under sec. 9379, Rev. Codes 1905, fine and costs are a lien on all of defendant's real property. State v. Ildvedsen, 62.
4. Where appellant fails to serve a copy of the undertaking with notice of appeal to the supreme court as required by sec. 7220, Rev. Codes 1905, such failure is not jurisdictional, and the facts present a proper case warranting the aid of sec. 7224, Rev. Codes 1905, allowing district court and supreme courts, or judges thereof, to permit amendments. Beddow v. Flage, 66.
5. Sec. 7039, Rev. Codes 1905, requiring it, in cases tried by the court on an issue of fact, to render its decision and entry of judgment to be given and filed within sixty days after submission, does not make void a judgment rendered thereafter. Bruegger v. Cartier, 72.
6. Where by chap. 116, Laws 1903, one judicial district was set off from another, *held*, that a judgment entered upon the order of the judge of the original district, and filed after its division, was at most voidable, there being no application to vacate under sec. 6766, Rev. Codes 1905; and the judgment is valid. Bruegger v. Cartier, 72.
7. Under Comp. Laws 1887, an affidavit of sale incorrectly reciting the place of sale may be corrected by filing another affidavit several months after the sale, reciting the sale to have been made as advertised. Ottow v. Friese, 86.
8. Under chap. 29, Comp. Laws 1887, an action to determine adverse claims was

STATUTES—continued.

maintainable the same as an action of ejectment at common law. Ottow v. Friese, 86.

9. Under sec. 8289, Rev. Codes 1905, statutes and rules of practice of district courts apply to county courts with increased jurisdiction. State v. Fleming, 105.
10. A term of court within sec. 9791, Rev. Codes 1905, means one actually held, and not that may be held; and a criminal case should not be dismissed because information is not filed at a term where trial cannot be had by a jury. State v. Fleming, 105.
11. Failure to arraign defendant under sec. 9871, Rev. Codes 1905, where arraignment is not made at the next term after the information is filed, does not warrant a dismissal. State v. Fleming, 105.
12. Under chap. 68, Laws 1907, for calling juries in county courts with increased jurisdiction, a jury is not to be called unless there is a criminal case "awaiting trial," and it is not "awaiting trial" where the return of the justice only is filed, and the defendant is at large on bail. State v. Fleming, 105.
13. It is not error to dismiss a criminal case under sec. 10307, Rev. Codes 1905, where the term therein mentioned is one at which defendant could have been tried. State v. Fleming, 105.
14. Sec. 8300 Rev. Codes 1905, is expressly applicable to dismissal of prosecutions in county courts with increased jurisdiction, for failure to prosecute where the defendants are not confined in jail, but under bonds to appear at the county court. State v. Fleming, 105.
15. Where arbitrators' award was never affirmed, and time to affirm has elapsed, action on the award will lie under sec. 7710, Rev. Codes 1905. Hackney v. Adam, 130.
16. Under sec. 7229, Rev. Codes 1905, procedure for settling statement of case considered. Blessett v. Turcotte, 151.
17. Upon the acceptance of the land grant under chap. 217, 13 Stat. at L. 365 U. S. the Northern Pacific Railroad Company became vested with its right of way. N. P. R. Co. v. Aas, 247.
18. Failure to properly present a claim to an administrator or executor for allowance under sec. 8100, Rev. Codes 1905, does not bar a subsequent presentation within the time fixed by law. Patrick v. Austin, 261.
19. One pleading guilty of murder under sec. 8807, Rev. Codes 1905, shall designate the degree to which he intends to plead guilty, and such plea is not sufficient when he pleads "guilty as charged in the information." State v. Noah, 281.
20. Sec. 5013, Rev. Codes 1905, provides for acknowledgments out of the state and requirements for admission of instruments to record, and, among these, that it shall be acknowledged before certain officers named therein.

STATUTES—continued.

A court commissioner is not one; a deed acknowledged before him is not evidence, without proof that he was authorized by the law of the state where he took the acknowledgment, to take it. Goss v. Herman, 295.

21. Under sec. 9246, Rev. Codes 1905, the offense is complete when the defendant, with intent to cheat or defraud another, obtains from him any money or property. State v. Merry, 337.

22. While a criminal contempt proceeding in which a warrant of attachment issued is an original special proceeding under sec. 7555, Rev. Codes 1905, it is not an independent proceeding, as it grows out of and is connected with the main action. State v. Heiser, 357.

23. Sec. 6765, Rev. Codes 1905, relative to one judge acting for another upon written request, construed not to restrict the jurisdiction of the judge called to another district, to causes only which were then pending. State v. Heiser, 357.

24. That part of sec. 21, chap. 109, Laws of 1907, relating to registration of voters is an attempt to amend the law providing for the registration of electors, and conflicts with sec. 61 of the Constitution, which provides that no bill shall embrace more than one subject, which subject shall be expressed in its title, and is void. Fitzmaurice v. Willis, 372.

25. The title to chap. 109, Laws of 1907, fails to express the substance of the attempted amendment to the registration law, and such amendment is not germane to the subject and title, and the act embraces more than one subject. Fitzmaurice v. Willis, 372.

26. Sec. 738, Rev. Codes 1905, forbidding the receipt of a vote from an unregistered elector who furnishes no affidavit as provided therein, is within the power of the legislature to prescribe regulations or proof of the qualifications of those offering to vote. Fitzmaurice v. Willis, 372.

27. Sec. 738, Rev. Codes 1905, forbidding the vote of an unregistered elector without the affidavit therein provided, is mandatory, and votes received in violation thereof, are invalid and cannot be counted. Fitzmaurice v. Willis, 372.

28. Sec. 2334, Rev. Codes 1905, applies to minor details and irregularities of election officers and the conduct of election, and not to the registration and election statutes; and in case no registry list is present at the polls, a statutory affidavit must be furnished, and the votes of unregistered voters who fail to furnish it cannot be received nor counted. Fitzmaurice v. Willis, 372.

29. The board of education of a special school district under sec. 949, Rev. Codes 1905, annexed adjacent territory upon application signed by fourteen voters of such adjacent territory. *Held*, that the question whether it was signed by a majority of such voters is not open to attack; it is presumed that the board did everything required by statute before it made the order. Greenfield School Dist. v. Hannaford School Dist. 393.

STATUTES—continued.

30. Under sec. 1585, Rev. Codes 1905, the fee owner of land not subject to taxation, or one claiming to be such, can recover from a county moneys paid to redeem from tax sale, without such sale having been previously adjudged void. Tisdale v. Ward Co. 401.
31. Sec. 7068, Rev. Codes 1905, permitting the district court to extend the time within which the acts mentioned in sec. 7058 and sec. 7065 may be done, either before or after the time limited, is a remedial statute, and is to be liberally construed. Smith v. Hoff, 419.
32. Sec. 7304, Rev. Codes 1905, forbidding a physician to testify as to information acquired in his professional capacity, furnishes a privilege that can be waived only by such patient. Auld v. Cathro, 461.
33. Sec. 9794, Rev. Codes 1905, requires the indorsement of names of witnesses known to the state's attorney when the information is filed, upon such information, but provides that other witnesses may testify whose names are not so indorsed. It is not error to receive the testimony of such witnesses. State v. Albertson, 512.
34. The provision of the primary election law, sec. 12, chap. 109, Laws 1907, that no nomination shall be made unless the vote for state, district, or county offices is thirty per cent of the total vote cast for secretary of state of each political party at the last general election, is arbitrary, unnatural, lacks uniformity in the different counties, and is therefore unconstitutional and void. State v. Hamilton, 592.
35. Chap. 106, Laws 1907, relating to division of school districts, and attaching parts thereof to a city, town, or village for school purposes, is not unconstitutional as depriving school districts of property without due process of law. School Dist. No. 94 v. King, 614.
36. The primary election law, chap. 109, Laws 1907, regulates only party nominations, and not the nomination of candidates representing no political party or principle. State v. Blaisdell, 622.
37. Sec. 501, Rev. Codes 1899, providing for nominations by petitions, and placing candidates' names upon the ballot at general elections, is still in force, and provides for the nomination of candidates for state and congressional offices, representing those too few to be entitled to a party ballot at the primary or a separate column at the general election. It requires parties nominated by petition, to entitle them to have a place upon the ballot, that their certificate of nomination or petition shall express in not more than five words the candidate's party or principle, which should appear after the candidate's name on the ballot. State v. Blaisdell, 622.
38. Neither chap. 109, Laws 1907, nor sec. 10 thereof, is invalid as furnishing no method by which new parties may secure printing of party ballots for use at the primary election. State v. Blaisdell, 622.

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STATUTE OF LIMITATIONS. See Limitation of Actions, 27.

STATUTORY CONSTRUCTION. See Attorney General, 357; Voters and Elections, 592.

1. The judgment upon conviction for keeping and maintaining a liquor nuisance fixed a lien for the fine and costs against the property on which the evidence disclosed that such nuisance was maintained. *Held*, if error, it was nonprejudicial, as the proof discloses defendant to be owner of such property, and under sec. 9379, Rev. Codes 1905, such fine and costs are made a lien on all of defendant's property until paid. State v. Ildvedsen, 62.
2. Where undertaking on appeal to the supreme court is not served with the notice, as required by sec. 7220, Rev. Codes 1905, *held*, failure not jurisdictional; and under the facts appellant may invoke the aid of sec. 7224, which provides, when notice of appeal is given, and through mistake or accident, some other act is omitted, the court from which the appeal is taken, or judge thereof, or the supreme court, or the justices thereof, may permit an amendment or the proper act to be done on terms. Beddow v. Flage, 66.
3. Sec. 7039, Rev. Codes 1905, providing that upon the trial of an issue of fact by the court its decision and conclusions of law and direction for entry of judgment must be given in writing and filed within sixty days after the cause is submitted, does not make void a judgment rendered after that period. Bruegger v. Cartier, 72.
4. After an action in Williams county was tried and before it was decided, the county was detached from the second judicial district, and formed into the eighth. *Held*, that a judgment in such action, entered on an order of the judge of the said second district, filed thereafter, was at most voidable, and, no application to vacate the same as provided by sec. 6766, Rev. Codes 1905, having been made, the judgment is valid. Bruegger v. Cartier, 72.
5. Under chap. 29, Comp. Laws 1887, an action to determine adverse claims to and for the possession of real estate was maintainable to the same effect as an action of ejectment under the common law. Ottow v. Friese, 86.

STATUTORY CONSTRUCTION—continued.

6. In an action to determine adverse claims to real estate under chap. 29, Comp. Laws 1887, the district court had original jurisdiction, and the facts essential to a cause of action thereunder were not the same as those for forcible entry and detainer. Ottow v. Friese, 86.
7. Section 7068, Rev. Codes 1905, providing that, upon good cause shown and in furtherance of justice, a district court may extend the time within which any of the acts mentioned in secs. 7058 and 7065 may be done, either before or after the time limited therefor has expired, is a remedial statute, and must be liberally construed in favor of the purposes obviously intended to be served by its enactment. Smith v. Hoff, 419.
8. Statutes and rules of practice pertaining to district courts in this state apply to proceedings in county courts with increased jurisdiction under sec. 8289, Rev. Codes 1905. State v. Fleming, 105.
9. A term of court within sec. 9791, Rev. Codes 1905, means a term of court actually held, and not one that may be held; and a criminal action should not be dismissed for failure to file an information at a term of court at which a defendant cannot be regularly tried by a jury. State v. Fleming, 105.
10. It is not error to refuse to dismiss a criminal action for failure to arraign a defendant under sec. 9871, Rev. Codes 1905, at the next term of the court after the information is filed. State v. Fleming, 105.
11. It is not error to refuse to dismiss a prosecution under sec. 10307, Rev. Codes 1905, where the next term of court mentioned in that section is one at which the defendant could not have been regularly tried. State v. Fleming, 105.
12. Sec. 8300, Rev. Codes 1905, is expressly applicable to the dismissal of prosecutions in county courts with increased jurisdiction, for failure to prosecute, in cases where defendants are under bonds to appear at such courts. State v. Fleming, 105.
13. One sentenced to pay a fine and costs which are taxed and not paid may be imprisoned for costs as well as fine. State v. Fleming, 105.
14. A stipulation embracing all issues but one was made in good faith, after careful consideration, and relied on by defendant's counsel for nearly six years, after which time a cause was submitted upon such stipulation and testimony not covered thereby; findings of fact, conclusions of law, and entry of judgment followed. Defendant's counsel then took steps to settle statement of the case for an appeal to the supreme court; later plaintiff moved that defendant show cause why such findings of fact, conclusions of law, order for judgment, and judgment be not vacated and plaintiff relieved from a portion of the stipulation, and a portion of the facts stipulated eliminated, or why the party should not be relieved *in toto* from such stipulation. Order was made, vacating findings, conclusions, order

STATUTORY CONSTRUCTION—continued.

for judgment, and judgment. *Held:* (1) That such order, so far as it vacates the findings of facts and relieves the party from such stipulation, is appealable under subd. 4, sec. 7225, R. C. 1905, upon the ground that it "'involves the merits' of the action or some parts thereof." N. P. Ry. Co. v. Barlow, 197.

15. Whether such order, in effect, grants a new trial, and therefore is appealable under the provision of subd. 3 of said section, not determined. N. P. Ry. Co. v. Barlow, 197.

16. The right to foreclose a real-estate mortgage containing power of sale and payable in instalments is not exhausted by foreclosure upon one or more of such instalments; under the statute each instalment is a separate and independent mortgage, and the mortgage for each may be foreclosed as if a separate mortgage was given for each separate instalment. Borden v. McNamara, 225.

17. The verification of the claim presented to the executor on September 11, 1906, substantially complied with sec. 8100, Rev. Codes 1905. Patrick v. Austin, 261.

18. Under sec. 9246, Rev. Codes 1905, the offense is completed when the defendant, with intent to cheat or defraud another, obtains from such person any money or property. The fraud is complete when such person parts with his property. State v. Merry, 337.

19. Appellant was sentenced to imprisonment in the county jail of Adams county for a period of eight months, to pay a fine of $200, and the costs of prosecution, taxed at the sum of $500, and, in default of said fine and costs, to be imprisoned in the county jail of Adams county for a further period of two months. Sec. 10104, Rev. Codes 1905, provides for such a judgment. Hence, no error was committed by the court in rendering such judgment. State v. Merry, 337.

20. While a criminal contempt proceeding where attachment issues is an original special proceeding under sec. 7555, Rev. Codes 1905, it is not an independent proceeding, as it grows out of and is connected with the main action. Such contempt proceeding is independent from those in the main action and the violation of the injunction therein issued. The written request of Judge Burr warrants him in assuming and exercising jurisdiction, both in the main action and in the contempt proceeding for violation of such injunction, whether the contempt proceeding was pending or not when the request was made. State v. Heiser, 357.

21. Sec. 6765, Rev. Codes 1905, provides: "No judge of the district court shall hear or determine any action, special proceeding, motion, or application, or make any order or give any judgment in any action or proceeding not pending in the judicial district for which he was elected, except in the following cases: (1) Upon the written request of the judge of the district

STATUTORY CONSTRUCTION—continued.

in which such action or proceeding is at the time pending." *Held*, it was not the intent to restrict the jurisdiction of the requested judge to causes only then pending. The words, "in which such action or proceeding is at the time pending," designate the judge to make the request, and have no reference to the subject-matter upon which the requested judge may assume jurisdiction. State v. Heiser, 357.

22. That part of sec. 21, chap. 109, Laws 1907, providing that the list of names of those voting at the primary election shall take the place of the first registration of the voters now required, and that notice only shall be given of the date of the second day of registration, is an attempt to amend the law providing for the registration of electors, and is in conflict with sec. 61 of the state Constitution, which provides that no bill shall embrace more than one subject, which shall be expressed in its title, and is void. Fitzmaurice v. Willis, 372.

23. The prohibition contained in sec. 738, Rev. Codes 1905, reading, "No vote shall be received at any election in this state if the name of the voter offering such vote is not on the registration list, unless such persons shall furnish to the judges of the election his affidavit stating that he is a resident of such precinct, giving his place of residence," etc., is within the power delegated to the legislative assembly to prescribe reasonable regulations for making proof of the qualifications of those offering to vote at an election. Fitzmaurice v. Willis, 372.

24. The prohibition contained in sec. 738, Rev. Codes 1905, reading, "No vote shall be received at any election in this state if the name of the voter offering such vote is not on the registration list, unless such persons shall furnish to the judges of the election his affidavit stating that he is a resident of such precinct, giving his place of residence," etc.,—is an express prohibition, and is mandatory; and votes received in violation thereof are invalid, and cannot be counted. Fitzmaurice v. Willis, 372.

25. At the general election in 1908, where the division of a county was submitted, electors voted in Kenmare without being registered or furnishing the affidavit as a substitute therefor, as required by sec. 738, Rev. Codes 1905, whose votes were received and counted. *Held*, in an election contest over the result such votes must be rejected. Fitzmaurice v. Willis, 372.

26. The purpose of the registration laws is to prevent frauds in elections, and they must be construed in the light of such object. The meeting of registration boards on the dates fixed by law is for the preparation of registration lists, which is the culmination of the proceedings of such board, without which their meetings and acts would be futile, as well as all other provisions of the registration statute. *Held*, the presence and use, at elections, of registration lists, is mandatory, and votes received in the absence

STATUTORY CONSTRUCTION—continued.

of such list or the substituted affidavit, of nonregistered voters must be rejected. Fitzmaurice v. Willis, 372.

27. Sec. 2334, Rev. Codes 1905, which provides that no refusal or neglect on the part of any official to perform his rightful duty in connection with an election on the division of counties shall in any wise affect the validity of such election, applies to the minor details and irregularities of such officers, and the conduct of the election, and not to the mandatory requirements of the registration and election statutes; and in case no registry list is present or used at the polls, the duty is upon the persons seeking to vote to furnish the statutory affidavits, and, failing to do so, their votes should neither be received nor counted. Fitzmaurice v. Willis, 372.

28. Under sec. 1585, Rev. Codes 1905, the fee owner of land not subject to taxation, or a person claiming to be such, can recover from the county moneys paid to redeem from a tax sale, even though such tax sale has not been previously adjudged void. Van Nest v. Sargent County, 7 N. D. 139, 73 N. W. 1083, distinguished. Tisdale v. Ward Co. 401.

29. Constitutional and statutory provisions declaring homestead exemptions should be liberally construed. Dieter v. Fraine, 484.

30. Homestead exemption is not only for the head of the family but for the protection and preservation of the home, for the family as a whole. Dieter v. Fraine, 484.

31. Homestead is exempt from all process, and is not waived by the failure or negligence of the head of the family to claim it. Dieter v. Fraine, 484.

32. Sec. 9794, Rev. Codes 1905, requires names of all witnesses for the state known to the state's attorney when the information is filed to be indorsed thereon, but provides that other witnesses may testify, whose names are not so indorsed. *Held*, it is not error to allow the examination of such witnesses. State v. Albertson, 512.

33. Chap. 106, Laws 1907, for division of school districts and attaching parts thereof to a city, town, or village, is not unconstitutional as taking property without a hearing or due process of law. School Dist. No. 94 v. King, 614.

34. Chap. 109, Laws 1907, the primary election law, is not intended to provide for and regulate the nomination of candidates not representing a political party or principle, but is only to regulate party nominations. State v. Blaisdell, 622.

35. Sec. 501, Rev. Codes 1899, providing for nominations by petition, and placing nominees upon the Australian ballot for the general election, is still in force, and provides for nominees for state and congressional offices, who represent individuals too few to be entitled to a party ballot, at the primary or separate column on the ballot at the general election. State v. Blaisdell, 622.

STATUTORY CONSTRUCTION—continued.

36. Sec. 501, Rev. Codes 1899, requires of parties nominated by petition to have their names upon the Australian ballot, that certificate of nomination or petition shall state in not more than five words the party or principle represented by the candidate. *Held*, such party designation should appear after the candidate's name on the ballot. State v. Blaisdell, 622.
37. Neither chap. 109, Laws 1907, nor sec. 10 thereof, is invalid as furnishing no way by which new parties may secure the printing of party ballots for use at the primary election as a party represented by candidates, whose names have appeared in the individual column followed by the party designation on the Australian ballot, used at the general election, and who have received 5 per cent of votes cast for governor, is entitled to a separate ballot at the next primary election. State v. Blaisdell, 622.

STIPULATION.

1. A stipulation embracing all issues but one was made in good faith, after careful consideration, and relied on by defendant's counsel for nearly six years, after which time a cause was submitted upon such stipulation and testimony not covered thereby; findings of fact, conclusions of law, and entry of judgment followed. Defendant's counsel then took steps to settle statements of the case for an appeal to the supreme court; later plaintiff moved that defendant show cause why such findings of fact, conclusions of law, order for judgment, and judgment be not vacated and plaintiff relieved from a portion of the stipulation, and a portion of the facts stipulated eliminated, or why the party should not be relieved *in toto* from such stipulation. Order was made vacating findings, conclusions, order for judgment, and judgment. *Held:* (1) That such order, so far as it vacates the findings of facts and relieves the party from such stipulation, is appealable under subd. 4, sec. 7225, Rev. Codes 1905, upon the ground that it "'involves the merits' of the action or some parts thereof." N. P. R. Co. v. Barlow, 197.
2. Whether such order, in effect, grants a new trial, and therefore is appealable under the provisions of subd. 3 of said section, not determined. N. P. R. Co. v. Barlow, 197.
3. While trial courts, in the exercise of a sound discretion and in furtherance of justice, may relieve from stipulations, and while the supreme court will not interfere with the exercise of such discretion except for clear abuse, the facts presented disclose an abuse of discretion in granting the order appealed from. N. P. R. Co. v. Barlow, 197.
4. Stipulations should be encouraged by the courts and enforced, unless there is good cause to the contrary, and applications for relief therefrom should be seasonably made; relief therefrom will not be granted in the absence of a clear showing that the facts stipulated are untrue, and then only when

STIPULATION—continued.
application is seasonably made and good cause for relief is shown. N. P. R. Co. v. Barlow, 197.

STREET RAILWAYS. See Streets and Highways, 434.

STREETS AND HIGHWAYS.

1. It is not negligence to drive upon a dangerous or defective highway by one knowing it to be such, unless its condition is such that a person of ordinary prudence would not attempt it. Solberg v. Schlosser, 307.
2. Knowledge of the dangerous condition of a highway, however, imposes a duty upon a traveler to exercise such care as the circumstances demand. Solberg v. Schlosser, 307.
3. Where the evidence is conflicting as to the condition of a highway at the point therein claimed to be dangerous for travel, the jury is to determine whether it was so or not. Solberg v. Schlosser, 307.
4. The complaint considered, and *held*, to set forth a cause of action for a violation of a duty not to render a highway dangerous by placing and leaving dirt thereon in a negligent manner, and not to state a cause of action on a breach of contract. Solberg v. Schlosser, 307.
5. Any person who wrongfully renders a public highway dangerous for travel by placing obstructions thereon must respond in damages to any one injured in consequence of such obstruction. Solberg v. Schlosser, 307.
6. A traveler may use every part of a city street, whether there is a street car track in it or not. It is the duty of free vehicles not to obstruct street cars unnecessarily, and turn aside when they meet them; but, subject to that and the respective powers of both, a car and wagon owe reciprocal duties to use reasonable care to avoid collision. Acton v. F. & M. St. R. 434.
7. Street cars have precedence on their tracks. It must be exercised with proper caution and regard for others; that they have a prescribed route does not alter the duty of a street railway company to the public, who can travel on their track until overtaken by cars. Acton v. F. & M. St. Ry. Co. 434.
8. The court charged the jury as follows: "I charge you, gentlemen of the jury, as a matter of law, that even if you find from a preponderance of the evidence that the plaintiff in this action was guilty of contributory negligence in going upon the defendant's track, under all the circumstances of the case, that nevertheless, if the defendant or its employees in charge of the car were aware, or should, by the exercise of reasonable diligence and care have become aware, of the dangerous position of the plaintiff in time to have, by the exercise of reasonable diligence and care, avoided the collision with the buggy of the plaintiff, that the prior negligence of the

STREETS AND HIGHWAYS—continued.
plaintiff would not bar his right to recover in this action." This instruction states the law correctly. Acton v. F. & M. St. R. Co. 434.
9. The ground upon which plaintiff may recover, notwithstanding his own negligence, is that the defendant, after becoming aware of the danger to which plaintiff was exposed, failed to use a proper degree of care to avoid injuring him. Acton v. F. & M. St. R. Co. 434.
10. It is not necessarily negligent to drive a vehicle on a street car track in either direction. But a driver should look out for cars approaching from front and rear, but he is not required to keep a constant watch to the rear for approaching cars. Acton v. F. & M. St. Ry. Co. 434.
11. A vehicle moving along a street railway track must leave it on the approach of cars; still, those in charge of cars must use reasonable diligence to prevent collisions, and the company is liable for failure to do so. Acton v. F. & M. St. Ry. Co. 434.
12. Where a street car is approaching from the rear a vehicle moving along the track, the motorman cannot proceed without regard to the presence of the vehicle, anticipating that it will leave the track in time for the car to pass. Acton v. F. & M. St. Ry. Co. 434.
13. When a street car approaches a vehicle in a line with its progress and an obstacle in the way, the car must be reduced to such control that it may be stopped if necessary. Acton v. F. & M. St. Ry. Co. 434.
14. A street railway company is liable for injuries sustained by a collision between a vehicle and a car, where those in charge of the car, by ordinary care, could have avoided the accident, notwithstanding the negligence of the driver in first placing himself in the situation of peril. Acton v. F. & M. St. Ry. Co. 434.
15. Such timely and reasonable warning of the approach of a street car must be given as will enable others in the exercise of due care to avoid injury from it. Acton v. F. & M. St. Ry. Co. 434.
16. If a motorman, by the exercise of ordinary care, could discover plaintiff's peril while driving a wagon on the track, in time to avoid the collision, and did not do so, plaintiff's failure to look back for an approaching car will not preclude his recovery. Whether such motorman made proper efforts to avoid the collision, or by the exercise of ordinary care could have seen plaintiff's peril, under the facts, was for the jury. Acton v. F. & M. St. R. 434.
17. Where the jury found that the motorman did not exercise ordinary care and reasonable diligence to stop the car and prevent the accident, after he saw, or with reasonable diligence might have seen, plaintiff's danger, for reasons stated in the opinion, appellant was not prejudiced by the instructions complained of. Acton v. M. & M. St. Ry. Co. 434.
18. The court refused to instruct that, though the motorman saw the plaintiff

STREETS AND HIGHWAYS—continued.

driving along and on the track, and (if he was driving thereon) he had a right to assume that the plaintiff would exercise ordinary care to observe the approach of the car, and would get out of danger before the car would reach him, and that the motorman is not required to check his car (if said car is running at an ordinary rate of speed) until he has reasonable cause to believe that there is actual danger of a collision. *Held* not error, under the facts of the case. Acton v. F. & M. St. Ry. Co. 434.

SUPREME COURT. See Appeal and Error, 66, 197, 211, 216, 434, 525, 635, 637.

1. Under the Constitution the jurisdiction of the supreme court to issue original writs, except in the exercise of appellate jurisdiction or supervision over inferior courts, extends only to prerogative writs, which will issue only in cases *publici juris*, involving sovereignty of the state, its franchises, prerogatives, or the liberties of citizens. State v. Norton, 180.
2. Under the facts of the case, although in the supreme court for trial *de novo*, in view of the lack of evidence on some question relative to the title of both parties, it is remanded for a new trial. Goss v. Herman, 295.
3. The supreme court will not decide grave constitutional questions raised upon original writs to be acted upon summarily, except where a decision is imperative and the application could not readily have been made earlier. State v. Blaisdell, 622.

TAXATION.

1. In an action by parties out of possession against a party in possession to determine adverse claims to real estate, which adverse claims are based upon a mortgage owned by defendant and a tax deed, which mortgage authorized the owner thereof to pay the delinquent taxes upon the premises covered by the mortgage, and add the amount to his mortgage debt, before plaintiffs are entitled to the relief prayed for, they must do equity, and reimburse the defendant for all taxes paid by him, and also pay him the amount due upon his mortgage. Blessett v. Turcotte, 151.
2. A tax deed executed in the name of the county, instead of the state, is void and conveys no title. Goss v. Herman, 295.
3. Under sec. 1585, Rev. Codes 1905, the fee owner of land not subject to taxation, or a person claiming to be such, can recover from the county moneys paid to redeem from a tax sale, even though such tax sale has not been previously adjudged void. Van Nest v. Sargent County, 7 N. D. 139, 73 N. W. 1083, distinguished. Tisdale v. Ward County, 401.
4. Respondent's contention that appellant's proper remedy was an application

TAXATION—continued.
to the board of county commissioners for an order abating the taxes considered, and *held*, untenable. Tisdale v. Ward Co. 401.
5. The owner of real property in a city on which is a special assessment may pay it in full, with interest to date of payment, and such payment will discharge the lien. State v. Murphy, 427.
6. The holder of a real-estate tax certificate issued for general taxes and delinquent special assessment, may pay the subsequent general taxes without the special assessments, and obtain such receipts for such general taxes so paid, and the sums paid to be additional liens on the land on which the certificates were issued. State v. Furstenau, 540.
7. Service of notice of expiration of time for redemption from tax sale must be made personally upon the owner if known to be a resident of the state; if a nonresident, registered letter addressed to his last known post-office, and must also be personally served upon the person in possession. Tronsrud v. Farm Co. 567.

TAX DEEDS. See Taxation, 295.

TAXES. See Taxation, 151.

TAX SALES. See Taxation, 540, 567.

TIME. See Appeal and Error, 419.

TRIAL. See Criminal Law, 114; Evidence, 142, 337; Indictment and Information, 62; Practice, 72.
1. On appeal from an order denying a motion by defendant for a directed verdict, if the sufficiency of the evidence to support the verdict is in some doubt, and the jury found in plaintiff's favor, the ruling of the trial court submitting the case will not be disturbed. Forzen v. Hurd, 42.
2. Oral instructions can only be given when the parties deliberately and voluntarily consent thereto, and such consent is entered on the minutes so as not to prejudice the rights of either parties. Forzen v. Hurd, 42.
3. Over defendant's objection, statements made by the witness P., not in the presence of the defendant, and not in furtherance or prosecution of the offense charged, but merely reciting acts that had been done or were in contemplation, were received in evidence. The contention by the state that this did not constitute error because the nature of the questions was such that they did not disclose to the court whether the answers would be competent or incompetent, and that defendant should have moved to strike

TRIAL—continued.

out the answer, is met by the fact that, after some of the questions referred to had been propounded, it must have been apparent to the court that they related to incompetent declarations. State v. Moeller, 114.

4. The jury were instructed that conversion took place, if at all, on September 25th. The instruction was not challenged in the trial court, and became the law of the case. Appellant's contention in this court, that conversion took place in October, and that there is no evidence showing the highest market value, or any value after such date, is untenable. Cochrane v. Nat. Elev. Co. 169.

5. The mere fact that testimony which constitutes a part of the plaintiff's original case was admitted in rebuttal after the testimony of the defendant had been closed does not constitute error. Patrick v. Austin, 261.

6. Where different persons may reasonably reach different conclusions upon the evidence, defendant's negligence and plaintiff's contributory negligence are questions for the jury. Solberg v. Schlosser, 307.

7. Objections on the ground that the questions were leading cannot be raised for the first time on appeal. State v. Merry, 337.

8. Objections to certain questions considered in the opinion and the rulings thereon, *held*, prejudicially erroneous. Lohr v. Honsinger, 500.

9. If a motorman, by the exercise of ordinary care, could discover plaintiff's peril while driving a wagon on the track, in time to avoid the collision, and did not do so, plaintiff's failure to look back for an approaching car will not preclude his recovery. Whether such motorman made proper efforts to avoid the collision, or by the exercise of ordinary care could have seen plaintiff's peril, under the facts, was for the jury. Acton v. F. & M. St. Ry. Co. 434.

10. The special findings made by the jury are sufficient to sustain the general verdict. If the questions not answered, or where the answers are not proved, were all answered favorably to appellant, the general verdict would still be consistent with the special findings. Acton v. F. & M. St. R. 434.

11. There was no evidence that the will was executed under undue influence practised upon testatrix, and it was proper to refuse to submit such issue to the jury. Auld v. Cathro, 461.

12. The failure of the trial court to have the testimony of a witness read at the request of the jury, *held*, under the circumstances of the case at bar, not error. Auld v. Cathro, 461.

13. It is not error to permit the state, after it has rested, to reopen the case for the introduction of testimony; in the exercise of its judicial discretion, the court may permit this. State v. Albertson, 512.

14. Remarks of the state's attorney in his address to the jury, as set forth in the opinion, *held*, not prejudicial. State v. Staber, 545.

TRIAL—continued.

15. The trial court has a large discretion in permitting leading questions. State v. Fujita, 555.
16. Record examined. *Held*, that counsel for the state made no remarks in the arguments to the jury not warranted by the evidence. State v. Fujita, 555.
17. Plaintiff proved his case and rested. No testimony was offered by defendant. Thereupon the latter moved for a directed verdict, and later a similar motion was made in plaintiff's behalf. The court denied plaintiff's motion, and granted defendant's, whereupon a verdict was entered in defendant's favor. *Held*, both rulings were erroneous. Schwartz v. Hendrickson, 639.
18. Plaintiff, instead of moving for a new trial, moved for judgment notwithstanding such verdict. Thereupon defendant moved that the verdict be vacated, and that he be allowed to furnish proof of the defenses alleged in his answer. The latter motion was granted on terms, and plaintiff's motion denied. *Held*, that such order, although irregularly issued, is nonprejudicial to plaintiff, as he is not entitled to judgment *non obstante veredicto*, but merely to a new trial, and this, in effect was granted by the order complained of. Schwartz v. Hendrickson, 639.
19. In an action for personal injuries by a collision at a crossing over defendant's track, *held*, under the evidence, that the question of plaintiff's contributory negligence was properly submitted to the jury. Hollinshead v. Soo Ry. Co. 642.

TROVER AND CONVERSION.

1. When a purchaser sued for conversion of personal property by the holder of a chattel mortgage thereon requests the seller from whom he bought such property to defend the action, and he fails to so defend, such person, in addition to the amount of the chattel mortgage and costs, may recover as special damages a reasonable attorneys' fee when pleaded and proven. St. A. & D. Elev. Co. v. Dawson, 18.
2. In an action for conversion of grain claimed to have been delivered by plaintiff to defendant, evidence examined, and *held*, competent and sufficient to establish the quantity of grain delivered. Cochrane v. Natl. Elev. Co. 169.
3. Evidence as to highest market value between the conversion and trial examined, and *held*, both competent and sufficient to support the verdict. Cochrane v. National Elev. Co. 169.
4. The jury were instructed that conversion took place, if at all, on September 25th. The instruction was not challenged in the trial court, and became the law of the case. Appellant's contention in this court, that conversion took place in October, and that there is no evidence showing the highest market value after such date, is untenable. Cochrane v. Nat. Elev. Co. 169.
5. Grain was raised by A under the ordinary cropper's contract entered into

TROVER AND CONVERSION—continued.

with the plaintiff. By its terms, title to all crops was reserved in plaintiff to secure the performance by A of all the terms thereof and until division of the grain. Prior to such division, defendant, with A's consent, took 405 bushels of wheat, which, upon full compliance with the contract by and the payment of all advances to him, would belong to A. The question for conversion of the wheat was tried on the theory that plaintiff could not recover if the equitable title of said wheat was in A. *Held*, such theory must prevail in the appellate court, and questions on appeal determined in accordance therewith. Casey v. First Bank of Nome, 211.

TRUSTS AND TRUSTEES.

1. A bank is not authorized to pay out funds intrusted to it to some person known by it to stand in a trust relation to the depositor, when it has notice that such person intends to misappropriate such funds; and in case such payment is made the amount can be recovered by the depositor. Emerado Farmers Elev. Co. v. Farmers Bank, 270.

VENDOR AND PURCHASER.

1. A contract for the sale of real estate may be waived by abandonment of the land and of the contract by the vendee, and his rights thereunder extinguished thereby. Ottow v. Friese, 86.

VERDICT.

1. On appeal from an order denying a motion by defendant for a directed verdict, if the sufficiency of the evidence to support the verdict is in some doubt and the jury found in plaintiff's favor, the ruling of the trial court submitting the case will not be disturbed. Forzen v. Hurd, 42.
2. Evidence as to highest market value between the conversion and trial examined, and *held*, both competent and sufficient to support the verdict. Cochrane v. Natl. Elev. Co. 169.
3. The note in suit was for the purchase price of a threshing machine sold by plaintiff to the defendants, Wheeler & Moffat, upon a written order providing, should any part of the machinery be defective it should be returned to them at the place where received. The order containd the following: "If inside of six days after the date of its first use it shall fail in any respect to fill the warranty, written notice to be given immediately by the purchaser to the plaintiff at its office in Peoria, Illinois, by registered letter, stating particularly, in said letter and notice, what and wherein it failed to fill the warranty." Also the following: "No agent or any other person shall be authorized to make any different warranty, or vary or modify any of its

VERDICT—continued.

terms, or waive any of the conditions of this one, and any attempt to do so shall not bind the company or affect this contract." On receipt of the machinery at Wimbledon, before unloading, certain belts belonging to the separator were water-soaked and unfit for use, and other parts were missing. Wheeler & Moffat claimed to be induced to execute the note and two others solely upon plaintiff's agents' representation that all missing parts would be immediately furnished, and accepted the machine upon that condition, and none other. Wheeler & Moffat took the machine, relying upon such representations, and kept it for a few days; such missing parts were never delivered; and Wheeler & Moffat returned the threshing machine to plaintiff's agents. Verdict was directed for plaintiff for the amount of the note. The trial court set aside the verdict on the ground that the motion directing it was not properly granted. *Held*, that the order setting aside the verdict and granting a new trial was erroneous. Colean Mfg. Co. v. Feckler, 188.

4. If the verdict of the jury has substantial support in the evidence, the appellate court will not weigh conflicting evidence, nor disturb the order refusing a new trial. Casey v. First Bank of Nome, 211.

5. Application for a new trial is addressed to the sound discretion of the trial court, and its order denying a new trial will not be reversed except for abuse of discretion. Casey v. First Bank of Nome, 211.

6. Error cannot be predicated upon the refusal of the court to advise an acquittal in a criminal action; the jury are not bound by such advice, and the court cannot say, as a matter of law, that the evidence is insufficient to support a conviction, nor prevent the jury from giving a verdict, but such question may be disposed of by the court on motion for a new trial in case of conviction. State v. Wright, 216.

7. The plaintiff had a verdict which the trial court refused to set aside; it will not be disturbed where it appears there is substantial conflict in the evidence. Patrick v. Austin, 261.

8. Evidence examined, and *held*, sufficient to sustain the verdict. State v. Merry, 337.

9. Where the verdict is supported by substantial evidence, and the trial court declines to disturb it for insufficiency of evidence, such ruling will not be reversed on appeal. Acton v. F. & M. St. Ry. Co. 434.

10. An instruction to the jury that the answers to the separate questions must be of such a nature that they will fully support the general verdict, *held*, not error. Acton v. F. & M. St. Ry. Co. 434.

11. A judgment will not be reversed by an erroneous instruction, if answers to interrogatories show that it did not influence the verdict. Acton v. F. & M. St. Ry. Co. 434.

12. The special findings made by the jury are sufficient to sustain the general

VERDICT—continued.

verdict. If the questions not answered, or where the answers are not proved, were all answered favorably to appellant, the general verdict could still be consistent with the special findings. Acton v. F. & M. St. Ry. Co. 434.

13. A trial court may reduce an excessive verdict, and require the prevailing party to take the reduced amount, or submit to a new trial. Lohr v. Honsinger, 500.
14. Refusal to advise the jury to acquit is not error, as the jury are not bound by that advice. State v. Albertson, 512.
15. The question of the insufficiency of the evidence to justify the verdict is not properly raised. State v. Albertson, 512.
16. Evidence examined, and, *held*, sufficient to sustain the verdict. State v. Fujita, 555.
17. Where the denial of a new trial is challenged solely for insufficiency of evidence to justify the verdict, and that the verdict is against law, the appellate court will only inquire whether there is evidence to support the verdict. Dowry v. Piper, 637.
18. The fact that one item of evidence was documentary will not take the case out of the above rule, if such documentary proof is not conclusive and there is conflicting oral testimony supporting the verdict. Lowry v. Piper, 637.
19. Evidence examined, and *held*, that there is legal proof to support the verdict, and it was no abuse of discretion to deny defendant a new trial. Lowry v. Piper, 637.
20. Plaintiff proved his case and rested. No testimony was offered by defendant. Thereupon the latter moved for a directed verdict, and later a similar motion was made in plaintiff's behalf. The court denied plaintiff's motion, and granted defendant's, whereupon a verdict was entered in defendant's favor. *Held*, both rulings were erroneous. Schwartz v. Hendrickson, 639.
21. Plaintiff, instead of moving for a new trial, moved for judgment notwithstanding such verdict. Thereupon defendant moved that the verdict be vacated, and that he be allowed to furnish proof of the defenses alleged in his answer. The latter motion was granted on terms, and plaintiff's motion denied. *Held*, that such order, although irregularly issued, is nonprejudicial to plaintiff, as he is not entitled to judgment *non obstante veredicto*, but merely to a new trial, and this, in effect, was granted by the order complained of. Schwartz v. Hendrickson, 639.
22. In an action by a principal against his agent for damages for not procuring "fair" security for the price of property sold by him under his agency contract, *held*, evidence sufficient to go to the jury, as showing not only negligence, but bad faith; and it was error to direct a verdict for defendant. Morris v. Bradley, 646.

VOTERS AND ELECTIONS.

1. In an action under the statute to try title to office, it appeared from the pleadings that appellant received a majority of the votes for sheriff of McLean county at the general election in 1908; he was declared elected, certificate of election issued to him, he qualified as required by law, entered upon to perform the duties of his office, claiming title thereto, and refused to surrender to plaintiff as his successor. Respondent in support of his title, over objection, offered parts of the minutes of the county commissioners, reciting a resolution of such commissioners, passed January 7, 1909, declaring the office of sheriff vacant because John A Beck, party elected thereto, was not a resident of said county as then constituted; on January 8, 1909, said commissioners appointed Gilbert Holtan as sheriff, and accepted his bond. Respondent offered in evidence primary election petition of Beck, stating that on March 14, 1908, he was a resident of McClusky, which after December 24, 1908, was in the newly segregated county of Sheridan; also copy of poll list showing that on June 24, 1908, Beck voted in that precinct. On such testimony respondent rested, and appellant offered no testimony. *Held*, respondent failed to sustain his action, and that the trial court should have sustained appellant's motion to dismiss at close of plaintiff's testimony. Holtan v. Beck, 5.
2. That part of sec. 21, chap. 109, Laws 1907, providing that the list of names of those voting at the primary election shall take the place of the first registration of the voters now required, and that notice only shall be given of the date of the second day of registration, is an attempt to amend the law providing for the registration of electors, and is in conflict with sec. 61 of the state Constitution, which provides that no bill shall embrace more than one subject, which shall be expressed in its title, and is void. Fitzmaurice v. Willis, 372.
3. The title to chap. 109, Laws 1907, is "An Act to Provide for the Selection of Candidates for Election, by Popular Vote, and Relating to Their Nomination and the Perpetuation of Political Parties." Such title in no manner expresses the substance of the attempted amendment to the registration law, and such amendment is not germane to the subject expressed in the title; hence the act in question embraces more than one subject. Fitzmaurice v. Willis, 372.
4. The provision of the general registration law which fixes the first day of registration as the Tuesday two weeks preceding a general election or any city election, remains in full force and effect. Fitzmaurice v. Willis, 372.
5. Electors cannot vote on the division of a county and creation of a new county, at a general election, unless their names are on the registry list in cities of 800 inhabitants or more, without furnishing the affidavit prescribed as a substitute for registration. Fitzmaurice v. Willis, 372.

VOTERS AND ELECTIONS—continued.

6. The term "general election," found in the registration law, was there used to identify and designate the whole election held on the Tuesday after the first Monday in November in even-numbered years. Fitzmaurice v. Willis, 372.
7. The legislature may prescribe reasonable regulations to prevent fraud, insure order and a fair election, and prescribe the method of proving qualifications of electors, and prohibit the reception of votes without such proof. Fitzmaurice v. Willis, 372.
8. The prohibition contained in sec. 738, Rev. Codes 1905, reading, "No vote shall be received at any election in this state if the name of the voter offering such vote is not on the registration list, unless such person shall furnish to the judges of the election his affidavit stating that he is a resident of such precinct, giving his place of residence," etc.,—is within the power delegated to the legislative assembly to prescribe reasonable regulations for making proof of the qualifications of those offering to vote at an election. Fitzmaurice v. Willis, 372.
9. The prohibition contained in sec. 738, Rev. Codes 1905, reading, "No vote shall be received at any election in this state if the name of the voter offering such vote is not on the registration list, unless such person shall furnish to the judges of the election his affidavit stating that he is a resident of such precinct, giving his place of residence," etc.,—is an express prohibition, and is mandatory, and votes received in violation thereof are invalid, and cannot be counted. Fitzmaurice v. Willis, 372.
10. At the general election in 1908, where the division of a county was submitted, electors voted in Kenmare without being registered or furnishing the affidavit as a substitute therefor, as required by sec. 738, Rev. Codes 1905, whose votes were received and counted. *Held*, in an election contest over the result such votes must be rejected. Fitzmaurice v. Willis, 372.
11. The purpose of the registration laws is to prevent frauds in elections, and they must be construed in the light of such object. The meeting of registration boards on the dates fixed by law is for the preparation of registration lists, which is the culmination of the proceedings of such board, without which their meeting and act would be futile, as well as all other provisions of the registration statute. *Held*, the presence and use, at elections, of registration lists, is mandatory, and votes received in the absence of such list or the substituted affidavit of nonregistered voters must be rejected. Fitzmaurice v. Willis, 372.
12. Sec. 2334, Rev. Codes 1905, which provides that no refusal or neglect on the part of any official to perform his rightful duty in connection with an election on the division of counties shall in anywise affect the validity of such election, applies to the minor details and irregularities of such officers and the conduct of the election, and not to the mandatory requirements of the registration and election statutes; and in case no registry list is

VOTERS AND ELECTIONS—continued.

present or used at the polls, the duty is upon the persons seeking to vote to furnish the statutory affidavits, and, failing to do so, their votes should neither be received nor counted. Fitzmaurice v. Willis, 372.

13. Primary election certificates must reach the auditor at least thirty days prior to a primary election. State v. Miller, 405.

14. The primary election law, with all other laws regulating the elective franchise, is in all its parts within the constitutional requirements that it must be just and reasonable, have a uniform operation throughout the state, and must bear with substantial equality upon all parties, candidates, and classes of citizens. State v. Hamilton, 592.

15. In case it is apparent that from the nature of a general law and the ends it purposes to effect, that its aims can be attained only through the medium of groups or aggregations of persons, a certain classification of objects to be affected differently by the operation of the law may be made. Such classification, if made, however, must rest upon some difference which bears a true and just relation to the act in reference to which the classification is proposed, and must be reasonable and natural, not artificial or arbitrary. State v. Hamilton, 592.

16. A standard prescribed by a general law for the determination of a basis of classification, that is from its nature and character unstable, illogical, inconstant, and arbitrary, cannot serve as a means for the computation of groups that must bear to it and to each other the natural, constant, and unvarying relation required by the Constitution; and a law that operates diversely upon classes so determined cannot have a just, reasonable, and uniform operation. State v. Hamilton, 592.

17. Sec. 12, chap. 109, Laws 1907, which provides that no nomination shall be made unless the vote for state, district, or county offices is 30 per cent of the vote cast for secretary of state by each political party at the last general election, is arbitrary, unnatural, and lacks uniformity in the different counties, because the standard provided for determining the basis of classification places the party group authorized to nominate in each county in a relation to the actual party strength and to each other that is unstable, inconstant, and without uniformity in the different counties in the state. It is therefore unconstitutional and void. State ex rel. Montgomery v. Anderson, 18 N. D. 149, 118 N. W. 22, is overruled. State v. Hamilton, 592.

18. Chap. 109, Laws 1907, the primary election law, is not intended to provide for and regulate nominations of candidates not representing a political party or principle, but is only to regulate party nominations. State v. Blaisdell. 622.

19. Sec. 501, Rev. Codes 1899, providing for nominations by petition, and placing nominees upon the Australian ballot for the general election, is still in

VOTERS AND ELECTIONS—continued.

force, and provides for nominees for state and congressional offices, who represent individuals too few to be entitled to a party ballot at the primary or separate column on the ballot at the general election. State v. Blaisdell, 622.

20. Sec. 501, Rev. Codes 1899, requires of parties nominated by petition, to have their names upon the Australian ballot, that the certificate of nomination or petition shall state in not more than five words the party or principle represented by the candidate. *Held*, such party designation should appear after the candidate's name on the ballot. State v. Blaisdell, 622.

21. Neither chap. 109, Laws 1907, nor sec. 10 thereof, is invalid as furnishing no way by which new parties may secure the printing of party ballots for use at the primary election, as a party represented by candidates whose names have appeared in the individual column, followed by the party designation on the Australian ballot used at the general election, and who have received 5 per cent of votes cast for governor, is entitled to a separate ballot at the next primary election. State v. Blaisdell, 622.

22. *Held*, the legislature has, within reasonable limits, the power to determine how many voters acting together for the purpose of making nominations shall be entitled to a party ballot, and that the provision above quoted, providing only for the printing of ballots for parties casting 5 per cent of the votes cast for governor at the next preceding general election, is a reasonable regulation of an election held to make party nominations. State v. Blaisdell, 622.

WAIVER. See Appeal and Error, 137, 268; Instructions, 42; Mortgage, 182.

1. A contract for the sale of real estate may be waived by abandonment of the land and of the contract by the vendee, and his rights thereunder extinguished thereby. Ottow v. Friese, 86.

2. Parties to an action submitted their differences to arbitration, and an award was made and filed in plaintiff's favor. The arbitrators, deeming such award void for their failure to take the oath and swear the witnesses, proceeded on notice to make and file a second award, which was affirmed by the court, and judgment ordered. From such judgment for an order denying defendant's motion to vacate the second award, defendant appeals. *Held:* (1) That there is no competent proof showing a noncompliance with the statute requiring an oath to be taken and the witnesses sworn; (2) conceding such noncompliance with the statute, such irregularities were waived by the parties, where both parties were present, failed to object to such failure, and appeared and submitted their case without calling at-

WAIVER—continued.

tention to such failure until award was made and filed. Hackney v. Adam, 130.

3. That the estoppel of a judgment may be effective, a party claiming its benefits must plead the adjudication in bar of a subsequent action, and establish it by competent proof; a failure to do either is a waiver of all rights depending on such estoppel. Borden v. McNamara, 225.
4. Where the insurer knowing the facts which renders a policy void, issues and delivers the same, receiving premium therefor, he waives such forfeiture, and cannot urge the invalidity of the policy in an action for a loss. Certain language contained in the opinions in Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799, and J. P. Lamb & Co. v. Merchants' Ins. Co. 18 N. D. 253, 119 N. W. 1048, approving the Federal rule to the contrary, is disapproved. Leisen v. St. P. F. & M. Ins. Co. 316.
5. Restrictions in a policy limiting the power of agents to waive conditions except in a certain manner cannot be held to apply to those conditions which relate to the inception of the contract, where the agent, with full knowledge of the facts, issues the policy and collects the premium, and the insured has acted in good faith. Leisen v. St. P. F. & M. Ins. Co. 316.
6. Homestead is exempt from all process, and is not waived by the failure or negligence of the head of the family to claim it. Dieter v. Fraine, 484.
7. Where the debtor induces the assignee to believe that his obligation will be met, and that there is no defense thereto, he will be held to have waived a set-off against the assignor, in an action by the assignee. Vallancey v. Hunt, 579.

WAREHOUSEMEN.

1. Indorsement and unconditional delivery by the holder of a warehouse receipt to a creditor for valuable consideration passes title to the grain represented therein, and is a sale of the grain to such creditor. St. A. & Dak. Elev. Co. v. Dawson, 18.
2. Where such creditor delivered the storage ticket to the warehousemen, received the money thereon, it is a sale of the grain. St. A. & D. Elev. Co. v. Dawson, 18.

WAREHOUSE RECEIPT. See Warehousemen, 18.

WARRANTY. See Sales, 579.

1. On a sale of personal property by the owner, there is an implied warranty of title free from encumbrance. St. A. & D. Elev. Co. v. Dawson, 18.
2. There may be implied warranty of title of personal property on a sale there-

WARRANTY.—continued.

of, although only in the constructive possession of the seller as bailor. St. A. & D. Elev. Co. v. Dawson, 18.

3. One who sells personal property on which there is a valid mortgage which the purchaser is compelled to pay after its validity is adjudicated is liable to the purchaser for the amount of the mortgage and costs. St. A. & D. Elev. Co. v. Dawson, 18.

4. When a purchaser sued for conversion of personal property by the holder of a chattel mortgage thereon requests the seller from whom he bought such property to defend the action, and he fails to so defend, such person, in addition to the amount of the chattel mortgage and costs, may recover as special damages a reasonable attorney's fee when pleaded and proven. St. A. & D. Elev. Co. v. Dawson, 18.

5. The note in suit was for the purchase price of a threshing machine sold by plaintiff to the defendants, Wheeler & Moffat, upon a written order providing, should any part of the machinery be defective it should be returned to them at the place where received. The order contained the following: "If inside of six days after the date of its first sale it shall fail in any respect to fill the warranty, written notice to be given immediately by the purchaser to the plaintiff at its office in Peoria, Illinois, by registered letter, stating particularly in said letter and notice what and wherein it failed to fill the warranty." Also the following: "No agent or any other persons shall be authorized to make any different warranty, or vary or modify any of its terms, or waive any of the conditions of this one, and any attempt to do so shall not bind the company or affect this contract." On receipt of the machinery at Wimbledon, before unloading, certain belts belonging to the separator were water-soaked and unfit for use, and other parts were missing. Wheeler & Moffat claimed to be induced to execute the note and two others solely upon plaintiff's agents' representation that all missing parts would be immediately furnished, and accepted the machine upon that condition, and none other. Wheeler & Moffat took the machine, relying upon such representations, and kept it for a few days; such missing parts were never delivered; and Wheeler & Moffat returned the threshing machine to plaintiff's agents. Verdict was directed for plaintiff for the amount of the note. The trial court set aside the verdict on the ground that the motion directing it was not properly granted. *Held*, that the order setting aside the verdict and granting a new trial is erroneous. Collan Mfg. Co. v. Feckler, 188.

WILLS.

1. There was no evidence that the will was executed under undue influence practised upon the testatrix, and it was proper to refuse to submit such issue to the jury. Auld v. Cathro, 461.

WILLS—continued.

2. Under the privilege of secrecy to all information acquired by a physician while attending a patient, in a contest of a decedent's will, the testimony and opinion of such physician, based on information derived while treating and for treatment of testator, are properly excluded. Auld v. Cathro, 461.
3. The charge of the court relating to the disposition a testator or testatrix can make of his or her property under the laws of this state correctly states the law. Auld v. Cathro, 461.

WITNESSES. See Criminal Law, 105; Evidence, 114, 512.

1. Instructions containing no exposition of the elemental principles upon which depends the liability of a party, and making the law of the case entirely dependent upon inferences from the testimony or resolvable from the degree of credibility to be given the different witnesses, are misleading and insufficient. Forzen v. Hurd, 42.
2. Where a jury is impaneled to fix the punishment upon a plea of guilty in murder cases, it is error to instruct the jury that they may consider the demeanor of the defendant in court, where he is not called as a witness. State v. Noah, 281.
3. The failure of the trial court to have the testimony of a witness read at the request of the jury, *held*, under the circumstances of the case at bar, not error. Auld v. Cathro, 461.
4. The competency of an expert witness is for the court; it is also a question of judicial discretion. The rule that such discretion will not be reversed except for abuse applies to nonexperts and experts called to express opinions on the issue of insanity. Auld v. Cathro, 461.
5. Sec. 9794, Rev. Codes 1905, requires names of all witnesses for the state known to the state's attorney when the information is filed to be indorsed thereon, but provides that other witnesses may testify whose names are not so indorsed. *Held*, it is not error to allow the examination of such witnesses. State v. Albertson, 512.

WORDS AND PHRASES.

1. Defendant was convicted of keeping and maintaining a liquor nuisance in a certain building in Minot, a particular description of the place not being designated. At date of offense defendant conducted a hotel, 3 feet from the rear of which was a small building, with sidewalk and passageway between, to enter which it was necessary to pass through the hotel; proof showed sale in basement of hotel and this little building. *Held*, within the meaning of sec. 9373, Rev. Codes 1905, both constituted "one place" for the maintenance of such nuisance; hence it was no error to deny defendant's motion to require the prosecution to elect which building they would

WORDS AND PHRASES—continued.
rely on as the place in which nuisance was maintained. State v. Ildvedsen, 62.
2. "A term of court," within sec. 9792, Rev. Codes 1905, means a term of court actually held, and not one that may be held; and a criminal action should not be dismissed for failure to file an information at a term of court at which a defendant cannot be regularly tried by a jury. State v. Fleming, 105.
3. Under chap. 68, Laws of 1907, a jury is not necessarily to be summoned unless there is a criminal case "awaiting trial," and no case is "awaiting trial" where the return of the committing magistrate only is filed, and the defendant is at large on bail. State v. Fleming, 105.
4. It is not error to refuse to dismiss a prosecution under sec. 10307, Rev. Codes 1905, where the "next term of court" mentioned in that section is one at which the defendant could not have been regularly tried. State v. Fleming, 105.
5. The term "general election," found in the registration law, was there used to identify and designate the whole election held on the Tuesday after the first Monday in November in even-numbered years. Fitzmaurice v. Willis, 372.